

Employment Group Of The Year: Gibson Dunn & Crutcher

By **Patrick Hoff**

Law360 (January 29, 2024, 5:45 PM EST) -- Gibson Dunn & Crutcher LLP in the past year represented UBS in a whistleblower case before the U.S. Supreme Court, helped Amazon defeat class certification in a suit over home internet expenses and scored a series of wins for gig economy companies, earning it a spot among Law360's 2023 Employment Groups of the Year.

Gibson Dunn's labor and employment practice group has been named a Law360 Practice Group of the Year more than 10 times since 2011, a success that Katherine Smith, co-chair of the group, attributed to "a lot of secrets that are not so secret."

For one, Smith said Gibson Dunn's employment practice doesn't typically handle smaller cases or lower-level employment matters — instead, they focus on clients' existential concerns and come in when the law is new or there's a chance to frame the law. In October, for example, the firm represented Zurich-based UBS Group AG in urging the Supreme Court to rule that the Sarbanes-Oxley Act requires a whistleblower to show that an employer intentionally retaliated against them in order to secure the law's protections.

The firm in March also convinced a California federal judge not to certify a class of Amazon.com Inc. employees who alleged the company failed to reimburse them for home internet expenses during the COVID-19 pandemic, with the court ruling the workers failed to show they were bound by a common policy.

Co-chair Jason Schwartz described the practice group's focus as "the most significant matters for the country's largest employers" and said the legal issues surrounding the gig economy are a good example of this.

In March, the Ninth Circuit said a lower court erroneously tossed an Uber and Postmates' suit alleging a California law governing worker classification treats the companies unfairly. The following month, the Third Circuit ruled that Uber drivers didn't qualify for an exemption to the Federal Arbitration Act because their interstate trips weren't the focus of their jobs.

Schwartz said one of the accomplishments he's most proud of from the past year, though, was when Gibson Dunn defended the Fearless Fund, which invests in businesses owned by Black women, from a challenge launched by a conservative activist group.



In its suit, the American Alliance for Equal Rights alleged that the Fearless Fund violated Section 1981 of the Civil Rights Act by excluding applicants based on race. In September, U.S. District Judge Thomas W. Thrash Jr. refused to grant a preliminary injunction to the conservative group, ruling it hadn't shown it was likely to succeed in its case.

AAER subsequently appealed the decision, and the Eleventh Circuit is set to hear oral arguments in the case on Jan. 31.

"That moment in the courtroom, where the judge ruled from the bench ... it really was a special moment of lawyers and clients hugging each other afterward," Schwartz said. "It was something I could go home and then talk to my family about what we had done that day."

Following the Supreme Court's June decision to strike down affirmative action admissions policies at Harvard University and the University of North Carolina at Chapel Hill, Schwartz said he expects challenges to employers' diversity, equity and inclusion, or DEI, programs will continue to escalate, and Smith agreed.

"This is not something that's going away," Smith said. "It's going to be a major focus of employment litigation and agency action for years to come."

Schwartz added that DEI programs are "an area where the law is very much in flux," with different agencies and political officeholders giving employers contradictory guidance.

In July, for example, a group of 13 Republican attorneys general warned the CEOs of Fortune 100 companies that race-based initiatives in hiring may violate the law. Less than a week later, however, nearly two dozen Democratic attorneys general said efforts to promote diversity and create inclusive work environments were legal and may reduce corporate risk for claims of discrimination.

"Like a lot of things in employment law, it intersects with really important social issues that people care deeply about," Schwartz said. "It's real stuff happening in real-time, with cases being filed and the law developing, and it's a really interesting, great opportunity for us to try to make an impact."

Schwartz said one of the most important things an employer can do in these volatile times is to stay ahead of the curve, to the extent that's possible, by thinking about where the law is headed and what issues are going to be important.

"You've got to plan for how you're going to deal with those things so you're not having to solve that in real-time in the middle of a crisis," he said.

Smith said it's also key for employers to identify their core set of values, particularly in the DEI context, to help guide them through difficult questions that arise.

"The Harvard admissions case does not require any employer to stop valuing diversity or inclusion or equity," she said. "Those can firmly be the goals and values of a company, and stick to that and then figuring out how to implement your values in the current employment law climate — that's where you need the good lawyers."

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