

Employment MVP: Gibson Dunn's Eugene Scalia

By Kelly Knaub

Law360, New York (December 4, 2015, 5:55 PM ET) -- Helping Ford score an en banc victory in the Sixth Circuit against the Equal Employment Opportunity Commission's Americans with Disabilities Act claims and representing UBS Financial in an important win in a high-stakes case over arbitration agreements earned Gibson Dunn's Eugene Scalia a spot on Law360's list of Employment MVPs for 2015.

Scalia, a partner in Gibson Dunn's Washington, D.C., office who co-chairs its labor and employment practice group, served as a key member of the team representing Ford Motor Co. in a closely watched case that centered on allegations by the EEOC that Ford failed to accommodate an employee with irritable bowel syndrome by not allowing her to work from home and retaliating against her for going to the commission.

After winning summary judgment on both claims, Ford hired Gibson Dunn for the EEOC's appeal. A divided Sixth Circuit panel reversed the lower court's ruling and revived the claims, but the EEOC's victory did not last long. Scalia filed a petition for rehearing en banc in June 2014 arguing that the panel's opinion conflicted with circuit court precedent holding that regular and predictable on-site job attendance is an essential function from which workers do not have the right to be excused as a reasonable accommodation.

The Sixth Circuit agreed to rehear the decision in August 2014 and eight months later, the full appeals court reversed the decision on the grounds that physical attendance is an essential function of most jobs, and a prerequisite to perform other essential functions, and that employers therefore are not required to provide telecommuting arrangements under the ADA.

Scalia said one challenge in the Ford case was to communicate to the court that Ford did have a telecommuting program, which it favored in many circumstances and had been quite flexible with, but that in this particular case, things had been taken too far. If the court were to force the kind of

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EMPLOYMENT



Eugene Scalia
Gibson Dunn

accommodation that was sought, Scalia said, it would have undermined telecommuting programs long-term because part of the government's claim was that the fact Ford had such a program served as a reason that an ever greater degree of working from home should be forced upon the company.

"We had to get across to the court that Ford favored telecommuting but if the court sided with the EEOC, the long-term effect actually might be to undermine companies' interest in adopting those kinds of policies in the future," he said.

Scalia also played a key role in the team of Gibson Dunn attorneys representing UBS Financial Services Inc. and UBS AG against former UBS financial advisers who filed a putative class action alleging compensation-related claims instead of submitting the claims for resolution in arbitration as Gibson Dunn said they had promised to do in their employment agreements. The district court ruled in favor of UBS, which had moved to compel arbitration on a nonclass basis.

One of the plaintiffs appealed to the Second Circuit, saying that a Financial Industry Regulatory Authority Inc. arbitration rule prohibited enforcement of his arbitration and class waiver agreement in court, but UBS — backed by the Securities Industry and Financial Markets Associations as an *amicus curiae* — rejected that contention, saying a FINRA rule could affect a federal court's authority under the Federal Arbitration Act to enforce such an agreement.

The Second Circuit sided with UBS in a June 2015 unanimous opinion, which held that the company's arbitration and class waiver agreements were enforceable — a ruling that has a broad impact on financial institutions since it held that such agreements are, in fact, allowable.

Scalia said the main difference between the Ford and UBS cases was that they were initially unsuccessful in the Sixth Circuit in the Ford case and had to get a rehearing en banc, which is difficult to do.

"You really needed the Sixth Circuit to see that this was a case of such importance — not just to Ford but to others — that it was worth devoting one of the relatively rare en banc sessions the Court of Appeals has," Scalia said.

He is currently representing Ford in a putative class action by workers alleging sex discrimination and sexual harassment claims, as well as Primerica Inc. in the U.S. Department of Labor's hotly debated proposal that would expand the fiduciary standard for retirement advisers, and Catastrophe Management Solutions Inc. against Title VII claims brought by the EEOC.

Scalia first came to Gibson Dunn 25 years ago after law school. He has temporarily left the firm twice — once, as a young associate, to work as an assistant to the U.S. attorney general, and later, after becoming a partner, to serve as solicitor of the U.S. Department of Labor. Although he started in the firm's Los Angeles office, he eventually moved to its D.C. location, where he has been for the past two decades.

Prior to law school, Scalia worked as a speechwriter for former Secretary of Education William Bennett during the Reagan administration and once wrote a Saturday morning radio address for President Ronald Reagan. Scalia said he had added the word "well" in all of the places where he thought the late president would say them, noting that while the White House speechwriters didn't make many edits to the speech, they do move the "wells" to different places.

Scalia said he likes the "human element" to employment law and that there are a lot of fun aspects of

the work, including all of the learning that's involved.

"I like digging in and mastering a complex set of facts and legal concepts in a case and then finding a way to present them in a simple, compelling way to a judge, jury or arbitrator. I find that very rewarding," Scalia said.

--Additional reporting by Michael Lipkin, Evan Weinberger, Aaron Vehling and Stewart Bishop. Editing by Katherine Rautenberg.

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