

Employment Group Of The Year: Gibson Dunn

By **Abigail Rubenstein**

Law360, New York (January 03, 2012) -- Gibson Dunn & Crutcher LLP's labor and employment practice group racked up a series of landmark victories in 2011, ranging from helping Wal-Mart Stores Inc. defeat the certification of the largest class in history to getting the National Labor Relations Board's controversial case against The Boeing Co. dropped, earning the group a spot on Law360's list of practice groups of the year.

The group also managed to score several significant wins in Employee Retirement Income Security Act cases, and convinced an appeals court to revive ABF Freight System Inc.'s \$750 million lawsuit against a union and its competitors.

But despite its outsize presence on the year's most high-profile cases, the practice group is relatively small, with 26 partners, 32 associates and two of counsel attorneys working from eight of the firm's offices.

"We find ourselves handling a disproportionate number of particularly challenging high-profile and precedent-setting labor and employment cases," said Eugene Scalia, a Washington-based attorney who co-chairs the group alongside Palo Alto, Calif.,-based partner Christopher Martin.

"Other labor and employment practice groups are larger," Scalia said. "We don't win the volume contest, but we are pleased to have been fortunate to handle so many precedential cases and to achieve the results that we have been able to for our clients."

Attorneys at the firm attribute the practice group's ability to achieve massive successes with such a lean staff to a willingness to draw on resources and talent from outside their own offices and even from outside the group.

"We're small, but we handle an extraordinarily large number of big cases," said partner Bill Kilberg, who served as lead counsel on the Boeing matter. "I think the reason we're able to do so, and the reason that we have such an excellent track record of handling those cases, is that we work well across office lines and across practice group lines, so that we're able to staff matters with an extraordinary array of talent pulled from around the firm."

According to Scalia, Gibson Dunn fosters a collaborative environment where lawyers in different offices and in different practices work together on a daily basis.

“We're a firm that really places a large premium on collegiality, and we're more interested in what lawyers are going to be best suited to a particular matter and what is going to best fit the client's needs than what particular office or lawyer is going to receive billing credit on the matter,” Scalia told Law360.

And the strategy certainly paid off for the practice group in high-stakes litigation this year.

In *Dukes v. Wal-Mart*, perhaps the most closely watched case of the year, Gibson Dunn attorneys convinced the U.S. Supreme Court to overturn certification of a class of 1.5 million current and former female Wal-Mart Stores Inc. employees in a lawsuit that accused the retail giant of gender bias.

A 5-4 majority ruled in an opinion handed down in June that the plaintiffs had not cleared the hurdle for class certification under Federal Rule of Civil Procedure 23(a)(2), which requires parties to prove that the claims of putative class members share common questions of law or fact. All nine justices rejected certification under a separate section of the class action rule, Rule 23(b)(2), which is designed for cases primarily seeking injunctive or declaratory relief.

While the full impact of the high court's decision is still coming into focus as lower courts interpret it, the decision was widely perceived as raising the bar for bringing class-wide claims by rendering it virtually impossible to bring a nationwide discrimination class action, unless an employer has an explicit, company-wide policy that allows discrimination.

And in another headline-grabbing matter, attorneys from the Gibson Dunn group helped Boeing dodge an NLRB complaint that claimed the company's decision to place the assembly line for its 787 Dreamliner at a nonunion facility in South Carolina was illegal retaliation for past strikes by unionized workers in Washington state.

The NLRB's acting general counsel filed the complaint in April based on a charge lodged by The International Association of Machinists and Aerospace Workers in March.

The case caused an outcry from some lawmakers, and legislation responding to the complaint was introduced in both the U.S. House of Representatives and the U.S. Senate. Boeing sought to have the complaint dismissed, arguing that it could not allege that any union members lost their jobs or suffered adverse employment actions because the South Carolina facility involved new, as opposed to already existing, production capacity.

Ultimately, the acting general counsel withdrew his complaint on Dec. 9, just days after Boeing and the machinists' union finalized a new four-year collective bargaining agreement that promised to keep assembly jobs in Boeing's Puget Sound-area facilities.

“Obviously, we would have liked to have had a ruling, but we're very pleased that the union decided to withdraw its charge and that the board dismissed its complaint,” Kilberg said.

The Gibson Dunn group also left its mark on ERISA jurisprudence in 2011 with a pair of significant appellate victories.

In another success on Boeing's behalf, Gibson Dunn lawyers persuaded the Seventh Circuit in January to dismantle the largest ERISA class ever certified, a class of more than 189,000 individuals seeking more than \$4 billion in damages.

The plaintiffs claimed that Boeing mismanaged their retirement plans by including imprudent investment options in the plan; an Illinois court had certified a class that included every plan participant.

In a big win for ERISA plan sponsors, the appeals court reversed the class certification, holding that the class failed to meet the typicality requirement of Rule 23(a) and noting that many plan participants had not invested in the challenged investment options.

And in March, the firm scored an ERISA victory before the Supreme Court for Cigna Corp. in a lawsuit brought by pension plan participants after the company switched its traditionally defined benefit plan to a cash benefit plan over alleged discrepancies between summary plan descriptions and official plan documents.

In a unanimous 8-0 ruling, the high court vacated a judgment in favor of the plaintiffs, which they had won at the district court level and gotten affirmed by the Second Circuit before Gibson Dunn took the case on for Cigna.

The Supreme Court's ruling clarified that in order to show that an alleged ERISA violation had injured them, plaintiffs needed to prove actual harm and causation.

And in yet another win for the firm in a complex area of labor and employment law, Gibson Dunn attorneys convinced the Eighth Circuit in July to reverse a lower court's dismissal of ABF's lawsuit against the International Brotherhood of Teamsters, YRC Inc. and Trucking Management Inc.

ABF, one of the nation's largest unionized freight trucking companies, turned to Gibson Dunn to appeal the order dismissing, for lack of jurisdiction, its complaint alleging that the union and the trucking competitors breached the collective bargaining agreement in the freight trucking industry by agreeing among themselves to reductions in wages.

The win the firm secured for the company before the Eighth Circuit, which overturned the dismissal with respect to all claims against all defendants, will allow it to proceed with its claims for \$750 million in damages.

"We'd like to think that clients are coming to us for the creativity that we can bring to a matter, for our ability to take a fresh look and to frequently successfully advance a new line of argument in areas of law that clients find to be particularly threatening challenges to their business model or cases that are otherwise of a type that attract the attention of a general counsel or even a board of directors," Scalia said.

Methodology: In November, Law360 solicited submissions from over 500 law firms for its practice group of the year series. The more than 550 submissions received were reviewed by a committee of Law360 editors. Winners were selected based on the significance of the litigation wins or deals worked on; the size and complexity of the litigation wins or deals worked on; and the number of significant, large or complex deals the firms worked on or lawsuits the firm had wins in. Only accomplishments from Dec. 1, 2010 to Dec. 1, 2011 were considered.

--Editing by Cara Salvatore.