How They Won It: Crowell Beats FLSA Suit At Trial

By **Abigail Rubenstein**

Law360, New York (November 17, 2011, 6:48 PM ET) -- While employee misclassification suits are often considered too risky to take to trial, it took a jury less than an hour to return a verdict in favor of Crowell & Moring LLP client DeWolff Boberg & Associates.

The decision to take the Fair Labor Standards Act case over DB&A's classification of its management consultants as exempt from overtime pay requirements all the way to trial — even though most similar cases end in settlements — was made early in the litigation process, according to Crowell & Moring partner Thomas Gies, who led a trial team that also included Christopher Calsyn and Arash Jahanian.

"Very, very early on the client determined that this was the place to fight the fight. The settlement demand was unrealistic, and their business model depends on these folks being classified as salaried exempt employees, so they needed to be vindicated," Gies told Law360.

"The case was filed in May 2010, and I told everybody on my team within the first month that we were either going to win on summary judgment or go to trial," Gies said.

The case was brought as a collective action in Texas federal court by a group of seven former DB&A employees who had worked as entry level management consultants with the title "staff associate." The plaintiffs claimed their work was essentially clerical in nature, and that the consulting firm had willfully misclassified them as exempt from the FLSA's overtime pay requirements.

The consulting firm did submit a motion for summary judgment arguing that the FLSA's administrative exemption applied to the staff associates, but U.S. District Judge Reed O'Connor denied the motion from the bench without issuing a written opinion on the issue.

"Even though we did not win at summary judgment, the motion was important because it helped educate the judge about our position," Gies said.

As the case progressed, Judge O'Connor certified a class of staff associates, which could have included as many as 200 class members. About 30 plaintiffs opted in to the suit.

But by the time the trial came around the Crowell & Moring team had managed to whittle the class down to 14 individuals, by showing some of the plaintiffs' claims were time-barred and that some other plaintiffs had failed to respond to discovery requests.

Only two plaintiffs actually showed up for the trial — a factor the defense team was able to use to its advantage.

“There only ended up being 14 people in the class, only one of whom was a current employee, and we made sure the jury knew that, with the implication being that the others were disgruntled ex-employees,” Gies said.

Leading up to the trial, the Crowell & Moring team scored two key strategic wins that played a part in DB&A's ultimate victory: convincing the court to bifurcate the case and winning a motion to permit them to open and close at trial.

By bifurcating the case on liability and damages, the defense was able to focus the trial on the issue of whether the staff associates were actually exempt. Splitting up the case kept the jury from hearing lengthy testimony about how many hours per week the staffers worked, which would have been necessary at a trial on damages.

As for opening and closing the trial, Gies said the tactic allowed the defense side to control the messaging in the case from start to finish.

“It’s a pretty unusual strategy, as we effectively conceded plaintiffs had made out a prima facie case, but we thought it was the right thing to do,” he said.

The strategies paid off. DB&A's attorneys were able to ensure that the evidence presented at trial emphasized what the staff associates actually did in their job.

To show the jury that the employees were properly considered exempt, the Crowell & Moring team used a compare-and-contrast approach, calling as witnesses DB&A employees who had succeeded at the job and one very satisfied DB&A client who could detail what the firm's employees had done for him.

Far from doing mere clerical work, DB&A's management consultants go on-site to work with clients and make use of complex behavioral modification techniques to get mid-level managers to realize how they can do things more efficiently, according to Gies.

In an effort to drive home the fact that the staff associates had a tough job, Gies compared the task to something he believed everyone on the jury would be familiar with, namely, getting a person to do something they don't want to do.

“Our theme was that some people are better at this job than others, and if you are good at it, then you are going to be successful, and if not, that’s a performance issue, not a misclassification issue,” Gies said.

The theme must have resonated with the jurors, because at the end of the three-day trial, the jury deliberated for just under an hour before returning a in a verdict in favor of DB&A.

Trial victories for employers facing wage-and-hour misclassification claims are rare, especially because so few of them actually let such cases go before a jury, but Gies said DB&A's win shows such cases can be won with the right set of facts and a client committed to seeing the matter through.

"This is the third recent defense verdict for an employer in a misclassification case, and the takeaway is that misclassification cases can be won. … It may be the beginning of a trend of employers realizing they can be vindicated rather than paying millions of dollars in settlement," Gies said.

The plaintiffs are represented by Steven Blau, Jason Brown and Shelly Leonard of Blau Brown & Leonard LLC, and Charles Branham III and Jeffrey Goldfarb of Goldfarb Branham LLP.

DB&A is represented by Thomas Gies, Christopher Calsyn and Arash Jahanian of Crowell & Moring LLP, and Lawrence McNamara of Spencer Crain Cubbage Healy & McNamara PLLC.

The case is Joseph M. Langer et al. v. DeWolff Boberg & Associates Inc., case number 3:10-cv-00956, in the U.S. District Court for the Northern District of Texas.

--Editing by John Quinn.