HOW WILL JUSTICE KAVANAUGH IMPACT EMPLOYERS?

By BILLY S. FAWCETT

The Supreme Court's newest justice has joined the Court just in time for the judicial October term. Justice Kavanaugh, sworn in on October 6, 2018, has spent most of his career dealing with accusations of being too conservative. Justice Kavanaugh's overall track record tilts conservative, but not as conservative as many might assume. He likely will fall somewhere left of Justices Gorsuch, Thomas, and Alito, but to the right of Chief Justice Roberts and of his predecessor, Justice Kennedy. However, this article will focus more specifically on how Justice Kavanaugh's judicial philosophy will affect the Court's decisions on labor and employment cases.

JUSTICE KAVANAUGH'S PHILOSOPHY

During his time on the D.C. Circuit of Appeals, Justice Kavanaugh sided with employers more than employees. However, that does not mean he never rules in favor of employees, although he rarely, if ever, is the lone judge supporting the employee. Justice Kavanaugh has written some brow-raising opinions and concurrences in the labor and employment context.

TITLE VII

Justice Kavanaugh's views on Title VII are surprisingly expansive. In two concurrences, he chided the majority opinion for not going far enough in expanding Title VII's coverage. These concurrences, however, do not argue for creating new protections, but instead logically propose expanding existing protections. In one case, he wrote that discriminatory transfers and denials of transfer requests should always be an adverse employment action under Title VII, and in another he wrote that calling an employee a racial slur one time is enough to create a hostile work environment.

In *Ortiz-Diaz v. HUD,* the court found that the denial of a transfer request was an adverse employment action because it affected the plaintiff's ability to further his career, and, important to the court, make more money. The plaintiff gave other reasons for his desire to transfer—he wanted to be closer to home and he wanted more field experience. Ultimately, the court only focused on the monetary and career aspects of the denial of his transfer. That is, if he simply wanted the transfer to work closer to home, the court apparently would have upheld summary judgment. Justice Kavanaugh felt that this ruling was too narrow: "As I see it, transferring an employee because of the employee's race (or denying an employee's requested transfer because of the employee's race) plainly constitutes discrimination . . . in violation of Title VII." *Ortiz-Diaz v. U.S. Dep't. of Housing & Urban Dev., Office of Inspector Gen.,* 867 F.3d 70, 81 (D.D.C. 2017).

In *Ayissi-Etoh v. Fannie Mae,* the court found that the plaintiff provided sufficient evidence of a hostile work environment to survive summary judgment. Notably, the court held that the employer's use of a racial slur directed at the plaintiff might have been enough by itself to create a hostile work environment. The court ultimately relied on the totality of incidents to find that a reasonable jury could find a hostile work environment. Justice Kavanaugh took issue with this. In his concurrence, he discusses various types of instances where a single act can create a hostile work environment, most of which include a death threat or a physical act. In his concurrence, where he cites Langston Hughes, Alex Haley, and Harper Lee, he notes that "being called the n-word by a supervisor . . . suffices by itself to establish a racially hostile work environment." *Ayissi-Etoh v. Fannie Mae,* 712 F.3d 572, 580 (D.D.C. 2013). Essentially, he wanted the majority to hold, rather than mention the possibility, that the use of a racial slur on one occasion can create a hostile work environment.

LABOR

Justice Kavanaugh's decisions for the D.C. Circuit are decidedly unfriendly toward unions. Justice Kavanaugh dissented in a case where the majority found that two companies were alter egos and refused to recognize a collective bargaining agreement between one of the companies and a union. In *Island Architectural Woodwork, Inc. v. NLRB,* one of Island's owners complained that it had to pay higher wages because its employees had unionized, and these higher wages hurt its profits. The CEO of Island's daughters began operating a similar business, Verde, in one of Island's buildings. Verde workers performed the same work on the same equipment. The NLRB, and the court, held that Verde was an alter ego of Island. Justice Kavanaugh dissented.

Justice Kavanaugh agreed with the majority regarding the applicable law, but he disagreed in its application. He noted that the companies did not share ownership, management, employees, or funds. Moreover, the companies had no financial interest in each other. Justice Kavanaugh further justified his decision by pointing out that the administrative law judge, who heard the facts first-hand, found that Verde and Island were not alter egos. Even further, the administrative law judge, and subsequently Justice Kavanaugh, pointed out that Verde did not affect the union employees of Island.

In this case, Justice Kavanaugh demonstrated his judicial restraint—something that will nearly always favor employers—while his colleagues stretched the analysis and agreed with the NLRB because they "found something shady in the fact that Verde was started and primarily owned by two daughters of Island's primary owner." *Island Architectural Woodwork, Inc. v. NLRB,* 892 F.3d 362, 378 (D.D.C. 2018).

CHEVRON DEFERENCE

Justice Kavanaugh's disdain of *Chevron* deference could have an effect on labor and employment law. Justice Kavanaugh disfavors *Chevron* deference, as he believes it takes power granted to the Court in Article III and gives that power to the executive branch via administrative agencies. He has written an article discussing it, and he has sided with opinions that limit it. It appears if the opportunity arises, he will likely try to limit it.

JUSTICE KENNEDY'S PHILOSOPHIES

Justice Kavanaugh takes Justice Kennedy's seat. Justice Kennedy was often the swing vote, so many commentators assume the Court will

now swing wildly in favor of employers. However, this may not be the case. Justice Kennedy, who indeed tended toward more liberal decisions than Justice Kavanaugh, was reliably pro-employer as a justice.

Justice Kennedy often broke from the conservative justices on civil rights issues, but not in employment cases. He joined the conservatives in all of the decisions during his tenure regarding unions and wage and hour issues. He also stayed with the conservatives in decisions regarding Title VII. So, although he strayed from his conservative counterparts on major civil rights cases, he did not stray on cases regarding labor and employment.

EFFECTS

Because Justice Kennedy consistently voted to limit the scope of Title VII and the rights of unions, it will be hard for Justice Kavanaugh to make a noticeable impact. Of course, Justice Kavanaugh is more conservative overall than Justice Kennedy, so that could have an impact on LGBT issues under Title VII.

The Court will likely decide, either this term or next, whether sexual orientation is protected by Title VII, and then, depending on that ruling, whether gender identity is protected by Title VII. Of course, the sexual orientation case is curious as the Department of Justice and the EEOC have completely different views on the issue, which might have an effect on whether the Court decides to hear the case, and it might have an impact on the Court's ruling. Justice Kavanaugh, with his self-touted textualist view, will almost definitely find that Title VII does not protect sexual orientation. Justice Kennedy, the author of the opinion that legalized gay marriage, might well have ruled that Title VII does, in fact, protect sexual identity.

LONG-TERM EFFECTS

Overall, employers might not notice much of a change. The end effect of Justice Kavanaugh's nomination is that Chief Justice Roberts is now the swing vote. Justice Kennedy had a notorious reputation for siding with the liberal justices on some civil rights cases. Replacing Justice Kennedy with a reliable conservative should give employers more confidence that labor and employment laws will not get more restrictive via the judiciary.

Additionally, the Court now has three Justices that have publicly questioned, either in opinions, papers, or the media, the *Chevron* decision. It seems likely that the power to interpret agency rules could come back to the courts. This shift will significantly limit the power of the EEOC and NLRB.

CONCLUSION

Employers should not expect a major swing in labor and employment law because of Justice Kavanaugh's recent confirmation. However, employers can have more confidence that the Court will hand down conservative labor and employment rulings, because Justice Kavanaugh will consistently rule pro-employer, and he replaces the reliably pro-employer, but always unpredictable, Justice Kennedy.

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