

Looking Forward: Spotlight on Potential Supreme Court Nominees

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It is anticipated that President Joe Biden will soon announce his pick to succeed Justice Stephen Breyer on the U.S. Supreme Court.

With that announcement imminent, we are continuing our “Road to the U.S. Supreme Court” series with a spotlight on President Biden’s top three contenders for the nomination.

President Biden has made clear that he intends to nominate the first Black woman to serve on the nine-member Supreme Court. He appears to have narrowed the field to three top contenders: South Carolina District Court Judge J. Michelle Childs, U.S. Court of Appeals for the District of Columbia Circuit Judge Ketanji Brown Jackson, and California Supreme Court Associate Justice Leondra R. Kruger.

Below is a brief spotlight on the top three contenders and their record on significant employment law jurisprudence.

Judge J. Michelle Childs

Judge J. Michelle Childs is a U.S. District Judge for the District of South Carolina with a strong employment law background. She earned her undergraduate degree from the University of South Florida in 1998 and her law degree from the University of South Carolina in 1991. Judge Childs also completed a master’s degree in Personnel and Employment Relations from the University of South Carolina and an LLM in Judicial Studies from Duke University School of Law. If she were nominated and confirmed, Childs would be one of the only two justices on the Court who did not attend Harvard or Yale (the other being [Amy Coney Barrett](#)).

Following law school, Judge Childs practiced law in South Carolina, where she developed extensive experience in employment law and became the first Black female partner at her law firm. Following private practice, Judge Childs served as the Deputy Director of South Carolina’s Department of Labor and as Commissioner on the South Carolina Worker’s Compensation Commission. Judge Childs then served as a South Carolina state trial court judge.

Nominated by President Barack Obama to serve on the U.S. District Court for the District of South Carolina, Judge Childs was confirmed on August 5, 2010. In December 2021, President Biden nominated Judge Childs to the U.S. Court of Appeals for the District of Columbia Circuit, but her confirmation hearing was postponed when it became clear she was a potential candidate for the U.S. Supreme Court.

Judge Childs is widely regarded as a fair-minded, hard-working, and well-respected judge. As a judge, she has earned praise for clearing a backlog of criminal cases and demonstrating a willingness to address complex issues. Judge Childs is aware of her

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impact as a federal judge and once told *Law360*, “In writing my orders, it’s been important to recognize who my audience is: basically, the world. You’re not just writing to the parties in the case, so I want every order to explain clearly the rationale and how I got to a decision. Because when I hit the send button, the world has it.”

Judge Childs has written a number of complex employment law decisions dealing with the various legal standards involved in proving different claims. In one such recent case, Judge Childs denied the employer’s motion for summary judgment in a race discrimination and retaliation claim, emphasizing plaintiff’s “relatively easy” burden of proof to establish a prima facie case and clarifying the standard of proof for causation in retaliation claims. Judge Childs presided over a five-day jury trial after which the jury returned a \$1.5 million verdict for the plaintiff on the claim of retaliation. The jury concluded that, although plaintiff had not suffered discrimination based on race, her employer refused to rehire her in retaliation for protected activity. Judge Childs also awarded six years of front pay as equitable relief in lieu of reinstatement, which she found impractical, noting she would be “hard pressed to understand how Title VII’s purposes would be served by placing [plaintiff] in a job she does not want.”

Judge Ketanji Brown Jackson

Judge Ketanji Brown Jackson graduated from Harvard University in 1992 and earned her law degree from Harvard in 1996. After law school, Jackson worked as a law clerk to Judge Patti B. Saris of the U.S. District Court for the District of Massachusetts and, later, Judge Bruce M. Selya of the U.S. Court of Appeals for the First Circuit. Judge Jackson then clerked for Justice Breyer on the U.S. Supreme Court. In addition to stints in private practice, Jackson also served as assistant special counsel to the U.S. Sentencing Commission and as an assistant public defender in Washington, D.C.

In 2012, President Obama nominated Judge Jackson to serve as a federal judge on the U.S. District Court for the District of Columbia. During her tenure of nearly a decade as a District Court judge, Judge Jackson honed her expertise in cases involving federal agency and administrative law. In 2021, President Biden appointed Judge Jackson to fill Merrick Garland’s seat on the U.S. Court of Appeals for the D.C. Circuit.

Judge Jackson is best described as thorough, analytical, and non-ideological. Judge Jackson described her judicial approach during the 2021 Senate confirmation hearings, stating “I’m looking at the arguments, the facts and the law, I’m methodically and intentionally setting aside personal views, any other inappropriate considerations and I would think that race would be the kind of thing that would be inappropriate to inject in my evaluation of a case.”

Judge Jackson’s notable employment law decisions include *Von Drasek v. Burwell*, 121 F. Supp. 3d 143 (D.D.C. 2015). There, Judge Jackson granted the employer’s motion for summary judgment with respect to the plaintiff’s discrimination and retaliation claims but found that neither party was entitled to summary judgment on plaintiff’s failure-to-accommodate claim. The plaintiff, Susan Von Drasek, worked for the United States Food and Drug Administration (FDA) as a chemist. Thirty years

prior to her employment with the FDA, she was diagnosed with bipolar disorder. She did not inform anyone at the FDA of her diagnosis; nor did she request accommodations at the time of her hire or a year later, when she allegedly began having trouble at her job because of her condition. She requested an accommodation and medical leave for the first time only after she learned her supervisor had proposed terminating her employment for performance issues. Von Drasek filed a lawsuit, alleging the FDA failed to accommodate her disability, intentionally discriminated against her because of a disability, and retaliated against her, all in violation of the Rehabilitation Act of 1973.

Judge Jackson declined to grant either parties' motion for summary judgment with respect to the failure-to-accommodate claim, concluding that "a genuine dispute of fact exists regarding whether Von Drasek's job performance was irredeemably poor, on the one hand, or the product of a specific work environment, on the other." With respect to the plaintiff's intentional discrimination and retaliation claims, Judge Jackson analyzed the plain language of the Rehabilitation Act, which requires that an employee suffer an adverse employment action solely because of her disability. Under these facts, plaintiff's supervisor "had resolutely set out on the path toward securing [plaintiff's] termination long before [she] had revealed her disability to the FDA," leading Judge Jackson to conclude that there was no direct or even circumstantial evidence that, but for discriminatory animus, the plaintiff would not have been fired.

Justice Leondra R. Kruger

At 45 years old, California Supreme Court Associate Justice Leondra Kruger would be the youngest justice confirmed since Justice Clarence Thomas joined the court in 1991 at the age of 43.

Justice Kruger received her bachelor's degree from Harvard University in 1997 and graduated from Yale Law School in 2001, where she was the first Black woman to hold the editor in chief position of the *Yale Law Journal*. In 2014, California Governor Jerry Brown nominated Justice Kruger to the California Supreme Court. She was confirmed and sworn into office in January 2015. Prior to serving on the California Supreme Court, Justice Kruger clerked for U.S. Supreme Court Justice John Paul Stevens, spent time in private practice, and served at the solicitor general's office, where she argued 12 cases before the U.S. Supreme Court. Justice Kruger also served as a deputy assistant attorney general for the Department of Justice's Office of Legal Counsel.

During her tenure as a California Supreme Court Justice, Justice Kruger has been described as a consensus-based judge who approaches cases objectively on the merits. In a 2018 interview with the *Los Angeles Times*, Justice Kruger said that she tries to do her job "in a way that enhances the predictability and stability of the law and public confidence and trust in the work of the courts." As one analyst recently noted, "Justice Kruger has been difficult to pigeonhole. She has sometimes joined Democratic appointees to reach an arguably 'liberal' results, but other times she has joined Republican appointees to arrive at an arguably 'conservative' result." Amy Howe, *Profile of a potential nominee: Leondra Kruger*, [scotusblog.com](https://www.scotusblog.com) (Jan. 26, 2022) (last accessed Feb. 24, 2022).

Troester v. Starbucks Corp., 421 P.3d 1114 (Cal. 2018), is one example of this nuanced approach. In *Troester*, the plaintiff worked for Starbucks as a shift supervisor and sought payment for time worked after clocking out at the end of his shift. He claimed that he would clock out and then initiate a sales transmission on another computer, activate the alarm, exit the store, and lock the front door. He further alleged that, at times after clocking out, he would walk coworkers to their cars, reopen the store for employees to retrieve items, wait with employees for rides, or bring patio furniture inside. Troester claimed that these activities constituted approximately 12 hours and 50 minutes of unpaid work, totaling \$102.67 and sought payment of these wages under California law.

The U.S. Court of Appeals for the Ninth Circuit asked the California Supreme Court to clarify whether the *de minimis* rule (which allows employers to disregard insignificant periods of time beyond scheduled working hours that cannot be precisely recorded for payroll purposes) applies to California state law claims for unpaid wages.

After analyzing the purpose and plain language of California wage and hour laws, the majority held that the *de minimis* doctrine was not applicable to the specific facts of the plaintiff's claim, while leaving open the question of whether there might be wage claims involving activities so irregular or brief that some form of the *de minimis* doctrine might apply.

In a concurring opinion, Justice Kruger addressed the question by providing several hypothetical scenarios under which it would be “impractical and unreasonable” for an employer to be expected to track and pay for such time. In her view, “the law [] recognizes that there may be some periods of time that are so brief, irregular of occurrence, or difficult to accurately measure or estimate, that it would be neither reasonable to require the employer to account for them nor sensible to devote judicial resources to litigating over them.”

We cannot predict who ultimately will be selected or whether a candidate will emerge outside of this short list of potential nominees. As soon as the U.S. Supreme Court nominee is announced, Jackson Lewis will publish additional, in-depth analysis on the nominee's employment law record.

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