Legal Update Article

Brett Kavanaugh Nominated to U.S. Supreme Court

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In the wake of Justice Anthony Kennedy's retirement, President Donald Trump was presented with the rare opportunity to make his second U.S. Supreme Court nomination in as many years, nominating the Honorable Brett M. Kavanaugh to succeed Justice Kennedy. If confirmed by the Senate, Judge Kavanaugh would bring more than a dozen years of judicial experience to the position.

While the nomination process was swift, the confirmation process is likely to be contentious. Any nominee to the Supreme Court can expect deliberate and careful scrutiny, but in the context of losing Justice Kennedy's critical "swing" vote, Judge Kavanaugh's record of judicial decisions will receive even more attention than usual.

Career

Judge Kavanaugh, a federal judge on the U.S. Court of Appeals for the D.C. Circuit, received his B.A. from Yale College in 1987 and his J.D. in 1990 from Yale Law School, where he was a Notes Editor on the *Yale Law Journal.* Judge Kavanaugh's lengthy experience with the judicial process began immediately upon graduation from law school, having clerked for Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit (1990-1991) and for Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit (1991-1992). Judge Kavanaugh served as a law clerk to the man he has been nominated to replace, Justice Anthony M. Kennedy of the U.S. Supreme Court, during October Term 1993.

Immediately following his U.S. Supreme Court clerkship, Judge Kavanaugh served in the Office of the Solicitor General of the United States. From 1994 to 1997, and for a period of time in 1998, Kavanaugh was Associate Counsel in the Office of Independent Counsel Kenneth W. Starr. He also spent time in private law practice, as a partner at Kirkland & Ellis in Washington, D.C., from 1997 to 1998 and again from 1999 to 2001. From 2001 to 2003, he was first Associate Counsel, and then Senior Associate Counsel to the President in the George W. Bush White House. From July 2003 until May 2006, Judge Kavanaugh was Assistant to the President and Staff Secretary to the President.

President Bush nominated Judge Kavanaugh to the D.C. Circuit and on May 30, 2006, he was appointed after being confirmed by a vote of 57-36.

Key Labor and Employment Decisions

Judge Kavanaugh's judicial philosophy is regarded as conservative; he is a textualist and an originalist, following in the footsteps of the late Justice Antonin Scalia. He generally takes a narrow and demanding approach to employment-related lawsuits and statutory interpretation, and routinely rules in favor of employers. That said, some of his opinions written for the majority, along with his dissents, reveal a flexible and nuanced approach to discrimination claims. How will Judge Kavanaugh treat workplace law cases that come before the Supreme Court? Following are summaries of several key decisions that illustrate his approach to deciding such cases.

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Judge Kavanaugh's opinions display a tendency to refer to the plain text of statutes and their history, especially when voicing his support for the authority of the Executive Branch. *See PHH Corp. v. Consumer Fin. Prot. Bureau,*881 F.3d 75, 165-67 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). In his PHH dissent, Judge Kavanaugh held that the structure of the Consumer Financial Protection Bureau is unconstitutional, because having only one director erodes the President's Article II powers. *Id.* at 166. Judge Kavanaugh reasoned that: (1) in light of historical practice, there has never been any independent agency so unaccountable and unchecked; (2) the lack of a critical check runs the risk of abuse of power and threatens individual liberty; and (3) Presidential authority to control the Executive Branch is of great importance and is diminished by this single-director independent agency. *Id.* at 167.

In an earlier dissent in *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,*537 F.3d 667, 686 (D.C. Cir. 2008), Judge Kavanaugh asserted that the Public Company Accounting Oversight Board (PCAOB), created by the Sarbanes-Oxley Act, is unconstitutional because the appointment and for-cause removal powers of the PCAOB lie with the SEC, another independent agency. Kavanaugh stated this structure unconstitutionally restricted the President's appointment and removal powers, either directly or through an alter ego, which he said has "never before [happened] in American history." *Id.*

Discrimination in the Workplace

Judge Kavanaugh frequently writes opinions in a manner designed to portray himself as giving precise meaning to statutes, and resisting the urge to expand the law or "legislate from the bench." *See, e.g., Miller v. Clinton,* 687 F.3d 1332, 1358 (D.C. Cir. 2012) (Kavanaugh, J., dissenting) (denouncing the majority's decision to apply Age Discrimination in Employment Act (ADEA) to the State Department and quoting from *Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts).*

Several of Judge Kavanaugh's decisions suggest he construes anti-discrimination statutes in a manner that may be considered plaintiff-friendly, but there is not a sufficient sample from which to draw a definitive conclusion on this issue. In both *Ortiz-Diaz v. United States HUD,* 831 F.3d 488, 494 (D.C. Cir. 2016),*rev'd* 867 F.3d 70, 81 (D.C. Cir. 2016), and *Ayissi-Etoh v. Fannie Mae,*712 F.3d 572, 579-80 (D.C. Cir. 2013), Judge Kavanaugh argued in favor of making it easier for plaintiffs to establish a *prima facie* case of employment discrimination. In *Ortiz-Diaz,* Judge Kavanaugh was part of a three-judge panel that initially affirmed a district court's ruling that refusal to grant a lateral transfer is not an adverse employment action under Title VII. *See Ortiz-Diaz,* 831 F.3d at 494. The ruling prevented the plaintiff from demonstrating harm resulting from his employer's refusal to grant him a lateral transfer away from an allegedly racist and biased supervisor who the plaintiff claimed was hurting his ability to develop and succeed professionally. *Id.* at 491-92. Several months later, however, that three-judge panel reversed itself *sua sponte,* holding that when an employer denies a lateral transfer for reasons based on race or gender or other protected grounds, that employer violates Title VII. *Ortiz-Diaz,* 867 F.3d at 74-77. In both decisions, Judge Kavanaugh wrote a concurring opinion arguing in favor of expanding the definition of adverse employment action to include discriminatory refusal to grant requests for lateral transfers. *Id.* at 81; *Ortiz-Diaz,* 831 F.3d at 494. Similarly, in *Ayissi-Etoh,* 712 F.3d at

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579-80, Judge Kavanaugh wrote a concurring opinion, arguing that a single verbal incident ought to be sufficient to establish a hostile work environment. Judge Kavanaugh opined, "[t]he test set forth by the Supreme Court is whether the alleged conduct is 'sufficiently severe *or* pervasive' — written in the disjunctive — not whether the conduct is 'sufficiently severe *and* pervasive.'" *Id.* at 579. He continued, "in my view, being called the n-word by a supervisor — as Ayissi-Etoh alleges happened to him — suffices by itself to establish a racially hostile work environment." *Id.* at 580.

Employee Benefits

Some of Judge Kavanaugh's dissenting and concurring opinions offer insight into what his approach may mean for employers. In *Priests for Life v. United States Dep't of Health & Human Servs.,* 808 F.3d 1, 14 (D.C. Cir. 2015), Judge Kavanaugh dissented from the denial of a rehearing en banc in a Religious Freedom Restoration Act (RFRA) challenge to the process for accommodating religious objections to the Affordable Care Act's contraceptive mandate. Under the accommodation, the carrier still provides the services to the plan participants, but directly to those requesting them rather than the plan paying for the services as the mandate requires. The panel decision had upheld the accommodation, stating that a court is not required "simply to accept whatever beliefs a RFRA plaintiff avows—even erroneous beliefs about what a challenged regulation actually requires." *Id.* at 4. Rather than join other conservative dissenters, who would have held for the religious organization agreeing that the government has no compelling interest in contraception facilitation, Kavanaugh wrote, "It is not our job to re-litigate or trim or expand Supreme Court decisions. Our job is to follow them as closely and carefully and dispassionately as we can. Doing so here, in my respectful view, leads to the conclusion that the plaintiff religious organizations should ultimately prevail on their RFRA claim, but not to the full extent that they seek." *Id.* at 14.

Judge Kavanaugh's approach to his cases is objective and literal, and he has shown a depth of understanding of ERISA, as well as an employer's duties and responsibilities. His dedication to the text of the law or the plan document does not favor one side over the other, but rather illustrates his commitment to interpreting the language objectively before applying it to the situation.

Immigration

Judge Kavanaugh's immigration decisions indicate a tendency to interpret the law to protect U.S. workers rather than employers who want to hire foreign nationals. For example, his dissent in *Fogo de Chao (Holdings) Inc. v. U.S. Department of Homeland Security,* 769 F.3d 1127 (D.C. Cir. 2014), offers a glimpse into his approach to immigration law. Fogo de Chao, a Brazilian steakhouse restaurant chain, claimed that a critical component of its success included employing genuine gaucho chefs, churrasqueiros, who "have been raised and trained in the particular culinary and festive traditions of traditional barbecues in the Rio Grande do Sul area of Southern Brazil." *Id.* at 1129. Over the years, the company had brought over 200 chefs to the U.S. on L-1B visas. To qualify for an L-1B visa, the company must show that the individual has worked for the company abroad for at least one year in the prior three years and has "specialized knowledge." The statutory definition states that an employee possesses specialized knowledge "if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company," and the regulation followed suit. 8 U.S.C. §

1184(c)(2)(B). The U.S. Citizenship and Immigration Services (USCIS) denied Fogo de Chao's petition, and the district court granted the government summary judgment. The D.C. Circuit reversed, holding that: (1) the regulation regarding "specialized knowledge" would not be given *Chevron* deference because the regulation merely mirrored the statute; (2) judicial review was not barred because the denial was not statutorily in the discretion of the Attorney General or the Secretary of Homeland Security; and (3) the agency's denial based upon a categorical bar on culturally acquired knowledge to prove specialized knowledge was not sufficiently supported. *Fogo de Chao,* 769 F.3d at 1149.

Judge Kavanaugh dissented, noting that even if *Chevron* deference was not required, under a *de novo* standard of review, the agency's decision should have been upheld. He reasoned the categorical bar on culturally acquired knowledge was correct because any other interpretation would "gut the specialized knowledge requirement and open a substantial loophole in the immigration laws." *Id.* at 1152. Moreover, Judge Kavanaugh agreed with the agency that Fogo de Chao's argument that American chefs could not be trained in a reasonable amount of time was inadequate. He noted that Fogo de Chao already employed some American chefs and "common sense tells us that the chefs who happen to be American citizens surely have the capacity to learn how to cook Brazilian steaks and perform the relevant related tasks." *Id.* at 1153.

Ultimately, Judge Kavanaugh concluded that Fogo de Chao's argument was at least in part based on their desire to cut labor costs and that "mere economic expediency does not authorize an employer to displace American workers for foreign workers." *Id.* He further stated that: "By claiming that its Brazilian chefs possess 'cultural' knowledge and skills that cannot be learned by Americans within a reasonable time, Fogo de Chao has attempted an end-run around the carefully circumscribed specialized knowledge visa program." *Id.* at 1154. Finally, in an interesting footnote, Kavanaugh pointed out that the agency could adopt a binding regulation (instead of relying on a policy memo) that would make it clear that workers such as the chefs in this case do not possess specialized knowledge under the statute — then their decision would be entitled to *Chevron* deference. *Id.*

Judge Kavanaugh's majority opinion in *Int'l Internship Program v. Napolitano,* 718 F.3d 986 (D.C. Cir. 2013), also illustrates his inclination to protect U.S. workers from being undercut based on an employer's economic needs. *Napolitano* involved an organization that sponsored a cultural exchange program that helped Asians find jobs in American schools. The exchange program applied for Q visas for these individuals. The USCIS denied several of these petitions because the individuals participating in the program were not paid. The agency interpreted the Q visa statute and regulations to require payment of wages. *Id.* at 987.

The plaintiff argued that unpaid interns were eligible for Q visas as long as there were comparable American workers in the program who were unpaid because the statute stated that the foreign participants "will be employed under the same wages and working conditions as domestic workers." *Id.* citing 8 U.S.C. § 1101(a)(15)(Q). Judge Kavanaugh disagreed, opining that the terms included in the statute and regulations ("employed," "wages," "workers," and "remuneration"), were "best read to require foreign citizens to receive wages and that those wages be equivalent to the wages of domestic workers." *Int'l Internship Program,* 718 F.3d at 987.

Labor

Because Judge Kavanaugh sits in the D.C. Circuit, he has frequently been involved in cases reviewing National Labor Relations Board (NLRB) decisions, which he appears to analyze on a case-by-case basis rather than in service of an overarching judicial philosophy. Judge Kavanaugh has written several majority opinions that vacated an NLRB order. Writing for the majority in *S. New Eng. Tel. Co. v. NLRB,* 793 F.3d 93, 94 (D.C. Cir. 2015), Judge Kavanaugh vacated an NLRB decision that had found an employer unlawfully banned employees (who went into customer's homes) from wearing union t-shirts that stated "Inmate" and "Prisoner of AT." Judge Kavanaugh opened his opinion by noting: "Common sense sometimes matters in resolving legal disputes," and criticized the Board for applying "the 'special circumstances' exception in an unreasonable way." *Id.* at 94, 96; *see also Verizon New Eng. v. NLRB,* 826 F.3d 480, 483 (D.C. Cir. 2016) (granting the employer's petition for review of an NLRB decision which had overturned a labor arbitration decision that had ruled for the employer); *Venetian Casino Resort L.L.C. v. NLRB,* 793 F.3d 85, 87 (D.C. Cir. 2015) (granting employer's petition for review, finding employer had a First Amendment right to contact police regarding a union demonstration allegedly trespassing on its private property).

In addition, Judge Kavanaugh has authored several dissenting opinions in favor of employers' arguments. Most recently, in *Island Architectural Woodwork, Inc. v. NLRB,* 2018 U.S. App. LEXIS 16109, at *32 (D.C. Cir. June 15, 2018), he dissented from the majority opinion enforcing an NLRB order holding an employer was an alter ego of a unionized shop and thus violated the National Labor Relations Act (NLRA). Judge Kavanaugh stated that "the Board's analysis is wholly unpersuasive." *Id.* at *34. In *NLRB v. CNN Am., Inc.,* 865 F.3d 740, 765-66 (D.C. Cir. 2017), Kavanaugh dissented in part, finding that the NLRB erred in its analysis of *both* the joint-employer and successor-employer issues when it found that CNN had violated the Act, stating, among other things, that he agreed with conservative Member Miscimarra's dissent in the underlying NLRB decision. Judge Kavanaugh ended his decision bluntly, "Bottom line: In my view, the Board jumped the rails in its analysis of both the joint-employer and successor-employer issues." *Id.* at 767.

Judge Kavanaugh also dissented in *Agri Processor Co. v. NLRB,* 514 F.3d 1, 10 (D.C. Cir. 2008), refusing to join the majority's decision enforcing an NLRB decision that held individuals who are not legally authorized to work in the United States are nonetheless "employees" for the purposes of the NLRA (and permitted to organize and vote in Union elections involving their employer). Judge Kavanaugh's dissenting opinion stated, "I would hold that an illegal immigrant worker is not an 'employee' under the NLRA for the simple reason that, ever since 1986, an illegal immigrant worker is not a lawful 'employee' in the United States." *Id.* In Kavanaugh's view, the case should have been remanded to the Board "to determine how a party can challenge a union election or certification upon discovering after the fact that illegal immigrant workers voted in the election and effected the outcome." *Id.; see also Midwest Div.-MMC, LLC v. NLRB,* 867 F.3d 1288, 1304-05 (D.C. Cir. 2017) (dissenting from majority, stating he would hold *Weingarten* rights do not apply to peer-review committee interviews, noting he would vacate the Board's order to the extent it ruled the Union was entitled to peer-review information).

However, Judge Kavanaugh has sided with the NLRB in some instances. Most recently, in *Veritas Health Servs., Inc. v. NLRB,* 671 F.3d 1267, 1269-70 (D.C. Cir. 2012), Kavanaugh enforced an NLRB decision that had determined that certain pro-union conduct of charge nurses (supervisors) did not taint a union election, determining the employer did not show that the Court should overturn the decision upholding the election that resulted in the union's certification. *See also New York-New York, LLC v. NLRB,* 676 F.3d 193 (D.C. Cir. 2012) (finding the NLRB had been granted discretion pursuant to an earlier Circuit decision to decide whether a property owner could prohibit employees of an on-site contractor from distributing handbills on its property); *Raymond F. Kravis Ctr. for the Performing Arts, Inc. v. NLRB,* 550 F.3d 1183, 1186 (D.C. Cir. 2008) (enforcing Board Order holding the employer violated the NLRA when it unilaterally changed the scope of the bargaining unit and withdrew recognition from the union); *United Food & Commercial Workers v. NLRB,* 519 F.3d 490, 492 (D.C. Cir. 2008) (enforcing NLRB decision that held employer was required to engage in effects bargaining with the union after positions no longer constituted an appropriate bargaining unit due to technological change); *E.I. du Pont de Nemours & Co. v. NLRB,* 489 F.3d 1310, 1312 (D.C. Cir. 2007) (enforcing Board Order finding that employer's refusal to provide requested information to the union precluded lawful impasse).

Workplace Privacy

Judge Kavanaugh's dissent in *Nat'l Fed'n of Fed. Employees-IAM v. Vilsack,* 681 F.3d 483 (D.C. Cir. 2012), is perhaps indicative of his stance on privacy issues. In *Vilsack,* the plaintiff union challenged the constitutionality of a policy of random drug testing of all employees working at the Job Corps Civilian Conversation Center (specialized residential schools for at-risk youth) run by the defendant, the Secretary of Agriculture and Chief of the U.S. Forest Service. 681 F.3d at 485. The district court granted the Secretary's summary judgment motion, concluding that the government interest in preventing illegal drug use justified intrusion of employee privacy interests and Fourth amendment rights. *Id.* at 488. The D.C. Circuit Court reversed and remanded the case. *Id.* at 486.

The panel opinion considered the balancing of the government's interest in a drug free work place with employee privacy interests, using the *Skinner* test in assessing the employees' privacy interests, to determine both "the scope of the legitimate expectation of privacy at issue" and the "character of the intrusion that is complained of." *Id.* at 490. In ruling in favor of the plaintiffs and their interest in employee privacy, the opinion emphasizes the defendant's lack of explanation of how "general program features loosely ascribed staff responsibilities serve to undermine the reasonable expectations of privacy held by Job Corps employees" and the lack of notice of such testing, given that for over a decade employees in the same position were not tested. *Id.* at 493. Moreover, typically drug testing is considered permissible in high security or safety positions; however, here the Secretary defendant designated all employees to drug testing, and the court concluded the defendant's rationale supporting "special needs" to justify drug testing all employees was too speculative. *Id.* at 494-95, 498.

Judge Kavanaugh's dissent narrowly addressed the issue of drug testing government employees who work at specialized residential schools for at-risk youth, and avoided an assessment of when drug testing should or should not be permissible in the government setting in general. *Id.* at 499-500. In the specific context of random drug testing at a "public school" for "at-risk youth," Kavanaugh stressed that there was no Supreme

Court precedent. *Id.* at 500. He distinguished a case the majority relied on, *Vernonia School Dist. v. Acton,* 515 U.S. 646 (1995), that cautioned against "suspicionless drug testing" passing "constitutional muster" in the public school setting. In *Vernonia*, the public school attempted to justify "suspicionless drug testing" of teachers and other staff on the basis that in the same school, drug testing of student athletes was permitted. Judge Kavanaugh found the Secretary's rationale supporting "special needs" to be persuasive. *See Vilsack,* 681 F.3d at 501. "To maintain discipline, the schools must ensure that the employees who work there do not themselves become part of the problem," Kavanaugh stated. *Id.* "That is especially true when, as here, the employees are one of the few possible conduits for drugs to enter the schools." *Id.*

Judge Kavanaugh emphasized that his dissenting opinion was narrowly limited to this specific factual situation. *See id.* at 499-500. Therefore, in this case, although Kavanaugh ultimately concluded that the government's interest outweighed the employees' right to privacy, it remains difficult to assess the degree to which this case signals Kavanaugh's stance on privacy issues generally.

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Next steps: Judge Kavanaugh's nomination must be approved by the U.S. Senate after the Senate Judiciary Committee holds a hearing. After a hearing, the committee votes on whether to put Kavanaugh before the Senate. If the committee votes to move forward, the Senate will vote on the nomination. A majority vote of the Senate is needed to put Judge Kavanaugh on the Court.

President Trump will have the opportunity to leave a lasting mark on the federal judiciary, which currently has more than 100 vacancies pending in the U.S. District Courts and the Courts of Appeals. In addition to the selection of the current nominee and Justice Gorsuch's appointment in April 2017, Trump may have occasion to fill another Supreme Court seat in the coming years, with Justice Ruth Bader Ginsburg at age 85 and Justice Stephen Breyer at age 79.

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