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Judge Kavanaugh's Record in Benefits, Labor, and Employment-Related Cases

Judge Brett Kavanaugh has decided numerous benefits, labor, and employment-related cases during his dozen years on the District of Columbia Court of Appeals. While the Supreme Court nominee's record in these areas shows a tendency to side with employers, he has also found merit in employees' claims. Senate Judiciary Committee hearings on his nomination are scheduled to begin today.

Background

On July 9, 2018, President Trump nominated Judge Brett Kavanaugh, age 53, to fill the Supreme Court seat recently vacated by the retirement of Justice Anthony Kennedy, for whom Judge Kavanaugh once served as a judicial clerk. Appointed by President George W. Bush, Judge Kavanaugh has served on the U.S. Court of Appeals for the District of Columbia Circuit since 2006 — when he was confirmed by a vote of 57-36 after a three-year delay.

Senate Judiciary Committee Chairman Chuck Grassley, R-Iowa, announced that confirmation hearings will start on September 4. Majority Leader Mitch McConnell, R-Ky., has said he expects a vote on Judge Kavanaugh's nomination before the high court starts its next term on October 1. Because Republicans currently hold a slim majority in the Senate, they will need to be nearly unanimous in their support of Judge Kavanaugh, or sway a few Democrats, if they want him to be confirmed.

Below is a survey of selected opinions, dissents, and concurrences authored or joined by Judge Kavanaugh that address a range of employee benefits, labor and employment-related topics. They provide some insight into his views on matters of significance to employers, as well as issues like statutory construction and interpretation, judicial philosophy, the role of administrative agencies, and Supreme Court precedent, that are likely to come up in his Senate confirmation hearings.

Retirement Benefits

In several cases involving retirement or retiree disability benefits, Judge Kavanaugh has sided with employers or the PBGC. In *Coleman v. PBGC* (2006), he joined in affirming the lower court's rejection of former employees'

claims for mutual consent benefits relating to breaks in service and shutdown benefits in connection with a terminated pension plan. In *Davis v. PBGC* (2009), he agreed with the majority in affirming the lower court's denial of an injunction against the PBGC's recovery and recoupment efforts of benefit payments to plan participants and deferred to the PBGC's interpretation of the ERISA provision prioritizing benefits in a plan termination. He was on a panel that rejected a retired worker's ERISA challenge to the termination of his disability benefits in *Oakey v. Airways Pilots Disability Income Plan* (2013), finding that the Railway Labor Act's arbitration requirements governed the dispute that grew out of the interpretation or application of a collectively-bargained agreement. He joined in affirming a determination that the PBGC properly ruled a permanent shutdown of the employer's mining operation had not occurred before the plan termination, meaning that participants were not entitled to shutdown benefits under the plan (*United Steelworkers Union v. PBGC* [2013]). Additionally, he agreed that the PBGC did not breach its statutory and fiduciary duties as statutory trustee of a terminated pension plan and did not fail to investigate potential claims against the plan's former trustees, finding that the plan's investment strategy and actuarial assumptions did not constitute "red flags" requiring the corporation to investigate further (*US Airline Pilots Association v. PBGC* [2015]).

In other cases, he has found in favor of plan participants. In *Stephens v. US Airways Group* (2011), the majority held that lump-sum distributions made 45 days after retirement were the actuarial equivalent of the annuity option payable on that date, but that the participants were entitled to interest for the unreasonable delay in payment. Judge Kavanaugh concurred, agreeing that the 45-day period was not a "reasonable delay" as described in IRS regulations, but he would have found that the lump-sum distribution check was worth less than the annuity payments because of the delay. He joined in affirming the lower court's ruling in *Kifafi v. Hilton Hotels Retirement Plan* (2012) that the plan was impermissibly backloaded because it did not satisfy the "133⅓% rule" — one of the three rules designed to prevent backloading, despite the fact that the backloading was eliminated by a retroactive amendment, and failed to properly calculate participants' vesting credit by excluding years of union service.

Health Care Benefits and the Affordable Care Act

Judge Kavanaugh has recognized the importance of ERISA preemption to the uniform functioning of employee benefit plan administration. In *Pharmaceutical Care Management Association v. District of Columbia* (2010), he was on a panel that affirmed the lower court's finding that ERISA preempted parts of a District of Columbia law that treated pharmacy benefits managers (PBMs) under contract with employee benefit plans as fiduciaries and imposed disclosure and other administrative requirements on the plans through those PBM contracts.

He rejected challenges to the ACA's constitutionality on two occasions, both times on procedural grounds. In *Seven-Sky v. Holder* (2011), Judge Kavanaugh dissented from the majority's finding that the ACA's individual mandate was constitutional, opining that the lawsuit should not have been heard because the Anti-Injunction Act bars a pre-enforcement lawsuit challenging the assessment or collection of a tax. In *Sissel v. HHS* (2015), Judge Kavanaugh dissented from the denial of a rehearing *en banc* (full court) petition on the constitutionality of the ACA on the grounds that the ACA was a revenue bill originated in the House (as the Constitution requires) and not in the Senate, as argued by the plaintiff.

However, Judge Kavanaugh would likely have ruled in favor of a religious rights-based challenge to the regulatory accommodation for objectors to ACA's contraceptive coverage mandate, which requires non-grandfathered group health plans to provide in-network coverage of FDA-approved contraceptive services without cost-sharing. In his

dissent in *Priests for Life v. HHS* (2015), he opined that, although the government has a compelling interest in facilitating access to contraception, the then existing regulations associated with the mandate "substantially burden the religious organizations' exercise of religion" because they "require the organizations to take an action contrary to their sincere religious beliefs (submitting the form) or else pay significant monetary penalties." (See our October 24, 2017 *FYI* for background on challenges to the contraceptive coverage mandate and the Trump administration's expansion of the exemption to this mandate.)

Labor Issues

As a member of the DC Circuit, Judge Kavanaugh has reviewed many decisions of the National Labor Relations Board (NLRB or Board). He has written and joined opinions vacating Board orders and has sided with the NLRB in other matters. He has taken positions that favor employers and positions that do not.

Specifically, he has been on panels that unanimously held that employers did not commit unfair labor practices for: refusing to bargain (*Trump Plaza Associates v. NLRB* [2012]); requesting the police to issue criminal citations to union demonstrators for trespass (*Venetian Casino Resort v. NLRB* [2015]); and barring customer-facing employees from wearing union shirts that said "Inmate" on the front and "Prisoner of AT$T on the back" (*Southern New England Telephone Company v. NLRB* [2015]). In the last case, Judge Kavanaugh noted that the company could lawfully "prohibit its employees from displaying messages on the job that the company reasonably believes may harm its relationship with its customers or its public image" under prior DC Circuit and Board rulings. In *Local 58 v. NLRB* (2018), he joined a unanimous opinion affirming the NLRB's determination that a union's policy requiring members who want to resign or opt out of union dues deductions to come to the union's office with a photo identification and a written request was unlawful.

Writing for the majority in *Verizon New England v. NLRB* (2016), Judge Kavanaugh laid out the standard for the Board to review arbitration decisions, concluding that the NLRB "acted unreasonably" by overturning an arbitrator's decision that a ban on picketing prohibited the display of picket signs in employees' cars on the employer's property. In *American Federation of Government Employees v. Gates* (2007), he wrote the majority opinion ruling that the Department of Defense had authority to temporarily curtail collective bargaining for civilian employees under the plain language of the National Defense Authorization Act for Fiscal Year 2004.

In some cases, Judge Kavanaugh agreed in part and dissented in part with the majority's view. For example, in *Midwest Division v. MMC, LLC v. NLRB* (2017), he concurred in setting aside the NLRB's decision that the employer improperly denied nurses' requests for union representation in peer-review-committee interviews, but dissented from the opinion that the union was entitled to information about the inner workings of the committee. In *NLRB v. CNN America, Inc.* (2017), Judge Kavanaugh agreed with the majority that the NLRB wrongly concluded that CNN and TVS were joint employers, but he also would have set aside the Board's determination that CNN was a successor employer.

In union recognition and duty to bargain cases, he dissented from opinions upholding Board decisions that went against employers, and he wrote for the court to enforce Board orders requiring employers to recognize and/or bargain with unions. In *Agri Processor Co. v. NLRB* (2008), for example, he would not have upheld the validity of a union election, reasoning that the votes of "illegal immigrant" workers should not have counted in (and been allowed to influence) the election because federal immigration law prevents them from being "employees" under the National Labor Relations Act. In *Island Architectural Woodwork, Inc. v. NLRB* (2018), where the majority affirmed

an NLRB determination that two employers were "alter egos" for labor relations purposes, he would instead have relied on the administrative law judge's conclusion that "the two companies, among other indicia of their separateness, did not have common ownership or common management."

On the other hand, he wrote for the court in *E.I. du Pont de Nemours v. NLRB* (2007) that the employer wrongfully declared an impasse with respect to subcontracting negotiations, even though it permissibly declared an impasse concerning the overall collective bargaining agreement. In *Raymond F. Kravis Center for the Performing Arts, Inc. v. NLRB* (2008), he upheld the Board's decision that the employer committed unfair labor practices by unilaterally changing the scope of the bargaining unit and withdrawing recognition from the union, and enforced the Board order to recognize and bargain with the union. His opinions in *United Food & Commercial Workers v. NLRB* (2008) and *Veritas Health Services, Inc. v. NLRB* (2012) enforced Board orders requiring the employer to bargain. In the former, the Board ordered bargaining over the effects of a technological conversion that eliminated the bargaining unit, and in the latter, the Board found that pro-union conduct by supervising charge nurses did not taint the election and that the employer had committed an unfair labor practice by refusing to bargain. Upholding the Board's ruling in a different context, he wrote for the court in *New York – New York, LLC v. NLRB* (2012) that a property owner generally may not bar employees of an onsite contractor from distributing union-related handbills on the property.

Employment Cases

Judge Kavanaugh's record in individual employment cases is also mixed.

Shortly after joining the Court of Appeals for the District of Columbia Circuit, he wrote the majority opinion in *Jackson v. Gonzales* (2007), finding that no reasonable jury could conclude that the employer's decision not to promote an African-American employee was discriminatory where the successful candidate had a much higher score on the "knowledge, skills, and abilities" qualification evaluation. Since then, Justice Kavanaugh has written a number of unanimous decisions affirming the dismissal of an employee's discrimination claims based on race, religion, age, and disability claims. In *Brady v. Office of Sergeant at Arms* (2008), the court held that the employee's race discrimination claims were properly dismissed where the employee was demoted for legitimate, non-discriminatory reasons. In *Adeyemi v. District of Columbia* (2008), the panel found insufficient evidence to show that the employer's qualifications-based reason for not hiring a deaf applicant was pretextual or that the employer intentionally discriminated against the applicant because of his disability. In that case, Judge Kavanaugh wrote that courts should not act as "a super-personnel department that reexamines an entity's business decisions – a role we have repeatedly disclaimed." *Colton v. Clinton* (2012) (*per curiam*) affirmed the dismissal of a State Department employee's ADEA claim challenging the Foreign Service Act's mandatory retirement provision.

Judge Kavanaugh has also written decisions favorable to employers in retaliation and hostile work environment cases. For example, in *Baloch v. Kempthorne* (2008), he affirmed the dismissal of an employee's race, religion, age, and disability discrimination, and retaliation claims that a change to his substantive duties constituted an adverse employment action, as well as dismissal of a hostile work environment claim for insufficient evidence. In *Robert Lee Johnson v. Interstate Management Company* (2017), Judge Kavanaugh affirmed summary judgment for the employer on claims that it fired an employee in retaliation for the employee's filing both OSHA and EEOC complaints rather than because of unsanitary kitchen practices. Writing for a unanimous panel in *District of Columbia and CCDC Office LLC v. DOL* (2016), he rejected the DOL's position that the Davis-Bacon Act applied to a construction project because the government was not a party to the construction contracts and the

project did not qualify as a public work under the statute; thus, the private development company was not required to pay construction workers prevailing local wages

In other cases, Judge Kavanaugh would have found for the employer where the majority did not, particularly on matters of statutory interpretation. For example, in *Miller v. Clinton* (2012) the majority reversed the dismissal of a claim that the State Department violated federal law when it required a U.S. citizen stationed abroad to retire at age 65. Judge Kavanaugh would have found, as a matter of law, that the State Department was free to impose a mandatory retirement age. Providing some insight into his judicial philosophy, he wrote that "our job is to apply and enforce the law as it is written." Stressing adherence to a statute's text, he wrote "[a]lthough I might disagree with the lines Congress has drawn in this statute, it is our job to respect those lines, not to re-draw them as we might prefer." In *LaTaunya Howard v. Office of the Chief Administrative Officer of the United States House of Representatives* (2013), he dissented from the majority opinion that held the Constitution's Speech or Debate Clause did not bar a lawsuit by a former employee of the congressional Office of the Chief Administrative Officer for alleged racial discrimination and retaliation in violation of the Congressional Accountability Act. In *SeaWorld of Florida, LLC v. Perez* (2014), he disagreed with the majority's opinion that SeaWorld violated OSHA's general duty clause by exposing a trainer to the recognized hazards of working with a killer whale, concluding that OSHA lacked statutory authority to regulate safety protocols at an entertainment venue like SeaWorld.

In other instances, he has found in favor of employees' discrimination claims. For example, he joined in opinions that reversed lower court dismissals of claims by a 63-year-old worker that his employer violated ADEA by maintaining a discriminatory partnership policy (*Schuler v. PwC* [2008]), and by a U.S. Foreign Service candidate that she was denied employment in violation of the Rehabilitation Act based on a "record of disability" following breast cancer surgery (*Adams v. Rice* [2008]). He joined in vacating dismissal for failure to exhaust administrative remedies of a putative class action alleging race discrimination by current and former Federal Reserve Board secretaries (*Artis v. Bernanke* [2011]), and agreed that an African-American female police commander's race and sex discrimination suit could go forward to let a jury decide whether her demotion and replacement by a white man at a higher rank was motivated by a discriminatory intent (*Primas v. District of Columbia* [2013]). In *Cannon v. District of Columbia* (2013), he joined in affirming the district court's dismissal of constitutional claims against reducing the salaries of retired police officers by the amount of their pension payments following rehire by other District agencies, but reversing and remanding the FLSA claim that they were paid less than minimum wage because of the offsets.

In other cases, Judge Kavanaugh agreed with the majority in plaintiff-friendly decisions but would have gone even further. For example, in *Ortiz-Diaz v. HUD* (2017), he agreed to permit a race and national origin discrimination lawsuit to proceed, but wrote separately to urge the court to establish that all discriminatory transfers, and denials of transfers, are actionable under Title VII. In *Ayissi-Etoh v. Fannie Mae* (2013) (*per curiam*), the court reversed the dismissal of claims that Fannie Mae unlawfully discriminated against, harassed, and retaliated against an African-American employee. While concurring in the opinion, he wrote separately to underscore his view that "a single, sufficiently severe incident may create a hostile work environment actionable" — and that "being called the n-word by a supervisor ... suffices by itself to establish a racially hostile work environment."

Conclusion

With hot-button issues like abortion rights, gun control, and climate change on the agenda, it remains to be seen how much time senators will devote to Judge Kavanaugh's record in employee benefits, labor, and employment-related cases. Nevertheless, if he is confirmed — as many believe he will be — his rulings could affect employers for decades.

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