

Historic SCOTUS Nomination of Ketanji Brown Jackson

By Stephanie E. Satterfield & Stephanie L. Adler-Paindiris

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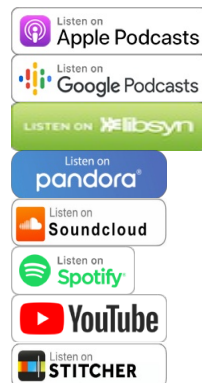
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Details

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Appointing a justice to the United States Supreme Court is a decision that has an immediate and potentially decades-long impact on Supreme Court jurisprudence, as well as a lasting impact on a president's legacy. On this episode of We get work™, we discuss President Biden's historic nomination of Judge Ketanji Brown Jackson, and how her background may influence labor and employment law in the years to come if her appointment is confirmed.

Stephanie Adler-Paindiris and Stephanie Lewis have authored an article for Law360 entitled, "[Judge Jackson's Employment Rulings Embody Pragmatism](#)"



Takeaways

[President Biden Nominates D.C. Circuit Judge Ketanji Brown Jackson to U.S. Supreme Court](#)

President Joe Biden has nominated Ketanji Brown Jackson, a judge on the U.S. Court of Appeals for the District of Columbia Circuit, to the U.S. Supreme Court. Fulfilling a campaign promise to nominate the first African American woman to serve on the high court, President Biden has named an experienced jurist with Ivy League credentials to succeed Associate Justice Stephen Breyer.

Transcript

Alitia (00:09):

Appointing a justice to the United States Supreme Court is a decision that has an immediate and potentially decades-long impact on the highest court's jurisprudence, as well as a lasting impact on a president's legacy.

On this episode of We get work™, we discuss President Biden's historic

nomination of Judge Ketanji Brown Jackson. And how her background may influence labor and employment law in the years to come, if her appointment is confirmed.

Our hosts today are Stephanie L. Adler-Paindiris and Stephanie Lewis, principals respectively in the Orlando and Greenville offices of Jackson Lewis. Co-leaders of the firm's litigation group, and members of the firm's board of directors. Admitted to the U.S. Supreme Court and federal courts throughout the country, Stephanie A. Defends class and collective actions on behalf of employers and provides daily legal advice and counsel to help employers navigate through today's workplace challenges. Stephanie L. also serves as co-leader of the firm's pay equity group, advising businesses on practices and policies to foster employee engagement, avoid litigation and represents them when litigation is unavoidable. Affectionately dubbed the Stephanie Show, Stephanie A. and Stephanie L. The question on everyone's mind today is, who is the honorable Ketanji Brown Jackson, and how will her potential confirmation impact my business?

Stephanie A. (01:33):

Hi, Stephanie.

Stephanie L. (01:34):

Hi, Stephanie.

Stephanie A. (01:36):

How are you doing?

Stephanie L. (01:37):

Doing great. So good to see you.

Stephanie A. (01:39):

It's good to see you too as always. We are so excited to be here today to discuss the nomination of Judge Ketanji Brown Jackson to the Supreme Court of the United States. Stephanie this is obviously, as we all know, a really historic nomination for so many obvious reasons. She is the first African American female to be nominated to the U.S. Supreme Court, that in and of itself is amazing. She would be the third, only the third black justice on the Supreme Court. And I believe she's going to be the first justice, if nominated, to have actually been a federal public defender representing indigent defendants. And I think that gives her a really cool perspective.

In our line of work we always talk about how important diversity is and how much impact diversity has on our institutions. And so, that's going to be a really interesting perspective that she brings to the court if she's obviously confirmed. We're really watching this confirmation hearing, it's going to start on March 21st. I'll definitely be glued to it. But before we jump in and talk about judge Jackson, which there's so much to talk about, I thought maybe it would be good to look back and talk a little bit about justice Breyer. What do you think

Stephanie?

Stephanie L. (02:56):

Absolutely Stephanie. You're right. Such an exciting time for all the reasons you mentioned, and really glad to be able to have this discussion with you today, as we are running up to the confirmation hearings. In terms of justice Breyer... When I think back on justice Breyer's legacy, in terms of his impact on labor and employment law, for me it's pretty obvious that the most significant impact is the Burlington Northern retaliation decision. In that decision justice Breyer set out the framework that we all continue to use for evaluating retaliation claims. And he wrote an opinion establishing that, retaliation claims could be based on actions other than just termination decisions, promotion decisions, what we think of as obvious tangible employment actions. And retaliation can be based on any materially adverse action, really that would shield someone from bringing forward a complaint.

And, it's interesting because retaliation claims are some of the most difficult claims our clients deal with. Because I think in some respects, it's somewhat human nature to be upset when someone makes a complaint about you. Particularly, if you feel sincerely that the complaint is not... it doesn't have any merit. But on the other hand, justice Breyer rightly noted that the discrimination laws would have little effect if employees weren't able to come forward in good faith and make complaints without fear of retaliation, including things like changing job duties, which is what happened in the Burlington Northern case. So, to me that's his significant impact in the labor and employment law. And obviously too, because judge Jackson clerked for justice Breyer, we now have the opportunity to see his legacy continue through her if confirmed. But before we dig into judge Jackson's labor and employment law decisions and her potential impact on the Supreme Court, Stephanie, what I would really love and I think our listeners would love, is to know a little bit more about judge Jackson as a person. So what fun facts can you tell us about judge Jackson?

Stephanie A. (05:18):

Oh, so many. I had so much fun digging into this. She's a really interesting person. So, first she's a mom of two daughters, 17 and 21. So I think as a mother myself, that's always going to inform how she sees the world. Her parents are very interesting. So her parents started school in a segregated school and that in and of itself, I found fascinating. They both went to historically black colleges and universities. They were both very committed to public education. Her mother was a public teacher, ultimately became a principal. Her father was also a public teacher and then went to law school. She's even noted that one of her earliest memories was in preschool watching her father study for his law exams at the kitchen table. She went to high school in Miami. She was incredibly successful. She was very popular, interesting fun fact, she was elected to be president of her class every year she was in high school, which I thought was really interesting.

She also was very active in the speech and debate club, which they called

Forensic. And she's publicly said that class or that club really prepared her to be a lawyer. It taught her to lean in and be resilient and be clear and concise. And it was with the Forensics team that she first visited Harvard University and decided that's the place for her. And when she told her guidance counselor, her guidance counselor thought maybe she should set her sites a little lower. And thankfully for all she did not. She ultimately did go to Harvard University. She graduated Magna Cum Laude [Latin 00:07:01].

Fun fact, she was a scene partner with Matt Damon at Harvard, something you might not have known. Ultimately her senior thesis was on criminal justice, which again, in sentencing, which as we see further in her career is important. She went to Harvard Law School. She graduated Cum Laude [Latin 00:07:21] in 1996 and then went on to clerk for three judges, a district court judge, a court of appeals judge, and ultimately for justice, Steven Breyer who she hopes to replace his seat. I would say the other things that are really important about her is she did spend some time in private practice. She's publicly said how difficult it was for her to have a child in private practice. She said, it could not be overstated how difficult that was.

Stephanie L. (07:51):

Interesting. So let me stop you there, Stephanie. So for those who don't know, who are listening, Stephanie has five children. Leader in the law firm on the board of directors, leads the practice group, has a very active practice herself. Stephanie how did that strike you? That comment that seems like you could really relate to that, right?

Stephanie A. (08:10):

I could relate to it. And I was really struck by the fact that she's been so open about it. She's obviously been very successful. She's been at several firms and she's contributed quite a bit, but I thought it was really... I thought it was like reassuring for me and other women who want to pursue the career that I'm pursuing, that you can do it. That it is hard, that it's a challenge that someone as successful as judge Jackson, could identify the difficulty but yet here she is sitting on the precipice of the United States Supreme Court. So I was really struck by that and I have to say it definitely moved me.

Stephanie L. (08:48):

I love that too. I love the authenticity of it, right? I love the fact that we need role models who will speak honestly about their experiences.

Stephanie A. (08:56):

Definitely. They say you can't be what you can't see. And so I think she breaks a lot of barriers in a lot of ways for those reasons. Is there anything in particular about her background that really jumps out at you?

Stephanie L. (09:11):

I just love how she has juggled so many different things in her professional career. So between private practice, between her work representing criminal

indigence, between her different judgeships, her clerkships. She just to me is really the embodiment of taking your time to explore different avenues and figuring out what you are really passionate about, what excites you and then continuing to grow and push and succeed. So obviously somebody who's very inspiring and somebody to look up to.

Stephanie A. (09:47):

The other thing I thought was interesting was the string of the criminal justice issues that have been weaved throughout her career from her senior thesis at Harvard to her time at the Sentencing Commission, where there were obviously a lot of issues and disparity on sentencing between... She worked specifically on sentencing involving crack cocaine and powder cocaine. And to her federal public defender time, she represented a detainee at Guantanamo bay. And now as a district court judge and ultimately as a Supreme Court justice, should she be nominated, she's going to be looking at a lot of issues involving criminal defendants. And I think it will just be really fun to see how she brings that perspective to the bench.

Stephanie L. (10:40):

No question about it. And in terms of what we do, labor and employment law, you and I have done a pretty deep dive into her labor and employment decisions. So we have a well developed body of law to draw from, in terms of making some prediction about her likely impact on labor and employment law, if she is confirmed to the Supreme Court. And what's interesting to me there is that, while it's true that her confirmation is not likely to change any decisions in labor and employment law in the near term, just due to the current composition of the court. What's also interesting to me is that when you review her body of labor and employment law, you can't pigeonhole her as particularly biased in any respect, at least not on ideological grounds from her decisions. Do you agree with that? And were there any decisions that jumped out at you that you thought were noteworthy?

Stephanie A. (11:44):

Yeah, I think that's right. I think a lot of times people look to judges in particular and say, "are they pro-employee or anti-employee? Are they pro-employer or anti-employer? Are they left? Are they right?" And I don't really think that judge Jackson fits neatly into any of those categories. And one of the opinions that really stuck out to me was an opinion that she wrote as a district court judge in 2017 in a case involving Lockheed Martin and the plaintiff there was Ross. And what was so fascinating to me about that... First of all, the opinion's amazing. It's a textbook rule 23 class and anyone who wants to be a class and collective action lawyer, which I am and I love that area of law, should read this opinion, because it's a really beautifully written opinion.

But in that particular case, it involved 5,500 members of a class who were alleging that, basically the performance system or evaluation system at Lockheed Martin created a disparate impact on African Americans. And what's interesting in that case is that, the class as it was defined, did not really obtain

or contain objective characteristics. That initially, it was hard to determine who was in that class. And before it even came to judge Jackson, the parties had come to an agreement and they were asking judge Jackson to approve a settlement agreement as well as grant conditional certification. And here's a place where people might think, well, of course judge Jackson's going to grant conditional cert on a class of 5,500 African American people who believe there's a disparate impact. But she didn't. In fact, what she did was she relied on Supreme Court jurisprudence.

And she basically said, "Look, you can't rely on these broad and amorphous claims of a disparate impact in evaluations." That you really need very specific allegations as to common injuries and common ways in which these people were being discriminated against. And she basically found that, alleging that the evaluation system was discriminatory, they really failed to provide any detail about how that system resulted in discrimination. And ultimately she denied certification. In this case, what's interesting is three years later, those same plaintiffs came back to her and said, "Okay, we're back. We want certification of a class, but before we do it, we want six months of discovery." And again-

Stephanie L. (14:28):

To looking to prove what those commonalities might be through discovery.

Stephanie A. (14:31):

Exactly. And even then she said, "Look, consistent with my 2017 decision..." She denies it because she found that the claims were what she called, manifestly implausible. That 5,000 African Americans, who were members of a punitive class suffered a common injury that could either be redressed through a single remedy on a classwide basis or prove it through a common questions effect. It was very, very interesting. And she also went out of her way to say, "Just by pursuing a class action in a complaint, doesn't give you the ticket to enter into a fishing expedition to find the evidence that would create a common injury and a common claim. And that to do so would allow discovery in any case, in which you just simply filed this class action complaint." So I thought she went out of her way to school the plaintiff's counsel and the plaintiffs and saying, "Look, rule 23 is, you really have to make out these elements of commonality. It's not going to be proforma and you didn't do it." And I thought that was just fascinating.

Stephanie L. (15:45):

It is. And we say it often. We just want our judges to call balls and strikes, right? We don't want agendas from our judges. And to me, that's a really good example, as you say, of her just applying the law completely in a way that's without an agenda.

Stephanie A. (16:03):

Agreed. She might not have agreed with the outcome, but she... She said once to someone, when they said, how do you want to be known as a judge? And she

thought, I want to be remembered for someone, and I'm not going to say it exactly because I don't have the quote in front of me, but I want to be known for somebody who really was thorough, careful and set out a really well written opinion.

Stephanie L. (16:32):

And all of the commentators who know her and talk about her describe her that way and is having such a strong work ethic and just really trying to get it right under the law. I think that her accommodation cases, the ADA disability accommodation cases, also speak to that style. There were two that jumped out at me, and you may have noticed other cases that you thought were really interesting. But the two accommodation cases that jumped out to me were... There was one, this is the FDA case where the employee had bipolar undisputed. Her supervisor put her on her performance improvement plan. And it was only after the supervisor had recommended termination for the ongoing performance problems that the employee raised the issue of her disability saying that the disability was causing some of the performance problems and asking for an accommodation.

And judge Jackson, granted summary judgment for the employer on the disability discrimination and retaliation claims saying there's no way the termination could have been caused by the disability, could have been motivated by the disability because it had all been put into motion before the employer ever knew of the disability. But at the same time, judge Jackson held that the employer still had an obligation to engage the interactive dialogue on the accommodation process because the employee raised the request for accommodation while she was still employed prior to a termination.

So really a balanced approach applying the ADA. And similarly, in another decision, you had an applicant who was applying for a position as a special agent, and she had to show that she could run a certain distance, a mile and a half. And because of her medical condition, she wasn't able to meet the physical requirements of the special agent position. So judge Jackson held that she could not perform the essential duties of her job, with or without accommodations, but that the employer should have considered whether there were other positions available to her. So definitely down the middle in terms of the approach on both of those cases, which those cases tend to involve a lot of sympathy and you didn't see the sympathy influence the outcome.

Stephanie A. (18:58):

I think that's right. I think a lot of cases trickle up to the Supreme court involving both the ADA, the Rehabilitation Act, race claims and really all of her opinions do seem to really follow the law. They're very thorough. And I thought that was really interesting. Another thing that jumps out at me about judge Jackson is, I think she's going to have an interesting role as a dissenter. She's obviously, as you mentioned, joining the court at 6-3, it'll be a 6-3 balance between Conservatives and a more liberal bench. And she's really never been in that position before. When she was a district court judge, she was obviously the highest authority in her courtroom. And even as a Circuit court judge she's

issued, I believe two opinions and no dissents. And so I'm really interested to see how she uses her dissenting power at the Supreme Court, similar to how Ruth Bader Ginsburg used it as well. What do you think of that?

Stephanie L. (20:08):

Well, I agree with you. When you review her opinions, you see someone who is passionate and direct. And so we do expect, from what we've reviewed, that you'll see the same sort of tone in dissents. So very much in the style of what I would consider justice Ginsburg's style when it comes to a subject that she feels strongly about and where she has deep subject matter expertise. I think that's right. And for me, the most interesting theme from reviewing judge Jackson's labor and employment law decisions taken as a whole is just the juxtaposition of what I would describe as a moderate approach with the attempt to characterize her as a radical left wing zealot, that some have attempted to use that sort of characterization. And I do think it's interesting, not all have attempted to sort of put her in that box.

So there has been some very recent conservative support. Most notably, in my mind, from judge Luttig. Mike Luttig was a Fourth Circuit Court of Appeals judge. He was considered for the United States Supreme Court before he left to serve as the General Counsel for Boeing. I had the privilege and pleasure to work with judge Luttig on the Fourth Circuit Court of Appeals. I was working for judge Karen Williams and so I had the opportunity to spend time with judge Luttig through that clerkship. And I can tell you, he is widely esteemed in conservative circles. His opinion is very highly regarded and he has spoken in plain and clear terms as to his endorsement for judge Jackson. So it's not going to be universal conservative rejection of judge Jackson. What do you see on the horizon in terms of her confirmation hearing, Stephanie?

Stephanie A. (21:59):

Yeah. Look, she's been confirmed three times now by the Senate. I believe all three, but for sure, two times with bipartisan support. I know, and Lindsey Graham has supported her. So I'm curious to see how the justices approach her. I know that we're living in increasingly partisan times, but she has enjoyed that nonpartisan or support from both sides. So I'm really curious to see how it goes. I think she's very professional. I think because she's been through this before, it's not her first rodeo. She will be very polished. She will be very prepared. I think she will no doubt be asked questions about her race and how that might play into decisions that she authors. Questions about her being a parent.

But, I think she'll probably follow along the lines of judge Sotomayor in talking about the fact that... Look, everything she brings to herself is going to influence how she sees the world and the cases before her. But that doesn't mean that she will consider race or some of those other factors in the actual outcome or decisions of her opinion. So I think she's going to be very prepared and very polished.

Stephanie L. (23:24):

Agreed. And another fun fact, is she has some friends that not everyone knows about. She's related by marriage to former House Speaker, Paul Ryan. So he's also indicated again on Twitter, I think as of last week, his strong endorsement of her. Now, the marriage connection is convoluted, but it is there and they're tight. So any closing comments or remarks Stephanie on judge Jackson?

Stephanie A. (23:56):

I think I've just really enjoyed getting to know her through this process. I believe that she's going to do very well on her key hearing. I suspect there will be no issues with her confirmation and I suspect that the confirmation will probably be completed by April 8th. And that there will be a smooth transition between justice Breyer and herself as the 115th Supreme Court Justice. But I'm really excited to watch. And I suspect that you will be watching with me.

Stephanie L. (24:32):

Listen, I was just going to say we need a little virtual viewing party, the two of us together. So we'll set it up [crosstalk 00:24:39].

Stephanie A. (24:39):

Yeah. It's going to be better than the Super Bowl. Hopefully they'll be some good commercials at that one too.

Stephanie L. (24:44):

That's right. And for those of be listening, Stephanie and I have written a detailed article on judge Jackson's labor and employment law decisions and her likely impact on the Supreme Court in that space. And those articles will be linked in the show notes and also please visit our website for more content. Thank you so much, Stephanie. This has been so fun.

Stephanie A. (25:06):

So Much fun. Thank you so much for joining us at this very historic moment in time. And we hope to be back with you soon. Thanks.

Stephanie L. (25:13):

Thanks, bye.

Alitia (25:15):

Thank you for joining us. Please tune in to our next program where we will continue to tell you not only what's legal, but what is effective. For more information on today's topic, our presenters and other Jackson Lewis resources, visit jacksonlewis.com. As a reminder, this material is provided for informational purposes only. It is not intended to constitute legal advice, nor does it create a client-lawyer relationship between Jackson Lewis and any recipient.

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