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Judge Jackson's Employment Rulings Embody Pragmatism

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U.S. Supreme Court nominee Judge Ketanji Brown Jackson is poised to make history as the first Black woman on the court following Justice Stephen Breyer's retirement.

Judge Jackson currently sits on the U.S. Court of Appeals for the D.C. Circuit, and she served as a district judge for the U.S. District Court for the District of Columbia from 2013 to 2021.

Due to the current composition of the Supreme Court, Judge Jackson's appointment is unlikely to have a significant impact on the outcome of labor and employment law cases in the near term. Given her body of work as a district court judge on employment and labor law issues, Judge Jackson is expected to defy stereotypical political descriptions and to take a more nuanced and pragmatic approach.

Like Justice Breyer, when in the role of dissenter, Judge Jackson is expected to write directly and passionately. In this vein, Judge Jackson may be best known for a 2019 decision rejecting then-President Donald Trump's assertion that White House staff may not be compelled to testify before Congress.

"Presidents are not kings," she wrote in a 118-page opinion in Committee on the Judiciary v. McGahn. "This means that they do not have subjects, bound by loyalty or blood, whose destiny they are entitled to control."[1]

Employment Law Decisions

Judge Jackson's well-developed body of employment law decisions, taken as a whole, do not demonstrate a strong ideological bias.

In Von Drasek v. Burwell[2] in 2015, 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 the plaintiff's failure-to-accommodate claim.

The plaintiff, Susan Von Drasek, worked for the U.S. Food and Drug Administration as a chemist.[3]

Thirty years prior to her employment with the FDA, she was diagnosed with bipolar disorder.[4]

The evidence established that she did not inform anyone at the FDA of her diagnosis; nor did she request accommodations at the time of her hire or when she allegedly began having performance issues.

She requested an accommodation and medical leave for the first time only after her supervisor recommended terminating her employment.[5] 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.[6]

Under the Rehabilitation Act, the plaintiff must show that: (1) she had a disability within the meaning of the act; (2) she was otherwise qualified for the position with or without reasonable accommodation; and (3) the employee suffered an adverse employment action solely because of her disability.[7]

Judge Jackson compared the Americans with Disabilities Act's causation standard with the Rehabilitation Act's causation standard, noting that, while the ADA prohibits discrimination against an employee "on the basis of disability, the Rehabilitation Act prohibits discrimination against an employee 'solely by reason of her or his disability.'"[8]

Judge Jackson thus held that under the Rehabilitation Act, a plaintiff must show that, but for the protected trait, the employer would not have taken the adverse employment action.[9]

Under this rubric, Judge Jackson found no genuine issue of material factual dispute with respect to the motivation behind the decision to terminate Von Drasek's employment.[10] Judge Jackson concluded that because the FDA had already started the process of terminating Von Drasek's employment before it learned of her disability, no reasonable jury could find that her disability was the but-for cause of her termination.[11]

Judge Jackson reached the same conclusion with respect to Von Drasek's retaliation claim, which requires a claimant to show a but-for causal link between the protected activity — Von Drasek's request for accommodation — and the adverse action. Judge Jackson concluded:

> [E]ven if the FDA was wrong about Von Drasek's capabilities, there is no dispute that it was planning to terminate Von Drasek (and, in fact, her supervisor had already initiated the removal process) before Von Drasek revealed her disability or requested accommodations.[12]

At the same time, Judge Jackson held that the agency had an obligation to consider reasonable accommodations once Von Drasek requested them prior to her termination.[13]

Likewise, in Raymond v. Architect of the Capitol in 2014, Judge Jackson granted summary judgment to an employer in a discrimination suit brought by a 56-year-old Black employee of Jamaican national origin.[14] The plaintiff was interviewed for a promotion by a three-member hiring panel.[15]

According to the plaintiff, one panel member previously commented on the plaintiff's Jamaican ethnicity and age, including making regular comments that the plaintiff was "getting old" and in one instance saying: "[W]hat [does] this guy know about football ... he [is] from Jamaica."[16]

Nevertheless, Judge Jackson rejected the plaintiff's assertion that the reasons given by the employer for

failing to promote him were a pretext for discrimination.[17]

She saw no evidence the lone panel member's alleged animus influenced the other panelists' assessments, both of whom independently concluded that the other applicant was more qualified, which "effectively insulated the selection determination from challenge."[18]

Class Action Decisions

The same balanced approach is apparent in Judge Jackson's employment-related class action decisions.

In 2017 in Ross v. Lockheed Martin Corp.,[19] the named plaintiffs sought class certification on behalf of 5,500 current and past African American employees, claiming the employer's performance evaluation system resulted in a disparate impact on the promotion, compensation and retention of salaried African American employees.[20]

The putative class excluded certain groups of African American employees — including those who signed release agreements, unionized workers and employees with current pending discrimination claims — and did not include any objective criteria that would permit the identification of specific employees who were allegedly injured because of the performance evaluation system.[21]

The named plaintiffs also filed a proposed settlement agreement and requested preliminary approval along with the class certification. This agreement contained a broad release of legal claims extending beyond those that may arise from the employer's allegedly discriminatory conduct but did not contain any guidance regarding how settlement funds would be distributed.[22]

Relying on Supreme Court precedent, Judge Jackson explained that "plaintiffs can maintain such an employment discrimination lawsuit as a class action only if they can identify a companywide 'common contention' regarding the reasons that each member of the class has suffered an injury."

According to her opinion, they can do so in one of two ways: pointing to a biased companywide evaluation process or providing significant proof of the employer's general policy of discrimination.[23]

Here, Judge Jackson found that, despite alleging the employer's evaluation system was discriminatory, the plaintiffs failed to provide any detail about how the system operated in a biased way.[24] Further, the plaintiffs failed to provide significant proof that the employer "operated under a general policy of discrimination."

She noted that "two anecdotes in a class of over 5,500 almost certainly [did] not constitute 'substantial proof' that any commonalities between them are pervasive throughout the class."[25]

Judge Jackson also criticized the proposed settlement agreement, noting the plaintiffs had failed to show that its terms were fair, reasonable and adequate as required by law.[26] Specifically, Judge Jackson cited concerns about the "gross imbalance" between the claims at issue and those that the participants in the settlement would be required to release.[27]

She also pointed to the opt-out procedure, and found issue with the fact that putative class members would need to decide whether to opt out of the settlement

> before knowing (1) the nature and value of the potential legal claims that she might otherwise have brought … or (2) the amount that she is likely to receive for participating in the settlement and relinquishing all of her (previously undisclosed) claims.[28]

Judge Jackson found that this procedure was exactly the type of settlement procedure that raised a red flag in proposed settlement agreements.[29]

Finally, Judge Jackson raised a concern that the agreement provided

> no sense of what the minimum recovery is likely to be; no sense of what the average recovery is likely to be; and no sense of how giving particular answers on the claim form will likely influence the amount of a class member's recovery.[30]

She then admonished the plaintiffs' counsel, stating

> this Court has no idea how Plaintiffs' counsel could possibly have determined that the amount that Lockheed is offering to settle this case is sufficient to redress the legal claims of the class members without having already gathered information regarding the universe of claims at issue.[31]

Three years later, the plaintiffs filed a second amended class action complaint and sought six months of discovery on the merits of their claims to allow them to demonstrate that their proposed class met certification requirements.[32] Judge Jackson held that a class action must be plausibly viable before a court will authorize discovery in support of class certification.[33]

Consistent with her 2017 decision denying the plaintiffs' request for class certification, Judge Jackson found it "manifestly implausible" that 5,000 African American employees who were members of the putative class suffered a common injury that could either be redressed through a single remedy on a classwide basis or be proven through common questions of fact.[34]

"[P]re-certification discovery is not an opportunity to engage in a 'fishing expedition' concerning company policies that cannot plausibly result in a common injury across the putative class," Judge Jackson held.

She stated that she would not "relax the plausibility requirement in the context of Rule 23 to the point where discovery becomes presumptive upon the filing of a class complaint."[35]

She also observed that pursuing classwide claims of allegedly discriminatory and discretionary performance appraisal systems was inherently problematic, in that they work in "a highly subjective, highly individualized fashion that is the antithesis of the commonality that Rule 23(a) requires."[36]

According to Judge Jackson, the indisputable purpose of the class action mechanism — and the "court's north star in answering these questions" — is whether class litigation would preserve judicial resources as well as those of the parties.[37] Judge Jackson concluded that it would not do so in that case and denied the relief requested.[38]

Labor Cases

Judge Jackson has demonstrated a willingness to reexamine her own conclusions when presented with additional evidence and arguments in a pair of labor cases.

She first presided over the AFL-CIO's 2020 challenge to the National Labor Relations Board's rescission of former President Barack Obama's 2019 election rule, which dramatically reshaped the representation election landscape in unions' favor.[39]

Judge Jackson held that the challenged parts of the 2019 election rule did not qualify as procedural rules within the meaning of the Administrative Procedure Act's exception to notice-and-comment rulemaking, and the NLRB thus violated the notice-and-comment requirement.[40]

As a result, she held that several specific provisions of the election rule were promulgated unlawfully and must be set aside.[41] Judge Jackson refused to invalidate the entire election rule, instead remanding to the agency for reconsideration.[42]

Weeks later, in AFL-CIO v. NLRB, citing her own clear error — she misapprehended the union's requested remedy, she explained — Judge Jackson amended her order to grant summary judgment, setting aside the five invalidated provisions.[43]

She granted the NLRB's motion for summary judgment with respect to the remaining counts of the union's complaint, finding the rulemaking, as a whole, was not arbitrary and capricious and upholding the election rule's automatic ballot impoundment provision.[44]

Conclusion

It is difficult to predict how Justice Jackson will rule once she joins the Supreme Court, but these decisions thwart any attempt to pigeonhole her as in ideological zealot in her labor and employment cases.

Perhaps reflective of this point, notable conservative lawyers and jurists, including retired U.S. Circuit Judge J. Michael Luttig of the U.S. Court of Appeals for the Fourth Circuit, have recently endorsed Judge Jackson.

Given this, employers can likely expect a predictable consistency in employment law decisions that emerge from the court in the 2022-2023 session.

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[1] Comm. on the Judiciary v. McGahn, 415 F. Supp. 3d 148 (D.D.C. 2019).

[2] Von Drasek v. Burwell, 121 F. Supp. 3d 143 (D.D.C. 2015).

[3] Id. at 147.

[4] Id.

[5] Id. at 147-48.

[6] Id. at 146.

[7] Id. at 160.

[8] Id at 154.

[9] Id.

[10] Id. at 160.

[11] Id. at 162.

[12] Id.

[13] Id

[14] Raymond v. Architect of the Capitol, 49 F. Supp. 3d 99 (D.D.C. 2014).

[15] Id. at 104.

[16] Id. at 107.

[17] Id. at 110

[18] Id. at 114.

[19] Ross v. Lockheed Martin Corp., 267 F. Supp. 3d 174 (D.D.C. 2017).

[20] Id. at 186.

[21] Id.

[22] Id. at 189.

[23] Id. at 197.

[24] Id. at 198.

[25] Id. at 199.

[26] Id. at 201.

[27] Id. at 201-02.

[28] Id. at 179.

[29] Id. at 202.

[30] Id. at 203.

[31] Id.

[32] Josey v. Lockheed Martin Corp., No. 16-cv-2508 (KBJ), 2020 U.S. Dist. LEXIS 127789 (D.D.C. July 21, 2020).

[33] Id. at *2.

[34] Id. at *3

[35] Id. at *27, *33.

[36] Id. at *17.

[37] Id. at *12.

[38] Id. at *33-4.

[39] AFL-CIO v. NLRB, 466 F. Supp. 3d 68 (D.D.C. 2020).

[40] Id. at 74.

[41] Id. at 83.

[42] Id. at 95.

[43] AFL-CIO v. NLRB, 471 F. Supp. 3d 228, 235 (D.D.C. 2020).

[44] Id. at 242-3.