Will Justice Ketanji Brown Jackson Treat Employers Well? The Magic 8-Ball Says: "Signs Point to Yes"

Insights
2.28.22

When President Biden announced on Friday that Judge Ketanji Brown Jackson would be nominated to replace the retiring Justice Stephen Breyer on the Supreme Court, history was made. Not only could she be the first Black woman ever to sit on the SCOTUS bench, her likely ascension to the seat will mark the first time in U.S. history that white men don't make up a majority of Supreme Court justices. While she may not ideologically alter the current Court dynamics – she'll be a like-for-like replacement of a Justice selected by a Democratic administration to retain a 6-3 split – employers are still curious about what they might be getting with Justice Jackson. To answer the question of how she'll treat workplace law cases, we once again turn to the Magic 8-Ball.

We first used the Magic 8-Ball in 2006, examining the future of the Court when Justice Samuel Alito was appointed; we did the same for Justice Sotomayor in 2009, Justice Kagan in 2010, Justice Gorsuch in 2017, and Justice Kavanaugh in 2018 (we gave the device a rest in 2020 for Justice Barrett). We now ask the same question of the Magic 8-Ball that we asked of previous appointees: if confirmed, will Justice Jackson be kind to employers? The perhaps-surprising answer: "Signs Point to Yes."

Will Judge Jackson Be Confirmed by the Senate?

Magic 8-Ball Says "Outlook good"

First things first. Before we examine Judge Jackson's background and her impact on SCOTUS, we'll first provide a look at what you can expect over the next month or so – and explain why the outlook appears quite favorable for Judge Jackson to be approved as Justice Jackson by mid-April.

From a political perspective, this promises to be the least controversial Supreme Court nomination process in a decade. For several key reasons, we don't expect the raw partisan emotion that has marked the last three nominations to erupt with KBJ (as she is known in D.C.). Again, the president is replacing a liberal justice with a liberal judge, and her selection will not come close to tilting the balance of power on SCOTUS. Several Senate Republicans have stated that they don't expect to see a large-scale opposition mounted against her, and we could even see a few Republicans – including several who recently voted for her to join the D.C. Circuit Court of Appeals – vote in her favor.

Senate Judiciary Chair Dick Durbin (D-IL), who will shepherd Judge Jackson through the process, has indicated that he hopes to complete the nomination process in about 40 days. "We will begin immediately to move forward on her nomination with the careful, fair, and professional approach she and America are entitled to," he said on Friday. The date to watch, then, is Monday, April 11 – to see if the Senate can vote on her nomination before spring recess begins on that day.

With Vice President Kamala Harris set to cast any tie-breaking vote in the event of a party-line 50-50 split in the Senate, the Democrats don't even need any Republican support. But the three Republican Senators to keep an eye on are Susan Collins (R-ME), Lisa Murkowski (R-AK), and Lindsey Graham (R-SC). They cast votes in her favor in June 2021, and while they can certainly change their minds and explain that the significance of an appeals court vote is vastly different than a SCOTUS vote, no one will be surprised if at least one of them votes in her favor again. Other Republicans to track are three retiring senators who may exhibit an independent streak: Roy Blunt (R-MO), Richard Burr (R- NC), and Rob Portman (R-OH). It seems unlikely, though, that we'll approach anywhere near the 68 and 63 votes that Justices Sotomayor and Kagan received in 2009 and 2010, and the 96 votes that Justice Ruth Bader Ginsburg received in 1993 seem a lifetime ago.

Does Judge Jackson Have the Pedigree of a Supreme Court Justice?

Magic-8 Ball Says: "Without a doubt"

A quick glimpse at her background shows why she appears eminently qualified for the role. Her educational background is outstanding: she graduated from Harvard University and Harvard Law School, where she served as an editor of the Harvard Law Review. And her work history is also impressive. She served as a law clerk at every level of the judiciary, including for Justice Breyer himself, while also working at several law firms in Washington, D.C. and Boston in defense-minded roles.

In 2009, she was nominated by President Barack Obama to serve as a Commissioner on the bipartisan United States Sentencing Commission, where she eventually rose to the position of Vice Chair. She also served as an Assistant Federal Public Defender in D.C. for several years (which also means she'd be the first former federal public defender in SCOTUS history) before returning to private practice and honing her appellate litigation skills, a common practice for attorneys hoping to rise to the role of judge in their careers.

In 2012, she got her wish when President Obama nominated her to become a federal judge of the United States District Court for the District of Columbia. The Senate unanimously confirmed her in early 2013. During her seven years as a district court judge, she had her hand in many high-profile cases, including several involving then-President Trump and many significant workplace law matters.

In 2021, President Biden nominated Judge Jackson to the U.S. Court of Appeals for the District of Columbia Circuit. This court is often referred to as the "second-highest court" in the country due to

Columbia Circuit. This court is often referred to as the "second-highest court" in the country due to the many cases of national importance heard there – and because it often serves as a launch pad for those who will eventually be nominated to the Supreme Court. Judge Jackson received several letters supporting her nomination, including from former Supreme Court law clerks as well as the National Education Association and the AFL-CIO — the largest federation of unions in the country. As noted above, the Senate confirmed Judge Jackson to the Court of Appeals in June 2021 by a 53-44 vote.

If she is confirmed, she would most likely serve on the Supreme Court for decades to come. At age 51, KBJ would be the second-youngest SCOTUS Justice behind only Justice Barrett.

Should Employers Feel Positive About Judge Jackson's Nomination?

Magic-8 Ball Says: "It's undecided, but likely"

A review of Judge Jackson's case history reveals a seasoned judge who has handled many labor and employment matters and likes to rule by the book. Her record on employment cases is decidedly moderate – if not more favorable to defendant-employers than plaintiffs. While employers may find ultimate success before Judge Jackson, her decisions do not reveal any particular bias.

Rather, her decisions are written in a straightforward fashion: lengthy fact sections demonstrating she takes all sides into account, followed by boilerplate sections of case and statutory citations reciting the applicable rules, followed by a section of analysis. The few workplace law cases Judge Jackson handled at the D.C. District Court are mostly standard, single-plaintiff matters that do not offer much insight into how Judge Jackson would rule from the high Court. From those decisions and the many rulings she issued during her eight years as trial judge, however, it appears likely that Judge Jackson will remain thorough in her opinions and consistent in her reliance on precedent.

How Will Judge Jackson Handle Employment Discrimination Claims?

Magic 8-Ball Says: "Outlook good"

Judge Jackson has handled several cases involving workplace discrimination in the D.C. District Court. Most of her decisions have involved motions to dismiss, a low threshold that plaintiffs frequently satisfy. Judge Jackson is not, however, afraid to dismiss all or certain of claims at this preliminary stage.

As for her summary judgment opinions, Judge Jackson is likely to side with defendant employers. For example, in 2016's *Johnson v. Perez*, Judge Jackson granted summary judgment to the employer (which ironically happened to be the federal Department of Labor) explaining in her decision that the plaintiff's alleged evidence of pretext was insufficient. Specifically, upon review of the record, Judge Jackson held that the reasons given for the plaintiff's termination were not contradictory and the general allegations of discrimination were insufficient to support his race discrimination claim. While Judge Jackson conceded that there was an issue of fact with respect to

opinions about the plaintiff's job performance and workplace demeanor, the factual dispute did not outweigh the lack of evidence showing that the reason for the adverse action was pretext for race discrimination to survive summary judgment.

And in *Snowden v. Zinke*, the plaintiff identified 16 individuals as comparators to support his disparate treatment argument against his former employer, the U.S. Department of the Interior. In a 2020 ruling, Judge Jackson held none were adequate comparators under the law. She also pointed out the plaintiff had agency to refuse to sign an agreement he belatedly called discriminatory, and his lack of action could not be used to bolster his claims.

Judge Jackson also granted an employer summary judgment in *Ng v. LaHood*, where the plaintiff alleged that his coworkers complained of difficulty understanding his speech and mimicked his accent. Judge Jackson noted in 2013 that these allegations were "troubling," but found the plaintiff failed to connect them to the alleged adverse actions supporting his claim. Accordingly, she held the plaintiff failed to establish an inference of discrimination and ruling in favor of the employer.

And in the 2014 decision of *Raymond v. Architect of the Capitol*, Judge Jackson granted the employer's summary judgment motion. She held that there was no inference of discrimination related to a three-person panel's failure to select the plaintiff for promotion. This is noticeable because the employee alleged that one panelist had previously made comments related to the employee's national origin. Judge Jackson explained that while discriminatory comments may raise an inference of pretext, such findings still depend on the facts and circumstances of the determination. She ruled that the circumstances found in that case did not permit an inference that the comments by one panelist tainted the entire selection process. There was no evidence, other than the employee's testimony, that the comments had even been made – and there were no facts in the record to show that any alleged animosity by the panelist carried over into the selection process. Nor did the record show that the panelist influenced the independent decision-making of the other panelists.

Judge Jackson has not always sided with employers, however, as you would expect from a judge who rules by the book. Where there is a genuine issue of material fact requiring jury determination, she has denied an employer's motion for summary judgment. In the case of *Park v. Hayden*, for example, Judge Jackson denied the defendant's motion and let the national origin discrimination case proceed toward a jury trial. She highlighted the credibility determinations and factual inconsistencies that would need be resolved by a jury rather than the court as the reasons for her ruling.

Will Judge Jackson Scrutinize Retaliation Claims with a Close Eye?

Magic-8 Ball Says: "It is decidedly so"

Employers will be relieved to learn that Judge Jackson has handled many retaliation claims – and has given them the close scrutiny they deserve. Several such claims that made it to the summary

has given them the close scrutiny they deserve. Several such claims that made it to the summary judgment stage before Judge Jackson have been dismissed in their entirety or in part in favor of the employer.

For example, in 2020's *Manus v. Hayden*, Judge Jackson rejected a retaliation claim for failure to establish an adverse employment action or a causal connection because management's critique of the plaintiff's performance began before she engaged in protected activity. Similarly, in 2017's *Salak v. Pruitt*, Judge Jackson granted summary judgment to the employer, finding that "unrebutted evidence" showed that the decision to transfer the plaintiff to a different office had already been made before he engaged in protected activity.

Judge Jackson is not afraid, however, to deny employers' requests to rule in their favor on retaliation claims. In 2016's *Alma v. Bowser*, for example, Judge Jackson opened her analysis with a crushing sentence for any scrupulous attorney: "the defendant's paltry arguments make short work of the Court's analysis of the present motion to dismiss." Judge Jackson then proceeded to shred the defendant's arguments asserting defenses that were either irrelevant or incorrect.

How Will Judge Jackson Handle Disability Discrimination Claims?

Magic-8 Ball Says: "Reply hazy, try again"

Judge Jackson has denied summary judgment to parties on both sides of the "v" in disability discrimination cases.

- In 2019's *Mitchell v. Pompeo*, the plaintiff alleged that her employer failed to accommodate her disability and instead terminated her candidacy for a position as a special agent. Judge Jackson ruled that the plaintiff had not presented evidence that she could perform the essential functions of the special agent position, which would ordinarily result in the dismissal of the claim. However, she ruled that there was an issue of fact as to whether the employee could be accommodated with a re-assignment to another position, and kept the plaintiff's claim alive.
- In *Von Drasek v. Burwell*, a 2015 case concerning the Rehabilitation Act (a statute where the standards are mostly analogous to the Americans with Disabilities Act), Judge Jackson held that there was no evidence that the plaintiff was fired because of her disability or in retaliation for her protected activity. But the plaintiff's claim for failure to provide a reasonable accommodation survived summary judgment because of an issue of fact over whether the plaintiff could have been reassigned to accommodate her disability.

Will Judge Jackson Analyze Age Discrimination Claims Closely?

Magic-8 Ball Says: "Most likely"

In the few age discrimination claims to reach the summary judgment stage, Judge Jackson has also found for the employer. In 2016's *Beshir v. Jewell*, the plaintiff alleged disparate treatment because of her age when some of her job duties were transferred to another employee. Judge Jackson

of her age when some of her job duties were transferred to another employee. Judge Jackson explained that the employee had failed to establish a connection between her age and the defendant's action. Further, the employee did not show that she suffered a significant change in her employment status since she had asked to move from a particular unit and did not show it had an adverse effect on the terms of her employment. For those reasons, Judge Jackson sided with the employer.

In 2020's *Manus v. Hayden*, Judge Jackson also granted the employer summary judgment where she determined that there was no cognizable adverse action against the employee, as the plaintiff merely received a formal performance counseling memorandum. She also ruled that such an action did not support an inference of a constructive discharge. Further, Judge Jackson dismissed the plaintiff's retaliation claim since it lacked proof that the employee engaged in protected activity, pointedly noting that "mere assertions are not enough at the summary judgment state — *evidence* is required."

Will Judge Jackson Uphold a High Barrier for Hostile Work Environment Claims?

Magic-8 Ball Says: "Signs point to yes"

Judge Jackson has had only a few hostile work environment claims reach summary judgment in her time as a judge – and those decisions show that she is likely to find for the employer. For example, in the 2016 *Beshir v. Jewell* case, Judge Jackson dismissed the plaintiff's hostile work environment claim and granted summary judgment for the defendant where the plaintiff failed to link the alleged harassment to her protected characteristics. Indeed, Judge Jackson ruled that the alleged conduct – which included being yelled at on a daily to weekly basis and threats to thwart the plaintiff's career – was not sufficiently hostile to permeate the workplace in accordance with the federal standard. Judge Jackson also made an interesting distinction that the alleged hostile conduct was not sufficiently hostile because it related to plaintiff's interactions with her supervisor and refusal to abide by instructions rather than there being a lack of culpability for the conduct.

In the 2016 case of *Johnson v. Perez*, Judge Jackson granted summary judgment to the employer because the evidence did not support a hostile work environment claim. While remarking that the conduct was "unpleasant and highly questionable," she held that the experiences of being yelled at, scrutinized, and called a name were still insufficient to support such a claim. Judge Jackson relied on precedent in making this determination, noting that previous cases examined objectively "worse" conduct and still did not find it met the high hostile work environment standard.

Judge Jackson is not dismissive of plaintiffs and shows deference, in accordance with federal practice, for *pro se* litigants. For example, in *Horsey v. United States Department of State*, Judge Jackson granted the employer's motion to dismiss in its entirety in 2019 but gave the employee leave to revise his hostile work environment, race discrimination, and retaliation claims in an amended filing. She noted that there was a possibility the *pro se* plaintiff could meet the low pleading standard. Upon repleading, however, Judge Jackson dismissed the complaint with prejudice after finding the plaintiff had once again failed plead sufficient facts to support his claims.

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Will Judge Jackson Side with Employers on Labor Relation Cases?

Magic-8 Ball Says: "Outlook not so good"

Judge Jackson has been on the D.C. Circuit since June of last year, but her first signed opinion was just released earlier this month. The case, *American Federation of Government Employees vs. Federal Labor Relations Authority*, involves labor relations and administrative law, providing some insight into Judge Jackson's views on these issues. An analysis of this one decision could demonstrate that she could be sympathetic to labor unions. Because this case comes from a higher court and is more recent than any of Judge Jackson's district court opinions discussed above, it warrants a lengthier discussion.

The federal government and its 2.1 million non-postal employees are not subject to the National Labor Relations Act. Their relationship is instead governed by the Federal Service Labor-Management Relations Statute, which largely mirrors the NLRA but has several major exceptions. One important difference between these two schemes is the scope of the employer's duty to engage in collective bargaining when there is a management-initiated change to the "conditions of employment affecting" employees. Private employers must do so only if the change has "a substantial impact on a condition of employment." But federal employers' duty to collectively bargain is broader. They must do so over any workplace change that has more than a "de minimis" effect on working conditions.

The Federal Labor Relations Authority (FLRA) administers the Federal Service Labor-Management Relations Statute and thus serves as an analogue to the National Labor Relations Board in this context. Two of its three members were appointed by President Trump; the third was appointed by President Obama and then reappointed by President Trump. In September 2020, the FLRA eschewed the "de minimis" test for federal employers and adopted the "substantial impact" test — a management-friendly change that would reduce the employer duty to engage in collective bargaining. The FLRA announced the change in a four-page policy statement over a dissent by one of the members and without soliciting public comment.

Several public-sector unions whose members would be affected by the rule change filed a petition for review challenging it in the D.C. Circuit. They argued that the FLRA's action was "arbitrary and capricious" under the Administrative Procedure Act and that the new rule was contrary to the plain language of the statute. Judge Jackson's opinion for a unanimous three-judge panel of the court sided with the unions, holding that the FLRA had not engaged in "reasoned decision making" when enacting the rule change.

- First, the court found that the policy statement's description of the problem it sought to solve was inconsistent. It concluded that the de minimis test had essentially extended the bargaining requirement to apply to every change of employment conditions, "no matter how small or trivial," but then stated that the test was "unpredictable" and "created uncertainty." The court noted that these two statements contradict each other — if the duty to bargain applies all the time, then it is

these two statements contradict each other — if the duty to bargain applies all the time, then it is not hard to predict. The court then discussed several cases involving the de minimis test's application and found that the "results are readily explained by distinguishable contexts" in this highly fact-intensive inquiry.

- Second, the court determined that the rule change "failed to grapple with the agency's own past policy choices and this court's decisions upholding them." The policy statement characterized the FLRA's original decision to adopt the de minimis test in 1985 as poorly reasoned. But the court found this was not so, noting that at the time, the FLRA explained why it specifically rejected the substantial impact test and adopted the de minimis the test: to better conform to the statute's "clear purpose of expanding public-sector bargaining rights." And, in any event, the decision to adopt a new policy must be sufficiently explained on its own terms, regardless of any deficiency in a past policy change. In other words, in "administrative law, as elsewhere, two wrongs do not make a right." The court also rejected the FLRA's argument that the de minimis test was inconsistent with the purposes of the statute, invoking a previous case in which the court held precisely the opposite.
- Finally, the court found the FLRA did not adequately "explain why and how it has concluded that the substantial-impact threshold is 'better' than the standard it was relinquishing." While the policy statement stated that the substantial impact test would be easier to apply and more predictable, the court noted the FLRA never conducted an analysis of this issue, and there was no obvious reason why one would be easier to apply than the other. The court stated that it was not required to defer to the FLRA's expertise because its "assertions about the consistency with which its new standard is likely to be applied in subsequent adjudications" was "conclusory and counterintuitive." The court further found the FLRA failed to address its previous balancing of the Federal Service Labor-Management Relations Statute's priorities — "a balancing that led it to adopt a different policy than that of the NLRB" — providing further evidence that the agency had not engaged in "reasoned decisionmaking" here. Thus, the court concluded that the rule change was "arbitrary and capricious" under the APA and declined to rule on the unions' statutory argument. It granted the petition for review and vacated the FLRA's policy statement.

While this decision does not directly affect private employers, it indicates that Judge Jackson's views lean toward being sympathetic to unions. In addition to finding for the union petitioners on the merits, the opinion had surprisingly harsh words for the FLRA, characterizing the agency's various arguments before the court as "specious," "misleading," and "simply incorrect." If Judge Jackson is confirmed to the Supreme Court, employers should not be surprised if she sides against management in labor relations cases.

If Confirmed, Will Judge Jackson Have A Lasting Impact?

Magic-8 Ball Says: "Cannot predict now"

Like recent conservative nominees for the Supreme Court, Judge Jackson is relatively young (51) and, if confirmed, is expected to have a lasting impact. As the first Black woman to sit on the Supreme Court, admirers and detractors will be watching her very closely. But any impact Judge

Supreme Court, admirers and detractors will be watching her very closely. But any impact Judge Jackson is expected to have will likely be muted, at least for the next few years, by the Court's current supermajority of conservative Justices. Further, it is too early to know just how Judge Jackson will rule on certain issues, and past opinions offer limited insight into future decisions. Just look at Justice Roberts, Justice Gorsuch, and Justice Kavanaugh, each of whom have surprised Court watchers (and some former presidents) with some of their decisions.

Accordingly, employers will have to wait and see what kind of jurist Jackson will be as she gets further and further from her time on the district court trial bench. Regardless, with the decidedly conservative majority, employers can expect the Supreme Court to remain understanding of employer interests for the time being.

What we can predict with absolute certainty is that Fisher Phillips will continue to publish same-day alerts when the Supreme Court releases workplace law opinions. If you aren't receiving them, you can subscribe here. And if you ask the Magic-8 Ball whether we will return with another preview when, at some point in the future, the next Supreme Court Justice is nominated, its answer will be: "It Is Certain."

If you have any questions about this development or how it may affect your business, please contact your Fisher Phillips attorney or any of the authors of this Insight.

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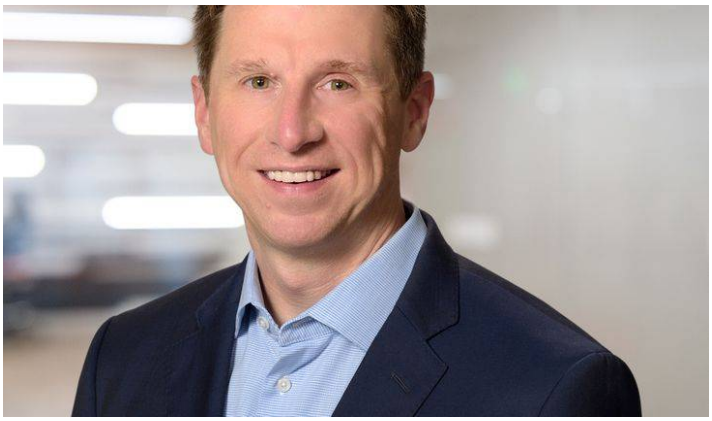

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