Will SCOTUS Justice Gorsuch Treat Employers Well? The Magic 8-Ball Says: "Signs Point To Yes"

Insights
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Late yesterday, President Trump selected Judge Neil Gorsuch to fill the vacant seat on the Supreme Court (SCOTUS) bench. Assuming he is confirmed by the Senate, Justice Gorsuch would occupy a critical position on the Court, assumedly aligning with the more conservative bloc of justices to form a slim majority in tight cases. The question on the mind of employers: how would Justice Gorsuch treat workplace law cases that come before the Supreme Court? To answer that question, 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, and did the same for Justice Sonia Sotomayor in 2009 and Justice Elena Kagan in 2010. We now ask the same question of the Magic 8-Ball that we asked of previous appointees: if confirmed, will Justice Gorsuch be kind to employers? The answer: "Signs point to yes."

Will Judge Gorsuch Be Confirmed By The Senate?
"Reply Hazy – Try Again"

Before we examine the impact that Judge Gorsuch would have on the SCOTUS, we need to examine whether he will even make it to the bench. That's because, as opposed to the three previous nominees who sailed through the confirmation process with little controversy, a sizable number of Senate Democrats already appear ready to use this nomination as a staging ground to express opposition to President Trump and the Senate Republicans. Not only has Democratic leadership been opposed to many of the president's actions during his first days in office, but many on the left are still upset that Senate Republicans blocked President Obama from filling the ninth seat on the bench with Judge Merrick Garland.

Current Senate filibuster rules would require 60 votes to confirm a nominee to the Supreme Court, which would mean Judge Gorsuch would need to garner at least eight votes from Democrats or Independents to earn the seat (assuming, of course, that all 52 Republican senators vote in unanimous lockstep). However, the majority party could invoke the "nuclear option" by suspending current Senate procedural rules to eliminate the filibuster and permit a simple majority vote to carry the day. That would all but assure Judge Gorsuch of being confirmed, but could have long-term implications on Senate relations and future SCOTUS nominations.

If all goes smoothly, it appears the Senate will hold confirmation hearings for Judge Gorsuch in late March or early April, with a full Senate vote expected immediately thereafter. The procedural issues may not be sorted out until then, so the question of whether he will actually be confirmed may not be determined for several months.

Should Judge Gorsuch's Background Give Employers Hope?
"It Is Decidedly So"

From the big-picture perspective, employers should be pleased with the president's selection. Some have described Judge Gorsuch as very similar to the late Justice Scalia when it comes to judicial philosophy. In fact, a recent study cited by the Washington Post found Judge Gorsuch to merit the highest scores when determining which possible nominee was "the most Scalia-like."

Judge Gorsuch graduated from Columbia University in 1988 and Harvard Law School in 1991. He then clerked for Supreme Court justices Byron White and Anthony Kennedy before joining a Washington, D.C. firm for about 10 years. He briefly worked for President George W. Bush's Department of Justice as a deputy to the Assistant Attorney General before being appointed to the 10th Circuit Court of Appeals in 2006. He has been a judge on that court for the past decade and has participated in hundreds of decisions, including quite a few labor and employment cases. It is this background that should comfort employers as workplace law conflicts are brought before the Supreme Court in the future.

For example, in the 2012 case of *Kaiser v. Colorado Dept. of Corrections*, Judge Gorsuch upheld the dismissal of a religious discrimination claim brought by a disgruntled former employee who believed his employer should have retained him. Judge Gorsuch wrote, "it is not our function under the federal discrimination laws to tell employers how best to go about their jobs … maybe others would have gone about the job differently than [the terminating supervisor] did," but that was not for the court to decide. And in 2006's *Young v. Dillon Companies, Inc.*, Judge Gorsuch upheld the dismissal of a race discrimination claim by concluding "our role is to prevent intentional discriminatory hiring practices, not to act as a 'super personnel department,' second guessing employers' honestly held (even if erroneous) business judgments."

Will Judge Gorsuch's Down-To-Earth Style Aid Employers?
"You May Rely On It"

Despite Judge Gorsuch's sterling educational background and impressive work history, it is common to hear those close to him describe him as "down to earth" and a "regular guy." His commonsense approach shines through in his legal decisions, often to the benefit of employers. In at least four instances, it would have been easy for Judge Gorsuch to rule in favor of an employee given the initial review of the case facts. But it is his ability to apply sound and reasonable logic to these matters that separates him from most other jurists.

- In *Roberts v. International Business Machines Corp.* (2013), an age-discrimination plaintiff thought he had a slam-dunk case after finding instant messages between supervisors questioning his "shelf life" immediately prior to termination. But Judge Gorsuch investigated further and concluded that, when viewed in context of other communications, the IM conversation "was nothing worse than an inartful reference" to the worker's productive work drying up. The case was dismissed.

- In the 2011 case of *Gorny v. Alvarez*, a plaintiff tried building a retaliation claim with evidence that her supervisor said he "did not trust her" after she filed an EEO complaint. Judge Gorsuch rejected this notion. He said the supervisor "may have distrusted Ms. Gorny for any number of perfectly benign (for Title VII purposes) reasons; his statement does not establish, directly, that he wished to retaliate against her."

- The 2007 case of *Montes v. Vail Clinic, Inc.* involved a group of plaintiffs challenging a hospital's English-only rule through a hostile environment claim. It was the first time the 10th Circuit was confronted with such a company policy narrowly tailored to only require English at specific times and places. Judge Gorsuch found that the employer's rule was necessitated by business reasons and essential to operations, dismissing the claim and creating a new standard for the circuit.

- *McKissick v. Yuen* (2010) involved a disgruntled executive who argued that a severance agreement should not prevent her from proceeding with a fraud claim against her former employer because of grossly inadequate compensation and alleged coercion. But Judge Gorsuch rejected her claim, pointing out that she entered an arm's length transaction and couldn't back out of it just because she later changed her mind.

Will Judge Gorsuch Always Rule For Employers On Gender-Related Claims? "Don't Count On It"

But just because Judge Gorsuch has a general reputation for siding with employers doesn't mean he will always give them a free pass. When it comes to gender-related claims, he has demonstrated the ability to render rulings for both employers and employees.

In *Gaff v. St. Mary's Regional Medical Center* (2012), Judge Gorsuch affirmed the dismissal of a sexual harassment claim brought after a coworker engaged in "boorish and immature conduct," ruling that the actions were neither severe nor pervasive. And in *Ferguson v. Shinkesi* (2013), he upheld the dismissal of a gender discrimination claim, ruling that sexually crude comments made by coworkers were in no way connected to the plaintiff's termination.

But in the 2008 decision of *Orr v. City of Albuquerque*, Judge Gorsuch revived a pregnancy discrimination claim brought by two female workers that had been dismissed by the lower court. He determined sufficient evidence existed to support the plaintiffs' allegations that they were mistreated in the way they were forced to take maternity leave. Despite the employer's arguments that it was simply applying its sick leave policy in a uniform manner, and that any harm done to plaintiffs was

simply applying its sick leave policy in a uniform manner, and that any harm done to plaintiffs was the result of a good faith error and not intentional discrimination, Judge Gorsuch found that "plaintiffs have presented evidence undermining both of defendant's explanations."

Will Judge Gorsuch Consistently Rule For Employers In Retaliation Cases?
"My Sources Say No"

One of the most common legal problems employers can face is a retaliation claim, and Judge Gorsuch is no stranger to cases involving this cause of action. Although he has ruled in employers' favor at times, he is not shy about upholding the rights of employees to proceed with retaliation lawsuits.

For example, he ruled that a seven-week gap between protected activity and an adverse action did not create sufficient temporal proximity sufficient to support a retaliation claim on its own in *Bergersen v. Shelter Mut. Ins. Co.* (2007). He ruled that an employer's "good business practices" in deciding to implement a reduction-in-force to rid the company of a poorly performing unit negated a worker's retaliation claim in *Hinds v. Sprint/United Management Co.* (2008). And in *Weeks v. Kansas* (2012), he upheld a narrow interpretation of "protected activity" and denied a terminated worker's ability to even proceed with a retaliation claim.

But in *Barrett v. Salt Lake County* (2014) and *Walton v. Powell* (2016), he upheld the rights of workers to proceed with retaliation claims, affirming lower court decisions in their favor. And in *Williams v. W.D. Sports N.M., Inc.* (2007), he overturned a lower court's decision that had dismissed a lawsuit, instead allowing a worker to proceed to trial on her retaliation claim. He applied a new Supreme Court standard establishing an expansive reading of Title VII's retaliation provision and breathed new life into the claim, demonstrating that he reviews each retaliation case with an open mind.

Will Judge Gorsuch Support Workplace Safety?
"As I See It, Yes"

In several instances, Judge Gorsuch has been faced with a case involving an employer that took action in the name of workplace safety, and in each case he ruled in favor of that employer. In the 2013 case of *Keeler v. ARAMARK*, he upheld the dismissal of a worker fired for threatening to "start a riot" after not being named employee of the month, rejecting his retaliation claim. In the *Gaff v. St. Mary's* case discussed above, he rejected a retaliation claim and upheld the plaintiff's termination for telling a coworker that she "owned a gun and knew how to use it." And in *Buck v. CF & I Steel, L.P.* (2013), he rejected a claim brought by a worker who was terminated for testing positive for drugs in an industrial environment. The opening line in Judge Gorsuch's opinion tells you all you need to know about the case: "At his employer's insistence, Carl Buck submitted to a randomized drug test, and the results weren't good."

How Will Judge Gorsuch Handle ADA Claims?
"Cannot Predict Now"

Judge Gorsuch has not had many opportunities to rule on cases brought under the Americans with Disabilities Act (ADA), so it is difficult to predict how he would rule should such a case land before him at the Supreme Court. Although he upheld the dismissal of a plaintiff's ADA discrimination case in 2010's *Johnson v. Weld County*, that decision predated the amendments to the ADA and no longer stands as solid law. He did dismiss a plaintiff's ADA case in the 2014 *Myers v. Knight Protective Service, Inc.* decision, ruling that the worker's statements made during a Social Security Disability Insurance proceeding precluded him from proving he was a qualified worker. However, because he has not built a more detailed track record in this area of the law, it is not easy to determine how he might rule in the future.

Will Judge Gorsuch Support Employers' Religious Freedom?
"Without A Doubt"

It seems likely that the Trump administration looked to Judge Gorsuch's record on religious freedom when it came time to make a final selection, and it seems equally likely that this record will be attacked by Senate Democrats during the confirmation process. What seems certain is that Judge Gorsuch is not afraid to take what many might consider a controversial position in this debate.

Perhaps his most notable opinion came in the 2013 case of *Hobby Lobby Stores, Inc. v. Sebelius*, where he ruled that the Affordable Care Act's contraception mandate could not be forced upon those employers with religious objections. As he stated in that decision, which was later affirmed by the Supreme Court, "Congress structured the Religious Freedom Restoration Act to override other legal mandates, including its own statutes, if and when they encroach on religious liberty." And in 2015's *Little Sisters of the Poor v. Burwell*, he defended the rights of an order of Catholic nuns not to be required to fund contraceptive coverage in the healthcare plans offered to the employees at their care facilities, arguing: "When a law demands that a person do something the person considers sinful, and the penalty for refusal is a large financial penalty, then the law imposes a substantial burden on that person's free exercise of religion."

Will Judge Gorsuch Be An Enemy Of The NLRB?
"Outlook Not So Good"

Although Judge Gorsuch is largely employer friendly and is skeptical of the power of administrative agencies, it is interesting to note that he has consistently upheld decisions issued by the National Labor Relations Board (NLRB). Some of these decisions have aided unions and some have aided employers, so this pattern does not necessarily reveal any anti-employer (or anti-union) animus.

For example, in the 2010 decision of *Laborers' Intern. Union of North America, Local 578 v. NLRB*, Judge Gorsuch agreed with the NLRB that the union committed unfair labor practices when it persuaded an employer to terminate a worker for failing to pay his union dues. In 2012's *Public Service Co. of New Mexico v. NLRB*, he sided with the NLRB and concluded that the employer engaged in unfair labor practices by not timely producing requested information to the union during a grievance proceeding. And in 2014, he issued a decision in *Teamsters Local Union No. 455 v. NLRB*

a grievance proceeding. And in 2014, he issued a decision in *Teamsters Local Union No. 455 v. NLRB*, again lining up with the Board – this time denying a union's request to hold an employer's lockout unlawful after the company threatened to hire permanent replacement workers.

Will Judge Gorsuch Side With Benefits Plan Administrators?
"It Is Certain"

Another area of the law where Judge Gorsuch has demonstrated a consistent judicial philosophy is the administration of benefits plans. In at least four cases – *Niedens v. Continental Cas. Co.* (2007), *Lucas v. Liberty Life Assur. Co. of Boston* (2011), *McClenahan v. Metropolitan Life Ins. Co.* (2011), and *Jensen v. Solvay Chemicals, Inc.* (2013) – Judge Gorsuch has concluded that an administrator's decision to terminate an individual's benefits was supported by the evidence and not an abuse of discretion. In fact, in the most recent case, he came to this conclusion despite evidence in the record showing that the plan administrator unintentionally failed to comply with technical ERISA notice requirements.

Will Judge Gorsuch Tangle With Regulatory Agencies?
"Yes, Definitely"

Perhaps the single-most defining characteristic that led President Trump to select Judge Gorsuch as his SCOTUS nominee is the judge's avowed hostility towards regulations. The president campaigned on a platform that promised to rid the country of burdensome regulations, and Judge Gorsuch will certainly aid in that effort. He has made a name for himself as someone who is no fan of the powers of regulatory agencies.

The defining case that may very well have sealed Judge Gorsuch's selection is the August 2016 decision in *Gutierrez-Brizuela v. Lynch*, a non-employment immigration case against the federal government. In a concurring opinion rejecting the application of a government regulation, Judge Gorsuch mercilessly attacked the existing Supreme Court standard that often affords a great deal of deference to federal regulations. "There's an elephant in the room with us today," he wrote. This Supreme Court standard "permits executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth." He called for a revolution, of sorts, where courts exercise their independent judgment and fulfill their duties to interpret the law, while regulatory agencies cease filling legislative voids.

This judicial philosophy could be a great asset to employers, as the Equal Employment Opportunity Commission (EEOC), the Occupational Safety and Health Administration (OSHA), the Department of Labor, the Department of Justice, and numerous other federal agencies have created a thicket of regulatory law through which employers must navigate on a daily basis. This is not a revolution that will happen overnight, however. For it to take hold, it will need other likeminded Supreme Court justices, and it will take time.

If there's one thing Judge Gorsuch has, however, it's time. The Magic 8-Ball's answer to our final question will explain why.

If Confirmed, Will Judge Gorsuch Have A Lasting Impact?
"The Answer Is Yes"

One of Judge Gorsuch's greatest assets is his youth – he is only 49 years old, seven years younger than each of the current most youthful justice (Justice Elena Kagan), and about 30 years younger than the three oldest justices (Justice Ruth Bader Ginsburg, Justice Stephen Breyer, and Justice Anthony Kennedy). If confirmed, he could easily enjoy between 20 to 30 years on the bench of our nation's highest court, and take part in hundreds of cases that shape our workplace laws.

It is impossible to predict whether his personal philosophy will carry weight on the Supreme Court, as we have no way of knowing the composition of the full Court in the future. Even the Magic 8-Ball can't determine whether he will regularly sit beside a bloc of willing allies or a group of justices who take opposing views in the years to come. Regardless whether Judge Gorsuch becomes an influential force or simply a solid contributor, employers can feel confident that he will more often than not side with them when it comes to workplace issues that land at the Supreme Court.

If you have any questions about this development or how it may affect your business, please visit our website at www.fisherphillips.com or contact your Fisher Phillips attorney.

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