JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW

EMPLOYMENT DISCRIMINATION

REVIEW OF DISABILITY-RELATED CASES INVOLVING JUDGE BRETT KAVANAUGH

The Bazelon Center for Mental Health Law strongly opposes the nomination of Judge Brett Kavanaugh to serve on the U.S. Supreme Court. The appointment of Judge Kavanaugh would threaten hard-won rights and protections for people with disabilities. Judge Kavanaugh's record demonstrates his great skepticism of the Affordable Care Act, his hostility to civil rights—including the rights of people with disabilities—and his narrow view of the authority of executive branch agencies to interpret and enforce the law. His confirmation could add a fifth vote for such regressive views. A summary of his record is provided below.

Employment Discrimination

In employment discrimination cases, Judge Kavanaugh has consistently demonstrated undue deference to employers and a particularly narrow understanding of antidiscrimination protections.

Judge Kavanaugh dissented from the majority opinion in ***Miller v. Clinton***,[1] which held that the Age Discrimination in Employment Act (ADEA) barred the State Department from imposing a mandatory retirement age for workers abroad and terminating an employee solely because he turned 65. Observing that the State Department's reasoning would extend beyond the ADEA to other statutes, including the ADA, the majority wrote: "We simply do not believe [Congress] would have authorized the State Department to ignore statutory proscriptions against discrimination on the basis of age, disability, race, religion, or sex through the use of ambiguous language."[2] Indeed, the majority noted that "Congress has made clear that it regards those protections as extremely important," and that a contrary holding would exempt a class of U.S. citizens "from the protections of the entire edifice of its antidiscrimination canon."[3]

In his dissent, Judge Kavanaugh dismissed these concerns, accusing the majority of "raising the specter of rampant race, sex, and religious discrimination by the U.S. State Department against U.S. citizens employed abroad."[4] Notably, although Judge Kavanaugh posited that the Constitution would still bar the State Department from discriminating against workers abroad

[1] 687 F.3d 1332 (D.C. Cir. 2012).

[2] *Id.* at 1337.

[3] *Id.* at 1338.

[4] *Id.* at 1357 (Kavanaugh, J., dissenting).

"on the basis of race, sex, or religion" even if antidiscrimination laws did not apply,[5] he offered no such comfort to workers with disabilities (and the Supreme Court has applied less searching constitutional scrutiny of policies treating people with disabilities differently). Judge Kavanaugh's eagerness to read this broad exemption into the nation's antidiscrimination laws is deeply troubling.

In employment discrimination cases, Judge Kavanaugh has routinely disregarded the experiences of people with disabilities in order to side with employers. For example, in ***Stewart v. St. Elizabeths Hospital***,[6] he ruled for the employer, a psychiatric hospital, because he found insufficient evidence that the employer had notice of the worker's disability—despite her allegation that her supervisors knew she had been hired under a "patient hire" program at the hospital that provided jobs to hospital residents with disabilities.[7]

Judge Kavanaugh again demonstrated great reluctance to scrutinize an employer's actions in ***Adeyemi v. District of Columbia***,[8] in which he ruled against the plaintiff, a Deaf job applicant who was turned down for an information technology position in the D.C. public school system. Judge Kavanaugh set out a high bar for job applicants alleging discrimination in the hiring process, writing that, in order to put his or her case to a jury, an applicant must provide evidence that he or she was "*significantly* better qualified for the job than those ultimately chosen."[9] To allow judicial scrutiny in a case where the "comparative qualifications" between the applicants "are close," he wrote, would turn the court into "a super-personnel department that reexamines an entity's business decisions."[10]

Similarly, in ***Baloch v. Kempthorne***,[11] Judge Kavanaugh rejected a worker's disability discrimination and retaliation claims, unpersuaded by the worker's allegations that, after he filed an administrative complaint, his supervisor imposed onerous sick leave restrictions requiring him to submit a physician certification each time he requested leave; gave him low performance reviews and a formal reprimand; and directed "profanity-laden yelling" at the worker on four separate occasions. Rather than considering these experiences as adverse actions that could support the worker's retaliation claim, Judge Kavanaugh viewed them as examples of the employer's ability to decide "[g]ood institutional administration."[12]

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[5] *Id.* at 1359.

[6] 589 F.3d 1305 (D.C. Cir. 2010).

[7] Appellant's Brief, 2009 WL 3126602.

[8] 525 F.3d 1222 (D.C. Cir. 2008).

[9] *Id.* at 1227 (emphasis added).

[10] *Id.* (quoting Jackson v. Gonzales, 496 F.3d 703, 707 (D.C. Cir. 2007)).

[11] 550 F.3d 1191 (D.C. Cir. 2013).

[12] *Id.* at 1200.

Most recently, in ***Johnson v. Interstate Management Company***,[13] Judge Kavanaugh again ruled for the employer, holding that the worker had not shown sufficient evidence that his employer terminated him as retaliation after he filed disability discrimination complaints. In reaching his conclusion, Judge Kavanaugh deferred to the employer's testimony alleging "repeated performance failings" by the worker;[14] he discounted or ignored significant evidence presented by the worker, including the absence of a single complaint in the worker's nearly 15 years with the company until a new executive chef came on board, and fact questions around the performance complaints relied on by the employer.[15] Indeed, another judge on the panel specifically noted in her concurring opinion that she disagreed with Judge Kavanaugh's analysis of the record on the retaliation issue.[16]

[13] 849 F.3d 1093 (D.C. Cir. Mar. 2017). Judge Kavanaugh also rejected the worker's claim that he was fired in retaliation for filing a workplace safety complaint with the Occupational Safety and Health Administration, holding that the Occupational Safety and Health Act did not provide workers a private cause of action. *Id.* at 1098.

[14] *Id.* at 1099.

[15] Opening Brief of Appointed Amicus Curiae in Support of the Appellant, 2016 WL 389495, at **5-6 and *12.

[16] 849 F.3d at 1101 (Millett, J., concurring).