PUBLICATION

The Future of Employment Law with a New Supreme Court Justice

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Justice Ruth Bader Ginsburg was well-known for her decisions (albeit mostly dissents) advocating for employees and employee rights. Consequently, there is a lot of speculation about the impact of Justice Ginsburg's replacement, Justice Amy Coney Barrett, on future employment law decisions. Justice Barrett has been accused of being "anti-worker." There is now a six-justice conservative majority (as opposed to a five-justice conservative majority) on the Court, but does Barrett's appointment really signal *status quo* or more favorable rulings for employers?

Justice Barrett was appointed to the 7th Circuit Court of Appeals (the federal appellate court for the states of Illinois, Indiana and Wisconsin) in November 2017. During her short tenure on that bench, Justice Barrett authored several employment law decisions. The rulings, however, show an even-handed and reasoned application of the law and did not tip the scales toward employers or employees. Her rulings are tied closely to precedent and to prior interpretations by the U.S. Supreme Court. She does not tolerate bad actors – whether they are employers or employees.

She authored several opinions that upheld jury verdicts in favor of employees in discrimination cases. For example, one of her opinions upheld a $300,000 award to a Hispanic Chicago parks employee on her national origin discrimination claim. The decision concluded the plaintiff, Lydia E. Vega, had produced enough evidence, however circumstantial, to show that she was the victim of national origin discrimination. The opinion focused on the employee's 20-year performance record, the employer's deviation from established policies, the insufficient internal investigation into the employee's alleged misconduct (including the employer's lack of interest in the employee's explanation of events) and the employer's historical treatment of other Hispanic employees. Similarly, Judge Barrett authored an opinion confirming a trial court's verdict which found that a male butcher at a grocery store was subject to sexual harassment by his male grocery store coworkers and supervisor. She rejected the employer's argument that it was merely "sexual horseplay" rather than harassment based upon sex, stating, "the evidence supports the inference that Smith's coworkers harassed him because he was male . . . a reasonable jury could conclude that Smith was tormented because of his sex." In another opinion, Judge Barrett also sided with a Costco employee who claimed the company did not protect her from a customer who harassed her for more than a year. The judge upheld a $250,000 trial verdict for the EEOC on behalf of the employee, stating the stalker created a hostile work environment, and Costco's response was "unreasonably weak." The decision also stated that the EEOC could recover back pay because the environment was so hostile the employee was "forced to take unpaid leave." A common theme in these cases is that Judge Barrett found the employer did not do enough on behalf of the employee.

But all is not lost for employers. Justice Barrett's 7th Circuit decisions strictly scrutinized class action lawsuits brought by employees. In the five opinions that she wrote regarding employment class actions, she ruled for the employer in four of the cases, finding that the employees could not proceed as a class. Justice Barrett also penned several decisions finding the employees did not meet their burden in their discrimination claims, often focusing on the employees' own (mis)conduct. One such case involved a disabled Zamboni driver who was fired after crashing the machine in an ice rink. The employee claimed disability discrimination and alleged the employer failed to accommodate his medical restriction of having to work sitting down. The employer argued that they tried to accommodate the employee by assigning him the job of sharpening skates. But the employee disagreed that the skates could be sharpened while sitting down although he never said this to his employer.

Justice Barrett found that the employee failed to engage in the interactive process required by the ADA: "if an employee does not provide sufficient information to the employer to determinate the necessary accommodations, the employer cannot be held liable for facility to accommodate the employee." She also found that the termination following the accident was justified since the employee had exhibited several behavioral problems such as bad attitude, inability to complete work on time and insubordination. Justice Barrett also dismissed a prison guard's sex discrimination case when the employee was fired for falsely claiming that a prisoner hit her with an empty snack cake box. Video footage showed that the box did not hit the employee, and Judge Barrett made particular note of the fact that the false report of assault could have resulted in serious consequences for the prisoner. Judge Barrett was similarly unpersuaded by the case of a traffic patrolman who claimed racial harassment and retaliation after he exhibited a "record of unsafe conduct" including driving away from a gas pump with the nozzle still attached, almost hitting a police car on a drive with a supervisor, and putting his truck in neutral and pulling the brake, which nearly caused his supervisor to be pinned between a tow truck and another vehicle.

It is often difficult to predict what a judge will do once given a lifetime appointment on the U.S. Supreme Court. Many critics were surprised this past summer when Justice Neil Gorsuch (a conservative justice who was called a "serious threat to progress toward legal equality for LGBTQ families" during his confirmation) authored a groundbreaking decision that guaranteed LGBTQ employees protection from workplace discrimination. Judge Barrett's appellate decisions hold both employers and employees accountable for their actions. Time will tell whether she will have an impact on the future interpretation of federal employment laws. Stay tuned.

If you have any questions regarding employment law, please contact the author or any member of Baker Donelson's Labor & Employment Group.