Employment Law

Evaluating Employment Law Decisions of US Justice Nominee Garland

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There is a sentiment in the employment law community, particularly those who practice on the employee side, that federal courts have grown increasingly hostile to employee rights cases. The empirical data compiled over the last three decades seems to support this sentiment. Plaintiffs who bring employment discrimination claims in federal court are far less likely to prevail than plaintiffs in non-employment cases. According to a 2009 Harvard Law and Policy Review article titled "Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?" since 1979, the plaintiff win rate for employment cases (15 percent) was lower than non-employment cases (51 percent). For cases going to trial, employment discrimination plaintiffs (28.47 percent) won less often than other plaintiffs (44.94 percent). With respect to appeals, employees succeeded only 9 percent of the time, while employers won 41 percent of appeals.

These startling numbers, as well as the general lack of professional diversity on the federal bench, got this writer to wondering what kind of justice President Obama's nominee for the U.S. Supreme Court would be, as it relates to employee rights. As many know, Chief Judge Merrick B. Garland of the U.S. Court of Appeals for the D.C. Circuit was nominated for the high court following the death of U.S. Supreme Court Justice Antonin Scalia in what many predict will be a test of political might. Notwithstanding the fact that Garland's nomination may never even get to a Senate vote during this president's term, his track record on matters affecting labor and employment law is noteworthy.

Garland graduated summa cum laude from Harvard University in 1974 and magna cum laude from Harvard Law School in 1977. His legal career began as a law clerk to Judge Henry Friendly of the Second Circuit. He later clerked for Justice William Brennan at the U.S. Supreme Court. Garland has served on the D.C. Circuit since 1997, when he was nominated by then-President Bill Clinton and confirmed on a bipartisan vote of 76–23 by the U.S. Senate. Garland has been presented as a centrist on many hot-button political topics, including religious freedom, immigration, detainees and constitutional claims, environmental rights and criminal law. A cursory review of his employment law decisions reflects the same centrist position.

Tom Goldstein, publisher of SCOTUSblog, examined Garland's potential nomination back in April

2010 when Garland was being considered to fill the vacancy of Justice John Paul Stevens, eventually filled by Justice Elena Kagan. (See "The Potential Nomination of Merrick Garland," April 26, 2010, goo.gl/eb7nUM.) Goldstein offered the following opinion of Garland's ideology: "To the extent that the president's goal is to select a nominee who will articulate a broad progressive vision for the law, Judge Garland would be a very unlikely candidate to take up that role." Goldstein went on to say that Garland has not been called upon to decide many civil-rights-related claims, thereby making it difficult to label him as inclined either toward or against such claims, given that the panels on which he sat in such cases were generally unanimous.

Garland's most notable foray into employment law came in the *Kolstad v. American Dental Association*, 139 F.3d 598 (1998) (en banc) (Tatel, J., dissenting) (along with Edwards, C.J., and Wald and Rogers, JJ., joining opinion arguing that intentional sex discrimination is sufficient to justify punitive damage award), rev'd, 527 U.S. 526 (1999), case where he was one of four judges on the D.C. Circuit who dissented from the denial of rehearing en banc in a case in which the panel had limited the availability of punitive damages under Title VII. Ultimately, the Supreme Court sided with Garland and the dissenters and reversed the panel decision.

Other than Garland's opinion on the availability of punitive damages under Title VII, his record on employment issues as a whole is not well established. Take the following cases as an example: *McGrath v. Clinton*, 666 F.3d 1377 (D.C. Cir. 2012), and *Waterhouse v. District of Columbia*, 298 F.3d 989 (D.C. Cir. 2002). In both cases, Garland affirmed summary judgment for employers on Title VII claims. Contrast those decisions with *Steele v. Schafer*, 535 F.3d 689 (D.C. Cir. 2008), and *Czekalski v. Peters*, 475 F.3d 360 (D.C. Cir. 2007), where Garland reversed summary judgment on Title VII claims for employers.

Other examples of Garland's centrist view can be found in *Sparrow v. United Air Lines*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) (reversing a lower court's dismissal of a Title VII claim, holding that "a - plaintiff need not set forth the elements of a prima facie [discrimination] case at the initial pleading stage"), and *Duncan v. Washington Metropolitan Transit Authority*, 240 F.3d 1110 (2001) (en banc) (reversing lower court and dismissing Americans with Disabilities Act claims after jury awarded the plaintiff $500,000).

In labor law matters, Garland does appear to have a reputation for giving strong judicial deference to federal agencies, such as the National Labor Relations Board. (See e.g., *Ceridian v. National Labor Relations Board*, 435 F.3d 352, 355 (D.C. Cir. 2006) ("an agency's interpretation of its own precedent is entitled to deference").) According to SCOTUSblog, Garland sided with the agency 12 out of 12 times in cases in which the court was divided. Between 1997 and 2016, Garland deferred to decisions of the agency in all but four of 22 cases where he authored the majority opinion, finding that an employer had committed unfair labor practices. (See goo.gl/MDYxfy.)

Having reviewed many of Garland's decisions in the areas of labor and employment law, as well as civil and constitutional rights, it is my opinion that Garland is unequivocally, unabashedly and without a shadow of a doubt a flaming centrist. Truth be told, Garland is an extraordinarily brilliant jurist who pays enormous attention to detail and dispensation of justice. He can neither be pegged as a left-wing activist ideologue or a right-wing strict constructionist. Garland is about as middle of the road as it gets on employment law issues, while leaning slightly toward the employee side in labor relations matters.

If Garland's nomination ever reaches the Senate floor for a vote, I suspect his breadth of experience will enhance the lack of professional diversity on the federal bench, ever so much. At a minimum, his nomination seems worthy of a vote. •

Jeffrey Campolongo is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries.
