



## ESSAY

## Rights, Facts, and Relevant Inquiries: Surveying Judge Neil M. Gorsuch's Employment Law Jurisprudence

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### Introduction

What consequences will the 2016 election have for employment and labor law? President Trump's potential policies are uncertain, especially given Andrew Puzder's withdrawal and Alexander Acosta's nomination as Labor Secretary. Consequently, Supreme Court nominee Judge Neil M. Gorsuch's past Tenth Circuit decisions may be increasingly of interest. This Essay presents a brief overview of Judge Gorsuch's employment jurisprudence before predicting how he may rule in future cases if confirmed. Part I discusses workplace issues, including accommodations, discrimination, and workers' compensation. Part II analyzes Judge Gorsuch's rulings about union relations and unfair labor practices. Finally, Part III assesses how he might address an upcoming case regarding class action waivers in employment contracts.

### I. Addressing Issues in the Workplace

In cases involving workers' compensation and workplace accommodations, discrimination, and safety, Judge Gorsuch's record shows continued affinity to law and facts rather than particular groups or interests.

Judge Gorsuch has ruled in favor of workers with discrimination claims involving disability accommodations,<sup>1</sup> age,<sup>2</sup> gender,<sup>3</sup> and religion and national

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1. *See, e.g.,* *Lowe v. Indep. Sch. Dist. No. 1*, 363 F. App'x 548, 554-55 (10th Cir. 2010) (Brorby, J.) (finding a genuine issue of material fact and remanding where the employer failed to adequately negotiate in good faith about accommodations).
2. *See, e.g.,* *Ridgell-Boltz v. Colvin*, 565 F. App'x 680, 687 (10th Cir. 2014) (McKay, J.) (holding enough evidence regarding age and gender discrimination was presented to merit review by the lower court).
3. *See, e.g.,* *Chapman v. Carmike Cinemas*, 307 F. App'x 164, 170-71 (10th Cir. 2009) (Ebel, J.) (finding that the employer was not entitled to summary judgment when an employee

origin.<sup>4</sup> By way of example, he upheld findings of discrimination where an employer required pregnant employees to use sick days for maternity leave while other employees could use vacation time for different types of family leave.<sup>5</sup> In other cases Judge Gorsuch also affirmed rulings for employees but respectively questioned an aspect of jurisdiction<sup>6</sup> and one of several underlying claims in his concurrences.<sup>7</sup> In employer retaliation cases, he ruled for employees who were fired because of their political affiliations,<sup>8</sup> who were threatened after bringing sexual harassment claims,<sup>9</sup> and who helped coworkers bring similar claims.<sup>10</sup>

However, Judge Gorsuch has also ruled against employee discrimination claims.<sup>11</sup> In these cases, he upheld findings that no pretext or discriminatory intent existed where employees were respectively fired for consistent poor performance,<sup>12</sup> logging hours not worked,<sup>13</sup> or exhausting maximum sick leave

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sexually assaulted the plaintiff at work and remanding for further consideration); *Lowber v. City of New Cordell*, 298 F. App'x 760, 762 (10th Cir. 2008) (holding the plaintiff alleging sex discrimination did not waive her claim by later introducing a new sexual harassment claim).

4. *See, e.g., Gad v. Kan. State Univ.*, 787 F.3d 1032, 1038 (10th Cir. 2015) (Tymkovich, J.) (holding the court can review an employees' Title VII claims without notarized complaint).
5. *Orr v. City of Albuquerque*, 531 F.3d 1210, 1212, 1219 (10th Cir. 2008).
6. *Flitton v. Primary Residential Mortg., Inc.*, 614 F.3d 1173, 1181 (10th Cir. 2010) (Gorsuch, J., concurring in part and dissenting in part) (arguing the court had jurisdiction regarding appellate attorney fees in a gender discrimination and retaliation case).
7. *Strickland v. United Parcel Serv., Inc.*, 555 F.3d 1224, 1231-32 (10th Cir. 2009) (Gorsuch, J., concurring in part and dissenting in part) (agreeing regarding a Family and Medical Leave Act claim but arguing the Title VII gender discrimination claim was wrongly remanded because no similarly situated male employee existed with which to compare the plaintiff's treatment, and other non-similarly situated male employees were also treated equally poorly).
8. *Walton v. Powell*, 821 F.3d 1204, 1214 (10th Cir. 2016).
9. *Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1093 (10th Cir. 2007); *see also Eisenhour v. Weber County*, 744 F.3d 1220, 1235-36 (10th Cir. 2014) (Bacharach, J.).
10. *Barrett v. Salt Lake County*, 754 F.3d 864, 866 (10th Cir. 2014) (finding an employer retaliated against an employee who helped his coworker bring a sexual harassment claim).
11. *See, e.g., Myers v. Knight Protective Serv., Inc.*, 774 F.3d 1246, 1248-49 (10th Cir. 2014); *Roberts v. Int'l Bus. Machines Corp.*, 733 F.3d 1306, 1310-11 (10th Cir. 2013); *Elwell v. Okla. ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1316 (10th Cir. 2012); *Almond v. Unified Sch. Dist. No. 501*, 665 F.3d 1174, 1183-84 (10th Cir. 2011); *Johnson v. Weld County*, 594 F.3d 1202, 1215 (10th Cir. 2010); *Iverson v. City of Shawnee*, 332 F. App'x 501, 504 (10th Cir. 2009) (O'Brien, J.); *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1201, 1205 (10th Cir. 2008); *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1166, 1177 (10th Cir. 2007).
12. *Kaiser v. Colo. Dep't of Corr.*, 504 F. App'x 739, 741 (10th Cir. 2012).
13. *Young v. Dillon Cos.*, 468 F.3d 1243, 1250-51 (10th Cir. 2006).

for a job the employee could not perform, even with full disability accommodations.<sup>14</sup>

Regarding workers' compensation and workplace safety, Judge Gorsuch ruled favorably for coal miners seeking workers' compensation for Chronic Obstructive Pulmonary Disease (COPD) caused by dust inhalation.<sup>15</sup> While Judge Gorsuch deferred to agency determinations in these COPD cases, he typically shows little deference to agency determinations in this area, especially when they contradict clear statutory language<sup>16</sup> (and sometimes market considerations<sup>17</sup>).

## II. Unfair Labor Practices and Union Relations

Judge Gorsuch had also demonstrated limited deference to agency decisions regarding labor practices and union relations.<sup>18</sup> He says a judge's role is not to please the judge's own convictions.<sup>19</sup> Judges should not allow politically motivated decisionmakers to pursue "whatever policy whim may rule the day" at the expense of parties' rights.<sup>20</sup> However, Judge Gorsuch has affirmed agency findings of fact in several decisions favorable to union employees.<sup>21</sup> In one case,

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14. *Hwang v. Kan. State Univ.*, 753 F.3d 1159, 1161, 1165 (10th Cir. 2014).

15. *See Energy W. Mining Co. v. Oliver*, 555 F.3d 1211, 1218-19 (10th Cir. 2009); *Energy W. Mining Co. v. Johnson*, 233 F. App'x 860, 863 (10th Cir. 2007).

16. *See Compass Envtl., Inc. v. Occupational Safety & Health Review Comm'n*, 663 F.3d 1164, 1173 (10th Cir. 2011) (Gorsuch, J., dissenting); *see also TransAm Trucking, Inc. v. Admin. Review Bd.*, 833 F.3d 1206, 1217 (10th Cir. 2016) (Gorsuch, J., dissenting) (arguing neither courts nor agencies can supplant clear statutory language with their own preference of what the law should mean).

17. *Compass Envtl.*, 663 F.3d at 1172 (arguing it would contradict statutory language and also create bad employer incentives to hold an employer liable for failing to meet self-set guidelines that were beyond statutory scope).

18. *See, e.g., NLRB v. Cmty. Health Servs., Inc.*, 812 F.3d 768, 785-86 (10th Cir. 2016) (Gorsuch, J., dissenting) (arguing the NLRB cannot develop new rules regarding backpay without evidence or reasoning to explain divergence from eighty years of long-held agency policies affirmed by the U.S. Supreme Court).

19. Judge Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 2016 Sumner Canary Lecture at Case Western Reserve University School of Law (Apr. 7, 2016), in 66 CASE WESTERN RES. L. REV. 905, 906 (2016) ("[J]udges should . . . strive . . . to apply the law as it is . . . not to decide cases based on their own moral convictions or the policy consequences they believe might serve society best.").

20. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring). Judge Gorsuch has also shown a preference for deciding employment issues as narrowly as possible. *See Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160, 1183-84 (10th Cir. 2007) (Gorsuch, J., concurring).

21. *See Teamsters Local Union No. 455 v. NLRB*, 765 F.3d 1198, 1202 (10th Cir. 2014) (affirming the NLRB's decision for employees after illegal lockout and threats to hire permanent staff by the employer during collective bargaining negotiations and affirming the NLRB's denial of damages beyond backpay); *Pub. Serv. Co. of N.M. v.*

he upheld an NLRB decision against an employer for unfair labor practices where the employer discharged and threatened union employees with physical violence.<sup>22</sup> In another case, a union asked an employer to fire a union member for failure to pay dues but did not provide information or time for him to pay them; Judge Gorsuch found for the employee.<sup>23</sup>

### III. Predictions for Future Employment Law Decisions and Employment Contracts' Class Action Waivers

Judge Gorsuch's nomination may affect union and nonunion employees alike. One upcoming Supreme Court case carries particular relevance: *Epic Systems Corp. v. Lewis*.<sup>24</sup> Circuit courts have disagreed as to whether mandatory arbitration clauses in employment contracts containing class action waivers violate the National Labor Relations Act.<sup>25</sup> In effect, the case asks whether employers can require individual employees to give up their ability to litigate claims as groups. If confirmed, Judge Gorsuch could cast the deciding vote. Several factors hint at how Judge Gorsuch may decide the issue. Consider recent Supreme Court cases on mandatory arbitration clauses in consumer contracts,<sup>26</sup> Judge Gorsuch's limited deference to administrative agencies,<sup>27</sup> and his previous opinions on arbitration.<sup>28</sup> Given these factors, it is possible a Justice Gorsuch

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NLRB, 692 F.3d 1068, 1072, 1079 (10th Cir. 2012) (affirming the NLRB's decision against employer's unfair labor practices).

22. *Leiser Constr., LLC v. NLRB*, 281 F. App'x 781, 790-92 (10th Cir. 2008) (Parker, J.).

23. *Laborers' Int'l Union, Local 578 v. NLRB*, 594 F.3d 732, 739 (10th Cir. 2010).

24. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016). The Supreme Court should hear oral argument sometime this fall. Lawrence Hurley & Robert Iafolla, *Supreme Court Nominee Gorsuch Could Decide Class Action Waiver Cases*, INS. J. (Feb. 9, 2017), <http://www.insurancejournal.com/news/national/2017/02/09/441351.htm>.

25. The Seventh Circuit and Ninth Circuit ruled against mandatory class action waivers. *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 990 (9th Cir. 2016); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1161 (7th Cir. 2016). The Fifth Circuit ruled in their favor. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015).

26. See generally *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). It is worth noting these cases deal with mandatory arbitration in a different context, so they are likely not determinative.

27. See generally *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016); *TransAm Trucking, Inc. v. Admin. Review Bd.*, 833 F.3d 1206, 1215-17 (10th Cir. 2016) (Gorsuch, J., dissenting).

28. See generally *Ragab v. Howard*, 841 F.3d 1134, 1139-41 (10th Cir. 2016) (Gorsuch, J., dissenting); *Genberg v. Porter*, 566 F. App'x 719 (10th Cir. 2014); *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975 (10th Cir. 2014). Judge Gorsuch was also on the panel in *Sanchez v. Nitro-Lift Techs., LLC*, 762 F.3d 1139 (10th Cir. 2014). For the sake of further reading, Judge Gorsuch wrote about minimizing frivolous lawsuits in the context of securities fraud class action suits, but this does not correlate to the subject matter of *Lewis v. Epic Systems Corp.* Neil M. Gorsuch & Paul B. Mately, *Settlements in Securities Fraud*

would rule for class action waivers in employment contracts. However, it is difficult to predict this with any certainty.

### **Conclusion**

After surveying his labor and employment decisions, it is clear that Judge Gorsuch does not favor (or oppose) employees, employers, unions, or the NLRB. His opinions do not show pro-labor or anti-labor tendencies. What they reveal is a deep-seated commitment to facts and law when evaluating employment disputes; he has decided for each group when circumstances demand it. While no interested group should definitively speculate victory or defeat in his nomination, parties can rely on a record of fair analysis and resistance to simply rubber-stamping business interests or executive agency decisions.<sup>29</sup>

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*Class Actions: Improving Investor Protection 2-5* (Wash. Legal Found. Critical Legal Issues, Working Paper No. 128, 2005), <http://www.wlf.org/upload/0405WPGorsuch.pdf>.

29. Interested parties may also appreciate past calls by Judge Gorsuch to increase access to affordable justice. See Neil M. Gorsuch, *Access to Affordable Justice: A Challenge to the Bench, Bar, and Academy*, JUDICATURE, Autumn 2016, at 47, 53 (“Lowering barriers to entry, ensuring judicial resolutions come more quickly and at less cost . . . share the common aim of increasing the supply and lowering the price of legal services.”).