



## BRETT KAVANAUGH: WHAT'S AT STAKE FOR THE #METOO MOVEMENT

The #MeToo movement has led to a wave of people, led by women, coming forward to expose and challenge sexual harassment and assault. Since January 2018, for example, the National Women's Law Center has received over 3,500 intakes from people who have experienced sexual harassment. People who face harassment and other forms of discrimination, whether at work, at school, when seeking health care, or elsewhere, need the courts to ensure justice and accountability. But Judge Brett Kavanaugh's record makes it clear: he sees anti-discrimination protections as a burden for employers rather than a necessary safeguard. We need a Supreme Court justice who will follow the law and uphold the right to be free from harassment and discrimination, not one who is always on the lookout for ways to let the powerful off the hook.

### **Kavanaugh's Record Signals Danger for Survivors of Sexual Harassment**

During his time as a judge, Kavanaugh has routinely ruled against working people, going out of his way to make decisions that deny people meaningful legal protection from sexual harassment and other forms of discrimination. His approach would harm those challenging workplace harassment and suggests a general hostility to discrimination claims, which could mean he would also make it harder to challenge harassment at school, from health care providers, and elsewhere.

- Sexual harassment is not about sex, it is about power and control. Undocumented immigrant workers are especially vulnerable to sexual harassment and abuse, because they lack power in the workplace and elsewhere. Luckily, the Supreme Court has made clear that federal labor and employment law protects

employees regardless of their immigration status, including their right to be free from harassment. Kavanaugh could change this. In *Agri Processor Co. v. N.L.R.B.*, Kavanaugh dissented from a decision holding that an employer must bargain with employees who sought to form a union. Kavanaugh disagreed because many of the workers were undocumented immigrants. In the face of clear Supreme Court precedent to the contrary, Kavanaugh claimed that undocumented workers were not "employees" protected by the National Labor Relations Act, solely because of their immigration status. His analysis suggests that he would also hold undocumented workers are not "employees" protected from harassment and other forms of discrimination under federal law. This would give employers a blank check to sexually exploit undocumented immigrants and otherwise engage in the most despicable kinds of discrimination.

- The #MeToo movement has shone a light on broken systems that prioritize protecting employers over helping those who experience harassment. One such system operates in Congress. Staffers experiencing sexual harassment at the hands of members of Congress or coworkers must endure three months' worth of counseling before they can even file a formal complaint, for example. Kavanaugh, in *Howard v. Office of Chief Admin. Officer of U.S. House of Representatives*, would have further weakened the system protecting Congressional staffers from harassment and other forms of discrimination. The case involved a Black woman who worked for a Congressional office and alleged she was discriminated and retaliated against because of her race and paid \$22,000 less than her white male counterparts



doing the same job. Kavanaugh's dissent argued she should be completely denied the right to bring her discrimination case in court, because judges should not inquire into most employment decisions made by Congress. Congressional employees, like other employees, should be able to go to court to enforce their legal rights and not be relegated into internal systems designed to protect their employers.

- Federal law prohibits workplace sexual harassment. But in *Miller v. Clinton*, Kavanaugh wrote a dissent that would have denied a group of employees working overseas for the State Department any legal protections against workplace harassment and other forms of discrimination. His dissent also argued that those protected by civil rights laws are less desirable employees — a troubling worldview.
- As the #MeToo movement has made clear, women are still too often disbelieved when they speak up about sexual harassment and assault. Unfortunately, Kavanaugh's kneejerk reaction is to believe employers over individuals alleging discrimination. For example, in *Jackson v. Gonzales*, Kavanaugh wrote an opinion dismissing a Black employee's claim that he was denied a promotion because of his race. The employer argued that the white employee who was promoted instead was more qualified even though her qualifications didn't match up with the requirements in the job description. Kavanaugh ruled for the employer rather than letting a jury decide whether the employer's explanation was believable.
- Many individuals who experience harassment are afraid to come forward because they believe doing so will make it difficult or impossible to find another job. Kavanaugh has shown no concern for these real-world consequences of challenging discrimination. In *America v. Mills*, an employee accused his former employer of race discrimination, and the former employer agreed to pay the employee thousands of dollars to settle the claims. The settlement agreement also said that if prospective employers contacted the former employer about him, the only response would be a neutral reference. Instead of abiding by this agreement, the former employer gave a reference that included statements such as "he may not be the guy to take it to the next level..." and "I don't think he got

along with everybody..."; he had significant difficulty finding a new job. Kavanaugh held the former employer was not liable for violating the settlement agreement because this was close enough to a neutral reference. In the real world, of course, comments like this can torpedo a job opportunity. As the dissenting judge (a Bush appointee) noted, Kavanaugh's analysis renders meaningless the part of the settlement agreement that was meant to ensure the individual's future job prospects were not harmed as a result of challenging discrimination.

### **Kavanaugh Must Answer Questions About Whether He Has Personally Tolerated Harassment**

Kavanaugh clerked for Judge Alex Kozinski of the Ninth Circuit and has reportedly remained close to his former boss, including since becoming a judge. Kozinski abruptly retired in late 2017 after over a dozen allegations of sexual harassment by his former clerks, and many have described Kozinski's abusive behavior as an open secret that was widely known for years. Kavanaugh also reportedly worked as a "screener" recommending clerkship candidates for Supreme Court Justice Kennedy -- and Justice Kennedy hired many of Kozinski's former clerks. In other words, working for Kozinski was a gateway to clerking on the Supreme Court and Kavanaugh was one of the gatekeepers. If Kavanaugh helped ensure that those who worked for Kozinski got Supreme Court clerkships, this likely encouraged many young attorneys to work for Kozinski despite the widespread rumors of his abusive behavior. Kavanaugh must respond fully to questions about what he knew or suspected regarding Kozinski's harassing behavior and whether he took any actions in response when he had the power to do so.

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Kavanaugh has built his judicial career by siding with the powerful over those turning to the law for help. We cannot allow a judge who has chosen to use his sweeping power to weaken protections against harassment and other forms of discrimination to be seated on our nation's highest court.

