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## SUPREME COURT

# Supreme Court Nominee Judge Jackson and Workers' Rights: A Fair and Even-Handed Approach

Judge Ketanji Brown Jackson's historic nomination comes at a critical time for our nation's workforce, especially working women. A Supreme Court nominee that prioritizes and understands the importance of gender and racial justice and worker rights is critical for women's workforce participation and workplace progress as we recover from the effects of the COVID-19 pandemic.

Many women are still reeling from the impact of the pandemic and a lack of structural supports needed to weather this crisis and the next.<sup>1</sup> Racism and other institutional barriers have also meant that women of color, Native women, immigrants, and women with disabilities have felt the impacts of the pandemic more acutely.<sup>2</sup> Too many women are also continuing to experience discrimination and harassment on the job. Some women have reported that the pandemic and its impacts created an opportunity for increased sexual harassment and related retaliation, further threatening their safety and economic security.<sup>3</sup>

The courts play a key role in protecting the ability of all working people to challenge harassment and discrimination on the job and assert their rights to fair pay and safe working conditions, the right to organize a union and collectively bargain, and rights to equal access to opportunities at work. Whether it is the case of a Black woman experiencing the intersection of race and gender discrimination in a low-paid job or unions denied the right to collectively bargain for fair wages on behalf of its members, judges are tasked with interpreting and applying laws to achieve the proper result.<sup>4</sup> As the highest court in the federal judiciary, the Supreme Court has the power and responsibility to ensure that laws advancing gender and racial justice at work meaningfully allow for all working people to achieve equality, safety, and dignity on the job.

**As a district court judge, Judge Jackson demonstrated a fair and even-handed approach to the interpretation of the laws protecting working people's rights to be free from unlawful discrimination.**

Through careful application of the law and legal standards, Judge Jackson has protected the right of working people to challenge unlawful discrimination in the workplace. Title VII, the federal law prohibiting workplace discrimination based on sex, race, national origin, and religion, has repeatedly been interpreted by the Supreme Court in unduly restrictive ways that tip the scale in favor of employers. While bound by these restrictive precedents, Judge Jackson has demonstrated a thoughtful and balanced approach to analyzing these cases. For example,

- In **WILLIS V. GRAY**,<sup>5</sup> a former public school teacher challenged his termination under a district-wide reduction in force, alleging that the layoffs were not a budgetary measure but were a pretext to fire older, African-American teachers. Judge Jackson found that Mr. Willis was barred from challenging the legitimacy of the overall reduction in force since that very issue had been previously litigated by his union and decided by a court. Nevertheless, Judge Jackson permitted Mr. Willis to proceed on his more specific complaint that he had been unlawfully selected for termination under the reduction in force because of his race and age.<sup>6</sup>
- In **TYSON V. BRENNAN**,<sup>7</sup> Judge Jackson denied a motion to dismiss a post office employee's religious discrimination claim. There, a supervisor prevented Mr. Tyson, who identifies as Christian, from playing gospel music, when other employees were permitted to play secular music in the same work area. Mr. Tyson alleged that his original post was eliminated and he was transferred to another job location after having "several confrontations" with his supervisor about playing gospel music at work, and his supervisor later unlawfully denied him the opportunity to take a new position at his previous job site. Judge Jackson found that Mr. Tyson provided sufficient facts to form the basis of a religious discrimination claim under Title VII.<sup>8</sup>
- In **BADWAL V. UNIVERSITY OF THE DISTRICT OF COLUMBIA**,<sup>9</sup> Judge Jackson allowed an age discrimination lawsuit to proceed against a public university, finding that a professor's allegation that the university's human resource department, his department chair, and other university officials had pressured him to retire before abruptly terminating his employment made out a "plausible claim" for discrimination.
- In **LAWSON V. SESSIONS**,<sup>10</sup> Judge Jackson denied a motion to dismiss an age discrimination lawsuit against

the FBI. In that case, a Black woman and former employee of the Federal Bureau of Investigation (FBI) alleged that she was a victim of age, sex, and race discrimination because the FBI refused to reinstate her employment as a Special Agent after she resigned, claiming that forty-one-year-old Ms. Lawson had "reached the age" where she was no longer eligible for reinstatement. Ms. Lawson also brought retaliation claims, stemming from past EEOC complaints, alleging that her supervisor interfered with the processing of her underlying EEOC complaint and refused to investigate her allegations because she had previously filed discrimination claims against the agency.<sup>11</sup> Judge Jackson allowed the age discrimination and retaliation claims to proceed.<sup>12</sup>

In *Willis, Tyson, Badwal, and Lawson*, Judge Jackson was considering motions to dismiss, which are employer motions seeking to throw out a case before fact discovery or a trial. Even though Judge Jackson was not making a final decision as to whether the plaintiffs had or had not experienced discrimination in violation of the law, she was allowing the cases to go forward; this is especially important, as most employment discrimination cases never make it to trial.<sup>13</sup> Judge Jackson's approach demonstrates a thoughtful approach to the law that recognizes the importance of equal access to justice.

In **Ross v. Lockheed Martin Corp.**,<sup>14</sup> although Judge Jackson denied preliminary class certification and preliminary approval of a settlement agreement for a race discrimination class action, her opinion is based on a careful application of the law and reflects deep concern with the ability of working people to vindicate their rights. In *Lockheed Martin*, current and former African-American employees brought a putative class action alleging Lockheed Martin's performance appraisal system discriminated on the basis of race. Applying the Supreme Court's decision in *Wal-Mart v. Dukes*,<sup>15</sup> which made it much harder for employees to bring discrimination class actions, Judge Jackson found that the proposed class of more than 5500 current and former African-American employees, nearly all of Lockheed Martin's African-American employees between 2013 and 2016, did not have enough in common for their legal claims to be considered together as a class. In addition, Judge Jackson found that the proposed settlement agreement was not "fair, reasonable, and adequate."<sup>16</sup> The proposed settlement agreement would have provided for a \$22.8 million settlement fund and have required Lockheed Martin to make certain changes to its performance appraisal system. In exchange, all 5500 class members would have been required to release a broad

range of legal claims against Lockheed Martin, “including claims that [had] nothing whatsoever to do with Lockheed’s performance review procedures.”<sup>17</sup> The proposed settlement agreement, however, did not specify how much money each class member might receive from the settlement fund. In practice, then, class members would have to agree to waive “any and all racial employment discrimination claims of whatever nature, known or unknown,”<sup>18</sup> against Lockheed Martin, even those arising after the allegedly discriminatory actions at issue in the case, without even knowing the amount of money they were likely to receive as part of the settlement.

Judge Jackson was particularly concerned that the proposed agreement would have forced class members who did not respond to a proposed notice of settlement to also give up all potential race discrimination claims against Lockheed Martin even though they would not be eligible to receive any compensation from the fund.<sup>19</sup> As a result, the settlement was tilted in favor of Lockheed Martin and would have been unfair to some class members.

### Judge Jackson has protected the right of workers to collectively bargain and actively participate in decisions involving their working conditions.

While unions are beneficial for all workers, union membership is especially important for women workers.<sup>20</sup> Through collective bargaining, union members have been able to win economic security for themselves and their families, including higher and more equal wages and the right not to be fired without cause. Women experience especially large increases in pay, both absolutely and relative to men, when they are in a union, and just cause protections shield workers who bring complaints about discrimination and other workplace abuses from retaliatory firing. The presence of a union in the workplace also makes it more likely that working people will raise safety concerns and have access to affordable benefits – which is especially critical in light of COVID-19. Despite this, during the Trump administration agencies like the National Labor Relations Board significantly rolled back workers’ rights to unionize and collectively bargain.<sup>21</sup> When presented with these issues, Judge Jackson rightly decided the cases in favor of unions, restoring the status quo.

- In her first written opinion as a D.C. Circuit Court of Appeals judge, **AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES V. FEDERAL LABOR**

**RELATIONS AUTHORITY**, Judge Jackson wrote the opinion for the unanimous panel striking down an agency rule promulgated by the Federal Labor Relations Authority (“FLRA”) that would have restricted unions’ rights to bargain.<sup>22</sup> In 2020, the FLRA released a policy statement changing the standard for when federal government agencies are required to collectively bargain with their employees. The FLRA changed the standard from one holding anything more than a small or insufficient change in employment to trigger bargaining to one that held bargaining was only required over changes with a “substantial impact” on employment. The panel found that the FLRA’s decision to depart from precedent was arbitrary and poorly reasoned.<sup>23</sup> The panel ultimately rescinded the rule, reinstating the previous standard for when workers and federal agencies must collectively bargain, thereby ensuring that unions have a seat at the table to protect their members’ rights.

- As a district court judge, Judge Jackson authored the opinion in **AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO V. TRUMP**,<sup>24</sup> where labor unions challenged Trump administration executive orders designed to eviscerate the right of federal workers to collectively bargain and engage with union representatives.<sup>25</sup> She ruled that several provisions were unlawful, including limitations on the amount of paid time union members could allocate to union-related work, bans on employees communicating with Congress, and provisions impacting collective bargaining and employee removals. She reasoned that President Trump had exceeded his authority to issue these executive orders because the orders curtailed workers statutorily protected right to bargain.

Judge Jackson’s record demonstrates consistent, thoughtful legal analysis anchored by her respect for the laws protecting the rights of workers and her care in ensuring that these laws are interpreted consistent with their purposes. In addition, her professional experiences and personal background will add much needed diversity as she’d be the first former public defender and first Black woman to serve on the Supreme Court. Considering Judge Jackson’s record to date, elevating her to the highest court in the federal judiciary would be an important step for the protection of the rights of all working people.

- 1 Women shouldered the brunt of the job losses experienced during the pandemic, losing nearly 11.9 million jobs between February and April 2020—more than half of the total jobs lost during that time; and although men have now recouped all of their labor force losses since the crisis began, more than a million fewer women are in the labor force today than in February 2020. NWLC calculations using Bureau of Labor Statistics, “Employees on nonfarm payrolls by industry sector and selected industry detail, seasonally adjusted” Table B-1 in Employment, Hours, and Earnings from Current Employment Statistics (Washington, DC: March 14, 2022), <https://www.bls.gov/webapps/legacy/cesbtab1.htm> and Bureau of Labor Statistics, “Employment of women on nonfarm payrolls by industry sector, seasonally adjusted” Table B-5 in Employment, Hours, and Earnings from Current Employment Statistics (Washington, DC: March 14, 2022), <https://www.bls.gov/webapps/legacy/cesbtab5.htm>. Between February and April 2020, the economy lost 21,991,000 jobs. Women made up 11,872,000 or 54% of those lost jobs.
- 2 *Workplace Civil Rights Implications of the COVID-19 Pandemic: Hearing before the Equal Employment Opportunity Commission* (April 28, 2021) (Testimony of Fatima Goss Graves, President, National Women’s Law Center), <https://www.eeoc.gov/meetings/meeting-april-28-2021-workplace-civil-rights-implications-covid-19-pandemic/graves>.
- 3 *Id.* at 12.
- 4 The judiciary is responsible for “interpreting and applying the[] [laws] in cases properly brought before the courts.” *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597 (1923).
- 5 No. 14-cv-1746 (KBJ), 2020 WL 80565, (D.D.C. Feb. 18, 2020).
- 6 *Id.* at \*5–8.
- 7 306 F.Supp.3d 365 (D.D.C. 2017).
- 8 *Id.* at 370.
- 9 139 F.Supp.3d 295 (D.D.C. 2015).
- 10 271 F.Supp.3d 119 (D.D.C. 2017).
- 11 According to the complaint, Lawson’s former supervisor allegedly retaliated against her “[t]hrough improper complaint processing, an incomplete investigation of Plaintiff’s claims of discrimination, and the omission of any investigation of Plaintiff’s claims of retaliation of prior EEOC complaints.” *Id.* at 139.
- 12 *Id.*
- 13 Laura B. Nielson et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. of Empirical Legal Studies 175-201 (2010), [https://www.americanbarfoundation.org/uploads/cms/documents/jels\\_final.pdf](https://www.americanbarfoundation.org/uploads/cms/documents/jels_final.pdf)
- 14 267 F. Supp. 3d 174 (D.D.C. 2017).
- 15 564 U.S. 338, 131 S. Ct. 2541 (2011).
- 16 *Lockheed Martin*, 267 F.Supp.3d at 193; Fed. R. Civ. P. 23(e)(2).
- 17 *Id.* at 179.
- 18 *Id.*
- 19 *Id.* at 201-02.
- 20 Amanda Fins et al., *Unions Are Good for Women*, National Women’s Law Center (July 2021), <https://nwlc.org/wp-content/uploads/2021/07/Union-Factsheet-7.27.pdf>.
- 21 Celine McNicholas et al., *Unprecedented: The Trump NLRB’s attack on workers’ rights*, Economic Policy Institute (Oct. 16, 2019), <https://www.epi.org/publication/unprecedented-the-trump-nlrbs-attack-on-workers-rights/#:~:text=Under%20the%20Trump%20administration%2C%20the%20National%20Labor%20Relations,detriment%20of%20workers%2C%20their%20communities%2C%20and%20the%20economy.>
- 22 25 F.4th 1 (D.C. Cir. 2022).
- 23 *Id.* at 2-3.
- 24 *Am. Fed’n of Gov’t Emps., AFL-CIO v. Trump*, 318 F. Supp. 3d 370 (D.D.C. 2018), *rev’d and vacated*, 929 F.3d 748 (D.C. Cir. 2019) (finding that certain provisions of the executive orders conflicted with the Federal Service Labor- Management Relations Statute (FSLMRS). The D.C. Circuit reversed on the threshold issue of subject-matter jurisdiction, without reaching the merits of her determination concerning the lawfulness under the FSLMRS.)
- 25 Margaret Poydock et al., *The Trump administration finalizes rule attacking federal workers’ right to union representation in workplace discrimination cases*, Economic Policy Institute (Jan. 13, 2021), <https://www.epi.org/blog/the-trump-administration-finalizes-rule-attacking-federal-workers-right-to-union-representation-in-workplace-discrimination-cases/>.