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Brett Kavanaugh: Good for employers?

Advocates for business interests would find comfort in a would-be justice who could move the court from reliably pro-business to more resoundingly so.

By **Erin Mulvaney** | July 16, 2018 at 10:59 AM

A SeaWorld trainer drowned in 2010 when a killer whale pulled her beneath the water during a live show, marking the third fatal attack during a performance and sparking an investigation into **employment risks** at the Florida theme park.

Federal occupational safety regulators faulted SeaWorld of Florida LLC for exposing its trainers to recognized hazards, and the case made its way to the U.S. Court of Appeals for the D.C. Circuit. The court in 2014, **ruling** for the Occupational Safety and Health Administration, said SeaWorld failed to take steps to protect employees from the hazards posed by close contact between trainers and killer whales. The appeals panel was sharply divided.

Writing in dissent was Brett Kavanaugh, the longtime D.C. Circuit judge who is **now poised**to join the U.S. Supreme Court. His SeaWorld dissent and other cases siding with the employer telegraphs how he might approach labor and **employment issues** presented to the Supreme Court. The majority's decision, Kavanaugh warned, could allow OSHA to regulate Nascar races and NFL games.

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The broad question the case raised, as Kavanaugh put it: “When should we as a society paternalistically decide that the participants in these sports and entertainment activities must be protected from themselves—that the risk of significant physical injury is simply too great even for eager and willing participants? And most importantly for this case, who decides that the risk to participants is too high?”

The majority found there was ample evidence showing SeaWorld recognized its precautions were not adequate to prevent harm or death to trainers, and that employees could be protected without harming the business.

Advocates for business interests would find comfort in a would-be justice who could move the court from reliably pro-business to more resoundingly so. Worker advocates, meanwhile, are sounding alarms as Kavanaugh’s nomination, to succeed Justice Anthony Kennedy, advances in the U.S. Senate.

Sharon Block, a former Obama-era National Labor Relations Board member, **said in a post at the blog On Labor** that Kavanaugh’s D.C. Circuit record “demonstrates consistent support for the interests of employers and a lack of concern for the interests of workers and the government agencies” that are protecting worker rights.

“What stands out about Kavanaugh’s record in labor cases is not just his consistency in ruling for employers over workers, but the seemingly unnecessary positions he sometimes takes when doing so,” Block wrote.

Kavanaugh's critics point to myriad rulings to argue he tends to favor employers over employees. In the case ***American Federation of Government Employees v. Gates***, Kavanaugh in 2007 said the secretary of defense was empowered to abolish collective bargaining altogether. More recently, in 2012, Kavanaugh dissented in the case ***Miller v. Clinton***, where the majority revived a State Department employee's age-discrimination claims.

"To be sure, Congress could (and perhaps should) change the law and bar the State Department from imposing mandatory retirement in these kinds of circumstances," Kavanaugh wrote. He added: "But our job is to apply and enforce the law as it is written."

Kavanaugh's SeaWorld dissent dings regulators

Kavanaugh's dissent in the SeaWorld case opened with a laundry list of professions that carry risk: "Football. Ice hockey. Downhill skiing. Air shows. The circus. Horse racing. Tiger taming. Standing in the batter's box against a 95 mile per hour fastball. Bull riding at the rodeo." (And this was to name only some, as Kavanaugh carried his point a bit further.)

"The participants in those activities want to take part, sometimes even to make a career of it, despite and occasionally because of the known risk of serious injury. To be fearless, courageous, tough—to perform a sport or activity at the highest levels of human capacity, even in the face of known physical risk—is among the greatest forms of personal achievement for many who take part in these activities," Kavanaugh

wrote. “American spectators enjoy watching these amazing feats of competition and daring, and they pay a lot to do so.”

He said that although safety precautions must be in place, the Labor Department is not the proper body to decide these issues. Regulators, he said, do not have the authority to make these decisions.

“Why isn’t close contact between trainers and whales as intrinsic to SeaWorld’s aquatic entertainment enterprise as tackling is to football or speeding is to auto racing? The department offers no answer at all,” Kavanaugh wrote.

Judge Judith Rogers, writing for the majority, turned down Kavanaugh’s notion that OSHA had an “all or nothing” regulatory demand on its shoulders—the idea that the agency could not regulate SeaWorld if it did not also police the NFL.

“No principle of law requires a court, when reviewing a citation based on specific facts relating to one of several kinds of entertainment shows put on by a single employer, to reach beyond that citation and decide the hypothetical application of the statute to another industry,” Rogers wrote.

Rogers said at one point in her ruling: “We note, however, that had Congress intended all unsafe and unhealthy performances in the entertainment industry to be beyond the scope of employee protection, it could have included such an exemption in the Occupational Safety and Health Act, and it did not.”

A lawyer for SeaWorld, Eugene Scalia of **Gibson, Dunn & Crutcher**, was not reached for comment.

Fisher Phillips partner Richard Meneghello said Kavanaugh's appointment to the Supreme Court would solidify the pro-business leanings of the Roberts Court.

"This court will go from a reliably pro-business court to being solidly pro-business. It will be an uphill battle for employees to win many cases, if he gets confirmed," Meneghello said. "He looks for ways to rule for employers."

Brian Markovitz of Joseph, Greenwald & Laake, who represents victims of workplace injuries, predicted Kavanaugh's arrival at the Supreme Court—if he's confirmed—would usher in more 5-4 rulings.

"That's the real travesty of this situation. There was a point in time where the court viewed and based decisions on judicial scholarship and thought," he said. "Now, it's almost full politics."