

All ‘Jiggery-Pokery’ Aside: Justice Scalia’s Impact on Employment Law

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Allow me to be the palate cleanser to Mitch McConnell’s shotgun-wedding-esque “memoir” to Justice Scalia. Barely an hour after the Supreme Court announced Scalia’s death, McConnell briefly offered his condolences to Scalia’s family, but made the focus of his statement a political shot at President Obama. The Democrats returned fire, and since then, any mention of Scalia barely mentions his life and work, instead heading straight into the political implications of his death. Rather than follow in those footsteps, let’s take a few minutes to honor a brilliant legal mind and eloquent, though sometimes eccentric, writer, regardless of whether we disagreed with or cheered him on as he punched his way through argument after argument.

One of the dangers in rushing past Scalia’s life and legacy is that Scalia’s incredible complexity is grossly oversimplified. **Scalia is labeled simply as a “conservative.” His opinions, even in the Labor and Employment law field, reveal that his beliefs were much more complicated.**

He sided with employers in [Young v. UPS](#), arguing in his dissent for a narrower standard than the majority adopted. Scalia believed that the Pregnancy Discrimination Act only prohibited an employer from distinguishing between the abilities and inabilities of pregnant employees, but allowed employers to distinguish between accommodations for pregnant and non-pregnant employees. His narrower reading would have allowed employers to put in place specific, and perhaps lesser accommodations for pregnant employees compared to the rest of the employer’s workforce.

Yet in [EEOC v. Abercrombie & Fitch](#), Scalia sided with Samantha Eulaf, the headscarf-wearing job applicant who was denied a position for failing to comply with Abercrombie’s “Look Policy.” In his majority opinion, Scalia wrote that employers can be held liable under Title VII even if the applicant’s need for an accommodation was just a motivating factor in the employer’s decision not to hire her. Scalia’s opinion forced employers to affirmatively accommodate their employees’ religious practices instead of adopting a neutral stance.

Scalia again protected employees in [Thompson v. North American Stainless](#) when he wrote that Title VII’s anti-retaliation provision covers a broader range of employer conduct than previously thought, including adverse actions taken against a complainant’s spouse. But in *St. Mary’s Honor Center v. Hicks*, Scalia’s majority opinion made it more difficult for employees to win summary judgment motions. He refuted the argument that when a

trier of fact rejects an employer's legitimate, nondiscriminatory reason for the employment action, the employee is entitled to summary judgment.

Quickly labeling Scalia "conservative" misses what drives his judicial opinions: text. **The text of the Constitution, Title VII, and the Pregnancy Discrimination Act drove his opinions in these cases, and it was the interaction of words and phrases that caused him to favor employees in one case and employers in another.** Scalia transcended political labels.

To that end, Scalia's legacy is complicated and destined to be over-simplified in coming years. But perhaps the best way to learn about and remember Scalia are through the impressions he left on his colleagues:

Nino Scalia will go down in history as one of the most transformational Supreme Court Justices of our nation. His views on interpreting texts have changed the way all of us think and talk about the law. I admired Nino for his brilliance and erudition, his dedication and energy, and his peerless writing. And I treasured Nino's friendship: I will always remember, and greatly miss, his warmth, charm, and generosity. Maureen and the whole Scalia family are in my thoughts and prayers.

- Justice Elena Kagan

In years to come any history of the Supreme Court will, and must, recount the wisdom, scholarship, and technical brilliance that Justice Scalia brought to the Court. His insistence on demanding standards shaped the work of the Court in its private discussions, its oral arguments, and its written opinions. Yet these historic achievements are all the more impressive and compelling because the foundations of Justice Scalia's jurisprudence, the driving force in all his work, and his powerful personality were shaped by an unyielding commitment to the Constitution of the United States and to the highest ethical and moral standards.

- Justice Anthony Kennedy

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