

About the Author



Kerry Scanlon is a partner in the Washington, DC office of Kaye Scholer and is co-chairman of the firm's Employment and Labor Practice. He previously served as a top official in the Civil Rights Division of the US Department of Justice. His practice involves all aspects of labor and employment law, as well as other civil rights areas including disability rights, with particular emphasis on the litigation of both individual and class-based claims in these areas. He can be reached at kerry.scanlon@kayescholer.com

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Q&A With Kaye Scholer's Kerry Scanlon

Q: What is the most challenging case you have worked on and what made it challenging?

A: It was a death penalty appeal to the US Supreme Court, which is an area of law that has been a proud part of our firm's pro bono practice. This case involved an ineffective assistance of counsel claim on behalf of a person whose inexperienced appointed lawyer failed to investigate evidence of his client's mental deficiencies as mitigation for the penalty phase of the trial.

The case before the Supreme Court was complicated by the ambiguity resulting from two sections of a federal statute that govern the deference that a federal habeas court must give to state court factual determinations. The factual record in the case was also long and complex, and the key issue was whether the lawyer's decision not to investigate was the product of a strategy or inattention and neglect. The stakes in this type of case made the challenge and all the hard work well worth it and an honor to work on.

Q: What aspects of your practice area are in need of reform and why?

A: An issue I see coming up frequently that is in need of reform is the issue of administrative deference, particularly when the agency's

decision is influenced as much by policy goals as it is by statutory construction. This issue has come up recently in regard to the Fair Labor Standards Act, the Americans with Disabilities Act and state law issues as well.

The courts have struggled to find a consistent method for determining the proper amount of deference to apply, and the issue will be addressed in the US Steel case now before the Supreme Court, which involves the US Department of Labor's interpretation of whether the time spent donning protective clothing by steel workers is compensable.

Q: What is an important issue or case relevant to your practice area and why?

A: The way systemic or class-based employment claims are treated by the courts is an evolving issue that will continue to be extremely important in light of the Supreme Court's ruling in Wal-Mart, but the decision in that case is not the only developing issue affecting the litigation of broad or class-based claims.

The application of that decision to a traditionally more lenient standard for class certification under the FLSA, for example, is in play right now, and there are other issues that will continue to impact this area, such as the mandatory waiver of class claims and the application of Daubert to the class certification stage, which [was] presented in the Comcastcase before the Supreme Court.

Over the next five years these evolving issues will have a substantial impact on both the plaintiffs and defense bars as well as the courts deciding these types of claims.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: One of the most impressive attorneys I have worked with, which happened earlier in my career, is William T. Coleman Jr., a distinguished lawyer who worked with Thurgood Marshall and later went on to be the secretary of transportation and a successful lawyer in private practice.

Bill is a giant in the legal profession who was very interested in civil rights and employment issues and helped broker a compromise on the most important amendment to Title VII of the Civil Rights Act of 1964. He had both a broad view of what was most important on a given issue, as well as a keen sense of the details that were critical in resolving the issue.

Q: What is a mistake you made early in your career and what did you learn from it?

A: The first settlement negotiation I ever attended, which took place in a very small room, was quite ordinary in retrospect, but when the opposing counsel completed his initial presentation, I realized I did not know how I would respond to many of his arguments. I knew the case but made the mistake of not preparing well enough for the back and forth process of settlement negotiations and knowing how to respond to a 20-minute argument. The sense of personal confrontation in a small room was also something I had not prepared for.

Fortunately, there was a more senior attorney with me, and he had no problem responding to each and every argument. The lesson I learned was to anticipate everything and prepare for it.