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BARRIERS TO JUSTICE: EXAMINING EQUAL PAY FOR EQUAL WORK

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BEFORE THE

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BARRIERS TO JUSTICE: EXAMINING EQUAL PAY FOR EQUAL WORK

TUESDAY, SEPTEMBER 23, 2008

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:04 a.m., in room SH–216, Hart Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Feinstein, Durbin, Cardin, and Specter.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning. I want to thank everybody for being here, and, Ms. Ledbetter, Mr. Lorber, and Mr. Mehri, thank you all for being here this morning.

Seeing Senator Specter here and Senator Durbin, the Assistant Majority Leader, and Senator Feinstein, who is coming in slowly after a broken ankle, we had offered this hearing room to Senator Dodd, the Chairman of the Banking Committee because they also have a matter of some significance on today. But I think they have taken the large Dirksen room. I am told that this place actually was not large enough for the overflow there.

I have tried as Chairman to have a series of hearings showing how court decisions which we just read about in the papers, but how they affect Americans' everyday lives. Today, in addition to the Supreme Court, we are going to examine the importance of the Federal courts of appeal, since the Supreme Court only hears about 75 cases a year, and the courts of appeal, of course, hear thousands of them.

You would think especially now that equal pay for equal work would be a given in this country. Whatever work you do, no matter who is doing it, man or woman, they should be paid the same for the same kind of work. But the reality is still far from the basic principle. My friend Jill Biden reminded us all recently that American women still earn only 77 cents for every dollar earned by a male counterpart, and that decreases to 62 cents on the dollar for African American women and down to 53 cents on the dollar for Hispanic American women. Mrs. Biden is right to say that equal pay is not just a women's issue; it is a family issue.

So I am pleased to welcome to today's hearing a brave woman who is a champion for equal pay. I had a chance to have a long chat with Lilly Ledbetter earlier this morning. She embodies the classic American story. Let me just tell you about that. She was a

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working mother in a Goodyear tire plant. After decades of flawless service, she learned through an anonymous note that her employer had been discriminating against her for years. She was repeatedly deprived of equal pay for equal work. That affected her family, and, of course, the discrimination for all those years on her pay affects today her retirement pay.

A jury of her peers found that Lilly Ledbetter had been deprived of over $200,000 in pay. They ordered the corporation to pay her additional damages for their blatant misconduct. Incredibly, the United States Supreme Court overturned stepped in—remember, they only take 75 cases a year, but, boy, they wanted to step in on this one, and they overturned that jury verdict. They created a bizarre interpretation of our civil rights laws, and they ignored the realities of the American workplace.

Her employer, Goodyear Tire, will never be held accountable for its illegal activities. The Court's ruling sends a signal to other corporations that they can discriminate with impunity, so long as they keep their illegal activities hidden long enough. That is not the way it should be in America.

The current Supreme Court seems increasingly willing to overturn juries who heard the factual evidence and decided the case. In employment discrimination cases, statistics show that the Federal courts of appeal are 5 times more likely to overturn an employee's favorable trial verdict against her employer than they are to overturn a verdict in favor of the corporation. That is a startling disparity for those of us who expect the employees and the employers to be treated fairly by the judges sitting on our appellate courts.

Set to be argued before the Supreme Court this fall are several more cases affecting women whose very livelihoods hang in the balance. In addition to cases involving domestic violence protections and Title IX, they will consider cases that involve: whether retired employees should be penalized for leave they took related to their pregnancies; whether a children's musician, who plays the guitar, who had her arm amputated has any right to recover against the drug company that negligently caused her injury that caused her to lose an arm; and whether an employee asked to participate in an internal sexual harassment investigation could be fired simply because she reported sexual harassment in her workplace.

Now, when corporations discriminate against women paycheck after paycheck, it should not be tolerated. The civil rights protections enacted by Congress must be made real by enforcement. And one of the basic civil rights should be equal pay for equal work.

Our courts are an essential mechanism to enforce the civil rights laws that Congress has passed—laws that protect women, the elderly, minorities, and the disabled. The rulings are reduced to hollow words on a page if judges issue rulings like the one rendered by the Supreme Court in Lilly Ledbetter's case.

A few months ago when the Senate tried to correct the Supreme Court's unjust decision in the *Ledbetter* case, we fell just a few votes short of breaking through the Republican filibuster of that legislation. And a senior Republican Senator who was not present for the vote, and who thus effectively supported the filibuster, claimed that the real problem is not discrimination, but just all

those women need more training. I mean, this is outrageous in this day and age. You should hear what my wife and my daughter say about something like this.

And for those of us who know that women are more educated and better trained than ever before, it is a surprising perspective. Despite their training women still receive only 77 cents for every dollar that men make for the exact same work. So I hope that today's hearing will be a chance to recognize the realities of the American workplace, the importance of fairness, and the indispensable role that our Federal courts play in making sure that all Americans receive equal pay for equal work.

As the economy continues to worsen, many Americans are struggling to put food on the table, gas in their cars, and money in their retirement funds. And it is sad that recent decisions handed down by the Supreme Court and Federal appellate courts have contributed to the financial struggles of so many women and their families. I remind these judges they all get paid the same, and they get lifetime pay. They ought to look at the realities of the people in the workplace.

[The prepared statement of Senator Leahy, appears as a submission for the record.]

Senator Specter.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman.

I join you in welcoming our witnesses here today. I believe that the legislation which would have given Ms. Lilly Ledbetter a cause of action without being precluded by the statute of limitations, that legislation is sound and ought to be enacted. And I say that because every time Ms. Ledbetter received a check which was of a lesser amount than people in similar situations, she was discriminated against. And it seems to me that the logic of the situation favored the four dissenters in her case. Each time she was paid, she was paid less than a man in a comparable situation.

I think that a construction ought to be employed which gives the maximum realistic protection to women in the workplace. We all know the problems that women have and the glass ceiling and the difficulties which are involved so that where there is discrimination, there ought not to be a technicality on statute of limitations, especially such a short statute of limitations as 6 months to preclude a recovery.

The issue is a hard one, obviously, but my view is that that would be the appropriate way to administer this important area of law.

I regret that I am not going to be able to stay to hear the witnesses. This is supposedly the last week in our session, and it is a very tumultuous week with very, very heavy engagements on the economic crisis, which I am working on this morning. And we are trying to wrap up a lot of business in the Judiciary Committee, and it is one of the burdens of chairmanship that the Chairman has to stay. I would welcome that burden, but it is not mine, at least for the moment. But staff will be here, and we will be reviewing the testimony and following this important issue very closely.

[The prepared statement of Senator Specter appears as a submission for the record.]

Chairman LEAHY. When Senator Specter says that it is a somewhat tumultuous week, I chuckled because that is sort of a New England understatement. It is a wild week, and I appreciate him taking the time to come.

If Senator Durbin has no objection, Senator Feinstein is the only woman on the Judiciary Committee panel, and she serves with distinction here and also is one of our crossover members on the Intelligence Committee.

Senator Feinstein, did you have anything you would like to add?

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I would.

I would like to say thank you, Ms. Ledbetter, thank you for doing what you are doing. Those of us who have looked at the history of our Nation know that women have had to fight for virtually everything they have received. In the early days of our Nation, women could not inherit property, women could not get a higher education; and, of course, until 1920, women could not vote in this country. The discrimination in the workplace still exists.

I was of the generation that went out into the workforce in the mid-1950s and found that women need not apply, that it really did not matter how much graduate work you had for a given job. The belief was that a woman really could not do the job and do the job well. And there still is a legacy, I think, in our country of that problem.

Lower paychecks are not the only problem. In a recession, it has been shown that women actually suffer disproportionately under almost any economic measure. As a matter of fact, as of April of this year, women were losing jobs faster than men; women's wages were falling more rapidly than men's; women were disproportionately at risk for foreclosure and 32 percent more likely to receive subprime mortgages than men; women had fewer savings than men; and non-married women had a net worth 48 percent lower than non-married men.

Once retired, women actually find themselves in greater jeopardy. On average, we live 7 years longer than men, but we receive significantly fewer retirement benefits.

Among women above retirement age, some do not receive any benefits at all because they have spent their working years inside the home caring for their children. Women who did work outside the home were often paid significantly less than their male counterparts. Their pension checks, of course, reflect that fact, and they are lower than those of their male colleagues.

The problem is compounded even further, I believe, by bad company practices that leave women with no benefits at all for some periods during their careers. Before Congress passed the Pregnancy Discrimination Act, many employers refused to recognize women's health issues as health issues. These companies denied women benefits for the weeks or even months that they were forced home due to pregnancy-related medical issues.

So these problems really deserve our attention. Ms. Ledbetter, it is so important that you have done what you have done, because you cannot possibly know your check is lower until you know it. And if there is a statute of limitations that ends your rights before you have an opportunity to know that you were not paid equally or fairly or rightly, then you are sunk, so to speak.

I think you have raised a critical issue in our country. We now have a two-person family workplace. Generally, to earn enough money, both people in a household have to work in this economy. So it is critically important that we change the rules of the workplace to be able to reflect that, and I think you have struck a blow.

As you know, Senator Kennedy has a bill to reverse the Supreme Court's decision in your case. Many of us are cosponsors of that bill, and it might not pass this session, but I believe it will in the next session.

So I just want to say thank you very much for what you have done. Be courageous and stand tall and hang tough.

Thank you. Thank you, Mr. Chairman.

[The prepared statement of Senator Feinstein appears as a submission for the record.]

Chairman LEAHY. Thank you. And, Senator Durbin, thank you for your courtesy in letting Senator Feinstein go first. I will yield to you.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you to all the panel for being here.

This Committee approves judges and even Supreme Court Justices, and people come before us and say, You know, I am just going to call the balls and the strikes, just call them as I see them. You know, we just take the law and apply it. You know, it is really pretty simple.

And look what happened to you. One of the Supreme Court Justices—in fact, the Chief Justice, who said he was just going to call the balls and strikes, obviously decided who was going to win the ball game before the first pitch. And in this case, it was your employer, because the standard that they held you to was inconsistent with the law as it has been written and interpreted, and it is inconsistent with common sense. And you are going to tell us about that, as you have so many times, and I am glad you are doing it. You put a face on an issue, and you have also dramatized why elections are important. Presidents pick judges. Judges interpret laws. If a President picks a judge who comes to it with a certain prejudice, people like you lose. And that is what happened. That is a simple fact. And all these folks who talk about strict construction and, man, we are going to stick by the law and just trust me, you know, we are going to call the balls and the strikes—well, unfortunately, you are out and they are still in. But we have got a chance to change it.

Thank you.

[The prepared statement of Senator Durbin appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

Our first witness, as we have already said, is going to be Lilly Ledbetter, who worked at a Goodyear tire plant in Alabama for more than 20 years. She became the first woman to be promoted to supervisor. Now, that was a plus for them. What she was not told, of course, was that she was being paid less than her male counterparts. And she turned to the courts for justice. The Supreme Court denied her claim. Today she is a tireless advocate for fair pay.

Ms. Ledbetter, please go ahead, and hit that talk button and it is all yours.

STATEMENT OF LILLY LEDBETTER, RETIRED GOODYEAR TIRE EMPLOYEE, JACKSONVILLE, ALABAMA

Ms. LEDBETTER. Thank you. My name is Lilly Ledbetter, and I appreciate this opportunity to testify. I am sorry to say that I am a living example of the fact that pay discrimination continues to be a pervasive problem in the workplace. In addition, my case illustrates the barriers that courts put in the way when workers try to vindicate their civil rights.

I began working as a supervisor in the Goodyear tire plant in Gadsden, Alabama, in 1979. I worked for Goodyear for almost 20 years. I worked hard and was good at my job, but it was not easy. I was only one of a handful of women supervisors, and I faced obstacles and harassment that my male peers did not have to endure. Although I only found out about it later, I also was subjected to pay discrimination for virtually the entire time I worked at Goodyear.

When I first started, the managers got the same pay, so I knew I was getting paid as much as the men. But then Goodyear switched to a pay system that was supposed to be based on performance where people doing the same jobs got paid differently. Like most employers, Goodyear knew all the facts. It knew who was making what. It made the decisions about how much to pay each manager, and it knew whether its pay system was based on performance or something else. But the workers didn't know. In fact, Goodyear prohibited us from discussing our salaries.

I only started to get some hard evidence when someone left an anonymous note in my mailbox showing that three other male managers were getting paid between 15 percent and 40 percent more than I was.

I thought about just moving on, but I just could not let Goodyear get away with their discrimination. So I filed a complaint with the EEOC and afterward went to court.

It wasn't until I filed my case that I finally was able to learn what Goodyear had known for years: that it was paying me a lot less than all of the men doing the same work. Goodyear claimed that it was because I was a poor performer. That wasn't true, and the jury didn't believe it. They found that Goodyear had violated Title VII and awarded me the money I was owed.

But Goodyear appealed the verdict, and the Eleventh Circuit Court of Appeals and then five Justices of the Supreme Court ruled that although I continued to be paid less than the men right up to the date I filed my charge, I had complained too late. According to these judges, any pay discrimination complaint must be filed

within about 6 months of the first time a worker gets a discriminatory paycheck—no matter how long the discrimination continues, no matter how much damage it causes the worker, and no matter how much the employer knows that it is getting away with, and profiting from, its unlawful conduct.

This ruling just does not make sense in the real world. At a lot of places, you could get fired for asking your coworkers how much money they were making, and it is the employers, not the employees, who know how much they are paying each worker and who have the chance to correct any disparities.

The end result of the Court's ruling is that employers can pay workers less than they are entitled to for their entire careers and then pocket the difference. Equally disturbing, the higher courts rejected what had been the law in every part of the country. I am not a lawyer, but my counsel told me it was settled law that an employee could challenge each discriminatory paycheck she received. In fact, the law was so clear that the EEOC intervened on my side before the Eleventh Circuit.

But the Supreme Court took a law that had been applied to protect people like me and created a loophole big enough for employers to drive a truck through. And my case is only the tip of the iceberg. Companies have gotten the Supreme Court's message loud and clear. They will not be punished for pay discrimination if they do it long enough and cover it up well enough. Women from all over the country have told me how they are paid less for doing the same job as their male colleagues. And now there is nothing they can do. And courts have applied the Supreme Court's ruling in my case to all different kinds of cases, not just pay discrimination cases.

The Senate can restore the promise that the Supreme Court broke in my case by enacting the Lilly Ledbetter Fair Pay Act, a bill that simply restores the law to what it was before the Court's decision. The Senate can also restore the promise of the laws more broadly by insisting that judges understand the real world and are committed to upholding longstanding legal protections.

My case is over. I will never receive the pay I deserve from Goodyear. But Congress has the power to ensure that what happened to me never happens to anyone else. I am honored to be here today, and thank you for the opportunity to testify before this Committee. I am very grateful from the bottom of my heart for this opportunity.

Thank you, each one of you, for being here.

[The prepared statement of Ms. Ledbetter appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Ms. Ledbetter, and I appreciated very much the opportunity to talk with you about this before the hearing.

Lawrence Lorber is a partner in the Washington, D.C., office of Proskauer Rose LLP. He is an employment law practitioner. He counsels and represents employers in connection with all aspects of labor and employment law. He was formerly Deputy Assistant Secretary of Labor and Director of the Office of Federal Contract Compliance Programs during President Ford's administration.

Good to have you here, sir. Please go ahead.

STATEMENT OF LAWRENCE Z. LORBER, PARTNER, PROSKAUER ROSE LLP, WASHINGTON, D.C.

Mr. LORBER. Good morning, Chairman Leahy, members of the Committee. I am pleased to be here. As the Chairman said, my name is Lawrence Lorber, and I am a partner in the law firm of Proskauer Rose here in Washington.

The laudable goal of equal pay for equal work that we are discussing today is one that I am personally familiar with. Prior to entering private law practice, I served as the Director of the Office of Federal Contract Compliance Programs and a Deputy Assistant Secretary in the Department of Labor. The OFCCP enforces an Executive order which prohibits discrimination and requires affirmative action by Federal contractors, in addition to requiring affirmative action and prohibiting discrimination on the basis of disabled and veteran status.

During my tenure at the OFCCP, policies asserting that agency's authority to retrieve back pay for employees were formulated and successfully litigated. In 1990 and 1991, I was counsel to the Business Roundtable for the discussions which led to the 1991 Civil Rights Act, which reversed, I believe, 11 Supreme Court decisions and resulted in a marked change in employment discrimination law. And most recently, I have served as the Chair of the U.S. Chamber of Commerce's EEO Committee and, as such, have been involved—it has been my privilege to be involved with the recently enacted Americans with Disabilities Amendments Act.

I wish to discuss very briefly three points.

First is the impact of H.R. 1338, the Paycheck Fairness Act, simply as an example of a purported response to a problem, which I believe neither responds to the problem nor creates an appropriate legal framework to address equal pay concerns.

Second, I would like to briefly mention a series of Supreme Court decisions all of which have served to vastly expand the rights of employees, in particular expand and redefine the concept of retaliation under various employment laws which could deal with many problems, including perhaps some addressed by Ms. Ledbetter.

And, third, I wish to briefly discuss the issue of class actions and what they do in reality to employment discrimination.

The Paycheck Fairness Act. We have heard a lot about it. We are told that this will restore the law to the way it was before the *Ledbetter* decision. With all due respect, I do not believe that is the case. The Paycheck Fairness Act really changes the notion and the whole thrust of the Equal Pay Act, which is an Act which prohibits denial of equal pay for equal work without any necessity to prove intent by employers. That is a critical element and something that should not be cavalierly cast away. The Equal Pay Act finds its genesis not in 1963, but really back to the War Labor Board in the 1940s, when the issue was when women were entering the workplace and performing tasks not heretofore then performed by women they were required to receive equal pay. The War Labor Board established principles then which carry forward to 1963 and carry forward today that equal pay for equal work is the law and intent has nothing to do with that concept. So that we have a structure to deal with this issue, I think we may look to some legal issues involving litigation as to how you deal with it. But, never-

theless, that has been the law since 1963, predating Title VII, and it is the law today.

In terms of the Paycheck Fairness Act, I just want to briefly talk about three elements of that.

First, it would eliminate caps on punitive and compensatory damages. The Congress addressed that issue in 1991 when it passed the Civil Rights Act, established appropriate caps to respond to the individual harms that individuals who were found to have their rights violated and they could be recompensed for. Unlimited caps, unlimited damages does nothing to preserve that; rather, it does simply provide and create a legal lottery so the very few who get their case in court may get a windfall; the very many who have to wait in a long line do not receive anything.

Second, the Paycheck Fairness Act would eliminate employer responses, defenses, to pay disparities—disparities which might be occasioned by geographic differences, job differences, or any of the other types of issues that we address. And it does bring back before us the concept of comparable work where we have Government agencies setting compensation and salaries, not based on the market, not based on the realities of the workplace, but based on statistical models which may have no meaning in the real world.

Let me very briefly talk about judicial decisions. Senator Durbin spoke about it. Mr. Chairman, you spoke about it.

The Supreme Court had a series of decisions in the last 2 years. Most critically, it rewrote the law of retaliation, established broad coverage for employees who assert their rights to have a cause of action, even if the underlying cases that they bring are found without merit. The *White* case and other cases that I briefly discuss in my testimony point out the fact that the Court understands the importance of our employment laws and understands the importance of retaliation to prevent violations and to enhance the enforcement of those laws. We do know that the Supreme Court in the *Meacham* case vastly expanded the reach of the Age Discrimination in Employment Act. So we do not have a Court that is unwilling to face the law as it finds it, but we do have a Court that tells the Congress, "Rewrite the law if you want it, but we cannot make the law." And that to me is the teaching of this Court because this has been a Court which has countless times enhanced the rights, at least as it interpreted the laws that were written, enhanced the rights of employees. But it does not make the law. And we go back to cases such as *Ricks* v. *Delaware*, go back a long time ago where the Supreme Court said you have to bring the case when the case arises.

Let me just briefly sum up by saying that employment law, perhaps unlike other law, tends to be individualized. We look to the actions of managers—

Chairman LEAHY. And we will go into that on our questions. I must say I somewhat disagree on whether they interpret the law instead of making the law. We can cite a whole lot of cases where I feel this Court has made the law in areas that had been considered for years to be settled law.

[The prepared statement of Mr. Lorber appears as a submission for the record.]

Chairman LEAHY. Our next witness is Cyrus Mehri, a founding partner in the law firm Mehri & Skalet. Mr. Mehri served as class counsel in the two largest race discrimination class actions in history: *Roberts* v. *Texaco, Inc.* and *Ingram* v. *The Coca-Cola Company*. He is a frequent guest on radio and television, a guest columnist for Diversity, Inc.

Mr. Mehri, please go ahead.

STATEMENT OF CYRUS MEHRI, PARTNER, MEHRI & SKALET, PLLC, WASHINGTON, D.C.

Mr. MEHRI. Chairman Leahy, thank you for the opportunity to be here today alongside a genuine American heroine, Lilly Ledbetter. Her case illustrates a profound problem in the Federal courts and one that has been documented by a seminal new Cornell Law study, as well as some case studies I put in my testimony.

First, the Cornell study, which is in a Harvard law journal. There are two key takeaways I would like the Committee to walk away with:

First, the U.S. appellate courts are hostile to American workers. They treat employee cases very differently than other cases. When employers win at trial, they show deference to the fact finder and they reverse them 8 percent of the time. But when employees win at trial, they reverse them a stunning 41 percent of the time, and these are employees like Ms. Ledbetter who had their cases vetted by counsel, who overcame motion practice before going to trial, and convinced the fact finder that they were discriminated against, and yet the appellate courts reached down and reversed those trial victories.

This has a chilling effect, a debilitating impact on civil rights litigants, and the data in this study shows a 37-percent drop in Federal employment discrimination cases in our court system.

But Ms. Ledbetter is not alone. There are many other devastating stories of American workers. One, I would like to tell you the story of Mr. Anthony Ash and Mr. John Hithon, African American workers at a Tyson's plant in Alabama. The citizens who served on that jury heard evidence that these two employees had greater experience, had longer tenure, and were loyal employees of the company, and yet they were passed over for promotions. They also heard evidence of racial animus where the decisionmaker, their supervisor, would repeatedly call them "Boy" in the workplace, to the point that Mr. Ash's spouse came in and said, "My husband is a man, not a boy." They heard that evidence. They found discrimination. And yet the appellate court, the Eleventh Circuit, found that as a matter of law—a matter of law—that the use of "Boy" in the workplace is not evidence of discrimination. They created a whole new legal standard that for promotion cases the evidence has to jump off the page and slap you in the face, a standard that no law school in America teaches.

Now let me tell you the story of Susan Septimus who worked in the general counsel's office of the University of Houston. The Texas citizens serving on that jury heard evidence of a hostile work environment. They heard that she was forced to file a grievance with the university, but as soon as she did that, her supervisor retali-

ated against her by giving her a low performance rating, and then even wrote a memo to the file outlining the plan of retaliation.

The university hired an independent counsel who found evidence of retaliation and hostile work environment, and the jury, hearing all that evidence, found that they had retaliated against Susan Septimus. But, once again, the employer has an easy recourse. They can go to the court of appeals, and there the court of appeals reversed this trial outcome. They created a whole new legal standard that makes it impossible, essentially, for an employee to show evidence of retaliation.

So Ms. Ledbetter is not alone. There are literally hundreds of stories like this around the country that are imperiling our Federal judiciary from being a level playing field for American workers. Fortunately, I believe there is a path to turn this around, and that is to cast a completely new prism—create a new prism in the judicial nomination process, to cast a much wider net of who the potential nominees are than we currently do.

Right now we are only drawing from a very narrow pool of potential nominees. When you do that, you are going to have skewed outcomes like we have here, a 5:1 disparity against American workers. And that is not going to change until we start bringing in nominees who, as part of their life experience, like Justice Ginsburg, part of their work experiences have fought to open doors, have fought for American workers, have fought for the middle-class and have fought for small businesses. We do not have that in the judiciary right now. We have a judiciary that is predominantly-the attendance is predominantly lawyers who have worked for the most powerful. We have precious few who have worked for people like Ms. Ledbetter who just want a fair shake in the American judiciary.

Thank you, Chairman.

[The prepared statement of Mr. Mehri appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

Ms. Ledbetter, you can tell from my opening statement I am concerned that the courts reward employers who conceal their discriminatory conduct from their employees. You had mentioned to me earlier Justice Ginsburg's dissent, and it is a powerful dissent. Justice Ginsburg emphasized that pay discrimination is more pernicious than other forms of job discrimination because it is hidden from sight. It is not here in the Congress. Pay is transparent. People can just look up and find out what anybody is paid. Most private employers conceal pay data.

Now, you said in your testimony that you first heard about this when somebody left an anonymous note in your mailbox. Is that correct?

Ms. LEDBETTER. That is correct. And the four of us, the names on that paper, we were doing the exact same job, because there were four crews, A, B, C, D. And I was one of those people making 15 to 40 percent less than the other guys.

Chairman LEAHY. How did this discriminatory pay affect you, your family, your retirement?

Ms. LEDBETTER. It affected me a great deal while I was earning a living because I had two children that I needed to send to college.

They needed college educations. They needed clothes. They needed all of the normal expenses that a family has during that time. And, also, first-line managers were paid overtime, being time and a half, double time, triple time. That cost me a great deal, because when I was working those extensive hours, I was not getting the money that I was entitled to. And during that period of time I was working, my retirement was based on what I earned. My contributory retirement was based on what I earned. My 401(k) investment was based on what I earned. And then I learned when I retired that Social Security was also based on what I earned. And so it makes me be treated, in my opinion, like a second-class citizen for all of my life because it never can be changed.

Another thing I learned early on in the process is that once a person has to file a charge, there is no compensation that can ever adjust for your retirement losses. They do not ever consider that in any lawsuit. So that is gone. And I would have never waited any period of time. I would have gone to court immediately because I needed the money that I was entitled to at the time I was working.

Chairman LEAHY. Let me ask you a little bit about this. Mr. Lorber has suggested that the courts are telling the Congress, well, we are just enforcing the law, you can write the law differently. But a few months ago, the Senate tried to bring up legislation to overturn the Supreme Court's decision, and the Republicans filibustered even proceeding to it. I mentioned in my opening statement that there is a senior member of the Senate, a Republican, who did not even bother to show up for the vote. He claimed the real problem is "women just need more job training."

Now, you worked for this company for 20 years. You were deprived of over $200,000 in pay. Were you lacking the training that your male colleagues had to perform that job?

Ms. LEDBETTER. No, sir. In fact, I had more training than most because I saw the discrimination early on, me being the lone female, so I was a member of a management association that is national. In fact, I was the first female president that was ever elected to head up that organization that was 95 percent men at the time. And we offered a lot of management courses that were very expensive, and I paid for those. I had over 100 professional courses that I was taking from Auburn University, University of Alabama, University of Georgia, anyone else that offered them. I had more training than most people at the plant.

Chairman LEAHY. Would it be safe to say you do not want to be dismissed by somebody who said, "I will pay you less just because you need more training"?

Ms. LEDBETTER. No, sir. I am very offended by that statement.

Chairman LEAHY. I can imagine.

Ms. LEDBETTER. Very offended.

Chairman LEAHY. So am I. So am I.

Ms. LEDBETTER. And the medical doctor that I participated in a meeting last weekend in New York, she would agree as well. She is a physician. She did not need any more education either.

Chairman LEAHY. Thank you. My time is up.

Senator Feinstein.

Senator FEINSTEIN. And I am going to try to keep to the strict time limit here. Thank you very much.

I was interested, Ms. Ledbetter, in what you said to Senator Leahy, that the way you found out was you received a note from someone. Is that right?

Ms. LEDBETTER. That is correct.

Senator FEINSTEIN. And that note said that you and three other people were being discriminated against with respect to your pay?

Ms. LEDBETTER. It was just—mine was the only one that had on it extremely low pay. In fact, at that particular time I worked, I was a supervisor in the tire room, the only female.

Senator FEINSTEIN. And what percent was your pay below the men?

Ms. LEDBETTER. Between 15 and 40 percent. Some of them were being paid 40 percent more than mine at that time.

Senator FEINSTEIN. I see. Then what did you do about it? Who did you talk to at Goodrich about it?

Ms. LEDBETTER. I went straight to EEOC.

Senator FEINSTEIN. And what did they say?

Ms. LEDBETTER. They did some investigation, and they called in a few days and said that I had one of the best cases that they had ever seen, but they were so backlogged that I might want to consider getting an attorney and going forward.

Senator FEINSTEIN. Did you ever talk to any of the leadership at the company?

Ms. LEDBETTER. They hired an arbitrator from Texas that called me and made me an offer of $10,000, which that was such an insult to me, knowing, looking back and calculating how much money that I had lost, there was no way. I just could not accept it, and seeing and knowing the injustice, what had been done to me and other people at that factory. And there were two other women who testified at my trial. One of them had been a supervisor during the time that I had been. She had previously been a union worker and was promoted. She finally had taken all the harassment that she could stand, and she sold her service. And at the time she testified for me, she was a supervisor for Honda in Alabama. But they asked her why she never complained, and she said, "Well, if I had complained, I was a divorced mother with a handicapped son, we live paycheck to paycheck. I could not afford to miss my check."

Senator FEINSTEIN. Of course, I am not recommending this, but the thought does occur that if every working woman were to take Goodrich tires off of their car, that might sensitize Goodrich. It is an interesting thing to me that increasingly as a society becomes more sophisticated, the leadership substitutes arbitrators—

Chairman LEAHY. It was Goodyear. It was Goodyear, not—

Senator FEINSTEIN. Well, all right.

Chairman LEAHY. It was Goodyear, not Goodrich. Entirely different companies.

Senator FEINSTEIN. Yes, right.

Ms. LEDBETTER. It was Goodyear.

Chairman LEAHY. I do not want to see people pulling the wrong tires off.

Ms. LEDBETTER. Neither do I. Neither do I. But you can pull the Goodyears off.

[Laughter.]

Senator FEINSTEIN. I am going to check mine. I am going to go check my tires.

Ms. LEDBETTER. You do that.

Chairman LEAHY. I can see my wife checking the tires right now on my car.

Senator FEINSTEIN. But something has to sensitize them, I think, to this concern. There is no greater issue among working women, poll after poll after poll has shown, than wage disparity. And it has got to be changed in our society. And it is not going to be changed, I believe, by arbitrators and conciliators and the middlemen.

Ms. LEDBETTER. No.

Senator FEINSTEIN. It is going to be changed by the CEO of the chairman that says this will not go on within our company.

And so I think—aside from the legislation, which I support—some of us who are in the working women world ought to put our heads together and see what we might be able to do to sensitize the top leadership of the company.

Now, having said that, this is a very difficult time because of what is happening in the investment and Wall Street community. But notwithstanding that, I think CEOs have to understand that this is a new day and that women have tremendous obligations of home support, family support, tuition, insurance, all kinds of things they have to pay and be responsible for. So no longer can this be tolerated in the workforce.

You are leading the way, and, again, I just want to say thank you very much.

Ms. LEDBETTER. Thank you for that. I do appreciate it, because this will never gain Lilly Ledbetter a dime, what I am doing today. But I have heard from so many people across this country, not just in the South. I originally thought it was a Southern problem. It is not. This is all across the United States. And we minorities are entitled to be treated fairly and paid fairly, and it is no longer just the females' problem or the minorities. It belongs to—it is a family issue because it affects all aspects of a family. You are exactly right in your statement. It does affect the whole bit.

Senator FEINSTEIN. Could I ask you one last question?

Ms. LEDBETTER. Yes.

Senator FEINSTEIN. What do you figure in terms of back wages you are entitled to?

Ms. LEDBETTER. That I am entitled to?

Senator FEINSTEIN. Yes.

Ms. LEDBETTER. It would be very difficult, I would have to go back and look at all the overtime, because it was not uncommon for me to work 12-hour shifts. We were on a continuous operation, and when my peer on the other shift was out, I was required to work his shift as well as mine. And there was one 3-month period that I worked 3 months, 12 hours at night, and I was required to be there an hour early and stay over an hour after the shift. And it was a 35-minute drive to where I lived. So, needless to say, I did not sleep much or eat much, either. I was primarily working. So it would be quite a bit.

And then my retirement, my contributory retirement was a percentage of what I was earning, and Goodyear matched it. And then the 401(k), I put in 10 percent, which was the max allowable. And

they matched with 6 percent stock. And at that time in those days, the stock was running around $77 per share. So I missed a lot of money just on that.

It is a tremendous amount of money.

Chairman LEAHY. The jury found $200,000, didn't they?

Ms. LEDBETTER. That is correct. And, also, the back pay, that is another problem that some in the Supreme Court said, why, people, if this was changed, people would be coming out of the woodwork filing lawsuits. That is not true because there is no incentive. I can only go back 2 years. That is the law. Nothing is changed about that, and I knew that when I filed my charge on going back for equal pay. You are only entitled to 2 years. And they took, the courts took the lowest-paid person in the department and calculated my back pay, which would have been, without overtime, just $60,000. I lost that. The Supreme Court took that away. They said that we should have had that all in one—in two different cases. Well, my attorney in Birmingham, Alabama, started out in two different cases. But the judge there said put them all together because they would all come under Title VII, Equal Pay.

And this gentleman is exactly right. Equal Pay passed in 1963. And why in 2008 are so many, so many women not being paid fairly?

And the other gentleman is exactly right. They are first to be laid off, they are the first to be cut, their wages and their work shifts.

Senator FEINSTEIN. Thank you.

Chairman LEAHY. Thank you.

Senator Cardin of Maryland is here. Please go ahead.

Senator CARDIN. Thank you, Mr. Chairman.

I want to really thank Senator Feinstein and thank our Chairman, Senator Leahy, for what they have done throughout their entire career to speak out and to do everything they can so that we address the inequities of pay in this country. They have been true champions, including my senior Senator, Senator Mikulski, who has been in the forefront on this fight. And I thank all three of our witnesses for your fighting for this, and for your continuous support for the right causes.

And I must tell you, Ms. Ledbetter, I think you will have done more for equal pay than just about any other person. And I know that you will not benefit directly. But you have done a lot for our country.

You are right, we have been struggling for this for many years. I was in the State legislature when we passed an equal pay statute, and still we have the inequities in our own State. And the Supreme Court decision in your case is just so outrageous, it defies logic. How are you expected to be able to file a claim if you did not know about it, that you were being discriminated against? That defies just common sense.

And I think Americans understand that what this Nation stands for, our basic protections of treating people fairly, is a protected right. And yet the Supreme Court by its 5–4 decision effectively said there is no way to enforce the right of equal pay for equal work.

And your courage and what you continue to do by being here as a witness—and I was with you in Denver, and I appreciate the fact that we got information out, had that opportunity. I think you have really put the conscience of America behind this issue, and I really just wanted to thank you for that. You are right, it is a critical issue for the individual. It is economic security. If you are not paid fairly, you are being robbed of the proper compensation for the work that you are doing. But it affects more than just your paycheck. It affects your retirement, and we are struggling with economic security for retirees. And women are at a terrible disadvantage today because of the compensation issue as one of the major factors of why women are not as well prepared for retirement security as their male counterparts.

So it is beyond just the paycheck that you receive. It affects your entire security. It affects your family's security. I believe it affects the economic security of America. I think we are being robbed of the right system, and it is affecting all of us, and it certainly affects the moral fiber of our Nation, what we stand for. The principles of America are very much challenged by these efforts.

So I just really wanted to take the time to be here to thank all three of you, all three of our witnesses, and to let you know that we will continue to make sure that this is corrected. It is important not just for the individuals who are being discriminated against. This is critically important for our country. It is what we stand for. It is our highest priority, protecting the rights of our citizens. And I think your presence here today gives us additional energy to continue this battle until we have won.

Thank you.

Ms. LEDBETTER. Thank you, sir.

Senator FEINSTEIN. Thank you, Senator Cardin. I think your words are well stated, and I think we all agree with them.

Senator Leahy just absented himself for a few moments, but I think unless there are additional things that any member of the panel has to say—oh, he is back. I was just going to adjourn the hearing.

Chairman LEAHY. Thank you. As we have said, we are all trying to cover about three different things because of the financial matters going on. I apologize. I had to return a phone call on that.

Mr. Mehri, I have read a number of these reports you have talked about, but I have also looked at this Harvard Law and Policy Review, "Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?" You have practiced in this area for years. Under the Cornell study, Federal courts of appeals are five times more likely to overturn a trial verdict in favor of an employee than they are to overturn a verdict in favor of an employer.

You refer to it basically as an anti-employee bias in our Federal courts. Is that something that surprises you? You have practiced there for years.

Mr. MEHRI. Chairman Leahy, I knew we had an uphill battle. But when I found out that there was a 5:1 disparity against employees from our U.S. appellate courts, I was shocked. And it pains me because I know the struggles that workers have like Ms. Ledbetter, hundreds or thousands of employees around the country who are just trying to get their fair shake in our Federal courts.

And when they overcome all these obstacles to get to the point where they have a fact finder, they have a case of substantial merit if the jury or the judge ruled in their favor, to have these appellate courts this hostile to employees, finding every way possible to rule against the employee, rewriting the law, ignoring the deference that one should have to the fact finder who is there hearing the witnesses, that shocks me. And it puts our civil justice system on a very weak foundation and imperils our civil justice system.

There is a connection between your hearing today, Chairman, and the other hearings today about the economic crisis, because what has happened is that ideology has been the No. 1 criteria for these nominees, now let's have a broader perspective. In both examples, the workers are the ones who are suffering.

Chairman LEAHY. Well, some of us have been troubled by not just the courts' policy, but in this case, the Equal Employment Opportunity Commission, the EEOC, which, as all three of you know, is charged with enforcing Title VII, they filed a brief in support of Ms. Ledbetter before the Eleventh Circuit. But when it came up to the Supreme Court, the Solicitor General of the United States, who normally would be expected to support EEOC's interpretation, he filed a brief against Ms. Ledbetter.

Mr. MEHRI. That troubles me, Chairman, because the experts are the EEOC, and as Justice Ginsburg pointed out in her dissent, they actually have a common-sense paycheck accrual rule in part of the EEOC manual. They are the experts. They are on the front lines. And when the Solicitor General overruled them between the U.S. Court of Appeals and the U.S. Supreme Court, I think that has had a chilling effect on the EEOC on subsequent cases that are going to go before the Supreme Court. I caution the Committee to take a look at that because when you politicize something like this, the losers of it in this circumstance is America's commitment to civil rights.

Chairman LEAHY. Mr. Lorber, I gather you would not agree. Is that—or do you agree?

Mr. LORBER. No, I do not agree, Mr. Chairman. With all due respect, you are looking at cases such as Ms. Ledbetter's case which are cases of procedure, which are cases as to when one knows the wrong has occurred, when one should bring the case.

Now, the statutes are clear as to when you have to bring your cases. In employment, evidence gets stale very quickly. The decisions, with all due respect, are not made by the CEOs. They are often made by managers in plants throughout the country. And the notion that you could wait and bring a case 2, 3, 5, 7, 10 years after an act occurred when the actor may no longer be available to explain why he or she made that act simply makes no sense.

Chairman LEAHY. But doesn't that kind of beg the question? Ms. Ledbetter did not know about the discrimination. But Goodyear did know about the discrimination. They knew they were discriminating. They kept it hidden. She had no way of knowing it. Workers do not have any incentive to sleep on their rights. But if the discrimination went on all that time, why shouldn't they be able to challenge it? Remember, there are four members of the Supreme Court who obviously disagreed with your position. Justice Ginsburg wrote a very compelling dissent in that.

Just as a matter of fairness, I find it difficult that if a company discriminates against an employee, they keep that discrimination hidden and do it in such a way that the employee does not realize they are being discriminated against, and then when they find out subsequently, the employer can then step forward and say, "You should have discovered it before now. We hid it. We had all the ability to hide it. You had no way of knowing it. But, gosh, we got away with it." Is that fair?

Mr. LORBER. The way you articulate it, I have questions about it, but I would simply say that there are alternatives. What is being asked for now is an unlimited time to bring cases when the evidence simply is stale. You have made it clear throughout your career, which is distinguished beyond anything anybody else could aspire to, that you began as a prosecutor. You know about stale evidence. You know when the evidence has to be brought.

There are other proposals, I understand, before the Senate, Senator Hutchison and others talking about discovery rules, rules which would enable the matter to be brought when and if the matter is discerned and understood. But what has happened here, what employers are being asked to deal with are cases that might be 20 years old. We know, fortunately or not, that the places of business where the acts occurred may no longer exist. And to ask that there be liability, this unlimited liability, liability which simply turns the Equal Pay Act on its head in a manner that does not reflect what the intent of these laws were does not seem to make sense.

If, in fact, there are these types of problems, the Congress dealt with it in—

Chairman LEAHY. But there are things—I mean, you talk about the criminal law and the statute of limitation. Obviously, there are some cases where the statute of limitation never runs. Some cases are considered serious enough even if the case is brought 45 years later, it can still be brought. And, of course, I agree with you about the difficulty in finding evidence on that. But there are other cases that are very specific. The analogy I would use, if somebody flees a jurisdiction to avoid prosecution, the statute does not start running in most jurisdictions. I would argue that if you hide what you are doing, the statute should not run either. Obviously, we disagree on this point, and obviously, I find the dissent more compelling than the majority. But I also wanted, because I knew you disagreed with what Mr. Mehri said, I wanted you to have a chance to state it.

You talked about the Hutchison bill. Are you familiar with that bill, Ms. Ledbetter?

Ms. LEDBETTER. Yes, sir.

Chairman LEAHY. Would that have helped? If that had been law at the time of your case, would that have helped you?

Ms. LEDBETTER. No, sir. No, sir. The only thing that would have helped me is the law as it was prior to the Supreme Court ruling the day of the—May 29th, I believe, of 2007. If the law had stayed like it was and the Supreme Court had interpreted the law like it had been, I would have been fine. The system worked for me, and I would like to point out, too, that there is never an incentive for anybody to sit and wait to file a charge, because one—I would like

to tell the Committee, too, that I filed an EEO charge in 1998, early, and this is 2008, and I am still talking. And the ruling did not come down until May of 2007. A person has to give up a lot of their life to go through something like this, and it is very difficult. It is not easy. And there is no incentive because I was working for my family and I needed every dime that I possibly could have earned. That is why I worked every hour of overtime I could, and I would have gone immediately—which I did when I knew. I never knew any earlier.

The Hutchison bill, the way I understand it, is not right on the point of when you know. It is when—something like you might have known or should have known or—and I am not a lawyer, I am not an expert, but it would not have helped me. The Lilly Ledbetter Fair Pay bill, as it is written, is the only correct way to put the law back, and it is very simple. Very simple. It should be a law that Democrats and Republicans could agree on because it is a human rights, civil rights solution to the problem.

Chairman LEAHY. Well, Ms. Ledbetter, I can assure you I am one of the ones who knows it is going to be here next year because of the 6-year term. This bill will come back up.

Ms. LEDBETTER. Good.

Chairman LEAHY. I would urge Senators not to avoid voting on it. I would hope that they would allow us to vote on it. And, frankly, I will not take as an excuse in a vote against it—I will not agree with somebody who says, "Well, women just need more training."

Ms. LEDBETTER. No. No, we don't. No more education either.

Chairman LEAHY. When my wife went back to nursing after raising kids, I know the kind of training she had just to get recertified and to get her RN license. She and male nurses were getting exactly the same training.

I will keep the record open, Mr. Lorber, if you want to add, of course, to anything that was said there. In fairness to you, we will. Mr. Mehri, the same; Ms. Ledbetter, the same.

I apologize for the lack of people here, but this really is, in my 34 years here, one of the most extraordinary times in the Senate, and Senators are all over the place.

So thank you very, very much, all three of you.

[Whereupon, at 11:10 a.m., the Committee was adjourned.]

[Additional material is being retained in the Committee files, see Contents.]

[Questions and answers and submissions for the record follows.]

QUESTIONS AND ANSWERS

LILLY LEDBETTER RESPONSES TO QUESTIONS FROM THE SENATE JUDICIARY COMMITTEE ON "BARRIERS TO JUSTICE: EXAMINING EQUAL PAY FOR EQUAL WORK"
OCTOBER 14, 2008

Questions from The Honorable Patrick Leahy

Question 1:

Last June, the House Judiciary Committee's Subcommittee on the Constitution held a hearing on "the impact of *Ledbetter v. Goodyear* on the enforcement of civil rights laws." During that hearing, Mr. Neal Mollen, on behalf of the Chamber of Commerce, testified that Justice Ginsburg's concern, that it is often unfair to expect a worker to possess sufficient information to conclude that discrimination has occurred in time to meet a statute's filing deadlines, was "misplaced." In particular, Mr. Mollen contended that, in your trial and in your Congressional testimony, you testified that you knew you had been the victim of discrimination years before you filed your charge with the EEOC. Is that correct? How do you explain your trial and congressional testimony?

Answer 1:

As I state in my response to Senator Specter's question, both my deposition and my Congressional testimony show that I simply had no proof that I was being paid less than each of my male peers – much less that any disparity was the result of discrimination – until I got an anonymous note in 1998 laying out the salaries of each of the male managers in comparison to my own. At that point, I immediately went to the EEOC to file a charge. As a result, Mr. Mollen is simply wrong that I knew that I had been the victim of discrimination years before I filed my charge.

But Mr. Mollen is also dead wrong on the larger point. Workers typically do not have information about the amounts their coworkers are paid; in fact, many employers, like Goodyear, penalize employees who discuss their salaries. And even if employees do know what their coworkers make, the criteria that employers use to set salaries are a big secret; it's information that is solely in the possession of the employer, leaving employees with no way to evaluate whether there is a discriminatory reason for any disparity. So putting the onus on employees to figure out when they have been subject to discrimination does not take account of the realities of the workplace and shields employers, who are in control of pay decisions and have all the relevant information, from responsibility for their actions. It is only through enactment of the Lilly Ledbetter Fair Pay Act, which makes clear that workers can challenge each discriminatory paycheck they receive, that Congress can undo the damage caused by the Supreme Court's decision in my case and restore the law to where it was.

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Question 2:

At the Senate hearing, Mr. Lawrence Lorber testified that the *Lilly Ledbetter Fair Pay Act* would provide incentives for employees to wait for years, if not decades, to challenge pay discrimination by their employers – and could even wait until years after they had left the company. Do you agree with Mr. Lorber that the *Lilly Ledbetter Fair Pay Act* creates these incentives? Why or why not?

Answer 2:

I firmly disagree with Mr. Lorber's assessment. In the real world, employees have no incentive to wait to complain about being paid too little. They may be afraid that if they complain they will lose their jobs, but it only hurts them to wait. For the vast numbers of employees who live paycheck to paycheck, any increase in that check is sorely needed. Delay is costly – both because we need every penny we can earn, and because our raises, bonuses, pensions and other benefits are often based on the amounts we make in salary. We thus have every incentive to file charges as soon as we possibly can, to make sure that we begin earning the amount to which we are entitled as soon as possible. Add to that incentive the fact that Title VII limits the amount of backpay recovery to the two years preceding charge filing. As a result, any failure to promptly challenge pay discrimination means that employees will permanently forfeit any monies they would have been owed for longer periods. There is simply no such thing as the big kill in employment discrimination cases, so waiting only harms employees.

Mr. Lorber is particularly ill-informed in saying that the *Lilly Ledbetter Fair Pay Act* would authorize employees to wait until years after they left the company to file EEOC charges. In fact, under the Act, the period for filing a charge runs from the last discriminatory paycheck an employee receives. If an employee has left the company, her right to challenge discriminatory pay thus expires 180 days from the date on which she was last paid by the company. It is simply incorrect to suggest that the *Ledbetter Fair Pay Act* allows suits by former employees years after they have left a company's employ.

Questions from The Honorable Arlen Specter

Question 1:

You testified that while employed by Goodyear, you were not aware of the differences between your pay and that of your male counterparts until someone left an anonymous note in your mailbox. However, during your deposition in the case, you testified that you knew in 1992 (six years before you initiated your claim) that you were being paid less than your male counterparts, and suspected it was due to gender discrimination (Testimony at pages 122-123).

Can you clarify for the record when you were first aware that you were being paid less than your male counterparts?

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Answer 1:

My deposition testimony in my case and my testimony before this Congress both demonstrate the same fundamental facts: that I did not have any evidence, until I received an anonymous note in my mailbox in 1998, of either how much less I was making than my male counterparts or of the fact that the differences were the result of sex discrimination. Prior to that time, my coworkers had bragged to me about the amount of overtime pay they were getting, and I knew from my managers that my salary fell short of the midpoint level set for my job category. But the frequent boasts of my coworkers had often in the past proved to be absolutely false. And the fact that I was below the midpoint told me nothing about the amounts Goodyear was paying to any individual coworker, or what the basis for those calculations was.

In addition, I knew from my experience filing a prior sexual harassment charge with the EEOC that I could not go to the agency with a complaint unless I had some proof beyond idle gossip – and some very specific information. And I did not want to endure the workplace abuse and retaliation that I suffered after filing my sexual harassment charge unless I was confident that I had a solid basis for my claims. I did not have even a minimal level of proof until I received the anonymous note in 1998.

At bottom, this question illustrates the problem with assessing when an employee "knew or should have known" that she has been subject to pay discrimination. Had this standard been in effect when I brought my case, would a court have found that I "should have" filed a charge based on the boasts and gossip of my co-workers and dismissed my case for failure to do so? If so, I would have ended up being penalized for wanting to wait until any suspicions that the gossip might have raised in my mind were confirmed or to see if my employer might voluntarily fix any disparity. In fact, my managers had told me, when I got a Top Performance Award, that they would be raising my pay to the level of my peers. It was only when I got the note in 1998 that I realized that they had failed to do that and that I saw how much less I was earning than the other supervisors.

As a result, basing the time when an employee should file an EEOC charge on the point at which she theoretically "should have known" about discrimination makes no sense and is surely a disservice to both employers *and* employees. It is also a disservice to the courts, which will have another issue that will have to be decided. All would instead benefit from the certainty and predictability of the long-standing approach taken in the Lilly Ledbetter Fair Pay Act, which remains the only bill that would fix the problems caused by the Supreme Court's decision in my case and restore the law to the way it had always been enforced.

Question 2:

Why did you decline to pursue your claim under the Equal Pay Act before the U.S. Court of Appeals for the Eleventh Circuit?

Answer 2:

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As you know, I am not an attorney and was relying on the advice of my counsel at each stage of the legal proceedings. But as I understand the situation, the magistrate judge who initially heard my case recommended dismissing both the Title VII and the Equal Pay Act claims on the ground that there was a nondiscriminatory reason for the pay disparity. The District Court then held that there were factual disputes that prevented that conclusion, but for some reason only reinstated the Title VII and not the Equal Pay Act claims. The jury then awarded me $3.8 million on the Title VII claim. At that point, I assume, my attorneys believed that there was no reason to pursue the Equal Pay Act claim.

Had I and my attorneys known that my Title VII claim would end up being dismissed on a wholly different basis, we likely would have decided to pursue my Equal Pay Act remedies. And those remedies, which are not the same as those under Title VII anyway, are also not available to those who are subject to pay discrimination based on race, national origin, religion, age or disability. As a result, the Equal Pay Act is no substitute for passage of the Lilly Ledbetter Fair Pay Act.

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October 14, 2008

VIA E-MAIL (Justin_Pentenrieder@judiciary-dem.senate.gov) AND U.S. MAIL

Hon. Patrick J. Leahy
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510
ATTN: Justin Pentenrender, Hearing Clerk

Re: Lawrence Z. Lorber's Responses to Questions from The Honorable Arlen Specter "Barriers to Justice: Equal Pay for Equal Work"

Dear Chairman Leahy:

Thank you for this opportunity to respond to Ranking Member Arlen Specter's questions following the United States Senate Committee on the Judiciary hearing regarding "Barriers to Justice: Examining Equal Pay for Equal Work" on September 23, 2008. My responses to your questions are below.

1. Some argue that Title VII of the Civil Rights Act of 1964 does not adequately account for victims of discrimination who do not know they are being discriminated against during the statutory filing period.

- **To what extent does current law provide a day in court for victims of discrimination who otherwise might not meet the statutory filing period because they did not have enough information to know they were being discriminated against?**

RESPONSE:

The U.S. Equal Employment Opportunity Commission ("EEOC") and federal courts apply three longstanding legal doctrines to assure that victims of discrimination who lacked enough information to know they were being discriminated against have their day in court: (1) the discovery rule; (2) the equitable tolling doctrine; and (3) the equitable estoppel doctrine.

The extent to which federal courts apply such doctrines and whether they do so with consistency may be an appropriate area for Congress to examine, rather than effectively extending the filing period indefinitely.

1. The Discovery Rule

The "discovery rule functions . . . to postpone the beginning of the statutory limitations period from the date when the alleged unlawful employment practice occurred, to the date when the plaintiff actually discovered "that the employer had made the allegedly unlawful decision. *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d 1994). Thus, the common law discovery rule "postposes the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990).[1]

Importantly, the discovery rule does require diligence on the part of the plaintiff. The purpose is not to have an individual "sit" on a claim, but rather, to surface the claim when the individual is aware of a problem or believes that she is being unfairly treated. A claim accrues as soon as a potential plaintiff is either aware or should be aware (after a sufficient degree of diligence) of the existence and source of an actual injury. *See Oshiver*, 38 F.3d at 1386.

The majority opinion in *Ledbetter* reserved judgment on the use of the discovery rule in Title VII cases. "We have previously declined to address whether Title VII sutis are amenable to a discovery rule [citing *National RR Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)]. Because *Ledbetter* does not argue that such a rule would change the outcome in her case, we have no occasion to address the issue." *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162, 2167, n.10 (U.S. 2007).

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[1] In equal employment opportunity cases, as well as in many other contexts, federal courts have applied a discovery rule to a statute of limitations. Eight federal circuits have held that "the discovery rule is the general accrual rule in federal courts" and applies in all federal question cases. *Romero v. Allstate Corp.*, 404 F.3d 212 (3d Cir. 2005).

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In truth, *Ledbetter* did not present the best case to test whether discriminatory pay decisions long in the past are actionable because they have present effects. The record and Ms. Ledbetter's testimony show that Ms. Ledbetter knew of both the pay differences and the subpar evaluations that caused them more than 180 days before filing her charge. As the Court said, Ms. Ledbetter "makes no claim that intentionally discriminatory conduct occurred during the charging period or that discriminatory decisions that occurred prior to that period were not communicated to her." *Ledbetter*, 127 S. Ct. at 2164. In her specific case, it is hard to see why a plaintiff with knowledge of differences in pay between herself and similarly situated men, and with knowledge of low performance evaluations, should be entitled to a special rule postponing the running of the statute of limitations.

2. Equitable Tolling

Another theory called "equitable tolling" could be used to delay the limitations clock where an employee does not have reason to suspect discrimination. Equitable tolling differs from the discovery rule in that the plaintiff is assumed to know that she has been injured, so that the statute of limitations has begun to run; but she cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant. *Cada*, 920 F.2d at 451. A plaintiff may toll the statute of limitations if, despite all due diligence, she is unable to obtain enough information to conclude that she may have a discrimination claim. *Thelen v. Marc's Big Boy Corp.* 64 F.3d 264, 268 (7th Cir. 1995). Equitable tolling does not postpone the running of the statute of limitations until the plaintiff is "*certain* [her] rights had been violated." *Cada,* 920 F. 2d at 451. Rather, the limitations period begins to run when a reasonable person would believe she *may* have a cause of action. *See* EEOC Compliance Manual § 2-IV(D)(1) (stating that a charging party who waits longer than would ordinarily seem reasonable to file a charge is responsible for showing that special circumstances justified the delay).

3. Equitable Estoppel

The filing period can also be extended when the plaintiff's delayed filing is attributable to active misconduct by the employer intended to prevent timely filing, or actions that an employer should have known would cause a delay in filing. Where equitable estoppel applies, the filing period begins to run when the charging party knew or should have discovered the misconduct. *See, e.g., Oshiver*, 38 F.3d at 1390 (automatic extension by length of tolling period is justified where employer's deceptive conduct caused untimeliness); *Felty v. Graves-Humphreys Co.*, 785 F.2d 516, 520 (4th Cir. 1986) (limitations period extended by such time as employer's misconduct effectively operates to delay employee's effort to enforce his/her rights).

Thus, there are several existing theories of law which, if utilized, may well have addressed Ms. Ledbetter's issues, or, which would obviate the incentive to change the structure

and procedures of employment case adjudication. The legislation before the Congress would destroy the imperative to reach conclusion in employment cases while the facts are fresh and the matter can be resolved expeditiously.

2. Some have proposed that pay discrimination can be harder to detect because of resistance by some to discuss their pay.

- **Do you think pay scales and compensation should be made public?**
- **Given a drive towards greater privacy protections, for example, of health care or genetic information, do you think we should be requiring employers to offer less privacy protection when it comes to compensation?**

RESPONSE:

Requiring employers to make available to any individual who requests information about the salary or compensation of fellow employees would constitute a gross breach of privacy, and would run counter to the growing recognition in the law that individuals must have confidence that their personal information will not be disclosed. As noted in the answer regarding equitable tolling, the common law has long recognized that a party cannot simply hide evidence and thereby avoid accountability for its illegal or improper actions. To the extent that an individual may believe that she is being paid less than counterparts working in the same or substantially similar job, requesting general information as to wage rates or compensation levels for that job may be appropriate.

It is clear however, that diligence on the part of the employee can lead to resolution of different compensation issues. For example, when Ms. Ledbetter knew or had reason to believe that she was being compensated less while performing the same job, with the same qualifications under the same working conditions, she could have raised the issue either with her employer or with the EEOC at that time.

Of course, the law already prohibits employers from restricting employees from discussing pay and other terms and conditions of employment. For a recent example of the application of this rule, *see Cintas Corp.*, 343 NLRB 943 (2005), enforced 482 F.3d 463 (DC Cir. 2007).

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3. How does the Equal Pay Act, as distinguished from Title VII, operate with respect to filing periods?

RESPONSE:

The *Ledbetter* decision stated that if Ms. Ledbetter had pursued her EPA claim, "she would not face the Title VII obstacles she now confronts." *Ledbetter*, 127 S. Ct. at 2176. Individuals experiencing sex-based pay inequity may file a claim under the EPA without first filing a complaint with the EEOC. In addition, the EPA has two-year statute of limitations (three years for willful violations), which is longer than Title VII's 180- or 300-day period. Unlike Title VII, the EPA bans the current payment of discriminatorily set pay, regardless of how long ago the decision was made, and does not require a showing of intent.[2] Finally, the burden of showing that the pay differential meets one of the exceptions under the EPA is a burden which must be met by the employer. *See* 29 C.F.R. § 206(d)(1).

4. Has the Supreme Court, in the context of civil rights laws like Title VII, Age Discrimination in Employment Act, and the Americans with Disabilities Act, ever endorsed an open-ended statute of limitations that extends as long as the effects of discrimination are felt regardless of when the victim learned of the discriminatory acts?

RESPONSE:

The Supreme Court has never endorsed an open-ended statute of limitations in the context of federal civil rights statutes.

More than thirty years ago, for example, the Supreme Court strictly applied a statute of limitations to bar a race discrimination claim brought under § 1981. "Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454, 463-464 (1975) (declining to toll the limitations period under § 1981 during the administrative processing of plaintiff's EEOC charge).

A steady stream of Supreme Court decisions in employment discrimination cases since *Johnson* have made the same point. The majority opinion in *Ledbetter* cited most of these cases:

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[2] *See, e.g.*, *Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989) (under Title VII, a plaintiff seeking to show pay discrimination must prove an intent [by the employer] to discriminate; "[i]n contrast, the [EPA] creates a type of strict liability in that no intent to discriminate need be shown.")

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> Statutes of limitations serve a policy of repose. . . . The EEOC filing deadline protects employers from the burden of defending claims arising from employment decisions that are long past. Certainly, the 180-day EEOC charging deadline . . . is short by any measure, but by choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination. This short deadline reflects Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation.

Ledbetter, 127 S. Ct. at 2171 (quotations omitted). In citing the Congressional policies protecting employers from stale claims, the *Ledbetter* majority explained that suits based on remote employment actions are disfavored because "the passage of time may seriously diminish the ability of the parties and the fact finder to reconstruct what actually happened." *Id.*

The Supreme Court showed a similar disdain for stale claims in *National Railroad Passenger Corp. v. Morgan*:

> Allowing suits based on such remote actions raises all of the problems that statutes of limitations and other similar time limitations are designed to address. Statutes of limitation promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

536 U.S. 101, 125 (2002) (quotations omitted)

Indeed, providing open-ended filing periods for employment related complaints is antithetical to the statutory structure prohibiting employment harm. Congress has established narrow filing periods for a host of employment issues, including whistleblower claims. For example, the recently passed Sarbanes-Oxley bill has an unwavering 90-day period in which an individual may bring a whistleblower claim (*see* 18 U.S.C. § 1514A(b)(2)(D)) to prevent claims from lingering long past the time that they may be addressed.

Moreover, open-ended statutes of limitations for employment discrimination claims would run afoul of agency record retention policies, including record-keeping policies required by the EEOC, which only requires employers to maintain employment records for one (1) year.

Under the EPA, an employer must retain records for only three (3) years. Even the federal tax laws only require the retention of personal tax information for four (4) years under Federal Unemployment Tax Act ("FUCA") and Federal Insurance Contributions Act ("FICA"). Therefore, establishing an unlimited statute of limitations period will enable claims to be brought long past the time that employers must retain the relevant records, making a coherent examination of the claims practically impossible.

5. In the Civil Rights Act of 1991, Congress overturned the Supreme Court's decision in *Lorance*, relating to the applicability of filing periods to seniority systems.

- **Can you explain how Congress's decision overturned the Supreme Court without imposing an open-ended statute of limitations?**

RESPONSE:

In *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), the Supreme Court ruled that the EEOC charge-filing period ran from the time when the discrete act of alleged discrimination occurred, not from the date when the effects of the practice were felt. The plaintiffs in *Lorance* filed suit based on their demotion under a facially neutral seniority system, operated in a non-discriminatory manner, but allegedly adopted with a discriminatory purpose, outside the statutory period. The Court, citing *Evans, Ricks*, and the special status of seniority systems in discrimination law, (*Lorance*, 490 U.S. at 911-12), held that "[b]ecause the claimed invalidity of the ... seniority system is wholly dependent on the alleged illegality of signing the underlying [collective bargaining] agreement, it is the date of that signing which governs the limitations period." *Id.* at 911.

After *Lorance,* Congress amended Title VII to cover the specific situation involved in that case. *See* 42 U.S.C. § 2000e-5(e)(2). Congress adopted a discovery rule, which allowed for Title VII liability arising from an intentionally discriminatory seniority system both at the time of its adoption and at the time of its application. *Id.* As Justice Alito noted in the *Ledbetter* decision, Congress specifically limited its amendment to Title VII to seniority cases and not as a general expansion of the statute of limitations for Title VII purposes. *Ledbetter*, 127 S. Ct. at 2169 n.2. Furthermore, the language Congress used was carefully chosen to apply only to seniority systems adopted for an intentionally discriminatory purpose, thus limiting the opportunity for frivolous litigation based on disparate impact or unintentional discrimination.

6. We have heard that the *Ledbetter* decision reversed existing interpretation of the law with respect to Title VII filing periods.

- **Is there precedent from the Supreme Court demonstrating that the *Ledbetter* decision was consistent with established interpretations of Title VII?**

RESPONSE:

The *Ledbetter* decision was consistent with, and arguably compelled by, prior Supreme Court precedent. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (U.S. 2007). The decision cited and discussed two important precedents at length.

In *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), plaintiff alleged the defendant airline maintained a salary system based on seniority. The plaintiff was terminated, in an allegedly discriminatory act, and although subsequently rehired several years later, was then treated as a new employee for seniority (and thus salary) purposes. Evans argued, similarly to *Ledbetter*, that although a suit for the initial discriminatory act was time barred, the airline's alleged refusal to give her credit for her prior service gave present effect to its past illegal act and thereby perpetuated the consequences of the alleged forbidden discrimination. *Evans*, 431 U.S. at 557. The Supreme Court refused to take the airline's alleged discriminatory intent in 1968, when it discharged the plaintiff supposedly because of her sex, and attach that intent to its later act of neutrally applying its seniority rules. *Id.* at 558.

Similarly, in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), a college librarian, Ricks, was refused tenure, and given a non-renewable one-year contract. When that contract expired, Ricks filed with EEOC, alleging that the denial of tenure was based in discrimination in violation of Title VII. *Id.* at 252-53. This was well outside of the 180-day period, but Ricks argued that the clock should start at the end of the one year contract, not the denial of tenure. *Id.* The Supreme Court said the appropriate time from which to measure the running of the statute of limitations was from the date of the University's communication of its decision to Ricks that it would not grant him tenure — not from the date of his termination at the end of the one-year contract. *Id.* at 257-58.

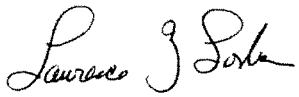
In *Ledbetter*, the Court concluded that these and other precedents stand for the proposition that "[t]he EEOC charging period is triggered when a discrete unlawful practice takes place," and that more to the point, "[a] new violation does not occur, and a new [180-day] period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination" (although naturally, "if an employer engages in a series of acts each of which is intentionally discriminatory, then a

fresh violation takes place when each act is committed"). *Ledbetter*, 127 S. Ct. at 2169. The Court explained that to accept *Ledbetter*'s argument that each pay check starts the clock anew "would shift intent from … the act that consummates the discriminatory employment practice … to a later act that was not performed with bias or discriminatory motive," with the effect that despite the plain requirement of the statute, "liability [would be imposed] in the absence of the requisite intent." *Id.* at 2170.

***

Please contact me if I can provide additional information on this topic.

Sincerely,



Lawrence Z. Lorber

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November 19, 2008

VIA U.S. MAIL & ELECTRONIC MAIL

The Honorable Patrick Leahy
Chair
United States Senate
Committee on the Judiciary
Attn: Justin Pentenrieder, Hearing Clerk
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Responses to Committee Members' Written Questions

Dear Senator Leahy:

Thank you for the opportunity to testify before the Judiciary Committee at the September 23, 2008 hearing regarding "Barriers to Justice: Equal Pay for Equal Work."

Enclosed for inclusion in the formal Committee record on the hearing are my responses to the written questions that Committee members sent me. Per your request, I will also send an electronic version of my responses to Hearing Clerk Justin Pentenrieder.

I look forward to working with you in the future on important issues that impact the federal judiciary.

Very truly yours,

Cyrus Mehri

Enclosures

Cyrus Mehri's Response to Written Questions from Chairman Patrick Leahy Regarding the U.S. Senate Judiciary Committee Hearing on Barriers to Justice: Examining Equal Pay for Equal Work

Legislation in the Wake of the *Ledbetter* Decision

Question 1: In *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, 127 S.Ct. 2162 (2007), the Supreme Court of the United States created a nonsensical rule that an employee must challenge pay discrimination within 180 days of the employer's initial decision to discriminate or the employee will be forever barred from enforcing his or her rights regardless of whether they knew about the discriminatory pay decision. Senator Kay Bailey Hutchinson has introduced the *Title VII Fairness Act*, S.3209, a bill designed to overturn the *Ledbetter* decision and fix the problems that decision created. Do you believe this legislation would correct the basic injustice created by the *Ledbetter* decision or provide an approach that is preferable to that of the *Lilly Ledbetter Fair Pay Act*? What practical impacts would this bill have on the ability of employees to remedy on-going discrimination in the workplace?

Answer: The ironically named *Title VII Fairness Act*, S. 3209, introduced by Senator Kay Bailey Hutchinson applies a divorced-from-reality solution to the divorced-from-reality *Ledbetter* decision. Frankly, I am surprised that Senator Hutchison would advance such legislation.

The Hutchinson bill, if enacted, would start the statute of limitations clock when the employee "has or should be expected to have" information about – or, in other words "knew or should have known" of – the pay discrimination. The bill would have the unintended consequence of clogging both the courts and the Equal Employment Opportunity Commission (EEOC) with claims that are hastily brought by plaintiffs to avoid the employer argument that the employee's claims are time-barred because he/she "should have known" about the discrimination earlier. Under the Hutchinson bill, employees will have no choice but to start the adversarial claims filing process to protect their claims even before they have hard proof of discrimination.

The "knew or should have known" standard will also discourage employees from using employers' internal complaint mechanisms to address discrimination since once they invoke such internal channels they will arguably have sufficient knowledge to trigger the statute of limitations clock under the Hutchinson bill and thus be forced to go simultaneously to the EEOC or ignore the internal complaint mechanism altogether. Most companies that I have been involved with strongly want to encourage employees to resolve discrimination claims through internal mechanisms as an alternative to litigation. Senator Hutchinson's bill will force employees to ignore these internal channels to the chagrin of most of America's top corporations.

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Most importantly, the Hutchinson bill ignores the teachings of the Supreme Court in *Jones v. Donnelly & Sons, Co.*, 541 U.S. 369 (2005). In *Donnelly*, the Supreme Court addressed the uncertainty over the appropriate standard for the filing period for civil rights cases under two other statutes, 42 U.S.C. § 1983 and § 1981. Uncertainty regarding deadlines creates, according to a unanimous Supreme Court, "a void that has spawned a vast amount of litigation." *Id.* at 383. Senator Hutchison's bill overlooks the Supreme Court's concern that the courts are unduly burdened when a statute of limitations period is vague. Her bill does exactly what Supreme Court discouraged in *Donnelly*: it burdens the courts with protracted litigation over determining the deadline for filing particular discrimination claims.

The "knew or should have known" standard will undoubtedly result in uncertainty and inconsistency in the case law as numerous district courts and Courts of Appeals try to apply a vague standard to complex factual situations. Tedious in-depth factual hearings will burden the courts. In sum, the indefinite standard in the Hutchison bill is unmanageable for all involved – the courts, employees, and employers.

Members of the Judiciary Committee may not be aware of another detrimental consequence of Senator Hutchison's bill – its potential to rob groups of employees of their power to change employers' discriminatory policies. The class action device is the most effective mechanism available to employees seeking *systemic* change in policies and practices of discriminatory employers. If the Hutchison bill became law, it would arm corporate defense lawyers with another tool to attack these important class actions.

For a class action to be viable, the class must be certified pursuant to Federal Rule of Civil Procedure Rule 23 which requires numerosity, typicality, commonality, and adequacy of representation. Under the Hutchinson bill, employers would likely argue that class actions alleging employment discrimination cannot be certified pursuant to Rule 23 because the date when class members "have or should have had" sufficient knowledge to bring the claim is an "individualized issue" that defeats the commonality standard in Rule 23.

Corporate defense firms have successfully used this technique before to defeat class actions under civil rights statutes that alleged discrimination. *See, e.g., Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311 (4th Cir. 2006) (denying class certification in a race discrimination case involving the sale of life insurance policies to African-Americans). Thankfully for civil rights litigants, the approach in *Thorn* has been rejected by courts in other circuits. *In re Monumental Life Ins. Co.*, 365 F.3d 408, 421 (5th Cir. 2004); *Norflet v. John Hancock Life Ins. Co.*, No 3:04cv1099, 2007 U.S. Dist. LEXIS 65793 (D.Conn. Sept. 6, 2007). *See also Thompson v. Metro. Life Ins. Co.*, 149 F.Supp. 2d 38, 54 (S.D.N.Y. 2001) (denying summary judgment and rejecting defendant's attempt to bar putative

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class claims). I serve as Co-Lead Counsel in the *Norflet* case and know how vigorously corporations can pursue the argument that the "knew or should have known" standard prohibits class actions by victims of discrimination.

I submit that the unstated reason that Mr. Lorber and the Chamber of Commerce are advancing the Hutchison bill is to have an additional tool to defeat civil rights class actions. Mr. Lorber's disdain of the class action device is plain from his testimony. What is not disclosed to the U.S. Senate is how the defense bar might use the Hutchison bill to inoculate discriminating employers from effective use of the class action device. If enacted, the Hutchinson bill could significantly hinder employees' ability to trigger systemic changes in employers' polices and practices.

Rather than creating new problems with the Hutchinson bill, the Senate should pass the *Lilly Ledbetter Fair Pay Act* which restores the Paycheck Accrual Rule. The Supreme Court in *Ledbetter* severely limited employees' ability to challenge pay discrimination by overturning the long-standing Paycheck Accrual Rule, which had been endorsed by the EEOC – the entity that Congress has charged with enforcing Title VII – and applied by most U.S. Courts of Appeals. *See, e.g., Forsyth v. Federation Employment & Guidance Servs.*, 409 F.3d 565, 573 (2d Cir. 2005); *Shea v. Rice*, 409 F.3d 448, 452-53 (D.C. Cir. 2005); *Hildebrandt v. Illinois Dep't of Human Resources*, 347 F.3d 1014, 1027-28 (7th Cir. 2003); *Goodwin v. General Motors Corp.*, 275 F.3d 1005, 1009-10 (10th Cir. 2002); *Cardenas v. Massey*, 269 F.3d 251 (3d Cir. 2001); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167-68 (8th Cir. 1995); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 345-49 (4th Cir. 1994); *Gibbs v. Pierce County Law Enforcement Support Agency*, 785 F.2d 1396, 1399 (9th Cir. 1986).

Under the Paycheck Accrual Rule, each discriminatory paycheck triggers a new period for filing a complaint with the EEOC. The Supreme Court in *Ledbetter* held that employees must challenge pay discrimination within 180 days (300 days in some jurisdictions) of the employer's decision to discriminate in pay. The Court found that future paychecks after the initial intent to discriminate, even if they compensate the employee less due to previous discrimination, are not discriminatory themselves and cannot trigger a new filing period with the EEOC. *Ledbetter*, 127 S.Ct. at 2172-74.

The *Lilly Ledbetter Fair Pay Act* is the only bill pending in Congress that would truly overturn the Supreme Court's *Ledbetter* decision by restoring the Paycheck Accrual Rule. The Fair Pay Act would hold employers accountable for pay discrimination, give employees time to evaluate their circumstances before rushing into court, and provide courts, employers, and employees with certainty about the time period for filing pay discrimination claims.

Question 2. At the hearing, Mr. Lawrence Lorber testified that under the *Lilly Ledbetter Fair Pay Act* employers will be exposed to needless litigation, stale

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evidence, and unlimited liability under Title VII for years, if not decades, including many years after an employee has left the company. Do you agree?

Answer: The *Lilly Ledbetter Fair Pay Act* would not expose employers to unlimited liability for many years after an employee has left a company. Mr. Lorber's suggestion that an employer could be exposed to *decades* of liability many years after the employee has left the company is misguided. In fact, quite the opposite is true. Under the *Fair Pay Act* and under the EEOC's Paycheck Accrual Rule, which was applied in most Circuits prior to *Ledbetter*, employees who leave their company have 180 days from the employer's last discriminatory act to file a claim of pay discrimination, which in most instances would be 180 days after their last paycheck. Thus, generally employers would only be exposed to liability for pay discrimination for about six months after the employee leaves the company. In any case, backpay liability is limited to two years prior to the filing of the charge with the EEOC. 42 U.S.C. § 2000e-5(g)(1).

Lilly Ledbetter's claim is a perfect example of the limitations of Title VII even under the Paycheck Accrual Rule. Soon after Ms. Ledbetter was hired in 1979, she faced her initial pay discrimination from Goodyear. She filed her EEOC charge in 1998, after receiving an anonymous note alerting her to the discrimination to which she was being subjected. As a legal matter, therefore, Ms. Ledbetter was unable to claim any of the backpay she was owed for the period between the first instance of discrimination in about 1979 and the date in 1996 that was two years before the point at which she filed her charge. In short, even under the Paycheck Accrual Rule the vast majority of her damages were cut off completely. If anything, Title VII even before *Ledbetter*, has been too soft on discriminatory actors.

Employees rarely, if ever, have the opportunity to address "decades" of discrimination. Title VII offers employees a very short time period (180 days or in some cases 300 days) to file a charge of discrimination with the EEOC, which protects employers at the expense of employees' claims. This six-month limitations period for employees is extremely short when compared with the limitations period for statutes frequently used by corporate employers to remedy their wrongs. Breach of contract claims, for example, which are often used by businesses, tend to have much longer limitations periods than 180 days. For instance, the statute of limitations for contract claims is four years in California,[1] five years in Florida,[2] and ten years in Illinois.[3] Legal scholars Deborah L. Brake and Joanna L. Grossman have noted that "Title VII's limitations period remains unusually short when compared to the vast majority of other laws seeking to

[1] Cal. Civ. Code § 337 (LexisNexis 2008).
[2] Fla. Stat. § 95.11 (2)(b) (LexisNexis 2008).
[3] 735 Ill. Comp. Stat. 5/13-206 (LexisNexis 2008). The statute of limitations on a contract for sale is four years in Illinois. 810 Ill. Comp. Stat. 5/2-725 (LexisNexis 2008).

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vindicate personal rights."[4] The *Fair Pay Act* does not change Title VII's short 180-day filing period.

Diversity of the Federal Judiciary

Question 3. Mr. Mehri, your testimony provided real life examples of American workers who have had their remedies for violations of their civil rights taken away by "out-of-touch federal appellate courts." You also testified that diversifying the Federal judiciary, by expanding the pool of judicial nominees, would offer a level playing field for American workers. Please elaborate on why the confirmation of more nominees to the Federal judiciary, with substantial experience representing ordinary American workers, would restore a level playing field. In addition, what factors do you believe the President and the Senate should consider in promoting diversity among judicial nominees.

Answer: The federal judges before whom I have appeared during my practice have all impressed me with their intellectual rigor and thoroughness. I applaud their skill and the quality of questions that I have received during oral argument.

However, the *Ledbetter* decision as well as the recent Cornell Law School study described in my written testimony suggest that federal judges are out of sync with ordinary Americans. There is no defensible reason why the U.S. Appellate Courts' decisions would have a five to one disparity against American workers – reversing employer trial victories 8.72% of the time and employee trial victories a stunning 41.10% of the time.

The skewed appellate reversal rate could be the result of judicial selection processes that tap into very select pools of potential nominees from the American bar. Casting a wider net for potential judicial candidates should be essential for the next President.

To better understand the experiences of sitting U.S. appellate judges, my firm undertook an informal review of their biographies. According to the U.S. Federal Judicial Center, established by Congress in 1967, there are 166 active U.S. Appellate Judges.[5] My firm surveyed the backgrounds of 162 of these judges whose biographical information was available in the *Almanac of the Federal Judiciary*. Though further research by scholars is necessary, we found some startling initial results.

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[4] Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C.L.REV. 859 (2008).

[5] Federal Judicial Center, The Federal Judges Biographical Database, http://www.fjc.gov/history/home.nsf (last visited Nov. 18, 2008). We did not survey U.S. Courts of Appeals judges on senior status.

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Whereas about 138 judges or 85.2% of those surveyed had worked in private practice, only 5 judges or 3.1% had substantial prior legal experience working for not–for-profit organizations.[6] While the experience of these 5 judges is notable, none of these judges has worked for a not-for-profit organization in the last 27 years. The most recent not-for-profit experience for a U.S. appellate judge was in 1981. That means the entire U.S. appellate judiciary, covering 13 circuit courts, is devoid of judges with any full-time, non-profit experience during the most recent generation. This is astonishing. Some of the most accomplished lawyers in the country are public interest lawyers with active appellate court and Supreme Court practices. Yet there is not one U.S. Circuit Court judge who served in such a role in the mid-1980s, 1990s, or this decade.

Further, not one out of 162 U.S. Court of Appeals judge has had substantial experience as in-house counsel for a labor union. Only five sitting federal appellate judges have worked for organizations that enforce traditional civil rights;[7] only three appellate judges have worked for organizations that represent lower-income Americans;[8] and only one appellate judge appears to have substantial experience advocating for consumer rights.[9]

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[6] In our review of judges' backgrounds in private practice or non-profit organizations, we did not consider academic or government employment. Because we were interested in significant experience in non-profit work, we did not include *pro bono* activities in our results for non-profit work. The appellate judges who have worked as lawyers for a non-profit organization include: Judge Deanell Reece Tacha who served both as the Director of Douglas County Legal Aid Clinic and the Director of the Legal Aid Clinic at the University of Kansas, from 1974-77; Judge Richard A. Paez who worked as a Staff Attorney at California Rural Legal Assistance from 1972-74, as a Staff Attorney at Western Center on Law and Poverty from 1974-76, and as Senior Counsel, Director of Litigation, Acting Executive Director and Director of Litigation at the Legal Aid Foundation of Los Angeles from 1976-81; Judge Rosemary S. Pooler who worked at the New York Public Interest Research Group from 1974-76; Judge David S. Tatel who served as Executive Director for the Chicago Lawyers' Committee for Civil Rights Under Law from 1969-70, and the Director of the National Lawyers' Committee for Civil Rights Under Law from 1972-74; and finally, Judge Judith W. Rogers who served as a staff attorney at the San Francisco Neighborhood Legal Assistance Foundation from 1968-1969. In our list of judges with non-profit experience, we did not include Judge Robert A. Katzmann, who worked at the Brookings Institution from 1981-99, because we viewed his role at Brookings as akin to an academic position.

[7] Judge Tatel worked at the Chicago and National Lawyers' Committees for Civil Rights Under Law and served as Director of the Office for Civil Rights for the U.S. Department of Health, Education and Welfare from 1977-79; Judge Allyson Kay Duncan worked for the EEOC from 1978-86 as an appellate attorney and as executive assistant to Chair Clarence Thomas; Judge Sandra Lea Lynch severed as general counsel to the Massachusetts Department of Education from 1974-78 and represented the state in the Boston desegregation cases; Judge Milan Dale Smith, Jr. served on California's Fair Employment and Housing Commission from 1987-1991; Judge Harvie Wilkinson, III served as Deputy Assistant Attorney General for the Civil Rights Division of the Reagan Department of Justice from 1982-83.

[8] *See supra* note 5.

[9] Judge Pooler served as the Executive Director of the New York Consumer Protection Board from 1981-86. We did not include Judge James B. Loken who was briefly general counsel to President Nixon's Committee on Consumer Interests.

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Equally revealing is the imbalance in appellate judges' backgrounds in prosecutorial versus defense work – about 45% of those surveyed formerly worked for prosecutors, U.S. attorneys, state or city attorneys, attorneys general, or solicitors general. There are only two U.S. Court of Appeals judges who worked as public defenders, but both of them also are former prosecutors.

Employment discrimination plaintiffs whose cases reach the U.S. Courts of Appeals are rather unlikely to draw a panel of judges that contains even one judge with experience working for a civil rights organization or representing the poor or disadvantaged. Though it is difficult to ascertain the experiences of judges during their private practice,[10] the makeup of the judiciary currently runs the risk that their collective perspectives are largely detached from the day-to-day hardships and realities that American workers face.

In order to improve the public's confidence that workers can have a fair chance in the courts, we need more nominees confirmed to the federal bench who have experience representing ordinary Americans. The Senate should value nominees who have devoted their careers to fighting poverty, expanding rights for children, enforcing civil rights, helping break down barriers to equal opportunity, representing *qui tam* whistleblowers, or fighting for consumers. Because judges with different backgrounds can bring different perspectives to a judicial panel, the Senate should find potential nominees who have devoted their careers to representing ordinary Americans, consumers and the underdogs of society.

Simultaneously, in order to ensure that the judiciary is more understanding of *all* American workers, the Senate should confirm judges who are diverse in terms of race, ethnicity, gender, and ability/disability. Currently, the judiciary lacks demographic diversity in many areas. For example, according to the U.S. Federal Judiciary Center, out of the approximately 822 sitting federal judges on active status, African-American women represent only 3% of the federal bench – only 25 judges.

There are only 11 Asian-American district court judges and *no* Asian-American Circuit Court judges.[11] The judges appointed under President George W. Bush have not significantly added to diversity on the bench. As of October 2007, out of the 292 appointments by President Bush, 77.7% were male, 82.5% were white, and 0.7% were Asian-American.

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[10] It was beyond the scope of our review to ascertain what each of the 138 out of 162 active appellate judges did in their private practices. It is clear from the judges' biographies that a sizable number of them worked for large, well-known firms that tend to represent corporations. We note, however, that one appellate federal judge's experience in private practice stood out as unique in our review. Prior serving on the bench, Judge Rosemary Barkett had a general private practice where she "mostly represented middle class individuals with ordinary legal problems." Almanac of the Federal Judiciary, Vol. 2, (11th Cir.) at 7 (Supp. 2008-2).

[11] Federal Judicial Center, The Federal Judges Biographical Database, http://www.fjc.gov/history/home.nsf (last visited Nov. 18, 2008).

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Diversity in terms of race and gender can have a significant impact on the bench. A recent study found that male judges are 10% less likely to rule in favor of an individual alleging sex discrimination than a female judge.[12] Similarly, a forthcoming study to be published by the *Washington University Law Review* found that white judges perceive racial harassment differently than African-American judges.[13]

American workers would be better served by a more balanced and diverse judiciary that understands their real-life work experiences. The President should select judges who are diverse in race, ethnicity, gender, and disability/ability, and who have diverse life and work experiences.

Impact of *Ledbetter* on Other Areas of Law

Question 4. You also testified that Ms. Lilly Ledbetter's experience in the Federal courts is "far from isolated" and represents "just the tip of the iceberg of a far larger systemic problem." Are you aware of other Federal or state courts expanding the *Ledbetter* precedent into other areas of the law? If so, what other rights are at stake?

Answer: Unfortunately, the message that the Supreme Court sent to Ms. Ledbetter – "justice denied" – is an all too common message for employment discrimination plaintiffs in the U.S. Courts of Appeals. An empirical study of federal employment discrimination litigation conducted by law professors at Cornell Law School found that when employers win at trial, they are reversed by the U.S. Courts of Appeals 8.72% of the time.[14] In striking contrast, when employees win at trial, they are almost five times more likely to be reversed by the U.S. Courts of Appeals. In fact, employees' victories are reversed 41.10% of the time. This study shows that employees face a harsh double standard on appeal.

It appears that federal courts may be expanding the *Ledbetter* decision to restrict employees' rights in areas beyond pay discrimination under Title VII. Courts have used the *Ledbetter* decision as justification for curtailing rights under other laws, including the Americans with Disabilities Act, the Fair Housing Act, and the Age Discrimination in Employment Act. *See, e.g., Proctor v. United Parcel Service*, 502 F.3d 1200 (10th Cir. 2007) (affirming summary judgment for the employer in a disabilities case); *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008) (*en banc*) (affirming summary judgment for builder and owner in Fair

[12] Christina Boyd, Lee Epstein, & Andrew Martin, Untangling the Causal Effects of Sex on Judging, Paper Presented at the Midwest Political Science Association (2008), *available at* http://epstein.law.northwestern.edu/research/genderjudging.pdf.
[13] Pat K. Chew and Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, Wash. U. L. Rev. (forthcoming 2009).
[14] Stewart J. Schwab and Kevin M. Clermont, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. (forthcoming 2009).

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Housing Act case); *Coghlan v. Peters*, 555 F. Supp. 2d 187 (D.D.C. 2008) (granting summary judgment to the employer in an age discrimination case). Thus, a dangerous trend of lower courts expanding *Ledbetter* is emerging.

AT&T v. Hulteen Case

Question 5. This year, the Supreme Court of the United States has agreed to hear another case involving the rights of women in the workplace. In *AT&T Corp. v. Hulteen*, the Court will decide whether a corporation's decision to pay its female workers smaller pensions because of their pregnancy disability leaves constitutes an unlawful employment practice under the Pregnancy Discrimination Act, an amendment to Title VII of the Civil Rights Act of 1964. In August 2007, in an 11-3 *en banc* ruling, the Ninth Circuit Court of Appeals ruled in favor of the female plaintiffs' sex discrimination claims. Specifically, the court held that AT&T's calculation of service credit, which excluded pregnancy leave, violates Title VII. What impact would a Supreme Court reversal of the Ninth's Circuit ruling have on the ability of women to achieve equal rights in the workplace?

Answer: The *Hulteen* case involves several long-term female employees who recently decided to retire from AT&T. They worked for AT&T prior to the passage of the Pregnancy Discrimination Act, which forbids employers from treating pregnancy differently than any other disability. When these women took pregnancy leave in the 1970s, they received a limited amount of service credit towards their pension plans. But employees who took regular temporary disability leave in the same time period had no limit on the service credit they could earn. When these employees retired in the 1990s, AT&T calculated their pensions based on the limited service credit they had received while on pregnancy leave. The employees filed suit in federal court arguing that AT&T discriminated against them when it calculated their pension benefits. The Ninth Circuit sitting *en banc* agreed with the employees.

Hulteen like *Ledbetter* is another example of an employer trying to shirk its responsibility to maintain a discrimination-free workplace. AT&T argued, in effect, that its discriminatory treatment of female retirees today is not actionable because it is based on discrimination that occurred in the past. The Ninth Circuit's rejection of this argument is an important vindication of the right of American workers to seek redress for the present effects of illegal discrimination.

The Supreme Court has an opportunity in *Hulteen* to rein in the *Ledbetter* decision by clarifying that discriminatory actions within the filing period, even if they are based on past discrimination, are actionable. For American workers across the country, it is imperative that the Supreme Court affirm the Ninth Circuit's decision requiring employers to pay employees fair retirement benefits. A Supreme Court reversal of the Ninth Circuit's decision would unfairly let employers off-the-hook by allowing them to make draconian decisions in the 21st century that short-change female employees.

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Cyrus Mehri's Response to Written Questions from the Honorable Arlen Specter Regarding the U.S. Senate Judiciary Committee Hearing on Barriers to Justice: Equal Pay for Equal Work

Questions for Cyrus Mehri

Question 1: In your testimony, you cited the Clermont-Schwab study as "confirming that thousands of American workers encounter a double standard in the U.S. Appellate Courts." The study, however, does not account for the particulars of any given case. Moreover, it does not account for several other important factors, such as the increase in wage and hour litigation, the Equal Employment Opportunity Commission's expansion of its efforts to resolve discrimination claims at the mediation stage, Supreme Court decisions holding that parties may agree to arbitrate employment discrimination claims, and plaintiffs pursuing claims under state law statutes that have little or no damage caps:

- How can the conclusion of the study be said to be reliable if none of the foregoing factors are accounted for?

Answer 1: The factors cited in your question do not change the fundamental results of the empirical study by the Cornell law professors.[1] Empirical legal studies scholars generally analyze systems and data sets rather than the particulars of individual cases. Professor Clermont and Dean Schwab used a data set coded by the Administrative Office of the United States Courts as "442 - Civil Rights: Jobs" or "Employment," which contained tens of thousands of cases spanning several decades . Their approach is consistent with professional standards and recognized by academic institutions such as Cornell Law School, New York University School of Law, and the University of Texas School of Law, all of which have sponsored an annual Conference on Empirical Legal Studies.

As I stated in my testimony, the double standard that American workers face on appeal in employment discrimination cases, which was revealed by Professor Clermont and Dean Schwab, is quite startling. They found that the U.S. Courts of Appeals reverse employer district court victories 8.72% of the time and employee district court victories 41.10% of the time. Particulars of individual cases cannot account for this disparity. Individual case studies to understand "the particulars" of a case (as you suggest) may be interesting, but the outcomes of individual cases might be aberrations. The Cornell study examines the outcomes of employment cases on appeal in the aggregate. Of course, we encourage further research, including a random sampling of case studies or an analysis of the data by type of case (i.e., race, sex, age, or religious

[1] Stewart J. Schwab & Kevin M. Clermont, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. (forthcoming 2009), *available at* http://www.hlpronline.com/Vol3.1/Clermont-Schwab_HLPR.pdf.

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discrimination), but it is unlikely that additional research would alter the fundamental conclusion that the data show a double standard on appeal.

Similarly, an increase in wage and hour litigation would not impact the study's analysis of appellate courts' reversal rates in employment discrimination cases because wage and hour litigation is given a separate code by the Administrative Office of the United States Courts – "710." Traditional wage and hour litigation was not part of the study's data set. The EEOC's efforts regarding mediation and the Supreme Court's decisions regarding arbitration also do not directly impact the Cornell study's conclusion regarding of the U.S. Courts of Appeals' reversal rate of district courts' employment discrimination decisions. The cases that are part of the study's appellate analysis are cases that have proceeded to trial, regardless of mediation or arbitration efforts. Cases that have made it to trial likely have gone through an extensive vetting process, including some, if not all, of the following: screening by the employee's attorney, pre-trial motions to dismiss, summary judgment motions, and other dispositive motions. It is also important to remember that when appellate courts reverse trial judgments, they are usually evaluating the rulings of district court judges for error or abuse of discretion, not engaging in a free-floating review of the merits of the cases. The extent to which these cases are screened makes the 8.72% versus 41.10% reversal rate on appeal even more troubling.

The final factor you cite, that some plaintiffs may be pursuing claims under state law statutes, also does not impact the statistical analysis that employment discrimination cases are subject to a double standard on appeal in the *federal* courts. It may or may not be true that employment discrimination plaintiffs fare differently in state courts, but that has no bearing on how they are faring in federal courts. State law employment discrimination cases are not part of Clermont and Schwab's analysis except to the extent they are prosecuted in federal court either pursuant to diversity jurisdiction or alongside federal claims.

In addition to finding a double standard on appeal in employment discrimination cases, Professor Clermont and Dean Schwab also found a 37% drop in employment discrimination cases in federal court from 1999-2007. The number of such cases fell from 23,721 in 1999 to 18,859 in 2005. They declined even more sharply in the last two years of the data from 18,859 in 2005 to 15,007 in 2007. Information provided by the EEOC shows that EEOC charges have remained steady or slightly increased from 1997 (80,680 charges) to 2007 (82,792 charges).[2] In 2008, the EEOC has experienced a 15% rise in charges compared with last year. The rise in EEOC charges suggests that discrimination in the workplace has not decreased.

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[2] Stewart J. Schwab, Dean Cornell University Law School, Presentation at American Constitution Society, Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse? 7 (September 18, 2008), *available at* http://www.acslaw.org/node/7149. (*See* Exhibit 5 attached to my written testimony).

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The Cornell study does not point to any one cause of the drop in employment discrimination cases in federal district courts. Professor Clermont and Dean Schwab do note, however, that the double standard on appeal might discourage employees and their lawyers from bringing employment discrimination cases. Professor Clermont and Dean Schwab also consider several other factors that could be related to the drop in employment discrimination cases in district courts:

> Of course there are other possible explanations for the decline in jobs cases, even though it seems too sudden and big to rest on fundamental societal or workplace changes. Perhaps alternative dispute resolution, popular in the employment setting, has suddenly increased in popularity to the point of flipping the trend in case filings. But such a massive change would not have gone unnoted elsewhere. Alternatively, perhaps the plaintiffs are shifting to the greener pastures of state courts and managing to avoid removal. Unfortunately, state court data equivalent to the federal court data do not exist. In any event, both of these explanations are consistent with the idea that employment discrimination plaintiffs or, more realistically, their lawyers are becoming discouraged with their chances in federal court.[3]

Thus, the Cornell study considers multiple factors that might explain the drop in employment discrimination cases in federal court. Though the study reaches no conclusion as to the cause of the drop in cases, the decline combined with the double standard on appeal in employment discrimination cases are cause for alarm.

Question 2. The Supreme Court decided a series of recent employment rights cases in which the majority of the Court found in favor of the employee. Those decisions include, Burlington Northern and Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006), CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951 (2008), Gomez-Perez v. Potter, 128 S. Ct. 1931 (2008), Meacham v. Knolls Atomic Power Laboratory, 128 S. Ct. 2395 (2008), Federal Express Corporation v. Holowecki, 128 S. Ct. 1147 (2008), Sprint/United Management Company v. Mendelsohn, 128 S. Ct. 1140 (2008), and Ash v. Tyson Foods, Inc., 126 S. Ct. 1195 (2006). You testified that the federal bench is devoid of former practitioners with experience representing "ordinary Americans" and is therefore biased against employees in general.

- **Question 2a:** Contrary to your claim, don't these decisions demonstrate that the federal courts are not hostile to employees or supportive of business interests?

[3] Schwab & Clermont, *supra* note 1 at 20 (internal citations omitted).

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- **Question 2b:** As the lower courts follow these precedents, will there not be more decisions that are favorable to plaintiffs?
- **Question 2c:** What is the basis for your conclusion that the bench is devoid of former practitioners with experience representing "ordinary Americans"?

Answers 2a & 2b: The study by Professor Clermont and Dean Schwab reveals a double standard in employment discrimination cases on appeal to the U.S. Courts of Appeals. The study did not analyze employment discrimination appeals to the U.S. Supreme Court. Thus, the Supreme Court decisions you cite do not alter the study's conclusion that the empirical data reveal an anti-plaintiff effect in the U.S. Courts of Appeals.

Though the Cornell study did not analyze data about Supreme Court decisions, several of the decisions you cite might suggest that Supreme Court decisions in employment discrimination cases do not necessarily mirror the double standard against employees by the U.S. Courts of Appeals. Thorough empirical research is necessary, however, to determine whether the Supreme Court's decisions in employment cases (including whether it declines to review these cases) reveal any pro-employee or pro-employer bias. The cases you cite do not include all recent Supreme Court decisions in this area and cannot be the basis for sweeping conclusions. For example, you cite only seven cases spanning 2006-2008, but the Supreme Court has decided more than seven employment discrimination cases in those three years. One Supreme Court recent case that you fail to mention is *Ledbetter*, a decision entirely out-of-touch with the experiences of American workers.

And even if some recent Supreme Court decisions can be described as pro-employee, the documented double standard in the Courts of Appeals remains very troubling. The Courts of Appeals decide numerous employment discrimination cases each year and, as a result, have a far greater impact on the lives of American workers than the Supreme Court, which delivers only a handful of written opinions on employment discrimination each year. And the relatively small number of employment discrimination cases decided by the Supreme Court – whether or not they can be characterized as pro-employee – has obviously not diminished the documented double standard against employees that prevails in the U.S. Courts of Appeals.

Moreover, though several of the Supreme Court decisions you cite resulted in relatively positive outcomes for employees, it is worth noting that not all of the decisions you cite are necessarily pro-employee. For instance, while the *Mendelsohn* decision left open the possibility that co-workers who have faced discrimination could be permitted to testify at trial, the Supreme Court's decision was largely a routine evidentiary decision that gave discretion to trial courts and was not a "win" for Ms. Mendelsohn. The *Ash* case is another mixed bag for employees. Even though the Supreme Court rejected the 11th Circuit's "jump off

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the page" standard, it gratuitously stated that the 11th Circuit's decision in favor of the employer might ultimately be correct. In fact, the *Ash* case is an example of a moderate Supreme Court decision *not* resulting in pro-employee decisions down the road in the appellate courts. Upon remand, the 11th Circuit still found that repeated references by a manager to an African-American employee as "boy" were insufficient to show race discrimination. *Ash v. Tyson Foods, Inc.*, 190 Fed. Appx. 924, 926-27.

Regardless of the tenor of Supreme Court decisions in employment discrimination cases, the well-documented double standard in the Courts of Appeals threatens the foundations of our judiciary. Below I describe steps the President and Senate can take to bring more diversity of experience to the appellate bench that would likely help alleviate the anti-plaintiff effect in the Courts of Appeals.

Answer 2c: As I stated in my written responses to Senator Leahy's questions, the federal judges before whom I have appeared during my practice have all impressed me with their intellectual rigor and thoroughness. I applaud their skill and the quality of questions that I have received during oral argument.

However, the double standard on appeal revealed by the Clermont and Schwab study suggests that federal judges are out of sync with ordinary Americans. There is no defensible reason why U.S. Courts of Appeals would reverse employer district court victories 8.72% of the time and employee district court victories a stunning 41.10% of the time.

To better understand the experiences of sitting U.S. appellate judges, my firm undertook an informal review of their biographies. According to the U.S. Federal Judicial Center, established by Congress in 1967, there are 166 active U.S. Appellate Judges.[4] My firm surveyed the backgrounds of 162 of these judges whose biographical information was available in the *Almanac of the Federal Judiciary*. Though further research by scholars is necessary, we found some startling initial results.

Whereas about 138 judges or 85.2% of those surveyed had worked in private practice, only 5 judges or 3.1% had substantial prior legal experience working for not–for-profit organizations.[5] While the experience of these 5 judges

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[4] Federal Judicial Center, The Federal Judges Biographical Database, http://www.fjc.gov/history/home.nsf (last visited Nov. 18, 2008). We did not survey U.S. Courts of Appeals judges on senior status.

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is notable, none of these judges has worked for a not-for-profit organization in the last 27 years. The most recent not-for-profit experience for a U.S. appellate judge was in1981. That means the entire U.S. appellate judiciary, covering 13 circuit courts, is devoid of judges with any full-time, non-profit experience during the most recent generation. This is astonishing. Some of the most accomplished lawyers in the country are public interest lawyers with active appellate court and Supreme Court practices. Yet there is not one U.S. Circuit Court judge who served in such a role in the mid-1980s, 1990s, or this decade.

Further, not one out of 162 U.S. Court of Appeals judge has had substantial experience as in-house counsel for a labor union. Only five sitting federal appellate judges have worked for organizations that enforce traditional civil rights;[6] only three appellate judges have worked for organizations that represent lower-income Americans;[7] and only one appellate judge appears to have substantial experience advocating for consumer rights.[8]

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Employment discrimination plaintiffs whose cases reach the U.S. Courts of Appeals are rather unlikely to draw a panel of judges that contains even one judge with experience working for a civil rights organization or representing the

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Staff Attorney at Western Center on Law and Poverty from 1974-76, and as Senior Counsel, Director of Litigation, Acting Executive Director and Director of Litigation at the Legal Aid Foundation of Los Angeles from 1976-81; Judge Rosemary S. Pooler who worked at the New York Public Interest Research Group from 1974-76; Judge David S. Tatel who served as Executive Director for the Chicago Lawyers' Committee for Civil Rights Under Law from 1969-70, and the Director of the National Lawyers' Committee for Civil Rights Under Law from 1972-74; and finally, Judge Judith W. Rogers who served as a staff attorney at the San Francisco Neighborhood Legal Assistance Foundation from 1968-1969. In our list of judges with non-profit experience, we did not include Judge Robert A. Katzmann, who worked at the Brookings Institution from 1981-99, because we viewed his role at Brookings as akin to an academic position.

[6] Judge Tatel worked at the Chicago and National Lawyers' Committees for Civil Rights Under Law and served as Director of the Office for Civil Rights for the U.S. Department of Health, Education and Welfare from 1977-79; Judge Allyson Kay Duncan worked for the EEOC from 1978-86 as an appellate attorney and as executive assistant to Chair Clarence Thomas; Judge Sandra Lea Lynch severed as general counsel to the Massachusetts Department of Education from 1974-78 and represented the state in the Boston desegregation cases; Judge Milan Dale Smith, Jr. served on California's Fair Employment and Housing Commission from 1987-1991; Judge Harvie Wilkinson, III served as Deputy Assistant Attorney General for the Civil Rights Division of the Reagan Department of Justice from 1982-83.

[7] *See supra* note 5.

[8] Judge Pooler served as the Executive Director of the New York Consumer Protection Board from 1981-86. We did not include Judge James B. Loken who was briefly general counsel to President Nixon's Committee on Consumer Interests.

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poor or disadvantaged. Though it is difficult to ascertain the experiences of judges during their private practice,[9] the makeup of the judiciary currently runs the risk that their collective perspectives are largely detached from the day-to-day hardships and realities that American workers face.

In order to improve the public's confidence that workers can have a fair chance in the courts, we need more nominees confirmed to the federal bench who have experience representing ordinary Americans. The Senate should value nominees who have devoted their careers to fighting poverty, expanding rights for children, enforcing civil rights, helping break down barriers to equal opportunity, representing *qui tam* whistleblowers, or fighting for consumers. Because judges with different backgrounds can bring different perspectives to a judicial panel, the President and Senate should find potential nominees who have devoted their careers to representing ordinary Americans, consumers and the underdogs of society.

[9] It was beyond the scope of our review to ascertain what each of the 138 out of 162 active appellate judges did in their private practices. It is clear from the judges' biographies that a sizable number of them worked for large, well-known firms that tend to represent corporations. We note, however, that one appellate federal judge's experience in private practice stood out as unique in our review. Prior serving on the bench, Judge Rosemary Barkett had a general private practice where she "mostly represented middle class individuals with ordinary legal problems." Almanac of the Federal Judiciary, Vol. 2, (11th Cir.) at 7 (Supp. 2008-2).

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SUBMISSIONS FOR THE RECORD

WASHINGTON
LEGISLATIVE OFFICE

September 26, 2008

Chairman Patrick Leahy
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Ranking Member Arlen Specter
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

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TREASURER

Dear Chairman Leahy and Ranking Member Specter:

On behalf of the American Civil Liberties Union (ACLU), and its hundreds of thousands of members, activists, and fifty-four affiliates nationwide, we thank the Senate Judiciary Committee for holding a hearing examining the impact of the Supreme Court's decision in *Ledbetter v. Goodyear* on women's equality in the workplace. We thank the Committee for holding the hearing record open, and we respectfully submit this statement for the record.

The Impact of the *Ledbetter* Decision

On May 29, 2007, the Supreme Court, in *Ledbetter v. Goodyear*, severely limited the ability of victims of pay discrimination to vindicate their rights.[1] According to the 5-4 decision, the majority held that the plaintiff, Lilly Ledbetter, did not have a valid claim of wage discrimination because she had not filed her complaint within 180 days of Goodyear's initial discriminatory pay decision. The Court so held despite the fact that Ms. Ledbetter did not become aware of the unlawfully lower wages until years after the discrimination began.

Under Title VII of the Civil Rights Act of 1964, an employee has 180 days after a discriminatory act to file a claim. Prior to the Supreme Court's decision, a majority of the federal circuits recognized the "paycheck accrual rule" in employment discrimination cases.[2] Under this principle, courts recognized that each new discriminatory paycheck started a new clock because each paycheck was a separate discriminatory act. This meant that employees were able to bring a timely claim as long as they could show that they had received a paycheck lessened by discrimination in the required time period. This common-sense rule prevailed in the majority of federal circuits and was the policy of the Equal Employment Opportunity Commission (EEOC) under both Democratic and Republican administrations before the Supreme Court's ruling. In fact, the EEOC intervened on behalf of Ms. Ledbetter before the Eleventh Circuit.[3]

Unfortunately, the Eleventh Circuit reversed Ms. Ledbetter's hard fought victory before a jury of her peers at trial, based solely on the radical, new argument that she had not timely filed her original claim. Worse still, when the case reached the

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Supreme Court, the U.S. Solicitor General and the Department of Justice filed a brief in opposition to this well-established principle, standing in stark contrast to the EEOC's earlier brief supporting the paycheck accrual rule.[4] The Supreme Court affirmed the Eleventh Circuit and overturned the broadly recognized legal precedent that each paycheck diminished by discrimination carries forward an employer's unlawful wage decisions. For Ms. Ledbetter, not only was she unaware of the date the pay discrimination began, but her employer also kept it secret, thereby preventing her from gathering the information that would have been necessary to file a complaint within 180 days of the original discriminatory decision.

The Supreme Court's decision to limit sharply workers' opportunities to challenge wage discrimination jeopardizes the robust application of our civil rights laws, which are intended to ensure that salary decisions are not infected by discrimination. The decision is also at odds with the realities of the workplace. As Supreme Court Justice Ruth Bader Ginsburg discussed in her dissent, the realities of the workplace may prevent employees from detecting pay discrimination when it first occurs. It might take years for an employee to uncover the problem, or as in the case of Ms. Ledbetter, it could happen through anonymous information provided by a concerned co-worker years after the initial problem. Indeed, the majority of workers may never know the salaries of their coworkers. According to a recent study, only one in ten private sector employers has adopted a pay openness policy. And many employers instruct employees not to share financial information at all. Furthermore, pay disparities often occur in small increments building up slowly but steadily in an insidious way. As Justice Ginsburg noted, "cause to suspect that discrimination is at work develops only over time."[5]

H.R. 2831: Addressing the *Ledbetter* Decision

In response to the Supreme Court's decision, Congress introduced H.R. 2831, the Lilly Ledbetter Fair Pay Act. The bill addresses the Court's decision to undermine protections against discrimination in compensation that have been bedrock principles of civil rights law for decades, by ensuring that victims of workplace discrimination have effective remedies. Moreover, because the Court's decision in *Ledbetter* has implications beyond Title VII, affecting pay discrimination claims brought under the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act, H.R. 2831 addresses pay discrimination based on race, color, religion, sex, national origin age, and disability. The bill clarifies that such discrimination is not a one-time occurrence starting and ending with a pay decision, but that each paycheck lessened due to discrimination represents a continuing violation by the employer.

Critically, this legislation will ensure employers do not profit from years of discrimination simply because their employees were unaware of it for a few months. This bill restores Congress' original intent and reaffirms the fundamental principle that our civil rights protections are intended to make people whole for injuries suffered because of unlawful employment discrimination. Employers should be assured, however, that the bill does not change the two-year limit of back pay damages that is currently part of Title VII of the Civil Rights Act of 1964.

S. 3209 Does Not Correct the Problems Raised by the Supreme Court in *Ledbetter*

The clear, measured approach taken in H.R. 2831 is the only way Congress can reverse the effects of the *Ledbetter* decision. A newly introduced bill from Senator Hutchison (R-TX), S. 3209, purports to offer a solution for victims of pay discrimination. But, in reality, S. 3209 would fail to correct the injustice created by the *Ledbetter* decision. The legislation would create new, confusing,

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and unnecessary hurdles for those facing discrimination and would flood the courts with premature claims and unnecessary litigation.

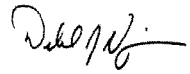
The approach taken in S. 3209 fails to recognize the basic principle that as long as discrimination in the workplace continues, so too should employees' ability to challenge it. Every time an employer issues a discriminatory paycheck, that employer violates the law, and victims of that discrimination should be afforded a remedy. Instead, S. 3209 would create new legal hurdles by requiring employees to show they filed their claims within 180 days of when they had – or *should have* had – enough information to suspect they had been subjected to discrimination. This *should have known* standard would encourage employees to file discrimination claims based on mere speculation or office rumors of wrongdoing in order to preserve their rights within the 180-day time frame.

Further, S. 3209 would create "mini-trials" focused on when the employee should have discovered the employer's wrongdoing, rather than on hard evidence correctly focusing on whether an employee suffered unlawful discrimination. The new and confusing standard and inducement to file premature claims will penalize both employers and employees by forcing them to expend time, resources, and money on unnecessary legal proceedings. In contrast, H.R. 2831 would not create a new standard, but would merely restore the law to the fair rule both employers and employees had come to rely upon prior to the *Ledbetter* decision.

The ACLU commends the Committee on holding a hearing to examine the Supreme Court's impact on women's equality in the workplace. We urge the Committee to help make equal pay for equal work a reality by supporting the approach in H.R. 2831 as the only real solution for the problems created by the Supreme Court's decision in *Ledbetter*. If you have any questions please contact Deborah J. Vagins at (202) 715-0816 or dvagins@dcaclu.org.

Sincerely,

Caroline Fredrickson
Director



Deborah J. Vagins
Legislative Counsel

cc: Members of the Senate Judiciary Committee

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[1] *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* 127 S. Ct. 2162, 167 L. Ed. 2d 982 (U.S. 2007).

[2] Prior to the Supreme Court's decision in *Ledbetter*, nine of the ten federal courts of appeals to consider the issue recognized the paycheck accrual rule. *See* **D.C. Circuit:** *Shea v. Rice*, 409 F.3d 448, 452-453 (D.C. Cir. 2005) (indicating that "[an] employer commit[s] a separate unlawful employment practice each time he pa[ys] one employee less than another for a discriminatory reason"); **Second Circuit:** *Forsyth v. Fed'n Employment & Guidance Servs.*, 409 F.3d 565, 573 (2d Cir. 2005) (stating that "[a]ny paycheck given within the statute of limitations period therefore would be actionable, even if based on a discriminatory pay scale set up outside of the statutory period."); **Third Circuit:** *Cardenas v. Massey*, 269 F.3d 251 (3d Cir. 2001) (finding that each paycheck was a separate discriminatory act); **Fourth Circuit:** *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 345-49 (4th Cir.1994) (stating that "in a compensation discrimination case, the issuance of each diminished paycheck constitutes a discriminatory act."); *Williams v. Giant Food Inc.*, 370 F.3d 423, 430 (4th Cir. 2004) (reiterating the longstanding rule that "each discriminatory salary payment was a discrete discriminatory act even though such payment was made pursuant to a broader policy"); **Sixth Circuit:** *Leffman v. Sprint Corp.*, 481 F.3d 428, 433 (6th Cir. 2007) (referencing "continuing violations that arise with each new use of the discriminatory act (*e.g.*, the *Bazemore* paychecks)"); **Seventh Circuit:** *Hildebrandt v. Illinois Dep't of Human Res*, 347 F.3d 1014, 1027-28 (7th Cir. 2003) (concluding that "each of [the plaintiff's] paychecks that included discriminatory pay was a discrete discriminatory act"); **Eighth Circuit:** *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167-68 (8th Cir.1995) (reiterating that "'[e]ach week's paycheck that delivers less to a [woman] than to a similarly situated [man] is a wrong actionable under Title VII'") (quoting *Bazemore v. Friday*, 478 U.S. 385 (1987)); *Tademe v. Saint Cloud State Univ.*, 328 F.3d 982, 989 (8th Cir. 2003) (noting that each discriminatory paycheck is a discrete act); **Ninth Circuit:** *Gibbs v. Pierce County Law Enforcement Support Agency*, 785 F.2d 1396, 1399 (9th Cir.1986) (stating that the policy of paying lower wages to female employees on each payday constitutes a continuing violation of the law); *Cherosky v. Henderson*, 330 F.3d 1243 (9th Cir. 2003) (noting that the "wrong in *Bazemore* accrued each time the salary policy was implemented"); **Tenth Circuit:** *Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1009-1010 (10th Cir. 2002) (commenting that each race-based discriminatory salary payment constitutes a fresh violation of Title VII).

[3]Brief of the Equal Employment Opportunity Commission in Support of Petition for Rehearing and Suggestion for Rehearing En Banc Filed by Appellee Ledbetter, *Ledbetter v. Goodyear Tire and Rubber Co. Inc.*, 421 F.3d 1169 (11th Cir. 2005) (No. 03-15264-GG), *available at* http://www.eeoc.gov/briefs/Ledbetter.txt.

[4] Brief for the United States as Amicus Curiae Supporting Respondent, *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* 127 S. Ct. 2162, 167 L. Ed. 2d 982 (U.S. 2007) (No. 05-1074).

[5] *Ledbetter*, 127 S. Ct. at 2178-2179.

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Statement of Senator Hillary Rodham Clinton

Senate Judiciary Committee

"Barriers to Justice: Examining Equal Pay for Equal Work"

September 23, 2008

Mr. Chairman, thank you for holding this hearing on an issue that touches the lives of so many women and their families. Thank you also to each of the witnesses for taking the time to provide their perspective on this topic, and in particular to Lilly Ledbetter, who has given so much of herself to this cause.

The Equal Pay Act was enacted in 1963. The Civil Rights Act became law in 1964. And yet more than 40 years later after these landmark pieces of legislation, women continue to make only 78 cents for every dollar earned by men. The wage gap exists across all education levels and a wide range of professions. The gap is larger yet for minorities, and widens as women grow older. A disparity persists even after one controls for occupation, experience, work hours, degree, training, and demographics. We continue to learn more about the nature of the gender wage gap with each passing month. Just this week, a new study found that the wage gap is far greater among employees who hold traditional attitudes about gender roles.

Lilly Ledbetter faced the reality of the wage gap first hand. She was a mother of two who worked as a manager at a tire factory in Alabama. For almost two decades, she earned less than her 15 male counterparts. She sued under the Equal Pay Act, and the jury heard evidence that her supervisor was openly biased against women, that the plant manager told her the "plant did not need women" and that women "caused problems," and that two other women who had worked as managers had been subject to discrimination, including one who was paid less than men she supervised.

The jury ruled in her favor, but the Supreme Court reversed. The Court did not find that she had failed to prove that she had been the victim of discrimination. Rather, the Court barred her claims because it found that she had not sued quickly enough. The Supreme Court expected her to sue within 180 days of the company's decision to discriminate, even though she did not realize that she was being paid less until an anonymous note was put in her locker, since salaries were confidential. A legislative effort to override the Supreme Court's rule passed the House earlier this year, but the Bush administration threatened to veto the measure, and it was blocked by Republicans in the Senate.

To explore the steps the government can and should take to address the pay gap, I joined with Senator Kennedy and Senator Harkin to ask the GAO to examine the enforcement of the pay equity laws in the public and private sectors. Last month, the GAO completed the first part of a report finding that the Bush Administration had failed to monitor its enforcement of the pay discrimination laws. The report also discussed how this administration walked back and then abandoned the Equal Opportunity Survey and other initiatives that the Clinton Administration

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designed to improve the collection of data on the wage disparity and strengthen the enforcement of the pay equity laws. When the Bush Administration then relied on contractors to self-assess their pay inequities, the GAO found the Department of Labor failed to track whether contractors were taking even this step.

I have introduced legislation that strengthens federal outreach efforts, creates strong incentives for employers to obey the laws that are now in place, and remedies several of the flaws raised in the GAO report. Specifically, the Paycheck Fairness Act would:

- Override court decisions by tightening the "factor other than sex" affirmative defense under the Equal Pay Act.
- Improve the enforcement of the Equal Pay laws for federal contractors;
- Require the Department of Labor to enhance outreach and training efforts to work with employers to eliminate pay disparities;
- Prohibit employers from retaliating against employees who share salary information with their co-workers;
- Strengthen the remedies available under the Equal Pay Act to include compensatory and punitive damages;
- Improve the collection of information on women and men's wages in order to more fully explore the reasons for the wage gap and help employers to address pay disparities; and
- Create a new grant program to help strengthen the negotiation skills of girls and women.

This measure passed the House by a vote of 247 to 148 earlier this year. Once again, the Bush Administration has threatened to veto this legislation.

The courts have undermined the right to equal pay. The Bush Administration has neglected the problem. It falls to Congress to take steps to safeguard this essential right. The hearing being held today is an important step towards that goal, and I look forward to continuing to work with my Senate colleagues to achieve equal pay for equal work for all.

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Statement of Senator Russ Feingold
Senate Judiciary Committee
Hearing on "Barriers to Justice: Examining Equal Pay for Equal Work"
September 23, 2008

Mr. Chairman, thank you for holding this hearing, and I want to commend Lilly Ledbetter for her courage and for the tremendous work she is doing to combat discrimination.

I know many of my colleagues, both on and off this Committee, share my disappointment and frustration that, despite all the gains women have made since gaining the right to vote 100 years ago, they still make 77 cents on the dollar compared to their male counterparts. It is hard to believe that this pay disparity continues to exist in the 21st century. Unfortunately, the pay disparity not only exists, but is even larger in my state of Wisconsin, which has one of the biggest wage gaps in the nation. According to data gathered by the Institute for Women's Policy Research (IPWR), in 2002, women's salaries were approximately seventy-one percent of men's salaries in Wisconsin. The wage gap gets even larger when you look at the earnings of minority women throughout Wisconsin. In 1999, African American women's salaries were only around 63 percent of white men's' salaries while Hispanic women's salaries were only 59 percent of white men's' salaries according to an analysis of Wisconsinites' wages by IWPR.

These troubling wage gaps exist throughout the country and, thanks to the flawed Supreme Court decision in Ms. Ledbetter's case, it is now even more difficult for hard working Americans to seek legal redress for this inequity in the workplace.

As Mr. Mehri notes in his testimony, Lilly Ledbetter's experience 'typifies the uphill battle that American workers face' in efforts to right the wrong of pay discrimination. After she found out that she was being paid less than her male counterparts, she filed a complaint with the EEOC and then brought a lawsuit in federal court in Alabama. The federal district court ruled in her favor, but last year, the Supreme Court ruled that Ms. Ledbetter had filed her lawsuit too long after her employer originally decided to give her unequal pay. Under Title VII of the Civil Rights Act of 1964, an individual must file a complaint of wage discrimination within 180 days of the alleged unlawful employment practice. Before the Ledbetter decision, the courts had held that each time an employee received a new paycheck, the 180-day clock was restarted because every paycheck was considered a new unlawful practice.

The Supreme Court changed this long-standing rule. It held that an employee must file a complaint within 180 days from when the original pay decision was made. Ms. Ledbetter found out about the decision to pay her less than her male colleagues well after 180 days from when the company had made the decision. Under the Supreme Court's decision,

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Ms. Ledbetter was just too late to get back what she had worked for. It did not matter that she only discovered that she was being paid less than her male counterparts many years after the inequality in pay had begun. And it did not matter that there was no way for her to find out she was being paid less until someone told her that was the case.

In Ms. Ledbetter's case, to put it simply, the Supreme Court got it wrong. It ignored the position of the Equal Employment Opportunity Commission and the decisions of the vast majority of lower courts that the issuance of each new paycheck constitutes a new act of discrimination. It ignored the fact that Congress had not sought to change this longstanding interpretation of the law.

The Court's decision also ignores realities of the American workplace. Perhaps we lose sight of this in Congress, since our own salaries are a matter of public record, but the average American has no way of knowing the salary of his or her peers. As Ms. Ledbetter noted, there are many places across the country where even asking your coworkers about their salary would be grounds for dismissal.

The Fair Pay Restoration Act, which has been pending in the Senate since shortly after the Supreme Court's erroneous decision, re-establishes a reasonable timeframe for filing pay discrimination claims. It returns the law to where it was before the Court's decision, with the time limit for filing pay discrimination claims beginning when a new paycheck is received, rather than when an employer first decides to discriminate. Under this legislation, as long as workers file their claims within 180 days of a discriminatory paycheck, their complaints will be considered.

This bill also maintains the current limits on the amount employers owe once they have been found to have committed a discriminatory act. Current law limits back pay awards to two years before the worker filed a job discrimination claim. This bill retains this two-year limit, and therefore does not make employers pay for salary inequalities that occurred many years ago. Workers thus have no reason to delay filing a claim. Doing so would only make proving their cases harder, especially because the burden of proof is on the employee, not the employer.

Opponents say that this bill will burden employers by requiring them to defend themselves in costly litigation. This is simply not the case. Most employers want to do right by their employees and most employers pay their employees fair and equal wages. This legislation will only affect those employers who underpay and discriminate against their workers, hoping that employees, like Ms. Ledbetter, won't find out in time. The Congressional Budget Office has also reported that restoring the law to where it was before the Ledbetter decision will not significantly affect the number of filings made with the EEOC, nor will it significantly increase the costs to the Commission or to the federal courts.

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The impact of pay discrimination continues throughout a person's life, lowering not only wages, but also Social Security and other wage-based retirement benefits. This places a heavy burden on spouses and children who rely on these wages and benefits for life's basic necessities like housing, education, healthcare, and food. This discrimination can add up to thousands, even hundreds of thousands, of dollars in lost income and retirement benefits. In these challenging economic times, the Congress and the courts need to do all they can to ensure that the wages and retirement savings of American men and women are protected and not subject to attack by flawed court decisions or legislative inaction.

Mr. Chairman, thank you again for holding this hearing to examine yet another mistaken Court decision that threatens the livelihood of hardworking American families. I am a proud co-sponsor of the Fair Pay Restoration Act, and I was disappointed when it failed in the Senate by just four votes earlier this year. I hope we will pass it quickly in the next Congress. Of course, women are not the only group that faces pay discrimination and we need to do more to protect the employment rights of minorities, people with disabilities, and other protected groups of workers. I stand ready to work with you and others on this Committee on this important issue.

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Statement of

The Honorable Dianne Feinstein

United States Senator
California
September 23, 2008

Thank you, Mr. Chairman. Congress passed Title VII and the Equal Pay Act almost fifty years ago to prevent employers from paying people less because of their race, sex, religion, or national origin.

Although this law has been a great success in many respects, fair pay problems persist and our courts have recently weakened rather than enforced Title VII's protections. I believe that we must be vigilant to ensure that women are not unfairly discriminated against in the workplace.

As the only woman on this Committee, I am particularly concerned about the problems facing women in the workplace and the overwhelming struggles that women are encountering as they try to maintain financial security in the current economic crisis.

During this year's presidential campaign, the nation's attention has focused at times on obstacles to women's progress in the workplace. There is much still to be done to make sure that employers judge women based on performance and not on extraneous factors such as appearance or the ability to fit into a male-dominated workplace.

We also have yet to resolve the difficulty that women have maintaining their careers while also bearing and raising children.

In today's strained economy, however, there is no issue more important for women than their financial security.

Put simply, women are still not paid as much as men, even when they do the exact same job.

Last month, the U.S. Census Bureau reported that women who work full time earn, on average, only 78 cents for every dollar that men earn. (U.S. Census Bureau and the Bureau of Labor Statistics. (August 2008). Annual Demographic Survey.) And as of last year, college-educated women with equal education, equal training, similar family situations, and equal hours to their male counterparts earned 5% less than men one year out-of-college, and 12% less nine years later. (Amer. Ass'n of Univ. Women, Behind the Pay Gap).

Lower paychecks are not the only problem. In a recession, women suffer disproportionately under almost every economic measure. As of April of this year:

· Women were losing jobs faster than men;

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· Women's wages were falling more rapidly than men's;

· Women were disproportionately at risk for foreclosure and 32% more likely to receive subprime mortgages than men;

·Women had fewer savings than men; and

·Non-married women had a net worth 48% lower than non-married men.

Once retired, women find themselves in even greater financial jeopardy.

On average, women live approximately seven years longer than men, but they receive significantly fewer retirement benefits.

Among women above retirement age, some do not receive any benefits at all because they have spent their working years inside the home caring for their children. Women who did work outside the home were often paid significantly less than their male counterparts. Their pension checks reflect this fact: their pension checks are – as their paychecks once were – lower than those of their male colleagues.

This problem is compounded even further by bad company practices that leave women with no benefits at all for some periods during their careers. Before Congress passed the Pregnancy Discrimination Act, many employers refused to recognize women's health issues as health issues. These companies denied women benefits for the weeks or even months that they were forced home due to pregnancy-related medical issues.

These problems deserve our immediate attention.

Right now, all Americans are concerned about downturns, layoffs, stagnant wages, and pay cuts. For the women on whom these burdens disproportionately fall, the concerns are even greater.

The federal courts and the Equal Employment Opportunity Commission should provide a forum where women can seek relief when employers try to cut corners by unfairly reducing their pay and benefits. In recent years, however, rather than a level playing field, the courts have become hostile to employees' claims.

Under Chief Justice Roberts' leadership, it has become commonplace for the court to narrow and constrict federal laws like Title VII rather than enforce them as Congress intended.

I am a co-sponsor of the bill to reverse the Ledbetter decision, and I favor passage of that bill; but it is my sincere hope that the courts will shift again and that it will no longer be necessary for Congress to restate the protections in laws that Congress has already passed.

# # #

TESTIMONY OF NOREEN HULTEEN

BEFORE THE SENATE JUDICIARY COMMITTEE

SEPTEMBER 23, 2008

In 1968, I was pregnant with my youngest child. I was employed by Pacific Telephone and Telegraph, a wholly was owned AT&T subsidiary, as an Assistant Manager.

In November, I was told by my immediate boss to begin my pregnancy Leave of Absence (LOA), as my body was not "hiding" the condition. At the time, a pregnancy leave was treated as unpaid personal leave by the company. My daughter was born on 1/12/69.

AT&T at that time required a doctor's certificate of fitness be provided before any employee could return to work following a pregnancy LOA.

My doctor told me that corrective surgery was needed before he could give me that document. A full laperotomy was required and it was scheduled for 6 weeks after the birth of my child. The surgery was not pregnancy related. Because I was on a "personal leave" for pregnancy and not a disability leave, the time I took off for the laperotomy was not considered by AT&T to be a disability LOA.

Recovery was long. I returned to work in either July or August 1969. If I had been male, I would have been absent on Disability Benefits for surgery. However, because I was on a personal leave, I could not take off additional time for the laperotomy as a disability leave unless I returned to work first. I asked my supervisor if I could return for one day and then begin a disability leave, My employer refused this request and, as I stated above, my doctor would not authorize me to return to work without the surgery. If I had been on disability leave and not pregnancy leave, my medical insurance would have been paid in full by the company. If I had been on a disability LOA, I had enough service then to have my full salary paid for part of the time and I would have received half-pay for the remaining time. I had to pay for my own medical insurance for all the months I was on LOA. Due to the AT&T requirement that a person work 6 months after return from a personal LOA before becoming eligible for paid vacation, I lost my vacation benefit for 1969. I also lost my annual raise in pay.

Because AT&T treated pregnancy leave differently from any other kind of disability leave, I lost all of those benefits.

Upon my return to work, my Net Credited Service (NCS) date was adjusted to deduct all but 30 days of the time I had been out on leave. If I had been out on disability leave, I would not have had my date adjusted. AT&T uses this date to keep track of how long someone has worked at the company for seniority and other purposes. This made no difference to anything at that time. It was just a paper record.

Later on, I read that Pacific Bell had been sued successfully for discriminating in pension calculations against women who took pregnancy leave by deducting that leave time from their NCS dates when it did not deduct that time for any other kind of disability leave. I asked my immediate boss to adjust my NCS date back to my original NCS date as required by the court ruling. He told me that I must write to the Benefits Committee for that.

I wrote the letter on my personal stationery and received no reply. I sent a second letter asking for a reply and received none. In June 1994, my early-retirement date (a force reduction) arrived without any disposition on my request. I signed the papers agreeing to the conditions, but noted

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"except my NCS date" in the margin, and signed that.

When AT&T calculated my pension, it reduced my annual pension benefit because of the pregnancy leave I had taken. I had actually worked for AT&T for 30 years and 8 months. I was credited with less than 30 years. A man hired on the same day as me, and retired on the same day as me, could have had several disabilities, and yet would retire with higher pension benefits than me. This is what I sued to have AT&T fix.

I waited some time for AT&T's response, but still received none. So, I made an appointment with the EEOC in San Francisco. My first communication there was difficult. The first contact rejected my complaint. Only after complaining was I finally connected to a supervisor who was helpful and understanding.

Eventually, I was issued a "Right To Sue" letter. I was referred to Judith Kurtz, the attorney on the Pallas case. We met and reached an agreement that I would be a named plaintiff in a class action suit. My case is currently before the Supreme Court.

About two years later, AT&T offered me $5,000 cash to drop the case. By then, I was aware of a number of women whose loss was probably greater than mine was and whose need was more urgent. I refused to settle and let the other women down. I also felt strongly that AT&T was obligated to obey the law.

For the 14 years since I retired and attempted to have my lost credit reinstated, AT&T has employed many delaying tactics. My understanding is that they claim that they are not responsible for correcting that which happened before the law was changed. I am not claiming damages for any of the harm done to me in 1969, before the Pregnancy Discrimination Act. I am not asking AT&T to pay the medical insurance or lost disability pay they should have paid me, or to reimburse me for the raise or the vacation time I lost. I am claiming correction of the harm that was done to me in 1994 – after the law was changed. I am sure that during the 14 years of litigation, many AT&T pensioners who should have been entitled to fair treatment have died and can never benefit from this lawsuit.

I was very happy when the Ninth Circuit agreed with us in my case and held that AT&T was not allowed to reduce pensions for women who took pregnancy leave in the past. I was disappointed that rather than finally deciding to do the right thing and stop discriminating, AT&T decided to try to get the Ninth Circuit's decision reversed.

In my opinion, the problem is not in the laws, which exist to protect women. The problem is that they are not enforced properly. When my deposition was taken as part of the lawsuit, the AT&T lawyer asked why I had not filed a complaint in 1969. She was very young and did not understand that there was no way to complain in 1969. If I had complained to AT&T, my belief is that I would have been fired. Today, women still hesitate to start a proceeding like this because it is apparent that large corporations can flaunt the laws and not be challenged.

I am hopeful that the Supreme Court will recognize that Congress never intended to allow AT&T to discriminate against women like it has been doing. Frankly, the Supreme Court should not have to be involved in this case in the first place – it is a shame that a big and wealthy company like AT&T is working so hard, and spending so much money on its lawyers, to try to win the right to pay smaller pensions to women whose only offense was that they dared to try to work and have a family at the same time.

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Statement of Chairman Patrick Leahy
Senate Judiciary Committee
"Barriers to Justice: Equal Pay for Examining Equal Pay for Equal Work"
September 23, 2008

This is another in a series of hearings we have held highlighting how court decisions affect Americans' everyday lives. Today, in addition to the Supreme Court, we will examine the importance of the Federal Courts of Appeal, since the Supreme Court hears only about 75 cases per year.

Equal pay for equal work should be a given in this country. Unfortunately, the reality is still far from this basic principle. As Jill Biden reminded us all recently, American women still earn only 77 cents for every dollar earned by a male counterpart and that decreases to 62 cents on the dollar for African-American women and just 53 cents on the dollar for Hispanic-American women. She is right to say that equal pay is not just a women's issue, it is a family issue.

I am pleased to welcome to today's hearing a brave woman who is a champion for equal pay. Lilly Ledbetter embodies the classic American story. She was a working mother in a Goodyear Tire plant. After decades of service, she learned through an anonymous note that her employer had been discriminating against her for years. She was repeatedly deprived of equal pay for equal work. That affected her family, and this discrimination continues to affect her retirement benefits.

A jury of her peers found that Lilly Ledbetter had been deprived of over $200,000 in pay, and ordered the corporation to pay her additional damages for their blatant misconduct. Incredibly, the United States Supreme Court overturned her jury verdict, created a bizarre interpretation of our civil rights laws, and ignored the realities of the American workplace. Ms. Ledbetter's employer, Goodyear Tire, will never be held accountable for its illegal actions. The Court's ruling sends a signal to other corporations that they too can discriminate with impunity, so long as they keep their illegal actions hidden long enough.

The current Supreme Court seems increasingly willing to overturn juries who heard the factual evidence and decided the case. In employment discrimination cases, statistics show that the Federal Courts of Appeal are five times more likely to overturn an employee's favorable trial verdict against her employer than they are to overturn a verdict in favor of the corporation. That is a startling disparity for those of us who expect employees and employers to be treated fairly by the judges sitting on our appellate courts.

Set to be argued before the Supreme Court this fall are several more cases affecting women whose very livelihoods hang in the balance. In addition to cases involving domestic violence protections and Title IX, they will consider cases that involve: (1) whether retired employees should be penalized for leave they took related to their pregnancies; (2) whether a children's musician who had her arm amputated has any right

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to recover against the drug company who caused her injury; and (3) whether an employee asked to participate in an internal sexual harassment investigation could be fired for simply reporting sexual harassment in her workplace.

When corporations discriminate against women paycheck after paycheck, it should not be tolerated. The civil rights protections enacted by Congress must be made real by enforcement. That means equal pay for equal work.

Our courts are an essential mechanism to enforce the civil rights laws that Congress has passed – laws that protect women, the elderly, minorities, and the disabled. Those laws are reduced to hollow words on a page if judges issue rulings like the one rendered by the Supreme Court in Lilly Ledbetter's case.

A few months ago when the Senate tried to correct the Supreme Court's unjust decision in the Ledbetter case, we fell just a few votes short of breaking through the Republican filibuster of that legislation. A senior Republican Senator who was not present for the vote, and who thus effectively supported the filibuster, claimed that the real problem is not discrimination, but that women just need more training. For those of us who know that women are more educated and better trained than ever before, this was a surprising perspective. Despite their training women still receive only 77 cents for every dollar men make for the same work. I hope that today's hearing will be a chance to recognize the realities of the American workplace, the importance of fairness and the indispensible role that our Federal courts play making sure that all Americans receive equal pay for equal work.

As the economy continues to worsen, many Americans are struggling to put food on the table, gas in their cars, and money in their retirement funds. It is sad that recent decisions handed down by the Supreme Court and Federal appellate courts have contributed to the financial struggles of so many women and their families.

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TESTIMONY OF LILLY LEDBETTER

**BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

HEARING: BARRIERS TO JUSTICE: EXAMINING EQUAL PAY FOR EQUAL WORK

SEPTEMBER 23, 2008

My name is Lilly Ledbetter, and I appreciate the opportunity to testify at this Committee's hearing on Barriers to Justice: Examining Equal Pay for Equal Work. I am sorry to say that, in my case, the barriers that Eleventh Circuit and five members of the Supreme Court put in the way are still standing.

I began working as a supervisor in the Goodyear tire plant in Gadsden, Alabama, in 1979. I worked for Goodyear for almost twenty years. I worked hard, and I was good at my job. For example, Goodyear gave me a "Top Performance Award" in 1996. But it wasn't easy. I was only one of a handful of women supervisors during the time I worked for Goodyear, and I definitely faced obstacles and harassment that my male peers did not have to endure.

But for virtually all of the time I worked at Goodyear, I did not know that I was also being subjected to pay discrimination. When I first started at Goodyear, the managers got the same pay, so I knew I was getting as much as the men. But then Goodyear switched to a new pay system based on performance. After that, people doing the same jobs could get paid differently. Of course, Goodyear had all the facts – it knew who was making what, made the decisions about how much to pay each of the managers, and knew whether its pay system was really based on performance or on something else.

But the workers didn't know. In fact, Goodyear kept what everyone got paid strictly confidential. No one was allowed to discuss their salaries. Over the following years, sometimes I got raises, sometimes I didn't. Some of the raises seemed pretty good, percentage-wise, but I didn't know if they were as good as the raises other people were getting.

I only started to get some hard evidence of what men were making when someone left an anonymous note in my mailbox at work, showing that three other male managers were getting paid between 15% and 40% more than I was. That discrimination harmed my family then, and it continues to affect me today, as my retirement income is substantially lower than what it could – and should – have been.

I thought about just moving on, but in the end, I could not let Goodyear get away with their discrimination. So I filed a complaint with the EEOC in 1998, only a few days after I received that note, and thereafter I filed a lawsuit in federal court in Alabama.

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It wasn't until I filed my case and got information through the discovery process that I finally learned what Goodyear had known all along: that it was paying me a lot less than all of the men doing the same work. Goodyear didn't deny that. But it claimed that it was because I was a poor performer and consequently got smaller raises than all the men who did better. That wasn't true, and the jury didn't believe it. At the end of the trial, the jury found that Goodyear had discriminated against me in violation of Title VII. The jury awarded me backpay as well as more than $3 million in compensatory and punitive damages.

I can tell you that that was a good moment. It showed that the jury took my civil rights seriously and wasn't going to stand for a national employer like Goodyear paying me less than others just because I was a woman. And it seemed like a large enough award that a big company like Goodyear might feel the sting and think better of it before discriminating like that again.

I was very disappointed when the trial judge was forced to reduce the damages award -- which he did because of Title VII's $300,000 statutory cap. But the trial judge said that the jury verdict was "abundantly supported by the evidence" -- vindicating that what had happened to me was wrong and violated our national civil rights laws.

That all changed when Goodyear appealed the verdict. The 11th Circuit Court of Appeals – and then five Justices of the Supreme Court – ruled that although I was continuing to be paid less than the men right up to the date I filed my charge, I had complained too late. According to these judges, any pay discrimination complaint must be filed within about six months of the first time a worker gets a discriminatory paycheck – no matter how long the discrimination continues, no matter how much damage it causes the worker, and no matter how much the employer knows that it's getting away with, and profiting from, its unlawful conduct. Justice Alito and four other Supreme Court justices sent the message that it's just tough luck for the employee – if she doesn't complain at the time of the employer's original decision, the employer gets to pay her less for the rest of her career.

I was, frankly, shocked by this ruling. Justice Ginsburg hit the nail on the head when she said that the majority's rule just doesn't make sense in the real world. Like Goodyear, many companies keep salary information confidential. And you can't expect people to go around asking their coworkers how much money they're making. At a lot of places, that could get you fired. The Supreme Court took a law that was supposed to protect people like me, and created a loophole that employers can drive a truck through.

Equally important, the higher courts rejected what had been the law in every part of the country before the 11th Circuit ruled in my case. I'm no lawyer, but my counsel told me that it was settled law that an employee could challenge each and every discriminatory paycheck she received. That approach seems to me to be not only right for the real world, but also the only sensible interpretation of the law: each time the employer pays

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you less on the basis of your sex, it's an act of discrimination that the employer should correct or be challenged on. In fact, the law was so clear that the EEOC intervened on my side before the 11th Circuit, acting to defend my jury verdict.

But unfortunately, as Mr. Mehri will tell you, what happened to me is all too common in employment discrimination cases that get to the appellate courts. In fact, I understand that Mr. Mehri's report says that my case was brought in the very worst area of the country – the 11th Circuit -- for those subject to employment discrimination. But in *every* circuit court, far too many workers are being denied their rights today, as well as the financial awards that compensate for what the workers have lost because of discrimination.

That's certainly true for me. Goodyear will never have to pay me what it cheated me out of. The jury in my case found that I lost approximately $224,000 in salary over time. And I know that I've lost even more than that, since those lower paychecks were used to calculate my pension and Social Security benefits.

But my case is only the tip of the iceberg. With regard to pay discrimination, there are lots of other companies out there that got the Supreme Court's message loud and clear: they will not be punished for discriminating, if they do it long enough and cover it up well enough. Scores of women around the country have shared their stories with me and told me how they were paid less for doing the same job as their male colleagues – and now there's nothing they can do about it. What is more, the legal repercussions from my case continue. For example, the Supreme Court is all set to hear a case this fall that raises the question whether employers who denied women credit for maternity leave in the 1970s can discriminate against them now in calculating their pensions and retirement eligibility. And I understand that since the Supreme Court's ruling in my case, federal courts have applied it to bar all different kinds of cases, not just pay discrimination cases.

The Senate can restore the promise that the Supreme Court broke in my case by enacting the Lilly Ledbetter Fair Pay Act, which would make sure that people can challenge discriminatory paychecks as long as they continue to receive them. But the Senate must also more broadly restore the promise of the employment discrimination laws by insisting that judges they confirm understand the real world and are committed to upholding longstanding legal protections. As I have learned all too well, it matters who sits on our courts – to me, and to workers all around the country.

My case is over. I will never receive the pay I deserve. But I will feel vindicated once again if I can play even the smallest role in ensuring that what happened to me will not happen to anyone else. I am honored to be here today and thank you for the opportunity to testify before this Committee.

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STATEMENT OF LAWRENCE Z. LORBER
PROSKAUER ROSE LLP

BEFORE THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

Barriers to Justice: Examining Equal Pay for Equal Work

Tuesday, September 23, 2008 – 10:00 a.m.
216 Hart Senate Office Building

Good morning Chairman Leahy, Ranking Member Specter, and Members of the Committee. Thank you for affording me the privilege of testifying today. My name is Lawrence Z. Lorber, and I am a partner at the law firm of Proskauer Rose here in Washington, D.C.

The laudable goal of equal pay for equal work that we are discussing today is one with which I am personally familiar. Prior to entering the private practice of law, I served as the Director of the Office of Federal Contract Compliance Programs ("OFCCP") and Deputy Assistant Secretary of the Department of Labor. The OFCCP enforces Executive Order No. 11246, which prohibits discrimination by federal contractors on the basis of race, gender, national origin, color, and religion, and requires contractors to take affirmative action to promote equal employment opportunity. During my tenure at the OFCCP, policies asserting that agency's authority to retrieve back pay for employees were formulated and successfully litigated. In 1990 and 1991, I was counsel to the Business Roundtable for the discussions and legislation activity which led to the 1991 Civil Rights Act. More recently, as Chair of the U.S. Chamber of Commerce's (the "Chamber's")[1] policy advisory committee on equal employment opportunity

[1] The Chamber is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every industry, sector, and geographical region of the country.

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matters, I have witnessed, first hand, the elimination of barriers that stand in the way of equal pay for equal work.

Today, I will discuss the meaning and impact of H.R. 1338, the Paycheck Fairness Act. If enacted, the Paycheck Fairness Act would amend the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), in significant substantive and procedural ways. Next, I will summarize a series of employment law cases decided by the Supreme Court during its 2007-2008 Term. As these cases demonstrate, the Supreme Court has not demonstrated a pro-employer bias when interpreting the equal employment opportunity laws. I will conclude my comments by discussing what I believe to be a serious barrier to equal pay for equal work – class action litigation of employment discrimination actions.

I. The Paycheck Fairness Act (H.R. 1338)

The Paycheck Fairness Act ("the Act"), if enacted, would radically amend the Equal Pay Act of 1963 in significant substantive and procedural ways. These amendments are based on an unsubstantiated premise that, throughout the United States, all unexplained wage disparities existing between men and women are necessarily the result of intentional discrimination by employers.

On this assumption, the Act would impose harsh, "lottery-style" penalties upon all employers, lower the applicable standards for claims, and make available a more attorney-friendly class action device (among other suggested changes). The Act's proponents contend these changes are necessary to ensure that women receive equal pay for equal work. Nothing could be further from the truth. In reality, the Act would expand litigation opportunities for class action lawyers seeking millions of dollars from companies without ever having to prove that the companies intentionally discriminated against women in setting compensation rates.

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The proposed changes to the EPA are also contrary to the most fundamental underpinnings of that Act – the requirement that equal pay for equal work be balanced against the mandate that government not interfere with private companies' valuation of the work performed for them and, more generally, the setting of wages. The proposed changes are also inappropriate given the EPA's distinguishing features, relative to other nondiscrimination legislation. Perhaps the most notable difference is the lack of any requirement to actually *prove* intentional discrimination. This feature separates the EPA from Title VII, the ADEA, the ADA, as well as Section 1981 of the Civil Rights Act of 1866 and Section 1983 of the Civil Rights Act of 1871. These statutes allow for the imposition of compensatory and punitive damages, but only upon a finding of intentional discrimination by the employer. Unlike these statutes, the EPA currently imposes liability on employers without any required showing that the employer intended to discriminate against the worker.

Commentators and courts have often referred to this leniency in the EPA as rendering employers "strictly liable" for any pay disparity between women and men for equal work unless the employer meets its burden of proving that the rate differential was due to: a seniority system, a merit system, a system measuring quality or quantity of work, or any other factor other than sex. The irrelevancy of an employer's intent is a defining feature of the EPA, and must be remembered as the significant amendments to the EPA suggested by the Paycheck Fairness Act are debated.

Because the EPA is a "strict liability" statute requiring no showing of discriminatory intent to facilitate the imposition of unlimited punitive and compensatory damages, it is both unnecessary and inappropriate to amend the EPA. Nonetheless, the Paycheck Fairness Act proposes the following amendments to the EPA:

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- The elimination of caps on punitive and compensatory damages.
- The availability of punitive and compensatory damages for unintentional pay disparities.
- The elimination of the employer defenses for pay disparities, such as paying employees differently because they work in different parts of the country based on the different costs of living.
- The creation of relaxed filing requirements for class claims.
- The creation of comparable worth "guidelines" that effectively second guess market forces regarding the relative worth of different jobs, *et cetera*.
- The re-imposition of statistical analyses and auditing methods used by the Labor Department.

These amendments would serve no legitimate purpose. They are contrary to the long experience under the Equal Pay Act and to the framework of Title VII as established by the 1991 Civil Rights Act. Instead, these amendments would serve the ill-conceived purpose of turning the EPA into a lottery for plaintiffs willing to roll the dice to capitalize on likely legitimate age differentials and unjustly enrich plaintiffs' attorneys. For these reasons, the Paycheck Fairness Act is an ill-conceived effort to dramatically change the compensation structure in our country and to substantiate unnecessary and non-productive litigation for carefully thought out compensation decisions.

II. Employment Law Decisions Issued During the 2006-2007 and the 2007-2008 Supreme Court Terms

A. *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (2008).

In 1996, the New York-based federal research laboratory, Knolls Atomic Power Lab, instituted an involuntary reduction in force and asked supervisors to follow a set of criteria to determine which employees would be dismissed. The supervisors were asked to rank employees based on performance, flexibility, and the criticality of their skills. Points were added to the employees' scores based on their years of service. On the basis of these rankings, thirty-

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one employees were terminated in connection with the reduction in force. All but one of the thirty-one terminated employees was over forty years of age. Twenty-six of the terminated employees filed a lawsuit, alleging age discrimination in violation of the ADEA.

The Second Circuit held, contrary to the EEOC's argument, that the dismissed workers, not the employer, had the burden to show that the evaluation system used to determine which employees would be terminated in connection with the reduction in force was unreasonable. The Second Circuit held that the employees failed to satisfy this burden.

The class petitioned the Supreme Court for *certiorari* on two questions: (1) who bears the burden of persuasion to show a "reasonable factor other than age"; and, (2) whether the evaluation practice at issue, whereby employers "confer broad discretionary authority on individual managers to determine which employees to lay off" should be deemed reasonable as a matter of law. By a vote of 7-1, the Supreme Court held that when an employer engages in a business practice that places a disproportionate burden on older workers, it is the employer that bears the burden of persuasion of showing that its action was based on a reasonable factor other than age. Thus, the Supreme Court's decision in *Meacham* eased the burden on plaintiffs bringing disparate impact claims under the ADEA.

B. *Fed Exp. Corp. v. Holowecki*, 128 S. Ct. 1147 (2008).

In December 2001, Patricia Kennedy filed an intake questionnaire and a six-page affidavit with the EEOC alleging that FedEx had instituted several workplace policies and practices that discriminated against employees on the basis of age. She did not file a Charge of Discrimination at that time and, thus, the EEOC did not assign a charge number, did not inform FedEx of the allegations set forth in the intake questionnaire and affidavit, and made no attempt at informal conciliation. In April 2002, Ms. Kennedy filed a class-action ADEA law suit on

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behalf of herself and similarly situated employees. Exactly on month later, Ms. Kennedy filed a Charge of Discrimination with the EEOC.

The district court granted FedEx's motion to dismiss on the ground that Ms. Kennedy's 2001 questionnaire and affidavit did not constitute a "Charge" under the ADEA. The Second Circuit reversed, holding that the standard to determine whether a "Charge" had been filed is two-pronged. According to the Second Circuit, a "Charge" must comport with the EEOC regulations and, second, a "Charge" must manifest the employee's intent to filed a charge, as viewed though the eyes of a reasonable person. The Second Circuit held that Ms. Kennedy's December 2001 submissions satisfied these requirements and permitted her suit to go forward.

In its petition for *cert.*, FedEx argued that an intake questionnaire, even if accompanied by an affidavit, cannot constitute a "Charge." The Supreme Court disagreed. In a 7-2 decision, the Court held that a "Charge" must contain basic information listed in the regulations, including the name of the Charging Party, the allegation, and the name of the respondent/employer. Provided such requisite information is included, a filing can be deemed a "Charge" under the ADEA if it objectively can be construed as a "request for the agency to take remedial action to protect the employee's rights." The Court referred to this as the "request to act" requirement.

C. *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008).

Gomez-Perez, an employee within the U.S. Postal Service, applied for and was denied a request to transfer from her part-time job as a postal clerk to a similar full-time position. She filed a grievance with the USPS, and a Charge of Discrimination with the Equal Employment Opportunity Commission, alleging in each that she had been denied her request for a transfer because of her age (45). Ms. Gomez-Perez claimed that, as a result of filing her grievance and Charge, she was subjected to various forms of retaliation, including harassment and a reduction

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in compensable working hours. Ms. Gomez-Perez alleged that the United States Postal Service, and the Postmaster General retaliated against for filing a Charge of Discrimination with the EEOC in violation of 29 U.S.C. § 633a.

The First Circuit held that Ms. Gomez-Perez's claim was not barred by sovereign immunity, but found that the ADEA does not provide a cause of action for retaliation. The First Circuit found that § 633(a) prohibits only "discrimination based on age" and contains no express cause of action for retaliation. The First Circuit further noted that the structure of the ADEA demonstrates Congress's intent not to include retaliation as a cause of action under § 633(a). According to the First Circuit, Congress allowed such a claim against private employers under section 623(d), but did not provide such a cause of action for federal employees against federal employers. The First Circuit conceded that other circuits, such as the D.C. Circuit, have held that § 633(a) does provide federal employees a cause of action for retaliation.

The Supreme Court, following *Sullivan* v. *Little Hunting Park, Inc.* and *Jackson* v. *Birmingham Bd. of Ed.*, reversed the First Circuit. The Court held that § 633(a) prohibits employers from retaliating against federal employees who complain of age discrimination.

D. *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951(2008).

Herndrick Humphries, an African-American, worked as an associate manager in a Cracker Barrel restaurant owned by CBOCS West, Inc. ("Cracker Barrel"). In August and October 2001, Humphries complained to his district manager about his general manager's disciplinary reports, racially offensive remarks, and the termination of a fellow employee, all of which he believed were racially motivated and groundless. The district manager did not take any action and fired Humphries in December 2001 due to a report from another associate manager that Humphries left the store safe open overnight. Humphries filed a lawsuit under Title VII and

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Section 1981 alleging both race discrimination and retaliation. The Title VII claim was dismissed for procedural defects.

The United States Court of Appeals for the Seventh Circuit determined that Humphries did have a potential cause of action under Section 1981 stating that Section 1981 provides broad protection against retaliation. Additionally, the court determined that Humphries had sufficient evidence to support his retaliation claim and remanded the case for trial.

It its petition for *certiorari*, Cracker Barrel raised a single question: "Is a race retaliation claim cognizable under 42 U.S.C § 1981?" Cracker Barrel noted that Section 1981 does not include the word "retaliation," and argued that terminating an employee in retaliation for having made a complaint is conceptually different from terminating an employee because of that employee's race. Cracker Barrel also argued that, because Title VII expressly provides a cause of action for retaliation in the employment context, Section 1981, which has no such provision, should not be read to allow retaliation actions. Humphries countered by arguing that Congress intended Title VII to supplement existing employment discrimination laws, and that the Civil Rights Act of 1991 allowed for such retaliation claims. The Court, in a 7-2 decision written by Justice Breyer, held that Section 1981 does, in fact, encompass retaliation claims and affirmed the judgment of the Seventh Circuit.

E. *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008).

Wanda Glen worked for Sears & Roebuck from 1986 to 2000, when she went on medical leave for a heart condition and never returned to work. Glenn submitted a claim under Sears's long-term disability plan in June 2000. The Sears plan provided for two distinct stages of "total disability" to obtain benefits under the plan. The first required the participant to be unable to perform her current job; the second—which became relevant after the first 24 months of

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benefits—in essence, required that the participant be unable to perform any job. After her initial 24 months of benefits, MetLife instructed Glenn that if she wished to continue receiving long-term disability benefits under the plan she was required to demonstrate that she met the second stage of total disability. Based on the medical information submitted by Glenn and her doctor, MetLife found that she was able to work in some capacity and denied her continued benefits. Glenn appealed, and MetLife had an independent physician review her medical file. Despite the fact that the physician's conclusion was unclear as to whether Glenn was in fact, totally disabled, MetLife affirmed its decision to deny benefits. Glenn filed suit against MetLife under ERISA § 502(a) for denial of benefits.

The Sixth Circuit held that although the plan documents gave MetLife discretionary authority to interpret the terms of the plan and to determine benefits, the Court is allowed to take into account the existence of a conflict of interest on the part of MetLife in reviewing MetLife's decision. A conflict of interest existed here because MetLife not only decided whether a participant was eligible for benefits, but also had to pay those benefits. While other facts were involved, such as MetLife's disregard for a Social Security Administration finding that Glenn was totally disabled, the Court admittedly "considered" MetLife's conflict of interest in determining that MetLife's denial of benefits was arbitrary and capricious.

Before the Supreme Court, MetLife argued that, by both administering and funding the Sears benefit plan, it "does not act under a conflict of interest that must be considered on judicial review." In support of that contention, MetLife pointed to the language of ERISA, 29 U.S.C. § 1108(c)(3), which permits a single entity to serve both as a plan's administrator and its payer. "It cannot be the case that an arrangement that was expressly contemplated—and authorized—by Congress, without more, changes the standard of review for discretionary benefit

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determinations." That assertion, according to MetLife, is further confirmed by principles of trust law, under which a trustee is presumed to have "'acted in good faith' despite . . . a potential conflict, unless there is some affirmative evidence to the contrary."

The Supreme Court rejected MetLife's argument and affirmed the Sixth Circuit's approach, holding that a company which both administers and funds a benefit plan operates under a conflict of interest that must be considered as a factor in a court's review of claim denials.

F. *Burlington N. & Santa Fe Railway v. White*, 548 U.S. 53 (2006).

Sheila White was the only woman that worked in the Maintenance of Way department of Burlington Northern & Santa Fe Railway Company's Tennessee Yard. Burlington Northern hired White as a "track laborer," a job that involves removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-of-way. Soon after White arrived on the job, a co-worker that had previously operated the forklift chose to assume other responsibilities, and White was assigned to the "less arduous and cleaner job" of forklift operator.

In September 1997, White complained to a Burlington Northern official about insulting sex-based comments by her supervisor. The company suspended the supervisor and ordered him to attend a sexual-harassment training session. The company also removed White from forklift duty and assigned her to perform only the track laborer tasks. White filed a complaint with the EEOC and claimed that the reassignment of her duties amounted to unlawful gender-based discrimination and retaliation for her complaint. White filed two additional EEOC charges in which she claimed that the company placed her under surveillance, monitored her daily activities, and suspended her without pay. White invoked internal grievance procedures, and those

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procedures led the company to reinstate White to her position and award her back pay for the 37 days she was suspended.

White subsequently filed a Title VII action against Burlington Northern claiming that changing her job responsibilities and suspending her for 37 days without pay was unlawful retaliation. A jury agreed with White and awarded her $43,500 in compensatory damages. The district court entered judgment on the verdict. A divided panel of the Sixth Circuit reversed. An en banc panel of the Sixth Circuit vacated the panel's decision and reinstated the district court's judgment in White's favor. The en banc court held that in such a case a plaintiff must show an "adverse employment action," which it defined as a "materially adverse change in the terms and conditions" of employment.

The Supreme Court affirmed the Sixth Circuit's decision, but rejected the standard they articulated. Specifically, the Court concluded that Title VII's retaliation provision is broader in scope than Title VII's substantive discrimination provision. The Court observed that Title VII's substantive discrimination provision, section 703(a), is limited in scope to actions that affect employment or alter the conditions of the workplace in the certain enumerated categories: hire; discharge; compensation; terms; conditions; or privileges of employment. Section 704(a), relied on by White, contained no such limiting words.

The Court explained its rejection of the Solicitor General's position by looking to and relying on the EEOC's sub-regulatory guidance, which "expressed a broad interpretation of the anti-retaliation provision." The Court cited with approval the EEOC's 1998 Compliance Manual statement that Title VII's anti-retaliation provision "prohibit[s] any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or other from engaging in protected activity."

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The Court concluded that "[t]he scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm." The harm must be materially adverse, which, the Court explained, means that a reasonable person might have been dissuaded from making or supporting a charge of discrimination. The Court added that "context matters," and that "the significance of any given act of retaliation will often depend of the particular circumstances."

III. The Class Action Is Neither An Appropriate Nor An Effective Mechanism For The Resolution of Statutory Employment Discrimination Claims.

In 1977, the Supreme Court stated that "suits alleging racial or ethnic discrimination are often by their nature class suits, involving class-wide wrongs."[2] Indeed, in 1966, when Rule 23 of the Federal Rules of Civil Procedure was amended, the Federal Rules Advisory Committee opined that Rule 23 is a particularly appropriate vehicle for the resolution of civil rights actions.[3] Despite these endorsements, many remained skeptical that the class action could be used to effectively and justly resolve employment discrimination lawsuits. This skepticism gained momentum when, in 1991, Congress enacted the Civil Rights Act of 1991. The Civil Rights Act of 1991, which amended Title VII of the Civil Rights Act of 1964, provides litigants with certain substantive rights that have significant, albeit unintended, procedural consequences. For example, under the Civil Rights Act of 1991, litigants are guaranteed the right to a jury trial, and victims of unlawful discrimination are permitted to recover compensatory and punitive damages. As has been demonstrated repeatedly in the years since the passage of the Civil Rights Act of 1991, the significant changes to the law of employment discrimination have created a substantial

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[2] *E. Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977).

[3] FED. R. CIV. P. 23(b) Advisory Committee Notes.

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barrier to the resolution of employment discrimination claims through class litigation and have arguably rendered the federal employment discrimination class action non-viable.

Plaintiffs' attorneys shochorn class claims by arguing that monetary relief, in the form of back-pay and punitive damages, is "incidental" and "secondary" to injunctive and declaratory relief. What is not clear, however, is how injunctive and declaratory relief can be found to predominate, even for those claimants who are still employed and might benefit from an injunction, when the plaintiff class seeks billions of dollars in punitive damages. Rather than accepting simply accepting such an obviously disingenuous argument, federal courts must seriously inquire whether the injunctive/declaratory relief sought is, in actuality, a sham.

As used in this way, the class action mechanism threatens to deny class plaintiffs – particularly absent class plaintiffs – the protection of the equal employment opportunity laws. In large nation-wide class actions, an employment discrimination case will be filed by an attorney representing a hand full of named plaintiffs on behalf of many more unnamed plaintiffs who are alleged to be similarly situated to the named plaintiffs. If, for example, an employment discrimination case is filed in federal district court in California by ten named plaintiffs on behalf of 10,000 similarly situated individuals, and the ten named plaintiffs are represented by a California-based attorney, it is not likely that the 10,000 unnamed plaintiffs will be adequately represented by the named plaintiffs' attorney. The question of venue raises additional concerns. In our hypothetical, the named plaintiffs filed an employment discrimination law suit in California. The California court will determine the rights of the named plaintiffs, but its decision will also impact 10,000 other individuals who live in cities and towns scattered throughout the United States.

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In sum, while the class action is intended to provide an effective and efficient mechanism to resolve legal claims held by numerous litigants, the mechanism has devolved into a money-making tool (albeit a very effective money-making tool) for plaintiff's attorneys. The settlement of large nation-wide class actions often results in attorney fee awards in the tens or hundreds of millions of dollars, while providing little relief to the class members. Used in this manner, the class action fails to provide justice for victims of discrimination. Instead, it makes a mockery of the equal employment opportunity laws. Congress should put a stop to this by enacting legislation to clarify the standards that govern employment discrimination class actions.

Thank you again for affording me the privilege to testify today. I look forward to your questions.

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APPENDIX

Statistical Evidence Showing the Equal Employment Opportunity Commission's Significant Enforcement Efforts for Title VII of the Civil Rights Act, the Equal Pay Act, the Age Discrimination in Employment Act, and the Americans With Disabilities Act

The Commission has settled thousands of Charges of Discrimination, filed hundreds of lawsuits each year, and recovered, literally, hundreds of millions of dollars for victims of discrimination. Statistical data for the period from 2003-2005 are summarized below in Subsections (A) through (C).

A. EEOC STATISTICS FOR FISCAL YEAR 2003

In FY 2003, the EEOC resolved 87,755 Charges of Discrimination under the four statutes enforced by the agency.[4] According to data compiled by the Commission's Office of Research, Information and Planning, the Commission resolved 17,134 Charges of Discrimination (or 19.5% of all Charges resolved) with outcomes favorable to the Charging Party.[5] For example, in FY 2003, 8,401 Charges of Discrimination (or 9.6% of all Charges resolved), were resolved pursuant to a Settlement Agreement with benefits to the Charging Party, and 3,700 Charges of Discrimination (or 4.2% of all Charges resolved) were withdrawn by the Charging Party upon receipt of desired benefits.[6] As a result of this pre-litigation resolution, the EEOC obtained $236.2 million in monetary benefits for Charging Parties.[7]

Of the 87,755 Charges of Discrimination that the Commission resolved through pre-litigation mechanisms in FY 2003, 1,071 of those Charges alleged a violation of the Equal Pay

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[4] http://www.eeoc.gov/stats/all.html.

[5] Id.

[6] Id.

[7] Id. (Total amount of monetary benefits excludes monetary benefits obtained by Charging Parties though litigation).

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Act.[8] In FY 2003, the Commission resolved 280 EPA Charges (or 26.1%) with outcomes favorable to the Charging Party.[9] For example, 124 EPA Charges (or 11.6%) were resolved pursuant to a Settlement Agreement with benefits to the Charging Party, and 44 (4.1%) were withdrawn by the Charging Party upon receipt of desired benefits.[10] The Commission obtained $3.4 million in monetary benefits for Charging Parties through the pre-litigation resolution of EPA Charges in FY 2003.[11]

Finally, in FY 2003, the Commission filed 400 enforcement lawsuits in federal district courts.[12] Additionally, during this same period, the EEOC resolved 381 enforcement lawsuits that were pending in federal district court.[13] In FY 2003, the EEOC obtained $146.6 million in monetary benefits for Charging Parties through enforcement lawsuits in federal courts.[14]

B. EEOC STATISTICS FOR FISCAL YEAR 2004

FY 2004 was a record year for the EEOC as the Commission obtained a total of $420.3 million in monetary benefits for Charging Parties – the largest award of monetary benefits in the Commission's history.[15] The EEOC's statistical data shows that the Commission obtained $251.7 million in monetary benefits for Charging Parties through pre-litigation resolution.[16] The

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[8] http://www.eeoc/gov.stats/epa.html.

[9] Id.

[10] Id.

[11] Id.

[12] http://www.eeoc.gov/stats/litigation.html.

[13] Id.

[14] Id.

[15] Id; www.eeoc.gov/stats/all.html.

[16] http://www.eeoc.gov/stats/all.html.

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Commission recovered another $168.6 million in monetary benefits for Charging Parties through enforcement lawsuits filed in federal district court.[17]

In FY 2004, the EEOC resolved 85,259 Charges of Discrimination through pre-litigation mechanisms.[18] During this period, the Commission resolved 16,661 Charges of Discrimination (or 19.5% of all Charges resolved) with outcomes favorable to the Charging Party, including, for example, negotiated settlements and withdrawals with benefits .[19] In FY 2004, 8,665 Charges of Discrimination (or 10.2% of all Charges resolved) were resolved pursuant to a Settlement Agreement awarding monetary benefits to the Charging Party, and 3,827 Charges of Discrimination (or 4.5% of all Charges resolved) were withdrawn by the Charging Party upon receipt of the monetary benefits desired.[20]

Of the 85,259 Charges of Discrimination that the Commission resolved through pre-litigation mechanisms in FY 2004, 996 alleged Equal Pay Act violations.[21] In FY 2004, the Commission resolved 257 EPA Charges (or 25.8%) with outcomes favorable to the Charging Party.[22] For example, 109 EPA Charges (or 10.9%) were resolved pursuant to a Settlement Agreement with benefits to the Charging Party, and 65 (or 6.5%) were withdrawn by the Charging Party upon receipt of desired benefits.[23] The Commission obtained $6.4 million in

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[17] http://www.eeoc.gov/stats/litigation.html.

[18] http://www.eeoc.gov/stats/all.htlm.

[19] Id.

[20] Id.

[21] http://www.eeoc/gov.stats/epa.html.

[22] Id.

[23] Id.

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monetary benefits for Charging Parties through the pre-litigation resolution of EPA Charges in FY 2004.[24]

Finally, in FY 2004, the Commission filed 421 enforcement lawsuits in federal district courts.[25] During this same period, the EEOC resolved 380 enforcement lawsuits that were pending in federal district court.[26] In FY 2004, the EEOC obtained $168.6 million in monetary benefits for Charging Parties through enforcement lawsuits in federal courts.[27]

C. EEOC STATISTICS FOR FISCAL YEAR 2005

In FY 2005, the EEOC resolved 77,352 Charges of Discrimination.[28] During this period, the Commission resolved 16,614 Charges of Discrimination (or 21.5% of all Charges resolved) with outcomes favorable to the Charging Party.[29] For example, in FY 2005, 8,116 Charges of Discrimination (or 10.5% of all Charges resolved), were resolved pursuant to a Settlement Agreement with benefits to the Charging Party, and 4,072 Charges of Discrimination (or 5.3% of all Charges resolved) were withdrawn by the Charging Party upon receipt of desired benefits.[30] As a result of this pre-litigation resolution, the EEOC obtained $271.6 million in monetary benefits for Charging Parties.[31]

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[24] Id.

[25] http://www.eeoc.gov/stats/litigation.html.

[26] Id.

[27] Id.

[28] Id.

[29] Id.

[30] Id.

[31] Id. (Total amount of monetary benefits excludes monetary benefits obtained by Charging Parties though litigation).

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Of those Charges resolved through pre-litigation mechanisms in FY 2005, 889 alleged violations of the Equal Pay Act.[32] In FY 2005, the Commission resolved 221 EPA Charges (or 24.9%) with outcomes favorable to the Charging Party.[33] For example, 101 EPA Charges (or 11.4%) were resolved pursuant to a Settlement Agreement with benefits to the Charging Party, and 44 (or 4.9%) were withdrawn by the Charging Party upon receipt of desired benefits.[34] The Commission obtained $3.1 million in monetary benefits for Charging Parties through the pre-litigation resolution of EPA Charges in FY 2004.[35]

Finally, the Commission filed 416 enforcement lawsuits in the federal district courts in FY 2005.[36] During this period, the EEOC also resolved 378 enforcement lawsuits then pending in federal district courts.[37] In FY 2005, the EEOC obtained $104.8 million in monetary benefits for Charging Parties through enforcement lawsuits in federal courts.[38]

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[32] http://www.eeoc/gov.stats/epa.html.

[33] Id.

[34] Id.

[35] Id.

[36] http://www.eeoc.gov/stats/litigation.html.

[37] Id.

[38] Id.

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TESTIMONY OF CYRUS MEHRI

**BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

**HEARING: BARRIERS TO JUSTICE:
EXAMINING EQUAL PAY FOR EQUAL WORK**

SEPTEMBER 23, 2008

Chairman Leahy, members of the Committee, thank you for inviting me to speak at today's hearing. It is an honor to appear before you today, especially along with a genuine American heroine, Lilly Ledbetter.

My name is Cyrus Mehri. I am a partner at Mehri & Skalet.[1] I have served as co-lead counsel in some of the largest and most sweeping race and gender employment discrimination cases in U.S. history: *Roberts v. Texaco Inc.* (S.D.N.Y 1997); *Ingram v. The Coca-Cola Company* (N.D. Ga. 2001); *Robinson v. Ford Motor Company* (S.D. Ohio 2005); *Augst-Johnson v. Morgan Stanley* (D.D.C. 2007); *and Amochaev v. Smith Barney* (N.D. Cal. 2008).

I have spearheaded a pro bono effort that has fundamentally changed the hiring practices of the National Football League for coaches as well as front office and scouting personnel. In addition, in 2004, my firm along with the National Council of Women's Organizations launched the Women on Wall Street Project that focuses on gender inequities in the financial services industry.

Blessed with courageous and steadfast clients, I am most proud of the groundbreaking programmatic relief in our settlements. Senior management at companies such as Ford and Morgan Stanley, CEOs such as Neville Isdell of Coca Cola, and NFL owners such as Dan Rooney, have all praised the way we have sincerely and effectively brought about change at their organizations.

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[1] Mehri & Skalet, PLLC | 1250 Connecticut Ave., NW Ste 300 | Washington, DC 20036 | (202) 822-5100 | www.findjustice.com | cmehri@findjustice.com. A short biographical sketch is attached. (Exhibit 1).

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I am asked today to provide a practitioner's perspective on employment discrimination claims in our federal courts, including pay discrimination claims. Let me say at the outset, that as a practitioner, I find Lilly Ledbetter's story to be a compelling example of what is wrong with the system. In her case, the federal courts reached a decision that is entirely out of touch with the American workplace –re quiring that she file an EEOC charge based on what she did not know, nor could have reasonably known, at that time regarding pay inequity. Her hard-fought trial victory vanished, and the factual findings of the jurors who heard her evidence firsthand counted for nothing.

Unfortunately, Ms. Ledbetter's experience in the federal courts is far from isolated. It typifies the uphill battle that American workers face. A new study from Cornell University Law School confirms that thousands of American workers encounter a double standard in the U.S. Appellate Courts. The Cornell data shows that Ms. Ledbetter's story is just the tip of the iceberg of a far larger systemic problem. After sharing key points from the Cornell study, I will provide real life examples of other "Lilly Ledbetters" who have had their civil rights remedies taken away by out-of-touch federal appellate courts. It is clear to me that to restore a level playing field, this Committee should infuse the federal bench with a dose of reality and appoint federal judges from diverse backgrounds, including those who have substantial experience representing average American workers.

The seminal new study is "Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?" by Dean Stewart J. Schwab and Kevin M. Clermont, both professors at Cornell Law School. 3 Harv. L. & Pol'y Rev. (forthcoming 2009). (Exhibit 2). Cornell Law School is at the epicenter of scholarship on empirical legal studies and is the home of the peer-reviewed Journal of Empirical Legal Studies. Earlier this month, Cornell Law hosted the Conference on Empirical and Legal Studies, with 350 legal scholars and 120 new papers.

Dean Schwab and Professor Clermont both have sterling credentials. Dean Schwab served as a judicial law clerk for Justice Sandra Day O'Connor and is a law and economics scholar. In addition to teaching and serving as dean, he is a reporter for the Restatement on Employment Law. Professor Clermont is one of the nation's leading scholars on civil procedure. Their curriculum vitae are attached. (Exhibits 3 & 4). Their article is to be published in the Harvard Law & Policy Review this winter. A

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pre-print was released by the American Constitution Society last week as part of a panel discussion moderated by former Sixth Circuit Judge Nathaniel R. Jones. During the panel discussion, Judge Jones declared that the study is a "profoundly important and significant work" that raises issues about the federal courts that "cry out for scrutiny and close examination."

It is important to note that I am a Cornell Law School alumnus, serve on the law school's advisory counsel, and have followed the law school's empirical legal scholarship for several years, particularly as it relates to employment discrimination cases. I was interviewed for the Clermont/Schwab study (see footnote 47) to provide a practitioner's insight.

THREE KEY FINDINGS OF
THE CLERMONT/SCHWAB STUDY

Dean Schwab and Professor Clermont used data maintained by the Administrative Office of the United States Courts and assembled by the Federal Judicial Center, to analyze district court and appellate court data for cases identified by civil cover sheet category 442 "Civil Rights: Jobs". Two-thirds of these cases are Title VII cases. The remainder are other cases involving discrimination in the workplace. They examined the most up-to-date and complete data available, covering the period from 1979 through 2007.

They made three key findings:

1. Double Standard on Appeal

Dean Schwab and Professor Clermont found that when employers win at trial, they are reversed by the U.S. Courts of Appeals 8.72% of the time. In striking contrast, when employees win at trial, they are reversed 41.10% of the time.[2] Dean Schwab and Professor Clermont summarized: "In this surprising plaintiff/defendant difference in the federal courts of appeals, we have unearthed an *anti-plaintiff effect* that is troublesome."[3] They found this anti-plaintiff effect on appeal particularly disturbing because

[2] Clermont & Schwab, Exhibit 2 at 10, *available at* http://www.hlpronline.com/Vol3.1/Clermont-Schwab_HLPR.pdf.
[3] *Id.* at 13.

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employment discrimination cases are fact-intensive and often turn on the credibility of witnesses:

> The vulnerability on appeal of jobs plaintiffs' relatively few trial victories is more startling in light of the nature of these cases and the applicable standard of review. The bulk of employment discrimination cases turn on intent, and not on disparate impact. The subtle question of the defendant's intent is likely to be the key issue in a nonfrivolous employment discrimination case that reaches trial, putting the credibility of the witness at play. When the plaintiff has convinced the factfinder of the defendants' wrongful intent, that finding should be largely immune from appellate reversal, just as defendant's trial victories are. Reversal of plaintiffs' trial victories in employment discrimination cases should be unusually uncommon. Yet we find the opposite.[4]

They concluded that "the anti-plaintiff effect on appeal raises the specter that appellate courts have a double standard for employment discrimination cases, harshly scrutinizing employees' victories below while gazing benignly at employers' victories."[5]

The 8.72% reversal rate for employers compared to the 41.10% reversal rate for employees is shocking. From my perspective, a two to one disparity would be troubling, but could have possible explanatory variables such as the resource advantage that typically favors employers. However, an appeal reversal disparity that is five to one is indefensible. It creates a crisis of confidence in the federal courts. Further, it has debilitating consequences for civil rights litigants. This leads to the second important finding.

2. Precipitous Drop in Employment Cases Since 1998

Dean Schwab and Professor Clermont found an absolute drop in employment discrimination cases of 37% from fiscal 1999-2007. Cases are

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[4] *Id.*
[5] *Id.* at 15-16.

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down dramatically, and the data indicate the decline in private enforcement is more pronounced in recent years. Specifically, in absolute terms, the number of such cases fell from 23,721 in 1999 to 18,859 in 2005.[6] They declined even more sharply in the last two years of the data to 15,007 in 2007.[7] Some might say discrimination has gone down; however, statistics from the Equal Employment Opportunity Commission (EEOC) show that EEOC charges have remained steady if not increased from 1997 (80,680 charges) to 2007 (82,792 charges).[8] Thus far in 2008, the EEOC has experienced a 15% rise in charges compared with last year. The rise in EEOC charges suggests that discrimination in the workplace has not decreased. In short, employment discrimination persists, but federal court cases enforcing anti-discrimination laws are down dramatically.

The five to one appeal reversal disparity could have a chilling effect on private Title VII enforcement of Title VII. Dean Schwab and Professor Clermont state: "Discouragement could explain the recent downturn in the number of cases...there could be a growing awareness, especially with the prolonged lack of success on appeal, that employment discrimination plaintiffs have too tough a row to hoe."[9] It appears that the U.S. Courts of Appeals have become increasingly hostile to workers, and workers are increasingly unable to find counsel ready to take these contingency cases. Wrongdoers in effect go scot-free, while workers expecting a level playing field face heart-breaking defeats.

American workers such as Lilly Ledbetter, having faced an unlevel playing field in the workplace, find an equally unlevel playing field in the courts. No wonder the number of discrimination cases filed in the federal courts is down by an astonishing 37%. The U.S. Courts of Appeals with the most dramatic drops in employment discrimination cases are:

11th Circuit: (FL, GA, AL)	8th Circuit (MO, MN, IA, AR, ND, SD, NE)
5th Circuit: (LA, MS, TX)	6th Circuit: (MI, OH, TN, KY)
4th Circuit: (MD, VA, NC, SC, WV)	

[6] *Id.* at 19.
[7] *Id.*
[8] Stewart J. Schwab, Dean Cornell University Law School, Presentation at American Constitution Society, Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse? 7 (September 18, 2008), *available at* http://www.acslaw.org/node/7149. (Exhibit 5).
[9] Clermont & Schwab, Exhibit 2, at 21.

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3. Troubling Patterns in the Trial Court

Dean Schwab and Professor Clermont's study also finds that employment discrimination plaintiffs fare significantly worse in judge, or bench, trials than other plaintiffs. The district court judicial disparity is particularly evident when outcomes in judge trials are compared with jury trials. Juries rule in favor of plaintiffs in job cases 37.63% of the time versus 44.41% in non-job cases. District court judges, however, rule in favor of jobs plaintiffs only 19.62%, while ruling in favor of non-jobs plaintiffs 45.53%, a striking disparity.[10]

The three key findings of Dean Schwab and Professor Clermont suggest that American workers are denied a level playing field in the federal courts. Let me next provide a window into the plight of American workers confronting discrimination in the workplace.

BATTLING DISCRIMINATION IN THE WORKPLACE: THE LONG HARD JOURNEY FOR WORKERS

During the last 15 years, I have interviewed hundreds of employees in dozens of companies. Invariably, they contact counsel as a last resort after exhausting all internal channels within a company. One of my clients, Bari-Ellen Roberts described this in her book, *Roberts v. Texaco.*[11] Ms. Roberts tried to work with her company to develop "best practices" regarding diversity and discrimination and turned to me only when the head of human resources shut down any constructive discourse. Ms. Roberts' experience is consistent with my own observations. The vast majority of employees remain extraordinarily loyal to their companies despite significant discrimination in the workplace. Many victims of discrimination do not want to believe they are discriminated against and only reach this sad conclusion reluctantly.

Once employees decide to take action, they typically begin a long hard journey. At the outset, most Title VII plaintiffs have a hard time finding counsel. Civil rights counsel generally take cases on a contingency fee basis since individuals are rarely able to pay costs or fees. Because of the

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[10] *Id.* at 34.

[11] BARI-ELLEN ROBERTS, ROBERTS V. TEXACO: A TRUE STORY OF RACE AND CORPORATE AMERICA 146-48 (1998).

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risk involved, counsel carefully vet their cases and tend to take only the strongest of cases. The pre-filing vetting process screens out non-meritorious cases. In short, the private bar serves as the first gatekeeper.

Next, the employee generally starts the pretrial discovery process against a large and often aggressive corporate law firm. The employee turns over documents and is deposed. It becomes an all-consuming process. Often, reliving the discriminatory experience in litigation can be just as painful as the difficult experience in the workplace. Motion practice follows and the District Courts serve as a fierce gatekeeper, tossing out a large segment of cases during pre-trial motions. At trial, employers win about 62.37% of jury trials and 80.38% of bench trials.[12] Most victims of discrimination have the unhappy experience of losing their case prior to or during trial.

Those employees who are victorious at trial have genuine cases that are not frivolous. They have overcome long and extraordinarily difficult odds with able counsel. They have faced a determined and well-financed defendant, followed by intense scrutiny by a district court. After all this, these "victorious" employees face the U.S. Courts of Appeals that reverse their victories an incredible 41.10% of the time. These extreme odds make employers more brazen in the workplace and in the courtroom. Civil rights attorneys are forced to counsel their clients about these sobering realities and the small probability of success for even the most meritorious claims.

If U.S. corporations had 41.10% of their trial victories reversed by the appellate courts there would be a stampede of lobbyists from the Chamber of Commerce crying foul. By contrast, American workers do not ask for much. They merely want each case to be heard by judges who approach all cases with an open-mind, devoid of politics or ideology. They just want a fair shake, not a double standard from our federal courts.

In preparation for this hearing, I asked Terisa Chaw, Executive Director of the National Employment Lawyers Association (NELA), to canvass NELA members for real life examples of appellate reversals of employee trial victories. There was an outpouring of calls and e-mails describing how individuals with powerful evidence of discrimination had their trial victories reversed by the U.S. Courts of Appeals. Many talented

[12] Clermont & Schwab, Exhibit 2, at 34.

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attorneys even expressed concerns about whether they could continue their civil rights practices. An email from one attorney, Nancy Richards-Stower, exemplifies the distress echoed by many civil rights practitioners:

> I hope the article explains that all that stands between total collapse of federal enforcement and its continuation is the plaintiffs' bar. I can't afford to go through federal summary judgment procedures, let alone trial and appeal. When I was young I used to go to federal court for civil rights justice. Now I can't. Federal courts are hostile towards employee rights.[13]

Let me now turn to three case studies from NELA members illustrating the double standard on appeal shown in the Clermont/Schwab data:

Case Study No. 1: *Ledbetter v. Goodyear Tire & Rubber Co.*[14]

Many of you have heard about the Supreme Court's *Ledbetter* decision, and Ms. Ledbetter who is testifying with me today will surely tell her compelling story. But the *Ledbetter* decision by the U.S. Court of Appeals for Eleventh Circuit is equally deserving of attention.

For nearly 20 years, Lilly Ledbetter worked at the Goodyear Tire plant in Gadsden, Alabama. She was hired in 1979 as a supervisor.[15] She was one of very few women supervisors.[16] Early on, she endured sexual harassment at the plant, and her boss told her he did not think women should be working there.[17]

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[13] Ms. Richards-Stower was the chair of the New Hampshire Commission for Human Rights from 1979-1985.
[14] *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1173 (11th Cir. 2005), *aff'd*, 127 S.Ct. 2162 (2007).
[15] *Id.*
[16] *Id.* at n. 26, n. 27.
[17] National Women's Law Center, Fact Sheet on *Ledbetter v. Goodyear Tire & Rubber Co.*: The Supreme Court Limitation on Pay Discrimination Claims and the Legislative Fix (2007) *available at* http://www.nwlc.org/pdf/Broad%20Ledbetter%20Fact%20Sheet-Letterhead.pdf.

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Throughout her employment, she received fewer and lower raises than male supervisors. Unfortunately for Ms. Ledbetter, these smaller increases had a cumulative effect: "At the end of 1997, she was still earning $ 3727 per month, less than all fifteen of the other [male] Area Managers in Tire Assembly. The lowest paid male Area Manager was making $ 4286, roughly 15% more than Ledbetter; the highest paid was making $ 5236, roughly 40% more than Ledbetter."[18] Goodyear had a merit compensation plan where employees' salaries were reviewed annually by a supervisor who recommended salary increases. Though the record is clear that Ms. Ledbetter's supervisor reviewed her salary annually from at least 1992 through 1998,[19] no one took steps to bring her salary in line with the men's.

After she filed a complaint with the EEOC in 1998, Ms. Ledbetter filed a lawsuit in federal court to recover the wages she was unfairly denied throughout her employment. The jury found that she had been given an unequal salary because of her gender and awarded her $223,776 in backpay plus compensatory and punitive damages.

Goodyear asked the district court to set aside the jury verdict based on a statute of limitations argument. Generally, employees are required to file EEOC charges with the Agency within 180-days of the discrimination. Goodyear argued that it made no discriminatory pay decisions within 180 days of Ms. Ledbetter's 1998 EEOC charge. The district court disagreed and found that there was sufficient evidence of pay discrimination within the 180-day period because a male supervisor who was paid the same salary as Ms. Ledbetter in 1979 was paid over $12,000 more a year than her in 1998.[20]

The U.S. Court of Appeals for the Eleventh Circuit reversed the jury verdict, holding that Ms. Ledbetter could not recover for pay discrimination throughout her employment because Goodyear's initial decision to pay her less was not made within 180 days of her EEOC complaint in 1998.[21] This decision effectively barred Ms. Ledbetter from any recovery for any of the years of undetected discrimination in her rate of pay.

Moreover, the Eleventh Circuit's decision was contrary to the well-established paycheck accrual rule applied by the EEOC and virtually all

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[18] *Ledbetter*, 421 F.3d at 1174.
[19] *Id.* at 1173-74.
[20] *Id.* at 1176.
[21] *Id.* at 1178, 1182-83.

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other U.S. Courts of Appeals.[22] The paycheck accrual rule states that each paycheck founded in discrimination, including past discrimination, triggers a new 180-day period for filing a charge with the EEOC. The paycheck accrual rule enabled employees, who are understandably almost always unaware of salary disparities, to recover for pay discrimination even if the initial discriminatory decision occurred before the 180-day period. Ignoring the concealed nature of pay discrimination, the Eleventh Circuit rejected the paycheck accrual rule, preferring that extreme limits be placed on workers' ability to recover hard-earned wages. When the Supreme Court affirmed the decision in 2007, it became one of the most controversial in recent Supreme Court history.

The National Women's Law Center can provide more information on the impact of the *Ledbetter* Supreme Court decision.

Case Study No. 2: *Ash v. Tyson Foods, Inc.*[23]

Anthony Ash and John Hithon, both African-Americans, worked as superintendents in the chicken processing plant run by Tyson Foods in Gadsden, Alabama. In their efforts to be promoted to the position of shift supervisor, both were rebuffed in favor of white employees. At trial, a jury heard evidence regarding the racial attitudes of the man who turned them down for promotion, as well as evidence of the relative qualifications of the whites he preferred. The jury concluded that Tyson was guilty of racial discrimination against both Messrs. Ash and Hithon and awarded each of them $250,000 in compensatory damages plus punitive damages.

There was testimony at trial that Thomas Hatley, the plant manager who made the promotion decisions, repeatedly addressed Messrs. Ash and Hithon as "boy." Plaintiffs testified that they experienced these remarks as demeaning and hostile. Mr. Ash's wife, present on one occasion, testified that Mr. Hatley laughed off her protest that her husband was a man, not a "boy." In its closing argument to the jury, Tyson's attorney conceded that Mr. Hatley's use of the word "boy" could have racial connotations, but protested that the word was not delivered with that level of venom and hostility" claimed by the plaintiffs and their witnesses. The jury obviously disagreed.

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[22] *Ledbetter*, 127 S.Ct. at 2184-85 (Ginsberg, J., dissenting).
[23] *Ash v. Tyson*, 129 Fed. Appx. 529 (11th Cir. 2005).

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In addition to the evidence of racist attitudes on the part of the decision-maker, plaintiffs offered substantial evidence that tended to show that under Tyson's own written standards, Messrs. Ash and Hithon were more qualified than the promoted whites. Company policy preferred three to five years of experience, experience on-site at that plant, and longevity with the company. Messrs. Ash and Hithon, who had loyally worked for the company for 13 and 15 years respectively, met these standards, but the promoted whites did not. Moreover, one supervisor only went through the motions – interviewing Mr. Hithon *after* he had offered the job to a white applicant who had accepted the position.

The district court judge set aside the verdict, finding that there was no credible evidence that the Plaintiffs had superior qualifications and that the use of the word "boy" did not have racial connotations. The Court of Appeals for the Eleventh Circuit affirmed in an unpublished *per curiam* decision.[24] Ignoring the jury's contrary conclusion based on trial testimony and the demeanor of witnesses, as well as the concession of Tyson's counsel, the Court of Appeals found that the decision-maker's use of the word "boy" could *never* be evidence of discriminatory intent.

Acknowledging that Plaintiffs had adduced some evidence that their qualifications were superior to those of the successful white candidates, the Court of Appeals concluded that such evidence did not support a jury's finding of discrimination unless the disparities in qualifications were so great that they "virtually jump off the page and slap you in the face."[25] The Court of Appeals concluded that the plaintiffs had not met this standard. The Court of Appeals cavalierly decided that the offensive use of the word "boy" could never be evidence of discrimination as a matter of law. The novel "jump off the page" standard the court articulated is patently absurd given that most discrimination is proven through circumstantial evidence.

In a *per curiam* decision the Supreme Court reversed, concluding that the "slap in the face" standard was "unhelpful" and that the term "boy" *could*

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[24] *Id.*

[25] *Id.* at 533. With regard to Hithon's claim, the Court of Appeals concluded that there was sufficient evidence to support the jury verdict, because Hatley had interviewed Hithon for one of the vacancies only *after* Hatley had actually offered the job to a white man who had accepted it. However, the court vacated the compensatory and punitive damages awards and directed a new trial.

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be evidence of discrimination.[26] On remand, however, the Eleventh Circuit has thus far stuck to its guns, purportedly following the Supreme Court's guidance, but upholding its earlier conclusion that the Plaintiffs had not adduced sufficient proof of superior qualifications, and that the decision-maker's use of the term "boy" was not evidence of racism.[27]

The experience of Messrs. Ash and Hithon represents a classic example of the all too familiar pattern of judicial nullification of the right to a jury trial in discrimination cases. A properly instructed jury concluded that the man who rejected the Plaintiffs' applications for promotion, in referring to the Plaintiffs as "boys," exhibited racist tendencies, and that the promotions were awarded to lesser qualified whites. In holding that "boy" could never be construed as a racist remark, and that the jury incorrectly concluded that the promoted whites had fewer qualifications than those of the Plaintiffs, the Court of Appeals second-guessed the better informed factfinder.

For more information about Messrs. Ash and Hithon's experiences of discrimination in the workplace and in the courts, contact Alicia Haynes of Haynes & Haynes, PC in Birmingham, Alabama who handled this case.

Case Study No. 3 : Septimus v. University of Houston[28]

Susan Septimus worked for the University of Houston as an Assistant General Counsel handling business and transactional matters. In 1998, the University announced an opening for Associate General Counsel. Ms. Septimus informed her supervisor, General Counsel Dennis Duffy, that she was interested in the promotion. Mr. Duffy responded by criticizing her performance and comparing her to a needy former girlfriend. He flatly refused to consider her for the position and shortly thereafter hired an outside male candidate even before the deadline for accepting applications.

Following her denial of promotion, Mr. Duffy regularly verbally insulted Ms. Septimus, intimidated her in front of colleagues and generally created a hostile work environment. Ms. Septimus decided enough was

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[26] *Ash v. Tyson,* 546 U.S. 454 (2006).
[27] *Ash v. Tyson*, 190 Fed. Appx. 924 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 1154 (2007).
[28] *Septimus v. Univ. of Houston*, 399 F.3d 601 (5th Cir. 2005), *reh'g en banc denied*, 158 Fed. Appx. 650 (5th Cir. 2006).

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enough and filed a grievance with the University. Six days later, Mr. Duffy retaliated by giving Ms. Septimus a negative performance review.[29] Unbeknownst to Ms. Septimus, Mr. Duffy also brazenly wrote a memo that reflected his plans to retaliate against her for filing the grievance.[30]

The University's Chancellor hired an outside investigator – a well-known defense attorney – to examine Ms. Septimus' complaints, as well as complaints of gender discrimination by two other women in the Office of General Counsel. The investigator issued a lengthy report finding that Mr. Duffy had discriminated against Ms. Septimus when he refused to consider her for the promotion, and that he had created a hostile work environment for women in general. Despite the extensive written report, a committee of University administrators concluded that the investigator's findings of discrimination were unfounded.[31]

Subsequently, Mr. Duffy followed through with his plans to retaliate against Ms. Septimus for filing a grievance. High-level administrators made it difficult for her to succeed in her job. The Chancellor informed Ms. Septimus that she could either stay in the Office of General Counsel and be supervised by her alleged harasser, Mr. Duffy, or transfer to a contract administrator position in a different department that also reported to Mr. Duffy at times.[32]

Caught between a rock and hard place, Ms. Septimus took the contract administrator position. Her new supervisor criticized her work unfairly and forced her to get approval from the Office of General Counsel headed by Mr. Duffy on all legal work. Ultimately, Ms. Septimus could not endure this demeaning treatment and was forced to resign.

Ms. Septimus then exercised her civil rights and took her case to federal court. Though the district court judge summarily dismissed her gender discrimination claims before trial,[33] the jury found in Ms. Septimus'

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[29] L.M. Sixel, *EEOC Probe Finds Fault with UH; Working Environment Hostile for Two Women,* THE HOUSTON CHRONICLE, February 23, 2000, at A13.
[30] *Id.*
[31] *Septimus*, 399 F.3d at 605.
[32] The Chancellor further conditioned the transfer offer on Ms. Septimus' agreeing to sign a release waiving her right to pursue discrimination claims against the University. The Chancellor eventually withdrew that requirement. *Id.*
[33] Before trial, the district court entered summary judgment in favor of the University on

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favor on retaliation and constructive discharge and awarded her $396,000.[34] The Houston newspaper reported that jurors had "harsh words" for the University. One juror was dissatisfied by the employer's inaction: "'The University of Houston could have stepped in a lot sooner.'"[35] Another juror was "troubled" that the University attempted to force Ms. Septimus to give up her legal rights before she could transfer to a new position.[36]

The University asked the district court to set aside the jury's verdict and order a new trial. When the district court did not, the University appealed to the U.S. Court of Appeals for the Fifth Circuit. On appeal, the University argued that the trial judge had used an erroneous jury instruction for the retaliation claim. Even though the University had arguably waived the objection by not raising it at trial, the Fifth Circuit boldly reversed the jury's decision, holding that the trial court should have instructed the jury to use a "but for" causation standard, instead of the well-established "motivating factor" standard. Under the motivating factor standard, a plaintiff may prove retaliation by showing that retaliation was a "motivating factor" for the employer's adverse employment decision. The Fifth Circuit decided that victims of retaliation who do not have *direct* evidence of retaliation must prove that "but for" retaliation they would not have endured an adverse employment action.[37]

This case is an example of an appellate court reaching to overturn a jury's decision in favor of an employee by shifting the legal standard. Even though the University failed to object to the jury instructions at trial, the Fifth Circuit, nevertheless, found that the use of the phrase "motivating factor," instead of the nearly impossible "but for" causation standard, in the jury instructions was sufficient to set aside the jury verdict.

The double standard in appellate reversals that Dean Schwab and Professor Clermont uncovered and these examples of the impact of that

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the gender discrimination claims even though the record was replete with evidence in Ms. Septimus' favor – including the written report by the University's outside investigator finding gender discrimination and a finding of cause by the EEOC.

[34] L.M. Sixel, *UH Ex-Employee Awarded $396,000; Jury Finds Job Offer Retaliatory*, THE HOUSTON CHRONICLE, *February 5, 2002*, at Business1.

[35] *Id.*

[36] *Id.*

[37] *Septimus*, 399 F.3d at 607-08.

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double standard on real Americans raise significant questions about the federal judicial nomination process.

THE PATH TO A LEVEL PLAYING FIELD: DIVERSIFY THE JUDICIARY BY CASTING A FAR WIDER NET OF POTENTIAL NOMINEES

However discouraging the current state of affairs may seem, there is a clear path to a federal judiciary that would offer a level playing field for American workers. Namely, we need a fundamental shift that dramatically expands the pool of judicial nominees. The next President should seek, and this Committee should insist on, judicial nominees from widely diverse backgrounds. That means not just diversity in terms of race, gender and other personal traits.[38] It means diversity in terms of legal expertise and life experiences.

In order to improve the public's confidence that workers have a fair chance in court, we need more nominees confirmed to the federal bench who have experience representing ordinary Americans. We should value nominees who have devoted their careers to fighting poverty, expanding rights for children, enforcing civil rights, representing qui tam whistleblowers, helping break down barriers to equal opportunity or fighting for consumers. We should find potential nominees who have devoted their careers to representing ordinary Americans, small businesses and the underdogs of society. Until this major shift occurs, the double standard documented by Dean Schwab and Professor Clermont will persist and imperil civil justice in America.

Thank you.

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[38] Christina Boyd et al., Untangling the Causal Effects of Sex on Judging, Paper Presented at the Midwest Political Science Association (2008), *available at* http://epstein.law.northwestern.edu/research/genderjudging.pdf (finding that a male federal judge is 10% more likely to rule in favor of an employer than a female federal judge in discrimination cases).

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