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.

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

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

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).

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.

[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.

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.

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).

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).

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.