Testimony of

Cyrus Mehri

September 23, 2008

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.

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 - requiring 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 andserving 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 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 mployment 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 or 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 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 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)

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 risk involved, counsel carefully vet their cases and tend to take only the strongest of cases. The pre-filing vetting process screens out nonmeritorious 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 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

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 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.

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 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 decisionmaker'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 Houston28

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 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' 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 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.

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.