



# **JUDICIAL HOSTILITY TO WORKERS' RIGHTS: THE CASE FOR PROFESSIONAL DIVERSITY ON THE FEDERAL BENCH**

A Report By The  
National Employment Lawyers Association  
February 2012



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The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are dedicated to working on behalf of those who have been illegally treated in the workplace. NELA advocates for independent and fair-minded federal judges who are committed to equal justice under law for all Americans, and who do not place the interests of employers over the rights of employees. NELA takes an active role in assessing candidates nominated for federal judgeships as well as individuals interested in becoming candidates for such vacancies. NELA screens potential judicial nominees, ensuring they are faithful to the progress made on civil rights and individual liberties, and possess a demonstrated record of respect for justice and equality in the workplace.

“Simply put, a judge’s life experiences affect the willingness to credit testimony or understand the human impact of legal rules upon which the judge must decide. These determinations require a judge to draw upon something that is not found in the case reports that line the walls of our chambers. Rather judges draw upon the breadth and depth of their own life experience, upon knowledge and understanding of people, and of human nature.”

—Judge Edward M. Chen  
U.S. District Court for the Northern District of California<sup>1</sup>

## EXECUTIVE SUMMARY<sup>2</sup>

Articles and commentary addressing the need for judicial diversity have typically focused on racial, ethnic, and gender diversity. “Judicial Hostility To Workers’ Rights: The Case For Professional Diversity On The Federal Bench,” targets another type of diversity that is equally as important and sorely lacking on the federal bench – professional diversity. We define professional diversity to include lawyers who have had experience representing individuals in labor, employment, or civil rights cases, as a legal services or public interest lawyer, or defending the rights of the most disenfranchised members of our society. The federal judiciary remains overwhelmingly homogenous in terms of professional diversity, and consists of those who were prosecutors, corporate lawyers, state court judges (and, for appellate judges, federal district court judges), and law professors.

Preserving the credibility of the federal judiciary requires taking concrete steps to level the playing field for all litigants that come before our nation’s courts. Achieving this requires embracing a federal bench that better reflects the professional diversity of attorneys across the country. Overlooking qualified candidates whose professional experience includes representing plaintiffs in employment, labor, and civil rights cases inevitably reinforces the

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<sup>1</sup> Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CALIF. L. REV. 4 (2003), p. 1120. Because of his service to the American Civil Liberties Union as a staff lawyer for 16 years, Judge Chen’s nomination was opposed by Republican Senators on the Senate Judiciary Committee and in floor debates. Judge Chen was first nominated to the U.S. District Court for the Northern District of California by President Barack Obama on August 7, 2009, and by October 15, 2009 the Senate Judiciary Committee voted 12-7 along party lines to send his name to the full Senate. But on December 24, 2009, the Senate sent Judge Chen’s nomination back to the President. President Obama renominated Judge Chen in January 2010 but the Senate again sent his nomination back to the White House. The President nominated Judge Chen a third time in September 2010 and finally a fourth time in January 2011. The Senate confirmed Judge Chen by a vote of 56-42 on May 10, 2011, and he was commissioned a federal judge on May 12, 2011. Judge Chen, the longest waiting nominee for a U.S. District Court judgeship, waited over 600 days for his confirmation vote.

<sup>2</sup> The National Employment Lawyers Association (NELA) gratefully acknowledges the members of its Judicial Nominations Committee, Matthew C. Koski, Paul H. Tobias Attorney Fellow of The Employee Rights Advocacy Institute For Law & Policy, Aniko R. Schwarcz, former Peggy Browning Fellow and NELA Advocacy Fellow, and Susannah Sanford, former NELA Program Assistant, for their invaluable contributions to this report.

image of a judiciary that is indifferent to the plight of America's workers. As discussed in this report, the lack of professional diversity has contributed to the increasing judicial hostility workers face in employment cases and the deleterious effect on plaintiffs' access to the courts to vindicate their rights. We urge the Obama Administration to stay true to its promise of making judicial nominations a priority and to continue its efforts to nominate individuals with professionally diverse backgrounds.

## **FEDERAL COURTS HAVE GROWN INCREASINGLY HOSTILE TO EMPLOYEES**

Significant research confirms that plaintiffs bringing employment discrimination claims are far less likely to prevail than plaintiffs in non-employment cases. This double standard is bolstered by recent empirical reports:

- From 1979-2006, the plaintiff win rate for employment cases (15 percent) was lower than non-employment cases (51 percent).
- For cases going to trial, employment discrimination plaintiffs (28.47 percent) won less often than other plaintiffs (44.94 percent).
- Employees succeeded on appeal only 9 percent of the time, while employers won 41 percent of appeals.

## **TOO FEW FEDERAL JUDGES POSSESS PROFESSIONAL DIVERSITY**

The reality is that employees rarely stand before a federal judge who possesses any professional experience representing plaintiffs in labor, employment, or civil rights cases. A study of the federal judiciary prior to the beginning of the Obama Administration confirms this reality:

- Only five out of 162 (3.1 percent) federal appellate judges had substantial legal experience working for non-profit organizations.<sup>3</sup> None of these judges had worked for a non-profit organization more recently than 1981.
- Only five out of 162 (3.1 percent) active federal appellate judges had worked for organizations or government agencies that enforce civil rights.
- None had substantial experience as in-house counsel for a labor union.

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<sup>3</sup> Testimony of Cyrus Mehri, *Barriers To Justice: Examining Equal Pay For Equal Work, Hearing Before the Senate Comm. on the Judiciary*, 110th Cong. (2008), p. 5.

- Only three federal appellate judges had worked for organizations that represent low-income Americans, and only one appeared to have had substantial experience advocating for consumer rights.

## **JUDICIALLY CREATED BARRIERS MAKE IT MORE DIFFICULT FOR PLAINTIFF-EMPLOYEES TO PREVAIL**

Anti-worker bias in the courts also manifests itself through judicially created procedural and substantive legal barriers applicable only to employment cases. These judge-crafted obstacles, such as the ones highlighted below, are applied at the apex of judicial discretion, including on the pleadings, at summary judgment, during post-trial motions, and on appeal.

- **“Stray Remarks”** – Allows judges to disregard discriminatory statements made by supervisors or other employees as merely “stray remarks,” and therefore not evidence of discrimination.
- **“Business Judgment”** – Permits judges to defer to an employer’s “business judgment” instead of carefully examining whether an asserted justification for an adverse employment action was pretext for unlawful discrimination. Some courts have gone so far as to accept the defendant’s asserted reasons for the adverse employment action being challenged, even when the employer’s explanation is harsh or unreasonable.
- **“Self-Serving Witness”** – Enables judges to presume the credibility of testimony from defense witnesses with a vested interest in helping employers avoid liability, while categorizing assertions by or on behalf of plaintiff-employees as purely “self-serving.”

## **THE OBAMA ADMINISTRATION MUST NOMINATE PROFESSIONALLY DIVERSE INDIVIDUALS TO THE FEDERAL JUDICIARY**

As the courts continue to limit the legal tools available to employees bringing employment discrimination lawsuits, the Obama Administration must nominate professionally diverse individuals to the federal judiciary, including those with experience representing workers, one of its highest priorities. When contemplating who might replace retiring Justice David Souter, President Obama suggested it might be someone who embodied the quality of “empathy.” As the President went on to explain, he wanted someone “who understands that justice isn’t about some abstract legal theory or footnote in a casebook; it is also about how our laws affect the daily realities of people’s lives, whether they can make a living and care for their families, whether they feel safe in their homes and welcome in their own nation.”

While the Obama Administration’s effort to augment the racial, ethnic, and gender diversity of the federal judiciary is a vast improvement compared to past administrations, civil rights,

public interest, and legal services attorneys rarely find their way onto the federal bench. The judiciary remains overwhelmingly homogenous with respect to professional diversity, and consists of those who were prosecutors, corporate lawyers, state court judges (and, for appellate judges, federal district court judges), and law professors.

NELA is committed to working with the Obama Administration to shepherd professionally diverse candidates for federal judgeships through the vetting, nomination, and confirmation processes as a means of ensuring that workers receive equal justice under the law, as well as enhancing the quality of decision making for litigants in employment cases.

For more information contact:

Eric M. Gutiérrez  
Legislative & Public Policy Director  
National Employment Lawyers Association  
1828 L Street, NW, Suite 600  
Washington, DC 20036  
Ph: (202) 898-2880  
Fax: (866) 593-7521  
[egutierrez@nelahq.org](mailto:egutierrez@nelahq.org)

Rebecca M. Hamburg  
Program Director  
National Employment Lawyers Association  
417 Montgomery Street, Fourth Floor  
San Francisco, CA 94104  
Ph: (415) 296-7629  
Fax: (866) 593-7521  
[rhamburg@nelahq.org](mailto:rhamburg@nelahq.org)

## FEDERAL COURTS HAVE GROWN INCREASINGLY HOSTILE TO EMPLOYEES

Over the last 50 years, Congress has enacted a number of laws to protect employees from unfair treatment in the workplace. These laws include the Fair Labor Standards Act of 1938 (FLSA),<sup>4</sup> the Equal Pay Act of 1963 (EPA),<sup>5</sup> Title VII of the Civil Rights Act of 1964 (Title VII),<sup>6</sup> the Age Discrimination in Employment Act of 1967 (ADEA),<sup>7</sup> the Employment Retirement Income Security Act of 1974 (ERISA),<sup>8</sup> the Pregnancy Discrimination Act of 1978 (PDA),<sup>9</sup> the Whistleblower Protection Act of 1989 (WPA),<sup>10</sup> the Americans with Disabilities Act of 1990 (ADA),<sup>11</sup> and the Family and Medical Leave Act of 1993 (FMLA).<sup>12</sup> Despite the progress made toward protecting America's workers from discrimination and retaliation through these landmark statutes, NELA members report it has become increasingly difficult for employees to obtain redress for violations of their workplace rights under any of these laws.

In the seminal law review article, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*,<sup>13</sup> Professor Kevin C. Clermont and Dean Stewart J. Schwab concluded that plaintiffs lose employment discrimination cases at a significantly higher rate than other plaintiffs lose their cases at both the trial and appellate levels. In the district courts, between 1979 and 2006, employees' win rate in all phases of employment discrimination cases was 15 percent, compared with 51 percent for non-employment discrimination cases.<sup>14</sup>

When cases went to trial, there was a modest increase in plaintiffs' win rates but they were significantly worse in bench trials than jury trials. Employees' win rate in bench trials over this time period was only 20 percent compared to 38 percent in jury trials. The comparable win rates for plaintiffs in non-employment discrimination cases were 46 percent of bench trials and 44 percent of jury trials.<sup>15</sup> A smaller study of all four federal districts in Texas found that in 2003, less than 2 percent of 320 sampled employment discrimination cases ended in a trial verdict for the employee.<sup>16</sup>

The differential between plaintiff-employees' and defendant-employers' success rates is particularly acute at the summary judgment stage:

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<sup>4</sup> 29 U.S.C. § 201 *et seq.*

<sup>5</sup> 29 U.S.C. § 206.

<sup>6</sup> 42 U.S.C. § 2000e *et seq.*

<sup>7</sup> 29 U.S.C. § 621 *et seq.*

<sup>8</sup> 29 U.S.C. § 1001 *et seq.*

<sup>9</sup> 42 U.S.C. § 2000e(k).

<sup>10</sup> 5 U.S.C. § 1212 *et seq.*

<sup>11</sup> 42 U.S.C. § 12101 *et seq.*

<sup>12</sup> 29 U.S.C. § 2601 *et seq.* and 29 C.F.R. § 825 *et seq.*

<sup>13</sup> 3 HARV. L. & POL'Y REV. 103 (2009) (Clermont & Schwab).

<sup>14</sup> *Id.* at 130.

<sup>15</sup> *Id.* at 133.

<sup>16</sup> Brian Sanford, "Disposition of Discrimination Employment Claims in Texas Federal Courts," presentation at the Texas Employment Lawyers Association Conference (October 2006).



- Between 1979 and 2006, employees in discrimination cases won only 4 percent of pretrial adjudications – the bulk of which can safely be assumed to have been on defendants’ motions for summary judgment.<sup>17</sup>
- Trial judges in the Eastern and Southern Districts of New York were found to have ruled favorably on 64 percent of defendants’ summary judgment motions in 2000.<sup>18</sup>
- Summary judgment rates were consistently higher in three large federal districts in civil rights than in non-civil rights actions in cases sampled between 1980 and 1981, and again between 2001 and 2002. In the Northern District of Georgia, in particular, the rate of summary judgment in employment discrimination cases approximately doubled over that same 20-year period.<sup>19</sup>

In the U.S. Courts of Appeals, the difference between employees’ and employers’ success is similarly remarkable. Employers (41.1 percent) are five times as likely as employees (8.72 percent) to win their appeals. The comparable figures for non-employment discrimination cases are 35 percent for defendants and 15 percent for plaintiffs.

“There is no defensible reason why the U.S. Appellate Courts’ decisions would have a five to one disparity against American workers....”  
 —NELA Member Cyrus Mehri  
 Mehri & Skalet, PLLC  
 Washington, DC

Most striking is the frequency at which judges in employment discrimination cases rule for employers. After examining and rejecting other explanations for employees’ extremely low success rates on appeal compared with employers’ rates, Professor Clermont and Dean Schwab concluded that “anti-plaintiff appellate attitudes [likely] explain the ... differential in [employment discrimination] cases.”<sup>20</sup> They go on to warn that:

The anti-plaintiff effect on appeal raises the specter that federal appellate courts have a double standard for employment discrimination cases, harshly scrutinizing employees’ victories below while gazing benignly at employers’ victories.<sup>21</sup>

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<sup>17</sup> Clermont & Schwab, *supra* note 13 at 131. For non-employment cases, the plaintiffs’ success rate was 21 percent.  
<sup>18</sup> *Id.* at note 68 (citing Vivian Berger, Michael O. Finkelstein and Kenneth Cheung, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L. J. 45, 53, 55 tbl.1, 57 tbl.3 (2005)).  
<sup>19</sup> Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts*, Cornell Law School Research Paper, No. 08-022 (2008) at 3, available at [http://scholarship.law.cornell.edu/lrsp\\_papers/108](http://scholarship.law.cornell.edu/lrsp_papers/108) (examining cases from the Eastern District of Pennsylvania, Northern District of Georgia, and Central District of California).  
<sup>20</sup> Clermont & Schwab at 114.  
<sup>21</sup> *Id.* at 115-16.

## TOO FEW FEDERAL JUDGES POSSESS PROFESSIONAL DIVERSITY

Contrary to the analogy that U.S. Supreme Court Chief Justice John G. Roberts, Jr. used in his confirmation hearings, judges rarely simply “call balls and strikes” as an umpire does.<sup>22</sup> Rather, as U.S. Supreme Court Justice Elena M. Kagan stated at her confirmation hearings, deciding cases “is not a robotic or automatic enterprise.”<sup>23</sup> The tasks involved in judging – understanding the evidence, interpreting the precedents, applying the latter to the former – are complex and subtle. Put simply, they require the use of personal judgment.

Abundant and well-recognized empirical evidence demonstrates that judges’ identities and experiences affect how they judge.<sup>24</sup> A diverse bench with a broader set of experiences increases public confidence in the judiciary as being representative of society. As University of Maryland School of Law Professor Sherrylin A. Ifill discussed in *Judging the Judges: Racial Diversity, Impartiality, and Representation on State Trial Courts*:<sup>25</sup>

The link between diversity and impartiality has been recognized by the Supreme Court in its jury *venire* selection cases. Diversity promotes impartiality by ensuring that no one viewpoint, perspective or set of values can persistently dominate legal decision making. Diversity then functions as a check on bias. In the jury *venire* cases, the Supreme Court has held that structural impartiality on the jury *venire* is compelled by both the Fourteenth Amendment and Sixth Amendment jury impartiality requirements. According to the Supreme Court, the right to an impartial jury includes not only the right of the litigants guaranteed by the Due Process Clause and the Sixth Amendment to be free from

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<sup>22</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the Supreme Court of the United States Before the Senate Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States), available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/55-56.pdf>.

<sup>23</sup> *Confirmation Hearing on the Nomination of Elena Kagan to be Associate Justice of the Supreme Court of the United States Before the Senate Comm. on the Judiciary*, 111th Cong. 103 (2010) (testimony of Elena M. Kagan, Nominee to be an Associate Justice of the United States), available at <http://gpo.gov/fdsys/pkg/CHRG-111shrg67622/pdf/CHRG-111shrg67622.pdf>.

<sup>24</sup> See, e.g., Dan M. Kahan, David A. Hoffman, and Donald Braman, *Whose Eyes are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 851 (2009) (“There are a number of social psychological mechanisms that explain how the group identities and values associated with such characteristics influence cognition of facts.”); See also *Id.* at 851-52 n.56-62 (collecting social science research examining the effects of sociological and psychological factors on individual perception); James J. Brudney and Deborah Jones Merritt, *The Influence of Appellate Judges’ Social Backgrounds When Reviewing NLRB Decisions*, 2 EMP. RTS. Q. 13 (Spring 2002) (finding that gender and political affiliation, as well as educational and professional background affected the likelihood that a judge would side with a union in an appeal from a decision of the National Labor Relations Board (NLRB)); John Friedl and Andre Honoree, *Is Justice Blind? Examining the Relationship Between Presidential Appointments of Judges and Outcomes in Employment Discrimination Cases*, 38 CUMB. L. REV. 89, 95-6 (2007) (finding that the political party of the President who appointed trial judges, often used as a proxy for judges’ own political affiliation, has a statistically significant effect on the outcomes of defendants’ summary judgment motions in Title VII employment discrimination cases).

<sup>25</sup> 39 B.C.L. REV. 95 (1997).

individual bias of jurors, but also the right to select juries from a pool that is representative of the community.<sup>26</sup>

The potential influence of professional background on the behavior, perceptions, and perspectives of judges is not surprising. When lawyers become judges, they are greatly affected by the experiences of their clients. Indeed, in order to advocate effectively lawyers must understand what it is like to “walk in the shoes” of their clients. A judge who has spent a significant part of her career representing employees in employment discrimination cases may well approach such lawsuits differently than one whose career has been devoted to defending such claims.

As relatively homogeneous as the federal judiciary is with respect to race, ethnicity, national origin, and gender, it is even less diverse as it pertains to judges’ professional experience. The judges currently on the federal bench have been primarily or exclusively prosecutors, corporate lawyers, state court judges (and, for appellate judges, federal district court judges), and law professors. Very few have the experience of actually representing individuals in disputes with large institutional actors.

In 2008, NELA member Cyrus Mehri and his law firm, Mehri & Skalet, PLLC,<sup>27</sup> examined the professional histories of 162 active judges then on the U.S. Courts of Appeals, using *The Almanac of the Federal Judiciary* as its data source.<sup>28</sup> Research revealed that:

- 138 (85.2 percent) of the judges reviewed had worked in private practice.<sup>29</sup>
- Only five (3.1 percent) had substantial legal experience working for non-profit organizations. None of those judges had worked for a non-profit organization, however, more recently than 1981.<sup>30</sup>
- Only five out of 162 (3.1 percent) active federal appellate judges had worked for organizations or government agencies that enforce civil rights.<sup>31</sup>

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<sup>26</sup> *Id.* at 120.

<sup>27</sup> Ellen Eardley, Mehri & Skalet, PLLC Associate Attorney, contributed significantly to compiling the report.

<sup>28</sup> See generally, *Barriers To Justice: Examining Equal Pay For Equal Work, Hearing Before the Senate Comm. on the Judiciary, 110th Cong.* (2008).

<sup>29</sup> *Id.*, Exhibit 5, *Response to Written Questions from Chairman Patrick Leahy by Cyrus Mehri, Partner, Mehri & Skalet, PLLC* (Mehri Response) at 7 n.10. While the study made no distinction between small and large firms, criminal and civil practices, or plaintiff-side and defense firms, “[i]t [was] clear from the judges’ biographies that a sizable number of them worked for large, well-known firms that tend to represent corporations.”

<sup>30</sup> *Id.* at 6.

<sup>31</sup> *Id.* at n.7. The confirmations of O. Rogeriee Thompson (U.S. Court of Appeals for the First Circuit, Rhode Island Legal Services) and James E. Graves, Jr. (U.S. Court of Appeals for the Fifth Circuit, Central Mississippi Legal Services) increased by two the number of active federal appellate judges with legal services experience.

- None had substantial experience as in-house counsel for a labor union.<sup>32</sup>
- Only three active federal appellate judges had worked for organizations that represent low-income Americans, and only one appeared to have had substantial experience advocating for consumer rights.<sup>33</sup>

Based on this research, Mr. Mehri concluded that “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.”<sup>34</sup>

Following up on this assessment, prominent NELA attorneys from a number of states reviewed the backgrounds of the federal judges in their circuit and district courts in 2010 using publicly available biographical information. A sampling of their data confirms the national findings:

- Of the five active and two senior judges on the U.S. Court of Appeals for the First Circuit, one had been a prosecutor, and one a state judge. The others hailed from private practice or the government. One judge had led a public interest advocacy organization.
- The U.S. Court of Appeals for the Second Circuit was dominated by former corporate lawyers (non-criminal) from large corporate firms and by former law professors. Judge Denny Chin was the only circuit judge who had plaintiffs’ employment litigation or any small firm litigation experience. No judges had experience working for civil rights or public interest organizations.
- Of the 24 judges on the U.S. Court of Appeals for the Sixth Circuit whose backgrounds were examined, half had worked for defense law firms and ten were state, federal, or military judges or magistrates. Six were criminal prosecutors, six had worked as full-time law school professors, and ten had worked for federal, state, or local government (in a capacity other than judge or prosecutor). None had practiced at a legal services organization, a public defender’s office, or at a plaintiff- or union-side law firm.
- Of the 11 judges examined on the District of Oregon, eight had worked for a defense-side law firm, been a state, federal, or military judge or

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<sup>32</sup> At least one federal judge, Marsha Berzon of the U.S. Court of Appeals for the Ninth Circuit, had substantial experience in a union-side private law firm before her appointment to the bench.

<sup>33</sup> Mehri Response, *supra* note 29, at 6.

<sup>34</sup> *Id.* at 7.

magistrate or a criminal prosecutor, or had worked for federal, state, or local government in a capacity other than judge or prosecutor.

In sum, previous appointments have resulted in a federal judiciary largely homogeneous in professional background. Judges tend to have experience in defending civil lawsuits, criminal prosecution, as academics or state court judges and, in general, with serving large institutional actors rather than individual clients. Very few have engaged in public interest civil litigation or represented individuals on a regular basis.

### JUDICIALLY CREATED BARRIERS MAKE IT MORE DIFFICULT FOR PLAINTIFF-EMPLOYEES TO PREVAIL

Federal lower court judges, especially in the U.S. Courts of Appeals, have erected significant legal barriers to plaintiffs pursuing employment discrimination cases – barriers not required by, and in some cases contrary to, U.S. Supreme Court precedent.<sup>35</sup> In many ways, the federal bench has rewritten procedural and substantive rules applicable only in employment cases that result in the disproportionate dismissal of workplace discrimination cases. These judicially-

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<sup>35</sup> It is also true that many such legal barriers have been created by the U.S. Supreme Court. See, e.g., Adam Liptak, “Justices Offer Receptive Ear To Business Interests,” N.Y. TIMES, (December 19, 2010), available at [http://www.nytimes.com/2010/12/19/us/19roberts.html?\\_r=1&hp](http://www.nytimes.com/2010/12/19/us/19roberts.html?_r=1&hp) (reporting on a study by scholars at Northwestern University and the University of Chicago finding a statistically significant increase in the percentage of cases that the U.S. Supreme Court led by Chief Justice John G. Roberts, Jr. decided in favor of business interests over prior Courts: 61 percent of relevant rulings were pro-business in the Roberts Court compared to 46 percent in a comparable period of the Rehnquist Court); See also, Moss *supra* note 13 at 6 (finding in recent U.S. Supreme Court decisions a “trend toward more hostility and less support for litigation [that] disproportionately skews outcomes in favor of defendants, most commonly businesses sued by those claiming deprivations of various rights and protections, such as workplace anti-discrimination rights, consumer rights, wage rights, and protection against unlawful competition.”); See also *Workplace Fairness: Has The Supreme Court Misinterpreted Laws Designed To Protect American Workers from Discrimination?*, Hearing Before the Senate Comm. on the Judiciary, 111th Cong. (2009) (statement of Senator Patrick Leahy, Chairman, Senate Comm. on the Judiciary), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=4096&wit\\_id=2629](http://judiciary.senate.gov/hearings/testimony.cfm?id=4096&wit_id=2629) (introducing hearing about two U.S. Supreme Court “decisions [that] make it more difficult for victims of employment discrimination to seek relief in court, and more difficult for those victims who get their day in court to vindicate their rights . . . [The] Court’s misinterpretation of the Federal Arbitration Act in [*Circuit City v. Adams*, which enables] employers . . . to unilaterally strip employees of their civil rights by including arbitration clauses in every employment contract they draft[.] [and *Gross v. FBL Financial Services, Inc.*, in which] [a] slim conservative majority of the Supreme Court . . . overturned [a] jury verdict and decided to rewrite the law . . . [likely] allow[ing] employers to discriminate on the basis of age with impunity so long as they cloak it with other reasons.”); Statement of Senator Patrick Leahy, *Courting Big Business: The Supreme Court’s Recent Decisions on Corporate Misconduct and Laws Regulating Corporations*, Hearing Before the Senate Comm. on the Judiciary, 110th Cong. (2008), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3485&wit\\_id=2629](http://judiciary.senate.gov/hearings/testimony.cfm?id=3485&wit_id=2629) (discussing the *Circuit City* case as well as “the tragic decision in Lilly Ledbetter’s pay discrimination case [in which the] Supreme Court overturned her jury verdict and created a bizarre interpretation of our civil rights laws”); Constitutional Accountability Center, *The Roberts Court and Corporations: The Numbers Tell the Story* (June 2010), available at [http://www.theconstitution.org/upload/fck/file/File\\_storage/Chamber%20Win%20Statistics.pdf](http://www.theconstitution.org/upload/fck/file/File_storage/Chamber%20Win%20Statistics.pdf) (finding that the conservative wing of the U.S. Supreme Court has sided with big business in 64 percent of business-related rulings, and in 84 percent of business-related rulings decided by a 5-4 majority, issued between 2006 and May 2010).

erected obstacles, such as those discussed below, tend to exert the greatest influence at those stages in a case where the judge's discretion is at its apex, such as at summary judgment, post-trial, and on appeal.

### 1. "Stray Remarks"

From its inception in U.S. Supreme Court Justice Sandra Day O'Connor's concurrence in *Price Waterhouse v. Hopkins*,<sup>36</sup> the so-called "stray remarks" concept has spread widely across the federal circuit courts. Indeed, statements deemed "ambiguous,"<sup>37</sup> "ambivalent,"<sup>38</sup> or made by "non-decisionmakers or by decisionmakers outside the decision making process,"<sup>39</sup> could all potentially be classified as "stray remarks." As the moniker is currently used in federal courts around the country, biased comments may be deemed inadmissible unless the employer specifically denigrates the age, gender, or ethnicity of an employee while in the same breath firing, demoting, or refusing to promote him.<sup>40</sup>

There is perhaps no more striking example of the pernicious use of "stray remarks" to minimize and disregard evidence of discrimination than in *Ash v. Tyson Foods, Inc.* In *Ash*, the U.S. Court of Appeals for the Eleventh Circuit overturned not one, but *two* jury verdicts finding that discrimination motivated the failure of Tyson to promote African-Americans to supervisory positions within the company.<sup>41</sup> In doing so, the Eleventh Circuit twice held as a matter of law

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<sup>36</sup> 490 U.S. 228 (1989).

<sup>37</sup> See *Moss v. BMC Software, Inc.*, 610 F.3d 917, 929 (5th Cir. 2010) (quoting *EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173, 1181 (5th Cir. 1996) ("In order for an age-based comment to be probative of an employer's discriminatory intent, it must be direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was an impermissible factor in the decision to terminate the employee.")).

<sup>38</sup> See *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993) (The court found that a supervisor's remark that "we don't necessarily like grey hair," while more than a "stray remark," was nevertheless "uttered in an ambivalent manner and was not tied directly to [the plaintiff's] termination.").

<sup>39</sup> *Price Waterhouse*, 490 U.S. at 277.

<sup>40</sup> In fact, that is precisely what the Seventh Circuit Court of Appeals seems to require. In *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 694 (7th Cir. 2006), the court stated: "We have cautioned that this [stray remarks] rule may give way where particular remarks in fact support an inference that unlawful bias motivated the decisionmaker, such as when those remarks are made by the decisionmaker or one having input in a decision, and are made '(1) around the time of, and (2) in reference to, the adverse employment action complained of.'" (quoting *Hunt v. City of Markham*, 219 F.3d 649, 652-53 (7th Cir. 2000)). See also *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996) ("Remarks may serve as sufficient evidence of age discrimination if the offered comments are: 1) age related; 2) proximate in time to the terminations; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue.").

<sup>41</sup> In *Ash v. Tyson Foods, Inc.*, 129 Fed. Appx. 529, 533 (2005), the Eleventh Circuit held that "[w]hile the use of 'boy' when modified by a racial classification like 'black' or 'white' is evidence of discriminatory intent, the use of 'boy' alone is not evidence of discrimination." (Internal citations omitted.) After the U.S. Supreme Court remanded the case, the Eleventh Circuit once again held, in *Ash v. Tyson Foods, Inc.*, 190 Fed. Appx. 924, 926 (2006), that "[a]fter reviewing the record, we conclude once again that the use of 'boy' by Hatley was not sufficient, either alone or with the other evidence, to provide a basis for a jury reasonably to find that Tyson's stated reasons for not promoting the plaintiffs was racial discrimination. The usages were conversational and as found by the district court were non-racial in context. But even if somehow construed as racial, we conclude that the comments were ambiguous stray remarks not uttered in the context of the decisions at issue and are not sufficient circumstantial evidence of bias to provide a reasonable basis for a finding of racial discrimination in the denial of the promotions. The lack of a

that calling an African-American employee “boy”<sup>42</sup> did not constitute sufficient evidence to support a jury verdict in the employees’ favor – labeling the comments as “ambiguous stray remarks” – when the white supervisor who made the statements later refused to promote the qualified African-American candidates to whom the comments were directed.

The Eleventh Circuit is not alone in using “stray remarks” to disregard evidence of discrimination and dismiss cases brought on behalf of workers:

- In *Melendez v. Autogermana, Inc.*,<sup>43</sup> the U.S. Court of Appeals for the First Circuit affirmed a grant of summary judgment against Robert Melendez, a former BMW car salesman who was employed by the defendant company for ten years before being fired at the age of 50. The court dismissed his age discrimination case despite the fact that Melendez alleged that both supervisors and other co-workers referred to him as “‘el abuelo’ (‘grandfather’), or ‘el viejo’ (‘old man’).”<sup>44</sup>
- In *Connolly v. The Pepsi Bottling Group, LLC*,<sup>45</sup> the U.S. Court of Appeals for the Third Circuit affirmed a grant of summary judgment against a plaintiff who alleged he was fired because of his age. The court decided that there was no genuine dispute as to any material fact, even though the plaintiff faced a variety of comments indicating age discrimination, including being called “the old man in the group” in a meeting, being told, “listen, old man, I know you’re lying to me,” and being informed that he was a “legacy liability” and that his boss “could hire two or three people for what [plaintiff] made.”<sup>46</sup> In addition, another supervisor told the plaintiff that “the job has passed [him] by” and that “younger key account managers can work rings around you.”<sup>47</sup>

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modifier in the context of the use of the word ‘boy’ in this case was not essential to the finding that it was not used racially, or in such a context as to evidence racial bias, in the decisions at issue, even if ‘boy’ is considered to have general racial implications.” On December 16, 2011, in its fifth opinion in this case, the Eleventh Circuit vacated its prior decision by reinstating the jury’s award of compensatory damages and finally conceding that the use of “boy” supported an inference of discrimination, especially (as instructed by the U.S. Supreme Court’s opinion) in light of the “context, inflection, tone of voice, local custom, and historical usage.” *Ash*, 546 U.S. at 456. The court held that there was sufficient testimony about the context of the statement for the jury to credit it. *Ash v. Tyson Foods, Inc.* 2011 U.S. App. LEXIS 25004 (11th Cir. 2011).

<sup>42</sup> See Brief of *Amici Curiae* NAACP Legal Defense & Educational Fund, Inc. et al. at 8 n.6, *Ash v. Tyson Foods, Inc.*, (Petition for Rehearing En Banc) (11th Cir. 2010) (No. 08-16135-BB) (The brief describes in great detail the history of the use of the word “boy” by whites in reference to African-Americans “to reinforce [African-Americans] racially subordinate status.” The brief includes an anecdote from Frederick Douglass’ autobiography where he told of a slaveholder who came across an African-American man walking along a road. He wrote that the slaveholder “addressed him in the usual manner of speaking to colored people on the public highways of the south: ‘Well, boy, whom do you belong to?’”).

<sup>43</sup> 2010 U.S. App. LEXIS 20992 (1st Cir. 2010).

<sup>44</sup> *Id.* at \*21.

<sup>45</sup> 347 Fed. Appx. 757, (3rd Cir. 2009).

<sup>46</sup> *Id.* at 759 n2.

<sup>47</sup> *Id.*

- In *Hill v. Lockheed Martin Logistics Mgmt., Inc.*,<sup>48</sup> the U.S. Court of Appeals for the Fourth Circuit affirmed summary judgment against Ethel Louise Hill on her claims of age and gender discrimination. Hill provided evidence that a safety inspector at the plant where she worked had called her “a ‘useless old lady’ who needed to be retired, a ‘troubled old lady,’ and a ‘damn woman,’ on several occasions while they were working together.”<sup>49</sup> The court held that the safety inspector was not the “actual decisionmaker or the one principally responsible” for issuing the reprimands that led to Hill’s termination, and therefore evidence of discriminatory animus on his part was irrelevant despite the fact that numerous courts have recognized that non-decisionmakers can and do influence the decision making process.<sup>50</sup>
- In *Suits v. Heil Co.*,<sup>51</sup> the U.S. Court of Appeals for the Sixth Circuit affirmed a summary judgment grant against a plaintiff who sued her former employer for pregnancy and gender discrimination after she was fired when she was five and a half months pregnant. The plaintiff offered evidence that, during the months before her termination, her supervisor made comments indicating bias towards her because of her pregnancy, such as observing that she was “not the type of person to leave” her child<sup>52</sup> and asking “How [was she] going to come back and work here and leave that baby?”<sup>53</sup> While recognizing that the remarks were “not exactly ‘stray’ or ‘innocuous’ statements,” the court nevertheless determined that the span of “up to three months” between the statements and plaintiff’s termination was too long to “demonstrate sufficient nexus” between the remarks and her firing.<sup>54</sup>
- In *Smith v. Fairview Ridges Hosp.*,<sup>55</sup> the U.S. Court of Appeals for the Eighth Circuit affirmed a summary judgment grant against an African-American woman who alleged she was the victim of a hostile work environment because of her race, as well as retaliation and constructive discharge. The court did so despite allegations of

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<sup>48</sup> 354 F.3d 277 (4th Cir. 2004).

<sup>49</sup> *Id.* at 283.

<sup>50</sup> See *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388 (2008) (“The question whether evidence of discrimination by other supervisors is relevant in an individual [discrimination] case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case.”); See also *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000) (“Consequently, it is appropriate to tag the employer with an employee’s age-based animus if the evidence indicates that the worker possessed leverage, or exerted influence, over the titular decisionmaker.”); See also *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000) (The plaintiff may use “discriminatory comments . . . made by the key decisionmaker or those in a position to influence the decisionmaker” to establish pretext.); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998) (“[R]emarks by those who did not independently have the authority or did not directly exercise their authority to fire the plaintiff, but who nevertheless played a meaningful role in the decision to terminate the plaintiff, [are] relevant.”); *Griffin v. Washington Convention Ctr.*, 142 F.3d 1308, 1312 (D.C. Cir. 1998) (“Evidence of a subordinate’s bias is relevant where the ultimate decision maker is not insulated from the subordinate’s influence.”).

<sup>51</sup> 192 Fed. Appx. 399 (2006).

<sup>52</sup> *Id.* at 401.

<sup>53</sup> *Id.* at 402.

<sup>54</sup> *Id.* at 403.

<sup>55</sup> 2010 U.S. App. LEXIS 22114 (8th Cir. 2010).



multiple instances of discriminatory statements or conduct. For example, the plaintiff alleged that on one occasion a nurse grabbed a chart out of her hands and said “these black aides don’t know what they are doing,” that another nurse at one point compared her to a “runaway slave,” and that two other employees said, in reference to her, that “she needs to go back to the ghetto where she came from.”<sup>56</sup>

That *Smith* involved a hostile work environment claim (among others), and not one implicating termination, failure to promote, or other adverse employment action, is illustrative of the extent to which “stray remarks” has become an almost generally accepted method of evaluating evidence in discrimination cases regardless of the underlying theory of the case.<sup>57</sup> The use of “stray remarks” functions to minimize or to exclude altogether evidence that, in the real world, is indicative of discrimination. Its pervasiveness in federal courts demonstrates either judges’ unwillingness or their inability to understand the ways in which discrimination manifests itself in the modern American workplace.

## 2. “Business Judgment”

The “business judgment rule” is an evidentiary presumption borrowed from corporate governance law, where courts are required to defer to the business decisions made by a corporation’s board of directors unless they act in a manner that cannot be attributed to a rational business purpose.<sup>58</sup> Under this rule, the decisions of corporate directors are presumed to be made “on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company, thereby shifting the burden to the party challenging the decision....”<sup>59</sup>

For example, in *Webber v. Int’l Paper Co.*,<sup>60</sup> the district court overturned a jury verdict for a plaintiff on his disability discrimination claim and granted the defendant’s motion for judgment as a matter of law on the basis of the “business judgment rule.” Over a period of 18 years, the plaintiff worked his way up from a position as a mechanical draftsman to that of a project manager for the defendant, despite the fact that he did not have a degree in engineering. For

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<sup>56</sup> *Id.* at \*8-\*9.

<sup>57</sup> While stray remarks first appeared in *Price Waterhouse*, a case evaluating a claim of discrimination under the “because of” standard in Title VII, it has since injected itself with equal force to minimize evidence of discrimination in cases arising under the “motivating factor” standard, as well as cases where the plaintiff challenges a defendant’s proffered non-discriminatory reasons as a pretext for discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (“A plaintiff may satisfy the burden of establishing a *prima facie* case of discrimination ‘by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.’”).

<sup>58</sup> *Brehm v. Eisner*, 746 A.2d 244, 264 n. 66 (Del. 2000); see also *Navellier v. Sletten*, 262 F.3d 923, 946 (9th Cir. 2001) (affirming district court’s formulation of the “business judgment rule” as requiring a director to “[r]ationally believe that the [director’s] business judgment is in the best interest of the corporation”). *Pac. Northwest Generating Coop. v. Bonneville Power Admin.*, 596 F.3d 1065, 1077 (9th Cir. 2009).

<sup>59</sup> *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

<sup>60</sup> 417 F.3d 229 (1st Cir. 2005).

the final four years of his employment, the plaintiff was severely limited by a knee injury, but the defendant did not assert that the injury affected his job performance. Instead, the defendant claimed it fired him because he lacked an engineering degree and was therefore unable to manage more complex projects. There was evidence, however, that the defendant often contracted with outside companies on more complex projects and that it continued to undertake projects that the plaintiff *was* qualified to manage. The U.S. Court of Appeals for the First Circuit affirmed the decision of the district court to overrule the jury because, “pursuant to the ‘business judgment’ rule, an employer is free to terminate an employee for any nondiscriminatory reason, even if its business judgment seems objectively unwise.”<sup>61</sup>

Similarly, in *Scamardo v. Scott County*,<sup>62</sup> the U.S. Court of Appeals for the Eighth Circuit relied on the “business judgment rule” to reverse a plaintiff’s jury verdict finding retaliation for previously having filed a gender discrimination suit in violation of Title VII. In that previous case, Deanne Scamardo sued Scott County for sex-based unequal pay in 1996. After settling that case in early 1997, the county decided to transfer most of the duties involved in Ms. Scamardo’s position to another department, which reduced her weekly hours from 30 to 12 and left her ineligible for continued health coverage. She again sued the county, this time alleging that the decision to reduce her hours was in retaliation for participating in the earlier suit. The Eighth Circuit overturned the favorable jury verdict, holding that the trial judge should have instructed the jury that “you may not return a verdict for plaintiff just because you might disagree with defendant’s decision or believe it to be harsh or unreasonable.”<sup>63</sup>

More broadly, transplanting the “business judgment rule” to the context of employment discrimination cases is a manifestation of the federal judiciary’s identification with the interests of employers rather than those of employees. This is hardly surprising when the federal judiciary is culled in large part from the same sector of society as high-level managers with whom it shares similar personal and professional backgrounds.

### 3. “Self-Serving Witness”

At common law, interested witnesses were said to be so lacking in credibility that they were considered incompetent to testify.<sup>64</sup> Even after recognizing that interested witnesses were competent to testify in some circumstances, courts still held that those witnesses may have such an interest in the question at issue as to affect their credibility.<sup>65</sup> In short, the witnesses’ interest alone presented a question of credibility that is properly assessed by a jury.<sup>66</sup>

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<sup>61</sup> *Id.* at 238 (citing *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 537 (1st Cir. 1996)).

<sup>62</sup> 189 F.3d 707 (8th Cir. 1999).

<sup>63</sup> *Id.* at 711.

<sup>64</sup> See, Sidney S. Bobbe, *The Uncontradicted Testimony of an Interested Witness*, 20 Cornell L.Q. 33, 36-37 (1934) (citing John Henry Wigmore, *A Treatise on the Anglo American System of Evidence in Trials at Common Law*, § 575 (2d ed. 1923)).

<sup>65</sup> *Elwood v. Western Union Telegraph Co.*, 45 N.Y. 549, 554 (1871).

<sup>66</sup> *Id.*

In the context of summary judgment, the longstanding rule, established in *U.S. v. Diebold, Inc.*,<sup>67</sup> is that “[o]n summary judgment the inferences to be drawn from the underlying facts contained in such materials *must* be viewed in the light most favorable to the party opposing the motion.” (emphasis added).<sup>68</sup> In *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 151 (2000), the U.S. Supreme Court articulated the implications of this rule as it pertains to evaluating the testimony of interested witnesses:

[A]lthough the court should review the record as a whole, it *must disregard* all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that ‘evidence supporting the moving party that is uncontradicted and unimpeached, *at least to the extent that the evidence comes from disinterested witnesses.*’ (Emphasis added and internal citations omitted.)

The federal courts have not followed this principle with sufficient rigor. For example, in *Wiley v. Am. Elec. Power Servs. Corp.*,<sup>69</sup> the U.S. Court of Appeals for the Fifth Circuit affirmed summary judgment against employees alleging gender discrimination and retaliation. The court accepted the supervisor’s bare assertion of lack of knowledge, refused to recognize her personal interest in avoiding liability, and used her testimony as grounds for granting summary judgment and denying the plaintiffs the opportunity to challenge her credibility through cross-examination at trial.

By contrast, there are many examples of federal courts dismissing plaintiffs’ testimony as self-serving because of their personal interest in the outcome of the litigation.<sup>70</sup> In fact, it is because of that self-interest that a multitude of our civil rights laws allow ordinary people to bring private causes of action to ensure that the rights embodied by those laws are enforced.

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<sup>67</sup> 369 U.S. 654, 655 (1962).

<sup>68</sup> This rule was affirmed in *Matsushita Elec. Indus., Inc. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), and has been reiterated *ad infinitum* by courts at all levels.

<sup>69</sup> 287 Fed. Appx. 335 (5th Cir. 2008).

<sup>70</sup> See *Santos v. Winter*, 2010 U.S. Dist. LEXIS 99499, \*27 (D.S.C. 2010) (“Plaintiff’s own self-interested statements as to what he believed or perceived are not sufficient evidence to maintain this claim.”); *Shaffer v. American Med. Ass’n.*, 2010 U.S. Dist. LEXIS 38276, \*17 (N.D. Ill. 2010) (“The employee ‘must do more than challenge the judgment of his superiors through his own self-interested assertions.’”) (quoting *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986)); *Slaughter v. Jones Day*, 2007 U.S. Dist. LEXIS 2198, \*15 (S.D. Tex. 2007) (“This is insufficient to create a disputed issue of material fact, as are plaintiff’s own self-interested characterizations of her job performance and qualifications.”); *Kelley-Hill v. Ingram*, 2006 U.S. Dist. LEXIS 57369, \*27 (N.D. Tex. 2006) (“Plaintiff’s self-interested testimony regarding McDuffie’s question does not create a fact issue as to whether Defendant’s proffered reason is false.”); *Haskins v. New Venture Gear*, 2002 U.S. Dist. LEXIS 4552, \*18 (S.D. Ind. 2002) (“However, these self-interested assertions cannot raise a genuine issue regarding the honesty of Lemaster’s view of her performance . . .”).

## THE OBAMA ADMINISTRATION MUST NOMINATE PROFESSIONALLY DIVERSE INDIVIDUALS TO THE FEDERAL JUDICIARY

President Obama enjoys a strong record of diversity with respect to race, gender, and ethnicity in confirmed federal judgeships. Out of 124 confirmations during the first three years of the Obama Administration, 18.5 percent were African-American, 12.0 percent were Hispanic, 5.6 percent were Asian-American, and 0.8 percent were Arab-American. In terms of gender, 55.0 percent confirmed were male and 46.0 percent were female.<sup>71</sup> In fact, nearly three of every four of President Obama's nominees who have been confirmed are women or minorities;<sup>72</sup> he is the first American president who has not selected a majority of white males for lifetime judgeships.<sup>73</sup>

Conversely, the President has nominated a less significant number of individuals with professional diversity to the federal bench. As of November 8, 2011, 26 of the 123 district judges nominated by President Obama possess at least some experience representing individuals,<sup>74</sup> such as having worked for organizations that provide legal services to the poor, or public defenders offices that represent indigent people accused of crimes.<sup>75</sup> In addition, 10 of the 37 appellate judges he had nominated by that time also have such experience.<sup>76</sup> The percentage of nominees with experience representing employees or unions is somewhat lower – only 10 district court nominees and 5 appellate court nominees have this type of experience.

Preserving the credibility of the federal judiciary requires taking concrete steps to level the playing field for all litigants that come before our nation's courts. Achieving this requires embracing a federal bench that better reflects the professional diversity of attorneys across the country. Overlooking qualified candidates whose professional experience includes representing plaintiffs in employment, labor, and civil rights cases inevitably reinforces the image of a judiciary that is indifferent to the plight of America's workers.

While President Obama's nominees better reflect the professional diversity of practicing attorneys than did those of his predecessors, the fact remains that employment discrimination plaintiffs are unlikely to draw judges at either the trial or appellate level who have significant experience representing individuals in such cases. In filling the many vacancies on the federal

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<sup>71</sup> Percentage calculations based on data retrieved from the Alliance for Justice Judicial Nomination Snapshot, <http://www.afj.org/judicial-selection/judicial-selection-snapshot.pdf> (last visited December 15, 2011).

<sup>72</sup> Jesse J. Holland, Obama Judicial Nominations Set Record For Women Minorities, HuffingtonPost.com, September 13, 2011, available at [http://www.huffingtonpost.com/2011/09/13/obama-judicial-nominees-women-minorities\\_n\\_959745.html](http://www.huffingtonpost.com/2011/09/13/obama-judicial-nominees-women-minorities_n_959745.html) (last visited December 15, 2011).

<sup>73</sup> *Id.*

<sup>74</sup> NELA used publicly available sources, including nominees' responses to the Senate Committee on the Judiciary's questionnaire to determine the professional background of nominees. In our examination, we differentiated between plaintiff- and defense-side law firms.

<sup>75</sup> The only current, non-confirmed district court nominee possessing at least some experience representing individuals is Justice Louis B. Butler, Jr.

<sup>76</sup> The two current, non-confirmed appellate court nominees possessing at least some experience representing individuals are Edward C. Dumont and Victoria F. Nourse.

judiciary, we urge the President to make nominating candidates with diverse professional backgrounds – in particular, experience representing workers – one of his highest priorities as the working people of our country deserve nothing less. We opened this report with a quote from Judge Edward M. Chen, and thus we close with one from his induction ceremony on September 28, 2011 as paraphrased by Pamela A. MacLean:<sup>77</sup>

“[I] never considered withdrawing my nomination, despite the initial rejections. It was a matter of principle....[I] wanted to show that a lawyer can practice public interest law, even for the ACLU, and still be selected as a life-tenure federal judge. The federal bench is not just for people from large corporate law firms, or who represent only the wealthy, or who never speak out, or play it safe in their careers.”

NELA is committed to working with the Obama Administration to shepherd professionally diverse candidates for federal judgeships through the vetting, nomination, and confirmation processes as a means of ensuring that workers receive equal justice under the law, as well as enhancing the quality of decision making for litigants in employment cases.

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<sup>77</sup> See “U.S. District Court Edward Chen Inducted as Federal Judge,” Pamela A. MacLean (September 29, 2011), <http://www.trialinsider.com/?p=812>.