NATIONAL
EMPLOYMENT
LAWYERS
ASSOCIATION
(Advocates for Employee Rights)

TESTIMONY OF NAIDA B. AXFORD IN OPPOSITION TO THE APPOINTMENT OF JUDGE CLARENCE THOMAS TO THE UNITED STATES SUPREME COURT

The next appointee to the Supreme Court will play a pivotal role in determining whether a half century of law establishing the rights of employees to be protected against arbitrary and discriminatory employment practices will be rescinded. As Justice Thurgood Marshall warned in his final dissenting opinion, the Court's current majority has launched a "far-reaching assault upon this court's precedents" and the majority has "sent a clear signal that essentially all decisions implementing the personal liberties protected by the Bill of Rights and the Fourteenth Amendment are open to re-examination."[1] It is therefore critical that the person nominated to

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[1] Payne v. Tennessee, 59 U.S.L.W. 4814 (New. S. June 25, 1991) (No. 90-5721)

assume the seat vacated by Justice Marshall be committed to a judicial philosophy which values the established rights of employees to be free from discriminatory treatment.

The National Employment Lawyers Association ("NELA") believes that Judge Clarence Thomas is clearly not the best person for the position. NELA is a non-profit professional organization comprised of over 1,000 lawyers in 48 states and the District of Columbia who represent employees in work related matters. As a group, NELA attorneys have represented hundreds of thousands of individuals seeking equal job opportunities. It is one of the few organizations dedicated to protecting the rights of all employees who rely on the courts for protection to be free from discrimination and wrongful discharge. We are, therefore, deeply concerned about Judge Thomas' lack of commitment to the constitutional and statutory rights of employees previously established by the United States Supreme Court.

In the coming years, the Supreme Court will be called upon to rule on a myriad of employee rights issues. Over the last two years, the Supreme Court substantially cut back on protection afforded the American working population against employment

discrimination.[2] However, many issues are left open. For example, there will be major cases raising the question of whether employees can be coerced into waiving their federally protected civil rights in order to obtain a job. At its last session the court held that victims of age discrimination can prospectively waive their rights to statutory protection under the Age Discrimination Act (ADEA). There have already been attempts to expand that to permit waivers of rights established by Congress under Title VII and under § 1981 and § 1983 of the Civil Rights Act, and ultimately the Supreme Court will be called upon to act. Another issue of significance will be the reach of the Supreme Court's decision in Patterson. There is now a split in the circuit courts as to whether Patterson reaches termination cases. The Court, in the future, will be called upon to rule on that issue. At this critical point in the history of the Court it is, in our view, crucial that the person appointed have a fair and open mind to the issues that will be presented.

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[2]Wards Cove Packing Company v. Atonio, 109 S.Ct. 2115 (1989). Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989). Lorance v. AT&T Technologies Inc., 109 S.Ct. 2261 (1989). Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989); Martin v. Wilkes, 109 S.Ct. 2180 (1989); Gilford v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991)

Judge Thomas' prior record, particularly his eight year tenure as Chair of the United States Equal Employment Opportunity Commission ("EEOC"), demonstrates clearly his hostility toward the protective legislation previously passed and interpreted by the Supreme Court. As chief enforcer of the federal civil rights statutes, he undermined the effective implementation of those laws, because of his personal disagreement with Supreme Court interpretation of his statutory mandate. The following is a brief summary of Judge Thomas' record which NELA believes demonstrates a judicial philosophy unsuited to elevation to the highest court of the land.

QUALIFICATIONS FOR THE JOB

There have been only 105 Supreme Court Justices since the establishment of the court. Elevation to that prestigious and powerful position is reserved for those persons who have a demonstrated record of significant national public service, legal scholarship or judicial experience. Judge Thomas' brief public career lacks these essential qualifications.[1] Judge

[1]Indeed at the time of his nomination to the Circuit Court of Appeals for the District of Columbia, the ABA merely found Judge Thomas "qualified" and denied him the higher ranking of "highly qualified" for that lower court position. When faced with his nomination to the Supreme Court, the ABA again rated him only "qualified" and overall gave him lower ratings than Judge Bork. A nominee who is not found most qualified for the position of Court

Thomas has extremely limited judicial experience, having served only about 17 months on the Court of Appeals for the District of Columbia. During that time, he has written only 17 opinions, all of which were opinions in non-controversial cases in which the decision of the court was unanimous.

His only other significant legal experience was as Chair of the United States Equal Employment Opportunity Commission from 1982 through 1990. As will be discussed more fully below, the Agency under his administration refused to enforce the civil rights laws under its jurisdiction as those laws were interpreted by the Supreme Court. Judge Thomas simply does not have the broad range of experience that would qualify him for the highest judicial appointment. Nor has he demonstrated respect for Constitutional principles and established legal precedents to qualify him for this esteemed position.

CHAIRMANSHIP OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The EEOC is the agency established to enforce federal laws forbidding employment discrimination based on race, sex, national origin, age, and religion. During his administration, Mr. Thomas demonstrated an unwillingness to enforce those laws

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of Appeals Judge can certainly not be viewed as the most qualified candidate for the United States Supreme Court.

vigorously. Among his more egregious failings was allowing 13,000 age discrimination claims to lapse and at the same time trying to hide those facts from the United States Congress.

Further, Judge Thomas routinely criticized and complained about the oversight committee of Congress charged with monitoring the work of the EEOC. When first asked by the Senate's Special Committee on the Aging about the number of ADEA[4] cases whose statute of limitations had lapsed, Mr. Thomas reported that only 78 such cases existed. He complained that the Senate Committee staffers were subpoenaing volumes of records and that this was an expense to the EEOC.[5] However, only after constant probing, including the use of subpoenas to obtain EEOC records, was it revealed that over 13,000 such lapsed cases existed.[6] It took special legislation of Congress to restore the rights of those workers whose claims the EEOC under the stewardship of Clarence Thomas, had allowed to lapse.

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[4]Age Discrimination in Employment Act, 29 U.S.C. §621 et seq.

[5]Speech before the Federalist Society, University of Virginia, March 5, 1988 at page 13.

[6]Letter to the President by 14 Members of Congress, July 17, 1989; United States Senate, Committee on the Judiciary, Nomination Hearing for Clarence Thomas to be a Judge on the United States Court of Appeals for the District of Columbia, February 6, 1990 at 90.

Former EEOC Chair Thomas was also responsible for the forfeiture of over $450 million dollars in lost benefits to older workers because of the EEOC's refusal to enforce the ADEA. Despite his stated commitment to rescind EEOC interpretive guidelines which had improperly held that employers were not required to make pension contributions on behalf of workers over the age of 65, Mr. Thomas issued no rescission order.[7] It was only when Congress stepped in, after four long years, that an amendment to the ADEA was passed requiring such pension contributions. In fact, EEOC did not correct its regulations until it was ordered to do so by the United States Federal Court. As United States District Court Judge Harold Green stated in finding against EEOC, the agency "has at best been slothful, at worse deceptive to the public, in the discharge of its responsibilities."[8]

A critical issue that will be facing the Supreme Court in the future is to what extent, if at all, can employees be forced to waive their rights to protection under the federal equal employment statutes. NELA is extremely concerned that employees, in their need to preserve their job, will be coerced

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[7] AARP v. EEOC, 655 F. Supp. 228, (D.D.C., 1987) Aff'd in part, rev'd in part, on other grounds, 823 F.2nd 600 (D.C. Circuit 1987)

[8] Id at 229

into waiving their most valuable statutory and constitutional rights in order to work. Judge Thomas, as Chair of the EEOC, has indicated his lack of willingness to protect workers against such coercion. The EEOC, under Judge Thomas' leadership, promulgated regulations which allowed employees to obtain waivers of rights under ADEA from employees without the supervision of the EEOC. Again Congress had to step in and suspend those regulations starting in fiscal year 1988. Again in a continuing pattern of arrogance and hostility toward Congress, the EEOC refused to withdraw or modify the lax waiver guidelines. Judge Thomas' willingness to undermine the protection afforded by ADEA to all the workers cast grave doubt on his commitment to enforce these laws.

The EEOC, under Mr. Thomas' stewardship refused to follow or actually undermined clear mandates of the Supreme Court and thereby denied claimants' remedies to which they were entitled. In Griggs v. Duke Power,[9] The Supreme Court established the disparate impact test for proving discrimination. Under this theory a member of the protected group could establish a prima facie case of discrimination by demonstrating that an employment practice disproportionately affected members of the protected class. Proof of intent was

[9] 401 U.S. 424 (1971)

not required. Mr. Thomas disagreed with that Supreme Court precedent and, therefore, not only failed to pursue litigation where appropriate, but sought to change EEOC regulations which were established pursuant to Griggs.[10]

Moreover, Judge Thomas has been less than candid with the Senate regarding his preconceived position on Griggs. Senator Spector extensively questioned the nominee on Griggs pointing out that Congress had let Griggs stand for 18 years, thus showing Congress' view that its intent was being carried out. Judge Thomas said that 18 years was a long time and it was a factor to take into account in determining congressional intent thus implying his agreement with Senator Spector. He failed to explain why, if he believed Griggs reflected congressional intent, he sought to undermine it through Executive regulations that were contrary to Congress' position.

Further, although the courts, including the Supreme Court, had established very clearly under Griggs and United States v. Teamsters[11] that statistical disparities could establish evidence of

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[10] "Changes Needed in Federal Rules on Discrimination," N.Y. Times, December 3, 1984 at A1, "EEOC Chairman Questions Job Bias Guidelines," Assoc. Press, December 5, 1984

[11] 431 U.S. 324 (1977)

discrimination, Judge Thomas criticized the use of statistics and in 1985 disbanded the EEOC Division responsible for bringing nationwide pattern and practice charges against major companies.[12]

Judge Thomas' hostility to affirmative action, particularly the use of goals and timetables in appropriate circumstances, is well documented and not denied.[13] As chair of the EEOC, he interjected his personal views on that subject and allowed those views to compromise the activities of the EEOC. The use of goals and timetables to remedy past discrimination was a well established legal remedy upheld by the United States Supreme Court on any number of occasions.[14] Nonetheless, as a consequence of his personal opinion, Judge Thomas did not exercise the EEOC's oversight authority to enforce public sector affirmative action requirements under Section 717 of Title VII. Judge

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[12] See BNA Daily Labor Reporter, February 19, 1985 Mixed Motives Attributed to EEOC's Disbanding of Systemic Programs Office, at page A-9

[13] Hearing Before the Committee on Labor and Human Resources of the United States Senate, 97 Cong. 2d Sess. 16 (March 31, 1982)

[14] United States Steel Workers v. Weber, 443 U.S.193 (1979) Fullilove v. Klutznick, 448 U.S. 448 (1980), Johnson v. Transportation Agency of Santa Clara County, 480 U.S. 616 (1987)

Thomas persistently voiced his strong opposition with the Supreme Court's approach insisting that the use of goals and timetables "turns the law against employment discrimination on its head".[15]

Judge Thomas also thwarted the prosecution of class actions. Discrimination claims, by their very nature, are class claims "as the evil sought to be ended is discrimination on the basis of a class characteristic, i.e., race, sex, religion, or national origin."[16] Class actions, are a major weapon in the arsenal of civil rights protection for minorities and women. Indeed, recognizing the class nature of discrimination claims, Congress empowered the EEOC to initiate "pattern and practice" claims of discrimination against employers[17].

The benefit of class claims is that they allow the government or private litigants to attack basic practices and policies which directly or effectively preclude women, Blacks, Hispanics and other minorities from obtaining employment opportunities within a given

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[15] Thomas, "Affirmative Action Goals and Timetables," 5 Yale L. and Pol. R. 402 at 403, note N.3 (1987)

[16] Bowe v. Colgate Palmolive Company, 416 F. 2nd 711, 719 (7th Circuit 1969). See General Tel. Company v. Falcon, 457 U.S. 147 (1982).

[17] Initially the United States Department of Justice was given the litigation power which was transferred to the EEOC in the 1972 amendments.

company. The class action/pattern and practice case can economically and more quickly reach issues that no individual litigant could resolve. For example, in one of the more major cases upholding a pattern and practice class action brought by the United States government, the trucking industry, which completely excluded Blacks and other minorities from the higher paying truck driver positions was on mass opened up to those groups by the successful resolution in United States v. Teamsters. If that had been simply an individual case then, if that individual could have even afforded to bring on a lawsuit, he would, at best, been able to obtain one single position among thousands for himself. Each individual teamster would have to come forward and raise his own complaint which would mean that the industry could continue to be foreclosed to a sizeable number of Blacks for many years.

Another major example of the economy and effectiveness of the class action/pattern and practice suit is the recent $66 million dollar settlement in the case of EEOC v. AT&T, 78 Civ 3951 U.S.D.C. for the Northern District of Illinois, Eastern Division. In that case, the company had discriminated against pregnant women by requiring them to take unpaid leaves at the end of their six months of pregnancy while

denying them full seniority credit while on pregnancy leave and denying them job guarantees after child birth. There were 13,000 identifiable victims of discrimination who were made whole by this settlement. There is no possibility that those 13,000 victims would have successfully pursued individual claims given the expense and time consumption of Federal litigation.

Although the class action pattern and practice suits have proven to be one of the major tools for successful elimination of discriminatory treatment, Judge Thomas has scorned its use. While EEOC filed a total of 218 class actions in fiscal year 1980, under Judge Thomas' chairmanship, only 129 such actions were filed in 1989.[18] Moreover, in 1985, while chair of the EEOC, Judge Thomas disbanded the EEOC division responsible for bringing national pattern and practice charges.[19]

Judge Thomas' reluctance to use the class action mechanism provided for in the statute or to rely on statistical evidence as approved by the United States Supreme Court deprived victims of discrimination the full panoply of government support committed by the

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[18] Women Employed Institute, EEOC Enforcement Statistics (1991)

[19] See Mixed Motives Attributed to EEOC's Disbanding of Systemic Programs Office, Daily Lab. Rep. (BNA) at A-9 February 19, 1985]

Congress of the United States. Congress specifically recognized the value of the class action/pattern and practice mechanism in adopting the law. The Supreme Court recognized these principles. Yet the person primarily responsible for enforcing the law allowed his personal opinions on these issues to thwart congressional intent. By limiting EEOC's class actions, he effectively denied thousands or possibly tens of thousands of victims of discrimination effective relief under the statute.

Judge Thomas' stated rationale for his opposition to the use of class action lawsuits and to the use of remedial goals and timetables is that the law protects rights of individuals, not groups. It was his announced position that acts of discrimination must be individually proven and dealt with.

However, under his administration, individual victims were unable to receive any remedial relief as were class members. Indeed, the lack of effective investigative and litigation techniques at the EEOC under Clarence Thomas required special investigation on three separate occasions by the Government Accounting Office.[20] The GAO severely criticized the

[20] Information on the Atlanta and Seattle EEOC District Office (GAO/HRD-86-63FS, Feb. 1986); EEOC Birmingham Office Closed Discrimination Claims Without Full Investigations (GAO/HRD-87-81, July 1987; Equal Employment Opportunity EEOC and State Agencies Did Not Fully Investigate Discrimination Charges (GAO/HRD-89-11).

EEOC's case handling and investigative methods. In its 1988 report on the EEOC, the GAO further found that during the five year period, fiscal years 1983-1987, the rate of EEOC cause determinations ranged from a mere 2.6 percent to a mere 3.9 percent[21]. Thus, as the GAO found, at no time from 1983 to 1987 did the EEOC find merit or cause to more than 4% of its charge filings. Such results from an agency with an approximate budget of 180 million dollars are mediocre indeed.

The EEOC's litigation statistics are equally dismal. Although the Agency had 50,110 new employment discrimination charges filed in 1986, the total number of cases that the EEOC actually filed in Court in 1986 was a mere 526 cases.[22] Thus, in only slightly more than 1% of its charges, did the EEOC engage in any litigation whatsoever on behalf of employment discrimination victims.

Statistics for the year 1986 are not an anomaly but merely one example of the astonishingly ineffective role of the EEOC under Chairman Thomas in the enforcement of its mandate. One need only contrast the record of the EEOC under Clarence Thomas

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[21] Equal Employment Opportunity EEOC and State Agencies Did Not Fully Investigate Discrimination Charges (GAO/HRD-89-11).

[22] Employee Rights Litigation: Pleading and Practice, Goodman, J. Editor, (Matthew Bender, 1981) § 13.18 p. 13-60 fn 4

with the record of the National Labor Relations Board (NLRB), a sister federal labor relations agency which had a similar workload and a similar task to place such failure in context. The NLRB received 41,639 cases in FY 1986.[23] In contrast to a reasonable cause finding of less than 4% at the EEOC, the NLRB had a reasonable cause finding of 33.7 percent of charges filed in that same year.

Moreover, the settlement rates plunged at the EEOC under Clarence Thomas. In fiscal year 1980, prior to Chairman Thomas, 32.1% of the cases were settled whereas in fiscal year 1989 under the helm of Chairman Thomas only 13.9% of the cases were settled. This astonishingly low settlement rate at the EEOC is to be contrasted with the settlement rates at the NLRB for the years 1985 through 1989 which ranged from 91.1 percent to 94.4 percent.[24] Clearly, these mediocre EEOC statistics reflect a record of non-performance. They further reflect the experience of NELA's member attorneys who hear the legitimate complaints of EEOC

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[23] EEOC Office of Program Operations, Annual Report, FY 1986, Appendix 3, EEOC Receipts by Statue for Title VII, for FY 1982 through FY 1986.

[24] Office of the General Counsel (NLRB), Summary of Operations Reports (For Respective Fiscal Years 1985, 1986, 1987, 1988 and 1989).

Charging Parties. The EEOC, under Chairman Thomas, simply did not meet its mandate in serving the Charging Parties who have sought its assistance in ending employment discrimination.

Judge Thomas' tenure at the EEOC was thus marked by hostility to the Agency's mandate, as then defined by the Supreme Court. While he was undoubtedly free to hold his own opinions about the EEOC's enabling statute and Supreme Court caselaw, his acceptance of a position in which he was charged with the enforcement of a statute with which he did not agree, and his refusal to enforce the law as authoritatively construed, raises troublesome questions about his commitment to the legal and judicial process.

CONCLUSION

Over 75% of the workforce is not represented by unions and has no protection other than that afforded by statute as interpreted by the courts. Congress has expanded the protection of those workers to assure that equal employment opportunities are established for all Americans. It is the Supreme Court's duty to safeguard those rights as established by Congress. Judge Thomas' record as the chief legal enforcer of the rights established by Congress, as interpreted by the court, raises gave doubt about his commitment to equal employment opportunity. He has withdrawn

support from those workers most vulnerable to the coercion of arbitrary and unfair employers. His record indicates a readiness to overturn established protections and that he would impose his own personal philosophy in disregard of long established legal principles. We, therefore, urge that the Senate this nomination.