



January 17, 2018

Submitted Via Email:

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The Honorable Charles Grassley, Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein, Ranking Member
United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Feinstein:

On behalf of the National Employment Lawyers Association (NELA), and its 4,000 circuit, state, and local affiliate members across the country, I write to express our strong opposition to the confirmation of Thomas Alvin Farr to the United States District Court for the Eastern District of North Carolina.

NELA is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Our members litigate daily in every circuit, affording NELA a unique perspective on how employment cases actually play out on the ground.

NELA strives to protect the rights of its members' clients, and envisions a workplace in which employees will be paid at least a living wage in an environment free of discrimination, harassment, retaliation, and capricious employment decisions; employees' safety and livelihood will not be compromised for the sake of corporate profits; and individuals will have effective legal representation to enforce their rights to a fair and just workplace, adequate remedies, and a right to have their claims resolved by a jury.

For nearly four decades, Mr. Farr has devoted himself to undermining the effectiveness of laws designed to promote equal employment opportunity and ensure that members of historically disenfranchised communities have a meaningful voice in choosing their elected officials. Viewed separately, either would provide sufficient grounds to oppose his nomination. Taken together, they constitute overwhelming evidence that Mr. Farr should not be confirmed for a lifetime appointment to our federal judiciary.

I. Thomas Farr Has A Demonstrated Commitment To Enabling & Defending Efforts To Disenfranchise African-American Voters

As has been documented thoroughly by a number of civil rights leaders and groups, Mr. Farr has spent a substantial portion of his career working to disenfranchise African-American voters, at alternate times supporting efforts to dilute votes from predominantly African-American communities through unlawful redistricting, helping to pass legislation making it more difficult for minorities to vote, and allegedly participating in a 1990 direct-mail campaign designed to intimidate over 100,000 predominantly African-American voters, thereby ensuring an electoral victory for his former boss, Senator Jesse Helms. Mr. Farr subsequently defended the Helms campaign when the U.S. Department of Justice (DOJ) filed a legal challenge to the mailing. Despite his role at the time as legal counsel to the Helms campaign, Mr. Farr denied having any involvement in the content of or decision to send the mailing in question. His recollection has been challenged by a former DOJ prosecutor, whose contemporaneous notes indicate that Mr. Farr was aware of the mailing, and therefore misled the members of the Senate Judiciary Committee regarding his involvement.¹

II. Mr. Farr Has Worked Assiduously To Help Companies Avoid Accountability Under Our Labor & Employment Laws

The rest of Mr. Farr's professional legal experience has consisted primarily of representing businesses accused of violating labor and employment laws. As described below, the types of positions for which he has advocated, if carried over to the federal bench, would threaten meaningful access to justice, allow unlawful behavior to persist with impunity, and undermine efforts to create and preserve safe workplaces.

A. Seeking To Short-Circuit Employment Claims Before They Can Be Assessed On Their Merits

In *Buchanan v. Hunter Douglas, Inc.*,² the plaintiff suffered from a condition whose symptoms were similar to cerebral palsy, and alleged that the defendant company had discriminated against him based on his disability. After filing his lawsuit under Chapter 168 of the North Carolina statutes, he voluntarily dismissed it, before reinstating it seven months later. However, in the period between his withdrawal of the case and re-filing it, Chapter 168 was repealed and replaced with Chapter 168A, which provided the same type of protections against disability discrimination.

The defendant, represented in part by Mr. Farr, nevertheless sought to dismiss the plaintiff's complaint, arguing that the repeal of the original statute effectively extinguished the plaintiff's cause of action. While the trial court granted the motion to dismiss, the state court of appeals reversed, finding that although the original statute had been repealed, the newly-enacted statutory provision provided for the same remedy, and to foreclose the plaintiff and other disabled individuals from pursuing those remedies would constitute a "grave injustice."

¹ Sam Levine, *Former DOJ Official Accuses Trump Judicial Pick Of Misleading Senate About Past Work*, HUFFINGTON POST (Nov. 17, 2017), https://www.huffingtonpost.com/entry/thomas-farr-voter-intimidation-senate_us_5a0f0c98e4b0e97dffed03a2.

² 359 S.E.2d 271 (N.C. App. 1987).

In *Williams v. Blue Cross Blue Shield*,³ a county human rights commission had investigated an employee's age and gender discrimination claims against the defendant, and found reasonable cause to believe the company discriminated against her. The company, represented by Mr. Farr, sought first to remove the plaintiff's subsequent lawsuit from state to federal court. After failing to do so, the company argued successfully that the provision giving the county commission the authority to investigate, adjudicate, and conciliate employment discrimination claims violated the North Carolina state constitution.

B. Promoting Arguments That Help Perpetuate Workplace Harassment

On this issue, Mr. Farr's work on behalf of the defendant in *Doyle-McTighe v. Pfizer*⁴ is instructive, particularly in light of the series of recent revelations exposing numerous instances of sexual assault, harassment, and other misconduct perpetrated by prominent figures in media, entertainment, and politics.

In this case the plaintiff and a number of her female colleagues were subjected to repeated harassment by one of their male supervisors. Examples of his allegedly unlawful behavior included calling the plaintiff and other female colleagues "stupid, retarded, and awful;" saying "that women with children should be at home and not employed in the workplace;" and at one point forcibly pulling the plaintiff onto his lap.

In arguing that the plaintiff's sex discrimination and hostile work environment claims should be dismissed without even proceeding to a trial, Mr. Farr diminished the plaintiff's evidence as merely indicating that the supervisor in question was "boorish or rude"⁵ and that because "much of the conduct challenged by plaintiff actually was gender neutral,"⁶ it could not support claims for discrimination and hostile work environment based on gender.

Dismissing harassing behavior as merely "boorish or rude" is precisely how such behavior is permitted to fester, and defending perpetrators on the grounds that they "treat everyone that way" helps enable serial harassment.

C. Undermining Enforcement Of Workplace Safety Protections

Since he began his legal career as a Staff Attorney with the National Right to Work Foundation, Mr. Farr has supported efforts to prevent workers from exercising their rights to unionize, but in particular he has sought on multiple occasions to derail initiatives designed to improve workplace health and safety conditions. In *Walters v. Algernon Blair, Inc.*,⁷ Mr. Farr urged the U.S. Supreme Court to review a North Carolina Supreme Court decision which had struck down a state law that treated workers with asbestos-related illnesses less favorably than workers with other occupational diseases, and in *NLRB v. American National Can Co.*,⁸ he defended a company that had engaged in unfair labor practices by preventing the AFL-CIO from accessing a plant that potentially was subjecting workers to unlawfully extreme levels of heat.

³ 581 S.E.2d 415 (N.C. 2003).

⁴ No. 02-CV-606 (E.D.N.C. Aug. 4, 2004).

⁵ Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 5 n.6, *Doyle-McTighe v. Pfizer, et al.*, No. 5:02-CV-606 (E.D.N.C. Sept. 30, 2003) (copy of memorandum on file with NELA).

⁶ *Id.* at 20 n.22.

⁷ 462 S.E.2d 232, 233 (N.C. 1995).

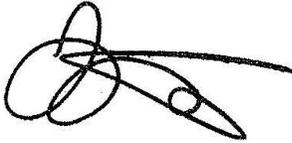
⁸ 924 F.2d 518 (4th Cir. 1991).

III. Mr. Farr Personally Has Supported The Repeal Of Employment Laws

The foregoing might credibly be explained as zealous advocacy undertaken on behalf of paying clients, but Mr. Farr also has voiced his personal desire to see workplace laws weakened or removed. While a substantial part of the public debate regarding North Carolina's controversial 2016 House Bill 2 (HB 2) concerned the provision preventing transgender individuals from using the restroom that matched their gender identity (if it conflicted with the gender indicated on their birth certificate), another section of the law effectively stripped North Carolina workers of their right to seek remedies in state court if they believed they faced an adverse employment action because of their race, gender, religion, or age. Mr. Farr was quoted in an article in *The News & Observer*⁹ stating that he felt that the provision in question represented "better policy for the state." Even Republican members of the North Carolina legislature disagreed with Mr. Farr's extreme assessment, and that portion of HB 2 ultimately was repealed.

For the foregoing reasons, NELA respectfully urges you to oppose the confirmation of Mr. Farr.

Sincerely,

A handwritten signature in black ink, appearing to read 'James H. Kaster', with a long horizontal stroke extending to the right.

James H. Kaster
NELA President

⁹ Anne Blythe, *Employment law advocates in NC hope for HB2 changes*, THE NEWS & OBSERVER (Apr. 9, 2016), <http://www.newsobserver.com/news/politics-government/state-politics/article70918692.html>.