



October 14, 2020

Submitted Via Email:

The Honorable Lindsay Graham, Chair
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 Graham and Ranking Member Feinstein:

On behalf of the 2,000 members of the National Employment Lawyers Association (NELA), I write to express our strong opposition to the confirmation of Judge Amy Coney Barrett to the United States Supreme Court. Our additional 2,000 circuit, state, and local affiliate members across the country are also watching this confirmation process with concern.

At the outset, we must raise our strong objection to the blatant Republican double standard surrounding this confirmation process. There should be no disagreement that the confirmation process for a United States Supreme Court nominee should be advanced in an honest, fair, and principled manner. One should not need to write a letter to the United States Senate Committee on the Judiciary underscoring that the rules that have been applied to a confirmation process of a Supreme Court nominee nominated by a Democratic president should be the same rules applied to a confirmation process for a nominee of a Republican president. But, the facts speak for themselves and we are compelled to object to this unjust power grab.

Upon the death of Justice Scalia in February 2016, Senate Leader McConnell and then-Chair Grassley refused a hearing and vote for President Obama's Supreme Court Nominee Judge Merrick Garland for the duration of 2016. Judge Garland was nominated in March 2016, eight months before the election. Majority Leader McConnell stated repeatedly that the next president should fill the vacancy. He declared: "Let's let the American people decide." Today, on day three of Judge Barrett's confirmation hearing, election day is not eight months, but 20 days away. As of this writing, fourteen million Americans have already voted via mail-in and early voting. It is not too late for the Republican leadership to do the right thing: stop this process and let the American people decide.

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 empowers workers' rights attorneys through legal training, promoting a fair judiciary, and advocating for laws and policies that level the playing field for workers. 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 all workers are treated with dignity and respect; workplaces are equitable, diverse, and inclusive; the well-being of workers is a priority in business practices; and individuals are able to meet the essential needs of their children and families, including access to affordable health care.

In reviewing Judge Barrett's record, we reviewed almost 100 employment cases in which Judge Barrett had a deciding role as a Seventh Circuit judge. We highlight four cases below. Three of the four cases involve race discrimination and we find Judge Barrett's rulings in race discrimination cases to be especially troubling. Based on our more extensive review, her rulings in these cases are not anomaly; rather they are exemplary of her approach. Our nation's civil rights laws have been hard-fought and hard-won. Working people deserve judges who approach and rule on discrimination claims with a deep and not a superficial understanding of the law; a real understanding of the circumstances our civil rights laws were passed to address, and the real-life impact on regular working people when discriminatory treatment is permitted to continue in the workplace.

As a member of the Seventh Circuit Court of Appeals, Judge Barrett has demonstrated a troubling propensity to interpret civil rights and workplace rights statutes so narrowly as to gut them of their power to protect individual workers who face discrimination in the workplace, as they were intended to do.

The case descriptions that follow constitute representative examples of the ways in which Judge Barrett's jurisprudence in employment cases has manifested itself in cases arising under several different employment statutes.

A. *Terry Smith v. Illinois Department of Transportation*¹ (Racial Discrimination)

Judge Barrett authored the opinion in *Terry Smith v. Illinois Department of Transportation*. In reference to the plaintiff's undisputed allegations that his supervisors "swore at him" and called him the n-word a few weeks before he was terminated, Judge Barrett stated "While the epithets may have made for a crude or unpleasant workplace, 'Title VII imposes no 'general civility code'" and "The n-word is an egregious racial epithet. That said, Smith can't win simply by proving that the word was uttered. He must also demonstrate that [a colleague's] use of this word altered the conditions of his employment and created a hostile or abusive working environment. And he must make this showing 'from both a subjective and an objective point of view.'"

There is a long history in our nation of profanity and racial epithets aimed at Black people as a precursor to the most horrific violence and being used for the purpose of instilling terror. Yet, Judge Barrett's reasoning, taken to its logical conclusion, means that Black workers subjected to profanity and racial epithets would be required to prove the impact of such egregious conduct on the recipient of such discriminatory treatment. Or the conclusion of such reasoning could be that Black and Brown people have no remedy under Title VII in the face of such mistreatment. This interpretation also directly contradicted precedent established in the Seventh Circuit over twenty years ago.² In the current moment, when the nation has taken a more honest look at the prevalence and impact of racism and

¹ 936 F.3d 554 (7th Cir. 2019).

² *Rodgers v. W.-S. Life Ins. Co.* 12 F.3d 668, 675 (7th Cir. 1993) (stating that "Perhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment' than the use of an unambiguously racial epithet such as the n-word by a supervisor in the presence of his subordinates.")

disparate treatment based on race, it should be of grave concern that Judge Barrett's approach to these issues move civil rights jurisprudence backwards, rather than forwards.

B. *Harris v. YRC Worldwide, Inc.*³ (Racial Discrimination)

In *Harris v. YRC Worldwide, Inc.*, Judge Barrett joined in an opinion which affirmed the dismissal, on a motion for summary judgment, of claims by four of the many plaintiffs in the district court case. The four Black plaintiffs claimed that the defendant discriminated against them because of their race by assigning them to urban, not suburban, driving routes and that their employer violated seniority in many of these assignments. The Seventh Circuit's opinion claimed that only one of the four presented evidence that urban routes were less desirable than suburban ones; that plaintiff testified that someone pulled a gun on him while delivering an urban load. The court concluded that the four plaintiffs failed to present any evidence of pretextual discrimination and pointed to the fact that they had not filed a union grievance. However, there is no case law that states that filing a union grievance is required to prevail on a discrimination claim. Moreover, the plaintiffs had presented evidence of deviations from a seniority policy, which is sufficient to demonstrate pretextual discrimination.⁴ In this case, Judge Barrett demonstrated her willingness to deviate from established precedent and impose arbitrary requirements on plaintiffs in order to dismiss valid claims of racial discrimination.

C. *Cervantes v. Ardagh Group*⁵ (Retaliation and Racial Discrimination)

In *Cervantes v. Ardagh Group*, Juan Cervantes brought this action against his employer alleging that his employer had refused to promote him, had issued him performance warnings, and had demoted him because of his race and national origin and in retaliation for previous complaints about discrimination and harassment. The district court found that Cervantes had only filed a retaliation charge with the EEOC, but did not reference racial discrimination, and thus had not met administrative exhaustion requirements for his discrimination charges. Cervantes argued on appeal that his discrimination claims satisfy a recognized exception for claims that are "like or 'reasonably related' to the EEOC charge and can be reasonably expected to grow out of an EEOC investigation of the charges." Judge Barrett, voting on a panel, affirmed the judgment. The court stated: "As a general matter, we do not consider a retaliation charge to be reasonably related to a discrimination claim," despite the fact that the retaliation claim was based on Cervantes' complaint about racial discrimination, and despite prior precedent on this question. See *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164, 168 (7th Cir. 1976) (allowing claims that are "like or reasonably related" to the EEOC charge, and can be reasonably expected to grow out of an EEOC investigation of the charges). Judge Barrett again demonstrated her willingness to deviate from established precedent to dismiss valid claims of racial discrimination.

D. *Kleber v. Carefusion Corporation*⁶ (Age Discrimination)

In *Kleber*, the 58-year-old plaintiff was refused an interview for a senior position because the company was only seeking applicants with less than seven years' experience. The company ultimately hired a 29-year-old with far less relevant experience. Judge Barrett and the majority, which included three other Trump appointees, held that the "disparate impact" provision of the Age Discrimination in Employment

³ No. 19-1721 (7th Cir. Jul. 9, 2020).

⁴ See *Hanners v. Trent*, 674 F.3d 683, 694 (7th Cir. 2012) ("Significant, unexplained or systematic deviations from established policies or practices can no doubt be relative and probative circumstantial evidence of discriminatory intent.").

⁵ 914 F.3d 560 (7th Cir. 2019).

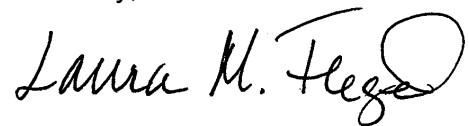
⁶ 914 F.3d 480 (7th Cir. 2019).

Act only applies to current employees, and not to job applicants. In dissent, Judge Easterbrook stated that the majority had twisted the words of the statute in a manner he called “baffling.”

Our civil rights laws were passed to ensure that workers be hired, promoted, given work assignments, and live their lives in the workplace on the basis of their work and without discrimination, harassment, or bias. Working people who have been treated unlawfully in the workplace deserve a full and fair opportunity to prove their claims in our federal courts.

Reasoning of the type found in many of Judge Barrett’s opinions undermines workers’ ability to vindicate their rights and undercuts the promise of a fair and just American workplace that is embodied by the employment statutes enacted by Congress. Judge Barrett’s treatment of both the law and facts in the cases cited above, and in others that we reviewed, reveals an ideological perspective which is unsympathetic to workers and highly favors employers, and belies her self-proclaimed reputation as a committed originalist. As such, we respectfully urge you to oppose Judge Amy Coney Barrett’s confirmation to the United States Supreme Court.

Sincerely,

A handwritten signature in black ink that reads "Laura M. Flegel". The signature is fluid and cursive, with a large loop at the end of the last name.

Laura M. Flegel
Legislative & Public Policy Director