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September 4, 2017

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
U.S. Senate
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
U.S. Senate
152 Dirksen Senate Office Building
Washington, DC 20510

RE: **Nomination of Eric S. Dreiband and the Unfortunate August 31 Statement of the Leadership Conference on Civil and Human Rights**

Dear Chairman Grassley, Ranking Member Feinstein, and Members of the Senate Judiciary Committee:

A. Who I Am

First, a word of introduction. I went to law school in 1965 in order to handle civil rights cases, have spent more than fifty years representing civil rights plaintiffs,[1] for nearly a quarter of a century helped prepare civil rights lawyers for their Supreme Court arguments, have been involved with civil rights organizations throughout my professional career, have repeatedly testified before Congressional Committees on civil rights issues, have written extensively on employment discrimination issues, having with a management co-author published fifteen editions of EQUAL EMPLOYMENT LAW UPDATE from 1996 through 2007 for the American Bar Association's Section of Labor and Employment Law (most of them running between 1,800 and 2,000 pages in length), and because of my experience and knowledge of employment and civil

[1] I am a member in good standing of the Bars of the District of Columbia and of Maryland. I am also a member of the Bars of the Supreme Court of the United States, the U.S. Courts of Appeals for the D.C., Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth and Eleventh Circuits, and of the U.S. District Courts for the Eastern District of Michigan, the Northern District of Mississippi, the Northern District of New York, and the Southern District of Texas, and the Bankruptcy Court of the Central District of California.

rights law have often been asked to speak to Bar and other organizations.[2] I was Chair of the ABA Section of Labor and Employment Law from August 2011 to August 2012; at the time, it was the third-largest entity within the ABA, with more than 26,000 members. I am a Fellow and former Governor of the College of Labor and Employment Lawyers. My views are my own, of course.

I worked with the Law Students' Civil Rights Research Council in Louisiana in the Summer of 1966, traveling in the North of the State with the Congress of Racial Equality's Deputy Southern Director signing up plaintiffs for school desegregation cases and later making these trips on my own,[3] and working on employment, desegregation,[4] and demonstration cases. I later was a member of its National Board. I worked the next Summer and for 15 months after my 1968 graduation from Harvard Law School for the U.S. Commission on Civil Rights investigating voting discrimination in Southside Virginia and in Mississippi, working on Northern discrimination, and other matters. I then worked for Marian Wright Edelman at the Washington, which later became the Children's Defense Fund.[5] I left to start my own practice

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[2] Alabama Conference of the N.A.A.C.P.; ALI-ABA; ALI CLE; American Arbitration Association; ABA Section of Business Law; ABA Section of Dispute Resolution; ABA Section of Labor and Employment Law; ABA Section of Litigation; ABA Section of Tort Trial and Insurance Practice; American Psychological Association; Association of the Bar of the City of New York; American Association for Justice (formerly ATLA); Center for American and International Law; Atlanta Bar; Connecticut Bar; District of Columbia Bar; Equal Employment Opportunity Commission; Federal Judicial Center (appearing on FJC videotape on employment law for training Federal judicial law clerks; and FJC / New York University member of panel on Jury Instructions at judges' conference); Florida Bar; Georgetown University Law Center; King County, Washington, Bar (Pacific Coast Legal Conference); Lawyers' Committee for Civil Rights Under Law; Mexican American Legal Defense and Educational Fund; Minnesota Bar (Upper Midwest Employment Conference and separate meeting); NAACP Legal Defense and Educational Fund; National Employment Law Institute; National Employment Lawyers' Association; New York State Bar; New York University Law School; Ohio Bar; Pennsylvania Bar Institute; Practicing Law Institute; Society for Industrial and Organizational Psychology; South Carolina Bar; U.S. Conference of Administrative Judges; U.S. Department of Justice; U.S. Bureau of Prisons; University of Louisville Law School; University of Richmond Law School; Wisconsin Bar; and organizations of plaintiffs' attorneys in the District of Columbia, Florida, New Jersey, Texas, and Wisconsin.

[3] We always warned them, before they signed retainers, that they would be fired by any white employers they had, they would never again be employed by any other whites, and the Klan was certain to burn crosses in front of their houses. These were among the bravest people I have ever met.

[4] Because school board resistance meant integration proceeded at glacial paces, I analyzed the published statistics of the Louisiana Board of Education on school funding, and prepared charts showing that the Parish School Boards we were suing generally spent six times as much per child on white students than on black students. I presented testimony in one of those cases. We could not get immediate-desegregation orders, but we could get immediate equal-spending orders—*Plessy v. Ferguson* relief that resulted on black teachers getting books for all their students, and writing paper and other supplies, for the first time in their careers, and black students getting bused to school in much safer vehicles, and far better school lunches.

[5] While there, I filed charges with the EEOC and filed a lawsuit, against J.P. Stevens & Co., that 25 years later — and after a trial and three consolidated appeals, and one subsequent appeal by the company and several changes of defense counsel — was settled in 1995 for $20 million on back pay, every cent of which went to the class.

in October 1973, doing the same work. The Lawyers' Committee for Civil Rights Under Law hired me in January 1977 to direct some, then all, of their employment discrimination work. I was there for 24 years.[6] While there, I litigated cases in U.S. District courts, and the Courts of Appeals, second-chaired some Supreme Court cases, filed *amicus* briefs in numerous cases in the Supreme Court and Courts of Appeals, and organized moot courts to help attorneys argues their cases in the Supreme Court. I was involved, by *amicus* or preparation, in the majority of Supreme Court civil rights cases involving employment, and a substantial number of the Court's non-employment civil rights docket. I am a member of the Board of Trustees and Board of Directors of the Lawyers' Committee, although I speak for myself alone.

I was for a few years a Co-Chair of the Leadership Conference's Employment Task Force. I was a member of its Drafting Task Force on the Civil Rights Act of 1991. I represented the interests of the Lawyers' Committee in negotiations I put together with the U.S. Chamber of Commerce, the Society for Human Resource Management, and privacy organizations, to seek a compromise on the Fair Credit Reporting Act that would leave employers free to use outside investigators to enquire into claims of serious misconduct of all kinds. I ultimately testified to the House Banking Committee on a way to accomplish that goal. I have testified before Congress numerous times on civil rights questions, including before the Subcommittee on the Constitution of this Committee in 1981.

I am also an arbitrator and a mediator. I am on the American Arbitration Association's Commercial Arbitrator roster and its Employment Arbitrator roster, and on the American Health Lawyers Association's roster for Arbitration and Mediation. My mediations and arbitrations, whether through these organizations or not, occur when the parties decide to put matters into my hands to help the reach a resolution or to reach a binding decision. The need for integrity is absolute, which is why I value it so highly in Eric Dreiband.

I have spent my entire professional life in pursuit of civil rights and basic fairness. To my mind, that does *not* mean that plaintiffs must win all cases. That would be tyranny, not civil rights. Civil rights law requires that that employers must be held liable only when they have violated the law, and must be exonerated when they have not. If the law is to command respect, it is just as important to test the defenses as it is to test the claims.

Everyone must individually be treated with basic fairness, no matter whom they represent. If basic fairness is accorded only to those with whom we agree, that spells the death knell for civil society.

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[6] While the focus of the Lawyers' Committee was on racial discrimination, I made it a condition of my employment that I be allowed to handle sex discrimination cases as well. And we did.

B. My Prior Letter

I previously joined the July 25, 2017 letter of civil rights lawyers representing employees, union lawyers representing labor unions, and management lawyers representing employers—all of whom have direct, years-long personal knowledge of Eric Dreiband, in strong support of his nomination.

C. My Reasons for Writing This Letter

I am writing again because I have seen the unfortunate August 31 letter of opposition from the Leadership Conference on Civil and Human Rights, joined by other organizations that relied to their detriment on the Leadership Conference's accusations.

If those accusations were true, I would be in the lead in calling for the rejection of Mr. Dreiband's nomination.

The accusations are either untrue, however, or depend on ski-jump conclusions from facts that cannot bear such weight, or depend on a fundamental misunderstanding of the duties of counsel to their clients that if accepted generally would destroy the rule of law, or depend on the assumption that whoever disagrees with one's preferred position must be a bigot.

I am responding in this letter to what seem to be the chief criticisms the Leadership Conference is making,

I urge the Leadership Conference to take to heart the statements in this letter, and remedy the damage it has done to its credibility by withdrawing the letter and apologizing to Mr. Dreiband, this Committee, and its own members, for presenting such a misleading statement of opposition.

D. The Leadership Conference's Main Criticisms of Mr. Dreiband

1. The LCCHR's Accusation that Mr. Dreiband "fought against equal pay for women," and "expressed opposition to meaningful access to the courts for women who were paid less than men for the same job" and described him as opposed to "the need for women to be able to remedy long-term pay discrimination"

The Leadership Conference's accusation on this point was conclusory, and gave no explanation of what Mr. Dreiband had actually said, so as to make its lurid conclusions follow from the facts. It stated only:

> **Women's Rights**: In both congressional testimony and litigation, Mr. Dreiband has fought against equal pay for women. In 2008, he opposed bipartisan legislation – the Fair Pay Restoration Act – that would have reversed the Supreme Court's infamous Ledbetter v. Goodyear Tire & Rubber Company decision. In testimony before the Senate Health,

> Education, Labor and Pensions Committee, Mr. Dreiband expressed opposition to meaningful access to the courts for women who were paid less than men for the same job.FN2/ Congress rejected Mr. Dreiband's views on the need for women to be able to remedy long-term pay discrimination, and passed the bill in early 2009.

Footnote 2, its only support, was Mr. Dreiband's January 24, 2008 prepared statement to the Senate Committee on Health, Education, Labor and Pensions, at its hearing on the Fair Pay Restoration Act.

It would have been accurate to say that Mr. Dreiband opposed the Fair Pay Restoration Act in the form presented, *if* the LCCHR *also* admitted that Mr. Dreiband testified that the doctrines of equitable tolling and equitable estoppel protected women and others who did not know facts critical to their decision whether to file an EEOC charge, that this protection lasted until they obtained this information, and that Congressional codification of this principle would be a good alternative to the Ledbetter bill and would get the job done. His prepared statement made all of these points, and said specifically:

> As an alternative to the Fair Pay Restoration Act, Congress could codify the EEOC's Compliance Manual standard for equitable tolling and equitable estoppel. This would preserve the EEOC's enforcement process and establish a clear, Congressionally-mandated rule for when the EEOC's charge-filing period ought to be extended.

The core issue that got the Ledbetter bill passed was the gut-level unfairness of a statute of limitations running before a woman knew there was a problem. As it turned out, that was not involved in the *Ledbetter* case itself, because she knew she was being paid less than the men around her years before she filed a charge. The issues of equitable tolling and equitable estoppel never came up.

The following exchange happened in the oral testimony of Mr. Dreiband during the hearing:

> Mr. Dreiband. … The reason, if I understood, Senator, your question, that equitable tolling or any other discovery rule, theory, or anything like that did not apply in Ms. Ledbetter's case was because her lawyer said it wouldn't change the outcome of the case because the record in the case and the record as presented to the U.S. Supreme Court of the United States indicated that Ms. Ledbetter knew about the pay disparities several years before she filed the charge. And, in fact, the way they framed the question presented in the case, they assumed that all of the discriminatory decisions were made outside of the charge-filing period.
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> Senator Isakson. On that point, and this is the question I want to ask. And let us remove Ms. Ledbetter's case for a second and assume it was a case with the same

> circumstances except that there wasn't a record of prior notice. Would the discovery, equitable tolling, or the estoppel rule allow you to go beyond the 180 days and file the case?
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> Mr. Dreiband. Potentially, yes. The EEOC standard, for example, says that any time a person who alleges unlawful discrimination ``was understandably unaware of the EEO process or of important facts that should have led him or her to suspect discrimination, the charge-filing period can be extended." That is the standard EEOC has endorsed. It is the standard that several Federal courts have endorsed that I have cited in my written testimony.

S.Hrg. 110-825 (Jan. 24, 2008).

It is simply not possible to read Mr. Dreiband's testimony as any of the things of which the Leadership Conference accused him. He did *not* fight "against equal pay for women," he did *not* express "opposition to meaningful access to the courts for women who were paid less than men for the same job, and he did *not* oppose "the need for women to be able to remedy long-term pay discrimination."

I would also like to make a few observations. Mr. Dreiband's analysis of the law before the *Ledbetter* decision is accurate. It is the same as mine. I am not sure jhow Justice Ginsburg came to believe that the Court was rolling back existing protections, but that was a mistake. Justice Ginsburg would be the first to admit she is capable of mistake.

Similarly, Mr. Dreiband's analysis of the practical difficulties was also based in real-world problems. Those same problems affect plaintiffs, and it can become very difficult to recover when a claim rests on events long ago.

Finally, I was a supporter of the Lilly Ledbetter bill. I met with the sponsors of the ABA House of Delegates resolution endorsing the paycheck accrual principle in Title VII, and helped persuade them to add the age and disability laws to their resolution, so it would track the pending bill and make the ABA's endorsement more meaningful.

However, I would have been fairly happy if Congress had adopted Mr. Dreiband's alternative suggestion of a statutory codification of the EEOC's generous interpretation of equitable tolling and equitable estoppel. That would have cured the limitations on the doctrines imposed by some lower courts and been just as effective.

The Leadership Conference's lurid accusations are without any support at all.

2. The LCCHR's Accusations that Mr. Dreiband Tried to Weaken the EEOC or Opposed Civil Rights

This accusation is a theme running through the LCCHR's statement. In some cases, it is nothing more than an accusation that Mr. Dreiband did not act unethically and throw his client to the wolves when the EEOC came calling. In some, it is an accusation that Mr. Dreiband spoke what he thought was the truth as to problems with the EEOC's approach, and failed to act like the Three Monkeys in seeing, hearing, and saying no evil. In some, it is an accusation that Mr. Dreiband allowed a competing value priority over the One Truth promulgated by the Leadership Conference.

These are all far from the arena of proper commentary on a nomination, and tar the commenter rather than the nominee. There are absolute fundamentals in a democratic form of government subject to the rule of law:

Lawyers must be able to represent their clients zealously, making all proper arguments in their behalf, without being confused with their clients. Someone who defends a man accused of murder must not be treated as if he were the murderer, or the system of justice will break down. Similarly, anyone who defendants a civil rights defendant must not be accused of being a bigot trying to undermine the law, or the rule of law will break down.

I am frankly shocked by this part of the Leadership Conference's remarks. It does not do to wave an airy hand at Mr. Dreiband's victory in *EEOC v. Bloomberg LLP* (2015)[7] by dismissing the entire system of justice in that case as involving "a conservative judge." That is supposed to explain everything.

Judge Loretta Preska is an honorably serving Federal judge confirmed through this Committee. The Leadership Conference I knew would never have stooped so low as to do this. It had respect for the judiciary, and would never have engaged in an conveniently airy *ad hominem* criticism of a judge as negating all of her work.

If the EEOC thought any ruling was inaccurate, it could have appealed and gotten a ruling on appeal. Since it did not and withdrew its appeal when Bloomberg did the same, and since the Leadership Conference did not identify a single statement or position by Mr. Dreiband that fell outside of professional standards, it cannot rescue itself by throwing stones at the judge.

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[7] There are numerous decisions in this case on WestLaw, but none from 2015. *E.E.O.C. v. Bloomberg L.P.*, 2010 WL 3260150 (S.D.N.Y., Aug. 4, 2010); E.E.O.C. v. Bloomberg L.P., 2010 WL 3466370 (S.D.N.Y. Aug. 31, 2010); *E.E.O.C. v. Bloomberg L.P.*, 751 F.Supp.2d 628 (S.D.N.Y. Oct. 25, 2010), *decision clarified on reconsideration* (Dec. 2, 2010); *E.E.O.C. v. Bloomberg L.P.*, 778 F.Supp.2d 458 (S.D.N.Y. Aug. 16, 2011); *E.E.O.C. v. Bloomberg L.P.*, 967 F.Supp.2d 816 (S.D.N.Y. Sept. 9, 2013); *E.E.O.C. v. Bloomberg L.P.*, .967 F.Supp.2d 802 (S.D.N.Y. 2013), *appeal withdrawn* 2nd Cir. 13-3861 (Feb. 6, 2014); *E.E.O.C. v. Bloomberg L.P.*, 29 F.Supp.3d 334 (S.D.N.Y. April 28, 2014). I checked the docket entries and found nothing in 2015 that stood out.

In the *Villareal* case, Mr. Dreiband is blamed for winning a case on behalf of his client. In the *Ghori-Ahmad* case, he is blamed for settling a case that presumably provided some relief to the plaintiff. In the *DeJesus* and *Abercrombie &* Fitch cases, he is blamed for losing the cases. In the *Bass* Pro case, he did not represent the employer but an amicus, and he is blamed because his position lost. In the *University of North Carolina* case, he is blamed for helping others in his firm on the case, and there is not even a decision yet. Plainly, there is nothing a defense lawyer can do that will not trigger the Leadership Conference's condemnation: win, lose, draw, don't know, or even comment from the sideline, it's all the same to them, and deserving of condemnation.

The Leadership Conference does not identify anything that Mr. Dreiband should have done differently to escape its condemnation, except not get involved in cases of which it disapproves. It seeks a veto over clients' choice of lawyers and lawyers' willingness to represent clients, and seems not even to realize that its approach is irredeemably hostile to the functioning of our system of justice and the rule of law. But of course, to the Leadership Conference, even an adverse ruling can be explained away by merely insulting the judge.

The *Abercrombie & Fitch* case deserves closer mention. Mr. Dreiband was one of seven attorneys representing the company, was not counsel of record, and did not argue the case.[8] Yet his mere name on a brief is enough to condemn him. The Supreme Court did not say the company's position was extreme; the Leadership Conference pulled that out of the air. While anyone who has ever been involved in litigation knows that there will be differences of opinion on an appellate or trial team—good lawyers demand differences on their teams, so they can consider all perspectives—there is no public record of who thought what. For the Leadership Conference, apparently the wish is its own fulfillment: it must have been Mr. Dreiband who took the "extreme" position rejected by the Court.

As alarming as these Leadership Conference positions are, its criticism of Mr. Dreiband for daring to represent the Roman Catholic Church in resisting the contraceptive mandate of the Affordable Care Act on those with religious objections displays an even more shocking position: Rejection of the First Amendment value of freedom of religion. Former Vice President Biden's discussion of his faith in the 2016 Vice Presidential debate and the tons of ink spread on the subject, demonstrate the seriousness of these concerns.

It does not do to flip off the First Amendment just as the Leadership Conference flips off Judge Loretta Preska and the rule of law. To do so smacks of a religious test of mandatory secularism overriding all other values, in flat violation of the founding principles of our country. Whether Catholic like me or a member of any other faith or an atheist, our collective freedom

[8] WestLaw shows Shay Dvoretzky, Washington, DC, for Respondent; Mark A. Knueve, Daniel J. Clark, Vorys, Sater, Seymour and Pease LLP, Columbus, OH, Shay Dvoretzky, Counsel of Record, Eric S. Dreiband, Yaakov M. Roth, Jeffrey R. Johnson, Jones Day, Washington, DC, for Respondent.

depends on our opposing such an imposed uniformity of anti-religious thought and forbids crushing the beliefs of those who do not think like the crusher.

3. The Accusations About Mr. Dreiband Opposing Legislation to Made ADEA Enforcement More Effective

This is another complete misfire, but may simply arise from not knowing the problems with litigating under a "mixed motives" standard.

Plaintiffs' employment lawyers are deeply divided on the subject, which is why the National Employment Lawyers Association has never joined the call to insert "mixed motives" analysis into the Age Discrimination in Employment Act. It is true that it is easier to show that age was a motivating factor than to show that age was the deciding factor, but it is also true that under a "mixed motives" standard it is very easy for employers to wave away all the evidence of an unlawful age motive and rest their defense on the idea that they would have made the same decision anyway. The result is that the plaintiff cannot get individual injunctive relief, cannot get general injunctive relief if he or she is gone as most are, cannot get back pay, and cannot get liquidated damages. In some courts, the plaintiff's attorney receives a fee award that is mere pennies on the dollar because of the low relief obtained. In others, a larger fee award may be made but that then creates a problem for the client, who wonders if going down the "mixed motives" route was just to benefit the lawyer. At least one Federal judge has told me he thinks there is a gross conflict of interest whenever a case is brought on a "mixed motives" basis and the jurisdiction allows full fees even when the plaintiff gets nothing but a declaratory judgment.

I personally belong to the school of thought holding that the "mixed motive" approach is a ticket to perdition. It may help survive summary judgment, but it gives the jury a perfect way to split the baby and they don't now they're really denying all relief to the plaintiff. Great theory, but a dud in practice. I believe it is much easier for an age discrimination plaintiff to win worthwhile relief under Gross and the traditional "because" standard of liability than it is to win under a mixed-motives approach.

Proponents of the bill have never explained why it is that defendants sometimes try to force a case into "mixed motives" mode so they can more easily beat back the most important claims for relief.

I have reviewed Mr. Dreiband's testimony on the proposed legislation, and agree with him on every point he raises. I represent age discrimination plaintiffs, and could comfortably have given the identical testimony, raising virtually identical points.

4. The Accusations That Mr. Dreiband is Against "Fair Chance Hiring"

The Leadership Conference accuses Mr. Dreiband of being "a staunch opponent of bipartisan efforts to remove barriers to employment for people with arrest or conviction histories," and of criticizing the EEOC's actions in this field. Frankly, I believe Mr. Dreiband makes very good points, and I agree with them. I spoke about this EEOC initiative to the American Law Institute in 2016, and my conclusion was that the Commission had left Title VII jurisprudence far behind, that its guidance was incompatible with Title VII, and that the EEOC needed to withdraw and rethink its guidance.

There is no question that there is an enormous need to re-integrate criminal offenders into society. That is a social goal that does not seem to me to justify placing law-abiding job applicants at the back of the line. There is also no question that very high recidivism rates can easily justify a criminal-history bar for many crimes under the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1 *et seq.*, a set of standards worked out with the EEOC, the Department of Justice, the Department of Labor, the Treasury Department, and the Office of Personnel Management. The EEOC's guidance completely ignores the Uniform Guidelines.

The EEOC's guidance also reflects a preoccupation with social goals to the exclusion of practicality and common sense. It states, for example, that arrests may not be taken into account because of the presumption of innocence, unless the employer conducts its own investigation of the events and determines that the person should have been convicted if tried. No employer has the resources to replicate local police departments and prosecutors' offices.

A short thought experiment demonstrates why the EEOC's guidance does not make practical sense. A day care center needs to fill a job as child care attendant and has two applicants. One has multiple arrests for child molesting, but no convictions. The other is clean. Another experiment involves truck driver applicants, one of whom has multiple DUI arrests but no convictions, and the other of whom has a good driving record. If we are to ask society to respect the law and comply with it, these employers must be allowed to do the sensible thing without the expensive steps required by the EEOC.

Mr. Dreiband is correct that the EEOC's presumptions of disparate impact stand the law on its head. They have not been endorsed by the courts. See, *e.g.*, *E.E.O.C. v. Freeman*, 778 F.3d 463 (4th Cir. 2015), which affirmed the grant of summary judgment to the Title VII defendant. The court summarized its decision at 464-65: "In 2001, Freeman began conducting background checks on its job applicants, which the Equal Employment Opportunity Commission ("EEOC") alleges had an unlawful disparate impact on black and male job applicants. The district court granted summary judgment to Freeman after excluding the EEOC's expert testimony as unreliable under Federal Rule of Evidence 702. Without this testimony, the district court found the agency failed to establish a prima facie case of discrimination. For the reasons below, we affirm the district court's exclusion of the EEOC's expert testimony and grant of summary judgment to Freeman." Defendant's policy was nuanced. The court described it at 465:

> Freeman is a provider of integrated services for expositions, conventions, and corporate events, with offices in major cities throughout the United States. In 2001, the company commenced background checks of job applicants' credit and criminal justice histories. Criminal background checks were required for all applicants, and credit history checks for "credit sensitive" positions involving money handling or access to sensitive financial information. Freeman's credit and criminal background check policies excluded applicants whose histories revealed certain prohibited criteria. If an applicant's history included one of the listed criteria, like a conviction for a crime of violence, the applicant was not hired.FN1 Freeman modified these criteria on July 20, 2006, and again on August 11, 2011, after which it no longer conducted credit checks.
>
> _____
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> FN1. Freeman required a form authorizing a background search to be completed with each job application, which, according to a company handbook, Freeman thought would "deter individuals with negative information from applying." However, the checks were not conducted until after a conditional offer of employment had been made. It appears most criteria, as well as making false statements on the job application, led to automatic disqualification. But, Freeman usually gave applicants a reasonable amount of time to resolve outstanding arrest warrants before rescinding an offer.

As discussed below, the Commission's attack on Freeman's practices seems to have had nothing to do with Freeman's actual practices, which were nuanced and which were applied after a conditional job offer—in short, what a model employer is supposed to do under many versions of the "ban the box" legislation many jurisdictions have passed. Putting aside the question of case selection, the EEOC's failure to produce competent evidence of disparate impact—because of the exclusion of expert evidence that was impossible to credit—in all fairness absolutely required the grant of summary judgment.

Judge Agee's separate concurrence on the striking of the EEOC's expert is a telling commentary. The judge issued a *cri de coeur* asking why the EEOC continued to rely on so unreliable an expert:

> Although I concur in Judge Gregory's opinion, I write separately to address my concern with the EEOC's disappointing litigation conduct. The Commission's work of serving "the public interest" is jeopardized by the kind of missteps that occurred here. … And it troubles me that the Commission continues to proffer expert testimony from a witness whose work has been roundly rejected in our sister circuits for similar deficiencies to those we observe here. It is my hope that the agency will reconsider pursuing a course that does not serve it or the public interest well.

Id. at 468. Judge Agee discussed in detail what he saw as very significant problems with the expert work in this case, and in other cases in which the same expert's work had been rejected. This is just one of his criticisms:

> Murphy undeniably "cherry-picked." The very few pieces of post–October–2008 data that Murphy included consisted of 19 applicants. Of those 19, one was a double-counted applicant, one was a "fail" miscoded as a "pass," and the remaining were all "fails" under one or the other (or both) checks. This 100% failure rate among the 19 post–October–2008 applicants wildly varies from the 3.5% failure rate for criminal checks and 9.9% failure rate for credit checks reflected in the rest of the data. *See* J.A. 326 (noting that "the likelihood of failing either [check] is low"). Thus, not only was Murphy capriciously selective in his use of post–October–2008 data, but the high number of "fails" among his few selections suggests that he fully intended to skew the results. The district court certainly thought so, terming Murphy's work "an egregious example of scientific dishonesty." …

Id. at 470. Judge Agee went on, in the same sad and sorrowful vein. At one point, he stated: "These problems would be troubling enough standing alone, but they are even more disquieting in the context of what appears to be a pattern of suspect work from Murphy." *Id.* He stated that in addition to the EEOC's duty to conciliate, the Commission had "'a duty to cease enforcement attempts after learning that an action lacks merit,'" and that "the EEOC failed in the exercise of this second duty." *Id* at 472 (citation omitted). He concluded:

> The EEOC must be constantly vigilant that it does not abuse the power conferred upon it by Congress, as its "significant resources, authority, and discretion" will affect all "those outside parties they investigate or sue." *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 156 (4th Cir. 2014) (Wilkinson, J., concurring). Government "has a more unfettered hand over those it either serves or investigates, and it is thus incumbent upon public officials, high and petty, to maintain some appreciation for the extent of the burden that their actions may impose." Id. The Commission's conduct in this case suggests that its exercise of vigilance has been lacking. It would serve the agency well in the future to reconsider how it might better discharge the responsibilities delegated to it or face the consequences for failing to do so.

Id, at 472-73. Ultimately, the district court ordered the EEOC to pay Freeman $938,771.50 in fees and costs for unreasonably litigating the case. *E.E.O.C. v. Freeman*, 126 F. Supp. 3d 560, 584 (D. Md. 2015). The EEOC did not appeal.

In short, problems abound with the EEOC's guidance, and Mr. Dreiband cannot fairly be blamed for pointing them out.

5. Scraping the Bottom of the Barrel: The Accusations About Undermining the EEOC by Truthfully Describing a Real Problem: EEOC's Suing First, and Asking Questions Later

It is pretty much given that lawyers at the top of their profession are expected to address significant unsettled legal issues and warn colleagues and clients about them. I do it all the time, as my writing and speaking engagements show.

The Leadership Conference scraped the bottom of the barrel when it stated that discussing an important open issue was the same as undermining the agency: "After his brief tenure at the EEOC, Mr. Dreiband attempted to undermine the agency's mission and narrow its ability to bring litigation. He co-wrote an article for Law360 on March 8, 2012 entitled "The EEOC Strategy of Sue First, Ask Questions Later," in which he criticized the EEOC's use of discovery to identify and seek relief for discrimination victims it hadn't known about before filing a lawsuit." The Leadership Conference cited the article at https://www.law360.com/articles/314725/the-eeoc-strategy-of-sue-first-ask-questions-later.

The article correctly described the Eighth Circuit's decision in the CRST one of the most badly reasoned Title VII decisions in the last decade:

> The U.S. Equal Employment Opportunity Commission (EEOC) claims that it can sue an employer and use discovery to identify, investigate and seek relief for individuals it never heard of before it filed its lawsuit. On Feb. 22, 2012, however, the U.S. Court of Appeals for the Eighth Circuit determined that the EEOC has no such authority.
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> The court's decision adds to a growing list of cases that have rejected what some courts have described as the EEOC's "sue first, ask questions later" litigation strategy.
>
> In EEOC v. CRST Van Expedited Inc., the Eighth Circuit affirmed the dismissal of the EEOC's claim on behalf of 67 class members after the court found that the EEOC did not identify these class members before it filed suit. The court's decision deals a serious blow to the EEOC's systemic litigation program, and the decision is not alone.

Not one word in this description is wrong. The article then fairly discussed other decisions to the same effect, noted that other courts disagree, and went on to address some open questions that had to be resolved:

> **Remaining Issues**
>
> Three issues remain unresolved.
>
> First, it remains unclear whether other courts will dismiss EEOC class claims when the EEOC seeks to litigate claims on behalf of individuals who it does not identify, investigate, issue reasonable cause findings and conciliate about before it files suit. Second, it is an open question whether all, some or none of the EEOC's pre-suit procedures apply to the EEOC pattern or practice cases. Section 707(e) of Title VII, 42 U.S.C. § 2000e-6(e), provides that "all" Section 707 actions "shall be conducted in accordance with the procedures set forth in section [Section 706]." The EEOC's pre-suit obligations are "procedures set forth in" Section 706. This suggests that the reasoning of EEOC v. CRST and other similar cases should apply to the EEOC "pattern or practice" cases.

> Whether Section 707(e) means what it says — that is, whether courts will require that the EEOC pattern or practice actions comply with all Section 706 procedures, including person-by-person investigation, reasonable cause determinations and conciliation — remains to be seen.
>
> Third, it is unclear to what extent the Eighth Circuit's decision in CRST, and the other cases described in this article, will affect EEOC class litigation for alleged violations of the Age Discrimination in Employment Act and the Equal Pay Act. Those statutes do not require EEOC to satisfy Title VII's multi-step administrative process.
>
> **What Happens Next?**
>
> CRST and the upcoming Sixth Circuit decision in Cintas may be the most significant EEOC appellate cases in many years. If the Sixth Circuit follows the Eighth Circuit's CRST decision and affirms the dismissal of the EEOC's class claim, both cases may herald a shift in the way the EEOC investigates and conciliates Title VII cases.
>
> The EEOC may have to provide employers with precise notice of the scope and nature of any claims that form the basis of its class lawsuits. The EEOC may respond by subjecting employers to additional and more comprehensive requests for information during EEOC investigations.
>
> This may cause more contentious interactions between the EEOC and employers during investigations. More onerous requests for information may also mean more disruption for employers. And the EEOC remains willing, perhaps even eager, to subpoena information from employers during investigations, and to seek enforcement of such subpoenas by means of enforcement actions in federal court.
>
> So, while the court's decisions in EEOC cases against Dillard's, UPS, CRST and Cintas favor employers, it remains to be seen whether other courts will follow those decisions and whether the EEOC will respond by conducting more aggressive, more invasive, and more burdensome investigations.

Every word of this is true, and no word of the article endorses the result of the CRST decision. It is an accurate summary and advisory, and useful to both sides.

My own comment on the decision, in CLE papers I presented to the Pennsylvania Bar Institute, the National Employment Lawyers Association, and the Arizona State Bar in 2012, was:

> **Comment by Richard Seymour on *E.E.O.C. v. CRST Van Expedited, Inc.*:** The court's ruling imposes an unreasonable burden on the EEOC: it would have to re-open the administrative process every time it learned of a new victim in discovery, do an administrative investigation as to that person, reasonably attempt to conciliate as to that person despite the company's position that conciliation was futile, and then seek to amend its claims in court to add the persons. While the court professed concern with the expanding list of victims and complained that the EEOC's approach would cause repeated delays of the trial date, the court's remedy would be far worse. In class actions, the specification of the persons entitled to relief is handled in Stage II, after the determination of liability. Where multiple practices are challenged as discriminatory, it would be wasteful of the limited resources of the court, and of the parties, to engage in useless attempts to finalize the list of persons who were harmed prior to the decision on which practices unlawfully caused harm. Nothing in the letter or spirit of Title VII compelled the court's imposition of these burdens on the EEOC.

Note that pretty much every other part of the decision was similarly disastrous to the law. My pointing these out does not mean I agreed with the decision, any more than Mr. Dreiband's pointing out the effects of the decision constituted an endorsement.

The EEOC failed seek rehearing before the full Eighth Circuit Court on any of the disastrous interpretations of Title VII, and limited its rehearing petition to the fee award against it. It won what proved to be a temporary reprieve and still wound up having to pay a great deal of money to CSRT years later, and still labors under the wretched effect of these decisions.

The Leadership Conference's condemnation of Mr. Dreiband for alerting the Bar and clients to important open issues is a classic shoot-the-messenger ploy, and illustrates for deeply into the bottom of the barrel it has sunk in an effort to provide some cover to try to make its opposition to Mr. Dreiband look reasonable. Its condemnation applies with equal justification to me and to every other attorney who takes legal issues seriously and dares to discuss them.

6. Scraping Through the Bottom of the Barrel and Into the Dirt Beneath: The Leadership Conference's Descent into McCarthyism

The essence of McCarthyism was guilt by association. Few things are as antithetical to any system of justice, or basic sense of decency, that arguments based on guilt by association. Yet that is what the Leadership Conference engages in the "Ideological Affiliations" part of its jeremiad.

a. Guilt Supposedly Arising from the Republican National Lawyers Association

The Leadership Conference condemns Mr. Dreiband for being "a longtime member of the Republican National Lawyers Association." Its first particular complaint is that this is "an ideological organization." Well, hello. A Republican this or a Democratic that is by definition ideological. Its second particular complaint is that the organization engaged in "highly partisan assaults on President Obama." I believe we just covered the fact that this was a Republican organization. Indeed, I have been involved in Democratic groups that engaged in highly partisan attacks on Republican office-holders with whom they disagreed. Its third particular complaint is that this group "recently applauded the creation of the Pence-Kobach voter suppression commission, asserting: "Secretary Kobach has long been a leader on election integrity issues such as voter list maintenance." Please see the first point, and by the way, when one is arguing guilt by association one cannot create one's own name for the group just because one thinks it is cute.

Here, I must make a confession. I started life as a Republican, and became a Democrat when President Nixon decided to slow down the pace of school desegregation and attacked "forced busing." I am not happy as a Democrat because it has far too many policies I reject, but it still stands for accountability and preserving the civil justice system. This Committee and the Senate have wisely resisted so far all of the attacks on the civil justice system emanating from the House side, but these attacks force me to remain in a party some of whose positions I dislike. And I firmly believe that there are Republicans who dislike some Republican positions but who are forced to remain Republican because there are Democratic positions that are important to them and they dislike even more. We may even share some dislikes, but draw the balances differently. Can either I or my hypothetical like-minded Republican fairly be tarred with guilt by association for everything our Parties do? Not in a pig's eye, if we respect our system of government and each other's differences of opinion, and refuse to engage in the politics of personal destruction that so sickens the American people.

So, too, with Mr. Dreiband and the Republican National Lawyers Association.

b. Guilt Supposedly Arising from the Federalist Society

Next, the Leadership Conference condemns Mr. Dreiband for being a member of the Federalist Society and serving as the vice president of the organization's Chicago Lawyers Chapter. We are left to wonder what dread things he did do in Chicago at the time. One thing he did is represent criminal defendants *pro bono*. He saved the life of a particularly heinous felon who killed a Catholic priest, and the felon got 114 years in prison to think it over. I have attached a copy of a 2007 article from the Chicago Tribune talking about it. I do not know if the Chicago chapter of the Federalist Society approves or disapproves of the *pro bono* representation of vicious felons, but the Leadership Conference leaves us to wonder what it has to do with anything. The Leadership Conference's only particular complaint is that both the Chicago chapter and the national organization do things of which they disapprove: "These organizations have promoted federal judges and policies that restrict civil and human rights in America." That does not do much to quell my concern about an ideological shotgun, blasting away everything the Leadership Conference considers an objectionable viewpoint. This Committee

reviews the Federal judges it may or may not recommend, and may be much more familiar than I with what useful or dread role the Federalist Society plays in nomination and confirmations.

I now have two more confessions. One is right on point: I have been a member of the ABA, according to the overstatement on my membership card, for 49 years. During that time, it has provided ratings and testimony on virtually every Federal judge. I know that there has been some upset among Republicans about its role, but in candor I have to say that my membership in the ABA would have to disqualify me from anything, if Mr. Dreiband's membership in the Federalist Society disqualifies him from anything.

And here life gets complicated. The only thing worse than a McCarthyite "guilt by association" argument is a poorly thought-out "guilt by association" argument. It turns out that Mr. Dreiband is also a long-time member of the ABA whose dues support the judicial nominee evaluation system and testimony. Should Republicans reject his nomination for guilt by association with the ABA, or should Democrats reject his nomination for guilt by association with the Federalist Society?

And one final confession before moving to the next point: I have spoken to the Federalist Society twice, once to the George Mason Chapter and once to a national convention. What struck me forcefully was that these were people much more conservative than I, but who were very anxious to hear the best possible presentation of competing views so they could rethink their own. Every panel on a controversial issue had someone like me to poke holes in their ideas, and to respond as best she or he could to holes being poked in their own. It was intellectually alive! This is the same approach we follow in my own beloved ABA Labor and Employment Law Section: we are the only entity in the ABA that insists on balanced panels presenting all points of view. That is how one learns and grows.

I thought about joining the Federalist Society to keep them and me roiled up, but they kept taking positions that irritated me, so I have been putting it off. I yet might. I like meeting different ideas respectfully, and talking things through. I do it with my defense-bar colleagues all the time, Eric Dreiband included.

c. Guilt Supposedly Arising from Working with Kenneth Starr

The Leadership Conference's third time sinking on its McCarthyite journey is to say "Early in his career, Mr. Dreiband worked for three years for Independent Counsel Kenneth Starr on the prosecution of Clinton Administration officials."

What did he do? We do not know. To the Leadership Conference, we apparently do not need to know.

I just looked up the names of those convicted of crimes by Mr. Starr's group. They were Robert Palmer, Web Hubbell, Christopher Wade, Neal Ainley, Stephen Smith, Larry Kuca, Jim Guy Tucker, James McDougal, Susan McDougal, William Marks Sr., and John Haley.

Again, it is frustrating when a guilt-by-association smear is so poorly thought-out. Does the Leadership Conference think all felons should be given a free pass if we like the President

with whom they were associated? Does it think the Constitution allows a political test for the application of the criminal laws? We do not know; apparently we are all supposed to cower in terror at the mention of Mr. Starr's name, and above all, *not think*.

So this is another dreadful misfire, except that the making of the argument raises extremely serious questions about what is going on at the Leadership Conference. This saddens me immensely. This is not the organization I knew and respected.

E. The Leadership Conference's Real Motivations Are Revealed at the End

1. A Holy War: Refighting the Last Election

The first two sentences of the last paragraph of the Leadership Conference's statement show its determination to fight the last election, and to oppose any nominee the Administration may nominate to the position of Assistant Attorney General for Civil Rights:

> In its first six months, the Trump Administration has exhibited an open hostility to core civil rights principles. The Justice Department's Civil Rights Division must serve as a bulwark against that troubling trend. …

The Leadership Conference's standard is thus revealed to be someone who will conduct a guerilla war within the Justice Department to make any change of Administration irrelevant. The Leadership Conference does not reveal how this strange standard could possibly work. It does not seem to recognize that an Assistant Attorney General must follow directions from above, and must follow the law and regulations. No government could possibly work if the only acceptable nominees are those who pledge to ungovernably insubordinate.

2. The Demand for Personal Purity in the Eyes of the Leadership Conference, Untainted by inconvenient Experience and Knowledge

The next sentence of the last paragraph is a demand for political purity unsullied by knowledge, experience, or judgment:

> The American people need and deserve an Assistant Attorney General for Civil Rights who has a demonstrated commitment to marginalized communities and to enforcing our nation's civil rights laws.

Mr. Dreiband has a lifelong commitment to civil rights, but not the kind that the Leadership Conference recognizes. Anyone who has really been active in the field knows that defense counsel—not plaintiff's counsel like me—are the first line of compliance for the civil rights laws: they tell their clients what should properly be done, to keep them out of trouble and avoid injuries that might have to be redressed later. That is one of the reasons I spend so much time talking to them.

It is also unclear to me what the Leadership Conference means by marginalized communities. Laid-off Rust Belt factory workers are about as marginalized as you can get, whether their race happens to be black or white. That does not mean that any of them have had their civil rights violated; there can be no discrimination in employment opportunities where there are no employment opportunities. It is

troubling that the Leadership Conference on Civil and Human Rights makes no reference at all to civil rights in its purity demand.

3. The Nub of It: No Defense Counsel Are Capable of Handlng the Job

The last three sentences of the Leadership Conference's jeremiad repeat the Leadership Conference's breathtaking misstatements and distortions, say in essence that ethically and honorably representing defendants is sinful, and make clear its view that only someone without sin, someone who is a carbon copy of the last holder of the position—the current Executive Director of the Leadership Conference—would be acceptable:

> Instead, Mr. Dreiband would bring personal views that are hostile to civil rights, and the experiences and perspectives of a career spent primarily defending powerful corporations accused of discrimination. As a coalition of advocates for justice, including many law organizations, we do not attribute to Mr. Dreiband the conduct of his clients; rather, we criticize him for the anti-civil rights positions he has espoused in pursuing their interests, which mirror his own personal ideology. Mr. Dreiband is the wrong person to lead the Civil Rights Division, and we urge the Senate to oppose his confirmation.

The message of the Leadership Conference is clear: try to fill this position with the objectively most qualified person in the world, and we will destroy him just as we are trying to destroy Mr. Dreiband.

This is beyond disgusting.

F. What Next for this Committee?

I respectfully submit that the Leadership Conference has forfeited all credibility and should be ignored until it gets its house in order.

In the event that any member of the Committee has any doubt about the validity of the Leadership Conference's views, I suggest that a panel be scheduled. I would be happy to appear on the panel with the Executive Director of the Leadership Conference and we can both submit to such questions as the members may have.

G. What Next for the Leadership Conference?

The Leadership Conference's destruction of its own credibility has betrayed its own Board, its members who rely on it for accurate and dispassionate analysis, this Committee, and Mr. Dreiband. The Board needs to step in and exercise proper governance, including recusing the Executive Director from this matter and directing that this disgraceful statement be withdrawn and that public apologies be made to all who were attacked or misled.

The threat to the Leadership Conference by this self-inflicted injury is so great that it should call on someone of undoubted stature, such as former Attorney General Eric Holder, to

conduct the kind of full inquiry he recently did at Uber, and make a public report with suggestions to prevent this happening again.

Institutional credibility takes generations or decades to build, but can be destroyed very quickly. The sooner the process of restoration starts, the sooner it can regain trust. The Leadership Conference is badly needed, but only if it is credible.

If the Leadership Conference is determined to continue on its downward path, I expect to be the next one smeared, for daring to tell truth to power. If it chooses to take the upward path, it will withdraw its opposition and apologize by the time of the September 6 hearing. Either way, we will know soon.

H. Conclusion

I continue to believe that Eric Dreiband is the best possible nominee for the position of Assistant Attorney General for Civil Rights. His most prominent attribute is integrity, and his second most prominent is sound judgment. He has respect for competing views, and will listen. The fact that he has inspired everyone who knows him, from the staff of the EEOC to my fellow members of the ABA—and myself—speaks volumes about him. The fact that he has consistently represented criminal defendants pro bono speaks volumes about him. He will not take on luster from the office of Assistant Attorney General; he will provide additional luster to this storied post.[9]

Richard T. Seymour

September 4, 2017

[9] I will not be able to be at the hearing, since I am currently hospitalized with pneumonia, but can be reached by cell phone and e-mail. My CV, last updated in 2013, is available on request.