

Testimony of Jocelyn C. Frye, General Counsel, National Partnership for Women & Families before the United States House of Representatives Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Oversight Hearing
on the
Employment Litigation Section of the Civil Rights Division of the Department of Justice
September 25, 2007

Thank you for the invitation to testify this morning. My name is Jocelyn Frye and I am the General Counsel at the National Partnership for Women & Families. Since our founding in 1971, the National Partnership has been at the forefront of efforts to ensure equal employment opportunity for women. As a critical part of that work, we have monitored federal agency enforcement of employment discrimination laws, including the work of the Department of Justice (DOJ). We have focused special attention on the enforcement of Title VII of the Civil Rights Act of 1964 (Title VII), the landmark antidiscrimination law that prohibits discrimination in employment based on race, color, sex, ethnicity, and religion. Title VII has been instrumental in expanding women's employment opportunities, and remedying discriminatory workplace practices used to deny or limit women's work options. The National Partnership has spent years – before federal agencies, Congress, the courts, and the public – working to secure Title VII's critical protections for all to ensure that our workplaces operate free of discrimination. I also have the privilege of co-chairing the Employment Task Force of the Leadership Conference on Civil Rights. In that capacity, I work with many leading national advocacy and legal organizations to ensure vigorous enforcement of employment discrimination laws, and advance equal employment opportunity principles in workplaces across the country.

I. Overview and Introduction

Today's spotlight on the work of the Employment Litigation Section (Employment Section or Section) of the Department of Justice's Civil Rights Division is particularly timely in light of the pending leadership change at DOJ's helm. My testimony will focus on the record of the Employment Section over the past six and one-half years, specifically with respect to Title VII enforcement, from our perspective as advocates firmly committed to the Employment Section's mandate to uphold and enforce important federal protections against employment discrimination.

Commitment to Equal Justice Under Law. This hearing is especially appropriate in a year that marks the Civil Rights Division's fiftieth anniversary. It is a historic milestone for a Division with a vitally important mission and rich legacy. The Civil Rights

Division was born at a remarkable time in our nation's history, when the push for equal rights and equal justice under law was a fresh but potent, emerging force, just beginning to penetrate and challenge the consciousness of America. The quest for equality and fairness was urgent and vocal, yet elusive and unrealized. In that climate of uncertainty, the Civil Rights Division often was called upon to step into the most contentious and volatile situations to enforce the law and seek justice, even if it meant standing alone. That is precisely as it should have been then, and as it should be today – it is the leadership, fortitude, resilience, and determination we should expect from the nation's civil rights lawyer.

The work of the Employment Section – and, indeed, the Civil Rights Division as a whole – should reflect and build on this legacy. It is crucial that the Employment Section's record is one that demonstrates its unwavering commitment to full and vigorous enforcement of employment discrimination laws using every available enforcement tool at its disposal. That commitment should not ebb and flow based on disdain or preferences for a particular law or legal theory, or the popularity or political connections of the parties involved. Partisanship, ideological agendas, and political influence can never replace sound, forthright civil rights enforcement, and any implications to the contrary undermine the integrity of the Section and the Civil Rights Division, and damage the overall credibility of employment discrimination and other civil rights law enforcement efforts.

Discrimination Persists. While the civil rights movement paved the way for enormous progress in eroding discriminatory employment practices and barriers, discrimination remains an all-too-real obstacle to success in today's workplaces. Far too many women, people of color, older persons, people with disabilities, and others continue to face discriminatory attitudes and practices that deny them jobs, limit their career advancement opportunities, or interfere with their workforce mobility. Women and people of color continue to lag behind their white male counterparts in accessing upper level managerial positions, moving into non-traditional fields, earning the highest wages, and ascending the career ladder. Statistics compiled by the Equal Employment Opportunity Commission (EEOC) indicate that individuals filed more than 75,000 charges alleging employment discrimination in FY2006 under the various statutes it enforces.¹ While many of these charges fall outside the jurisdiction of DOJ,² these EEOC charge numbers at a minimum demonstrate the sizable number of employees who believe they have faced employment discrimination.

¹ U.S. Equal Employment Opportunity Commission, *Charge Statistics FY1997 Through FY2006*, <http://www.eeoc.gov/stats/charges.html>. The Equal Employment Opportunity Commission enforces Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act (which clarifies that Title VII also cover pregnancy discrimination), Title I and V of the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Equal Pay Act, sections 501 and 503 of the Rehabilitation Act of 1973, and the Civil Rights Act of 1991.

² DOJ, through the Employment Section of the Civil Rights Division, enforces Title VII against state and local employers. EEOC enforces Title VII against private sector employers.

II. The Employment Litigation Section's Record Raises Serious Concerns About the Commitment to Vigorous Enforcement and Equal Employment Opportunity

As an advocacy organization that cares deeply about achieving equal employment opportunity and eliminating discrimination in the workplace, the National Partnership believes it is crucial to have an Employment Section within DOJ's Civil Rights Division fully committed to and engaged in vigorous enforcement of employment discrimination laws. The Employment Section must be a strong leader in investigating allegations of job discrimination, rooting out and challenging discriminatory employment practices, pursuing comprehensive remedies for discrimination, and utilizing every available enforcement tool to ensure compliance with the law. We expect the Section to advance legal arguments and theories in the courts that extend maximum protections under Title VII to employment discrimination victims, and send the message to state and local employers that illegal workplace discrimination will not be tolerated. Unfortunately, the past six and one-half years have prompted serious, troubling questions about the strength and scope of the Employment Section's Title VII enforcement efforts. Among the concerns:

- A decline in the Employment Section's overall enforcement and litigation numbers.
- Perceptions of decreased emphasis on cases that traditionally have been a high priority, such as race discrimination cases involving African Americans.
- Fewer pattern or practice cases and disparate impact cases that could be used to uncover systemic practices that affect large numbers of employees.
- Reversals of legal positions in key cases, resulting in less protection for discrimination victims and making it much harder for discrimination victims to vindicate their rights.
- Allegations of improper political influence affecting attorney hiring and case decisions.
- Lack of leadership and visibility, to draw attention to the persistence of workplace discrimination, the legal protections available, and the obligation of public employers to comply with the law.

These concerns have cast doubt on the Administration's commitment to vigorous, serious civil rights enforcement and, instead, have created the perception of a conscious effort to rollback and curtail vital protections.

A. Brief Overview of the Employment Section's Title VII Enforcement and Litigation Authority

The Employment Section is responsible for enforcing Title VII as it applies to state and local employers. The Section's authority is derived from two provisions under Title VII – section 706 and section 707.³ Section 706 authorizes the Attorney General to file lawsuits against state or local employers that allege discriminatory treatment of

³ 42 U.S.C. 2000e-5(c) (section 706) and 42 U.S.C. §2000e-6 (section 707).

individuals in employment. These cases stem from charges initially filed with and investigated by the EEOC, and subsequently referred to DOJ for additional action. Section 707 authorizes the Attorney General to file lawsuits against state or local employers that allege a “pattern or practice” of discrimination affecting large numbers of employees. These cases can involve policies that treat employees differently for improper reasons, or policies that are facially neutral but nonetheless have the effect of discriminating against a particular group of employees. Cases filed under section 707 typically are larger, more complex cases that have the potential to affect large numbers of employees. As such, these cases often can garner greater public attention and help educate employees and employers about employment discrimination protections. As a general matter, many of the concerns about the Employment Section’s work over the last six and one-half years grow out of the declining number of section 707 case filings, particularly those alleging disparate impact violations.

B. Declining Litigation and Enforcement Numbers

Of grave concern to many advocates has been the apparent diminished productivity of the Employment Section over the last six and one-half years. According to published reports and available data, the Employment Section has filed 44 Title VII cases and is on track to file just over half the number of Title VII cases filed during the prior Clinton Administration.⁴ Even more troubling has been the shifting composition of the cases filed, with fewer pattern or practice cases alleging race and gender discrimination, and fewer cases involving discrimination against African Americans and Latinos. For example, the listing of complaints on DOJ’s website indicates that over the last six and one-half years the Employment Section has filed 13 complaints under section 707 alleging a pattern or practice of discrimination.⁵ Four were filed on behalf of African Americans and Latinos, one of which was filed initially by the US Attorney’s Office for the Southern District of New York. Only two were filed on behalf of women, two on behalf of white men, one on behalf of American Indians, and four were based on allegations of religious discrimination. Only four included disparate impact claims. Again, these numbers fall well below the number of complaints filed during the previous Administration.⁶

Questions about these trends frequently have been met with swift denials from Employment Section and Civil Rights Division leaders, complete with “dueling numbers” to refute any criticisms. But the publicly available record tells a different story.

⁴ These numbers are based on a review of Employment Section complaint filings listed on the DOJ website through September 20, 2007, <http://www.usdoj.gov/crt/emp/papers.html> (website last visited September 20, 2007). There are three complaints filed on the same day that stem from one case involving allegations of sex discrimination by the District of Columbia Fire and Emergency Medical Services Department. See *Jane Doe and US v. District of Columbia*, *Jane Doe II and US v. District of Columbia*, and *Jane Doe III and US v. District of Columbia*, (filed August 5, 2004). Those complaints are counted as one case for purposes of the overall numbers cited herein. For a discussion of the cases filed during the Clinton Administration, see Testimony of Helen Norton, Civil Rights Division Oversight Hearing Before the US Senate Committee on the Judiciary, June 21, 2007.

⁵ *Supra* n. 4.

⁶ *Id.*

The numbers reflect what many advocates have observed – fewer case filings, fewer cases with systemic impact, fewer cases on behalf of African Americans and women.

The apparent decline in the Employment Section’s litigation and enforcement numbers is particularly disheartening for advocates who look to the Employment Section to advance cases that small advocacy and legal organizations simply do not have the resources to bring. The Employment Section is uniquely positioned, with access to resources far beyond those of most public interest and legal organizations, to litigate large, complex cases challenging discriminatory employment practices. One such high-profile case can make an enormous difference by sending a message to employers that the power of the federal government will be brought to bear against those who discriminate when making employment decisions. The deterrent impact of an aggressive, active Employment Section litigation docket cannot be minimized. Conversely, declining litigation numbers at a minimum create a perception – and at worst confirm the reality – of less rigorous scrutiny of potential employment law violations.

C. De-emphasis of Longstanding Enforcement Priorities

The creation of the Civil Rights Division was fueled, in part, by rising opposition to entrenched discrimination against African Americans throughout American society. The push for racial equality helped provide the legal framework for challenges to other forms of inequality, such as longstanding discrimination aimed at women. While discrimination has evolved in the decades that have followed, with cases becoming increasingly complex and discriminatory practices becoming subtler and more nuanced, there has been a striking consistency in the employment discrimination charges filed with the EEOC in one important respect. Charges alleging race discrimination remain the largest number of discrimination charges filed with the EEOC each year, followed by sex discrimination charges.⁷

While we do not have access to the precise breakdown of charges referred by EEOC to DOJ, it would be reasonable to expect race and gender discrimination claims to comprise a significant portion of both the EEOC referrals and the complaints filed by the Employment Section. But a different trend has emerged over the past six and one-half years. Available data reveal fewer race discrimination cases alleging a pattern or practice of discrimination against African Americans, and fewer gender discrimination cases alleging a pattern or practice of discrimination against women. Indeed, the Employment Section did not initiate a pattern or practice case alleging race discrimination against African Americans until last year.⁸ The Section filed two pattern or practice cases alleging race discrimination against White men, one in 2005 and one in 2006, before it

⁷ See, e.g., US Equal Employment Opportunity Commission, *Charge Statistics FY1997 Through FY2006*, <http://www.eeoc.gov/stats/charges.html>; US Equal Employment Opportunity Commission, *Charge Statistics FY1992 Through FY1996*, <http://www.eeoc.gov/stats/charges-a.html>.

⁸ An earlier pattern or practice race discrimination complaint filed in June 2002 was initiated by the US Attorney’s Office for the Southern District of New York. See *US v. City of New York and New York City Department of Parks & Recreation*, June 19, 2002. The first case initiated by the Employment Section under the Bush Administration alleging a pattern or practice of race discrimination aimed at African Americans was filed in April 2006. See *US v. Virginia Beach Police Department*, April 3, 2006.

initiated the case alleging discrimination against African Americans.⁹ And, according to the complaints listed on its website, the Section has filed the same number of pattern or practice cases alleging discrimination against men as it has filed alleging such discrimination against women.

These numbers raise serious concerns, but not because the Section is enforcing Title VII's protections for different groups – Title VII rightly protects individuals from employment discrimination regardless of race, sex, ethnicity, color, or religious background. Rather, these numbers are disconcerting because they suggest a lack of attention to pattern or practice cases on behalf of African Americans and women, groups that historically have filed the largest percentage of Title VII complaints. In the past, such cases have been an Employment Section priority, but the record of the current Administration suggests that priority no longer exists.

D. Reversals of Position in Key Cases

The credibility and integrity of the Employment Section – as well as the Civil Rights Division as a whole – rests in part on the accuracy and soundness of the legal positions it takes before the courts. In several cases, however, the Section has reversed course or changed position dramatically, undermining the rights of plaintiffs in the process. Among the examples, the Section moved to dismiss a consent decree involving a police department that used an allegedly discriminatory selection test case,¹⁰ the Section withdrew its support for previously negotiated remedies in a lawsuit alleging race and gender discrimination against a group of custodians,¹¹ the Section withdrew from a high-profile case against a transportation police agency whose physical fitness test disproportionately excluded and allegedly discriminated against women.¹² In each of these cases, the Section had invested considerable investigatory and litigation resources. The change in position effectively diminished the value of the Section's previous work, and sent a message of disinterest or weakened commitment to the courts and litigants involved.

Particularly troubling, DOJ – and the Employment Section to the extent it has been consulted – also has reversed course in cases before the Supreme Court. In *Ledbetter v. Goodyear Tire and Rubber*,¹³ DOJ failed to defend the EEOC's longstanding position that discriminatory paychecks could trigger Title VII's 180-day charge-filing deadline. The case was brought by Lilly Ledbetter, a 19-year employee of Goodyear. After discovering she was being paid significantly less than her male colleagues, she sued, took her case to a jury, and won. Unfortunately, her victory was short-lived and ultimately eviscerated by a sharply divided Supreme Court. The EEOC supported Ms. Ledbetter's pay discrimination claim, filing an *amicus* brief in the lower court. But when the case

⁹ See *US v. Pontiac, Michigan Fire Department*, July 26, 2005; *US v. Board of Trustees of Southern Illinois University*, February 8, 2006.

¹⁰ *US v. Buffalo Police Department*, No. 73 CV-414 (W.D.N.Y.).

¹¹ *US v. NYC Board of Education*, No. 96-CV-0374 (E.D.N.Y.).

¹² *Lanning v. SEPTA*, 181 F.3d 478, 488 (3d Cir. 1999) (Lanning I), *Lanning v. SEPTA*, 308 F.3d 286, 289 (3d Cir. 2002) (Lanning II).

¹³ 550 US ____ (2007).

arrived in the Supreme Court, DOJ switched positions and filed an *amicus* brief siding with the employer. In doing so, the Administration effectively lent support to the employer's efforts to rollback employees' rights and make it much more difficult for workers to bring pay discrimination claims.

In *Burlington Northern & Santa Fe Railway Co. v. White*,¹⁴ DOJ again filed an *amicus* brief that contradicted a well-established EEOC interpretation. The case examined the scope of Title VII's protections against retaliation, which are triggered when individuals file, report, or assist with complaints of discrimination. Although EEOC guidance interpreted the provision broadly, DOJ urged a much narrower reading, limiting the retaliation protections only to retaliation affecting the terms and conditions of employment. Under the DOJ rule, retaliation by the employer outside of the workplace setting would not be covered. The Supreme Court rejected this narrower argument and deferred to the EEOC interpretation.

In both of these cases, DOJ failed to defend EEOC positions and, instead, advocated rules that would make it harder for victims to bring employment discrimination claims. This posture creates confusion for the courts and undermines agency deference principles.¹⁵ More importantly, it also is completely contrary to the role DOJ – and the Employment Section – should play in helping plaintiffs to vindicate their rights.

E. Political Influence in Attorney Hiring and Case Decisionmaking

There have been many published reports of allegedly improper political influences at DOJ, including the Civil Rights Division, driving DOJ's policy agenda, and affecting hiring and case decisions. The extent to which politics have played a role in attorney hiring or case decisions in the context of the Employment Section is unclear. Reports of political maneuvers used to usurp DOJ's longstanding attorney hiring process, or overturn case decisions made by career staff, are alarming because they suggest a calculated effort to thwart vigorous enforcement and manipulate outcomes.¹⁶ What is clear, however, is that sound, effective civil rights enforcement cannot be held hostage by political preferences or agendas. We expect every administration, regardless of political affiliation, to enforce our employment discrimination and civil rights laws. Moreover, it is essential that every DOJ division to take whatever steps are necessary to remove any implication of political bias or other efforts to undermine vigorous enforcement of the law.

¹⁴ 126 S.Ct. 2405 (2006).

¹⁵ Indeed, in the *Ledbetter* argument before the Court, several justices took note of the fact that the Solicitor General had taken positions contrary to the expert opinion of the EEOC on several occasions. See Transcript of Oral Argument of Glen Nager in *Ledbetter v. Goodyear*, http://www.supremecourtus.gov/oral_arguments/arguments/transcripts/05-1074.pdf.

¹⁶ See, e.g., Dan Eggen and Amy Goldstein, *Political Appointees No Longer to Pick Justice Interns*, Wash. Post, April 28, 2007, at A2; Dan Eggen, *Justice Dept. Hiring Changes Draw Fire*, Wash. Post, January 12, 2003, at A8.

III. Recommendations and Next Steps

To address these concerns, several steps could be taken:

- ***Consistent support for legal interpretations providing maximum protections to discrimination victims.*** It is essential that the Employment Section – and the Civil Rights Division and Department of Justice – advance legal arguments that preserve, and do not rollback, the ability of victims of employment discrimination to vindicate their rights. The failure to defend such legal protections, particularly when they reflect longstanding positions of the federal government, is troubling and inappropriate. The inconsistencies reflected in the government’s reversal of position in court cases and shifting legal arguments undermines public confidence in federal agency enforcement efforts, diminishes the authority and integrity of agencies when they appear in court, and weakens the available protections for individuals who experience employment discrimination.
- ***Increased transparency and accountability.*** Questions of political influence and partisanship are particularly harmful in the context of civil rights enforcement. Even the perception of such factors influencing law enforcement efforts is damaging to the integrity of the legal process. We believe it is crucial to have regular reporting of the Employment Section’s enforcement statistics, such as: the number of complaints filed annually broken down by the bases for these complaints, the number of cases of resolved each year, and a report summarizing any changes in legal positions taken in cases. This information would minimize persistent questions about the Section’s record. It also could be used as one measure of the Section’s overall effectiveness and productivity.
- ***Establishment of Enforcement Goals and Priorities.*** Establishing clear enforcement goals and priorities on an annual basis could be a useful mechanism for understanding and measuring the scope and direction of the Section’s enforcement efforts. The development of such goals and priorities helps encourage regular analysis and evaluation of enforcement and other data to identify areas where greater enforcement may be needed. It also can be a tool for directing targeted resources at particular enforcement problems. One enforcement goal that we believe is particularly important is increasing the number of cases challenging systemic employment practices, especially those with a disparate impact on women and people of color.
- ***Eliminating improper political influence from the attorney hiring process and case decisionmaking.*** Allegations of political preferences and affiliations trumping solid experience in civil rights enforcement when making attorney hiring decisions have harmed the stature, morale, and ultimately the effectiveness of the Employment Section, the Civil Rights Division, and the Department of Justice as a whole. The public, the courts, policymakers, and advocates alike – all of us must have confidence that the agencies responsible for enforcement of employment discrimination and other civil rights laws are committed to putting faithful adherence to the law before politics or political advantage. Anything less is unacceptable. Recent changes reported

publicly regarding modifications to the attorney hiring process to diminish the role of political appointees is welcome, but additional steps may be necessary to correct past mistakes.

- ***Regular Oversight.*** Oversight of the Employment Section's activities is critical to ensure Section accountability, inform Congress and the public about the Section's work, and provide for an independent assessment of the Section's effectiveness. Such oversight should be fair, even-handed, and thorough; and can be an invaluable mechanism for helping to advance the Civil Rights Division's broad mission.
- ***Leadership and visibility.*** It is essential that leaders of the Employment Section and the Civil Rights Division be visible leaders on employment discrimination issues. The persistence of workplace discrimination demands that every public official charged with enforcement of employment discrimination laws use every available opportunity to uphold the principles of equality enshrined in our constitution and civil rights laws, and emphasize the importance of compliance with the law.

Conclusion

The Employment Section has a critical role to play in preserving, defending, and upholding rights and protections of critical importance to ensure fair treatment in the workplace. We believe the Section's record over the past six and one-half years has fallen short of what is needed to make the promise of equal employment opportunity a reality for all workers. Thank you for the opportunity to participate in today's hearing and I look forward to answering your questions.