

On The Hill

NELA's Washington Report

NELA
Advocates for
Employee
Rights
National Employment Lawyers Association

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NELA's Judicial Nominations Program: Your Voice In The White House

During his January 25 delivery of the 2012 State of the Union Address to Congress and the country, President Obama alluded to the national sentiment that "Nothing will get done in Washington this year, or next year, or maybe even the year after that, because Washington is broken." He went on to say that "some of what's broken has to do with the way Congress does its business these days. A simple majority is no longer enough to get anything — even routine business — passed through the Senate." As the applause in the U.S. Capitol dwindled from members of Congress and other distinguished guests, the President made more than an oblique reference to the Senate's partisan derailment of his nominees, "For starters, I ask the Senate to pass a simple rule that all judicial and public service nominations receive a simple up or down vote within 90 days." As of April 13, 2012, Republican filibusters and obstructionism have resulted in 99 current vacancies in the nation's district and appellate courts, and 27 jurisdictions designated as "judicial emergencies," meaning there are not enough sitting judges on the bench to hear on a timely basis the number of cases filed each year.

NELA's Judicial Nominations Program plays a key role in addressing the judicial vacancy crisis through the work of its Judicial Nominations Committee (JNC) and NELA Staff. The Program's mission is to advocate for independent and fair-minded federal judges who are committed to equal justice under law for all of America's workers, and who do not place the interests of employers over the rights of employees. The JNC regularly assesses candidates nominated to federal judgeships as well as individuals interested in becoming candidates for such vacancies. It also screens potential judicial nominees, ensuring they are faithful to the progress made on civil rights and individual liberties, and possess a demonstrated record of respect for justice and equality in the workplace. Rebecca M. Hamburg, NELA Program Director, coordinates the JNC's work and facilitates the vetting process with JNC Circuit and State Advisory Representatives.

In DC, my job as NELA's Legislative & Policy Director is to lead the organization's judicial nominations advocacy efforts with the White House, Congress, and other coalition partners. (See the update below on my meeting with Christopher Kang, White House Counsel, on NELA's judicial nominations agenda.) This includes my interaction and coordination with key coalition partners and advocacy organizations like the Leadership Conference on Civil and Human Rights (LCCHR), the Common Purpose Project, the Alliance For Justice (AFJ), and People for the American Way (PFAW), to name a few. The work of NELA's Judicial Nominations Program will only become more intense and, by default, more focused as we poise ourselves to address squarely our nation's judicial vacancies and the need for a professionally diverse judiciary that takes into consideration the plight of America's workers.

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To find out more about NELA's Judicial Nominations Committee, go to:
<http://www.nela.org/judicialnominations>.

If you would like more information about becoming a federal judicial candidate or know someone who NELA should consider endorsing, please contact Rebecca M. Hamburg, NELA Program Director, rhamburg@nelahq.org.

Meeting With Christopher Kang, White House Counsel, On NELA's Judicial Nominations Agenda

On April 11, 2012, I met with Christopher Kang ("Chris"), Special Assistant to the President, Office of White House Counsel, to discuss NELA's judicial nominations agenda. Prior to joining the White House staff, Chris served as Senate Floor Counsel to Assistant U.S. Senate Democratic Leader, Senator Dick Durbin, overseeing constitutional, criminal justice, and labor issues.

Our conversation centered on vacancies on the U.S. Court of Appeals for the Fifth Circuit as well as the U.S. District Court for the District of Oregon, and the lack of women judges on the U.S. District Court for the Western District of New York. This was the second meeting with Chris to discuss judicial nominations; our first meeting last year focused on a NELA-endorsed nominee for a vacancy on the U.S. Court of Appeals for the First Circuit. Chris' main message to NELA was the importance of weighing in with the White House on nominees that affect our membership and their clients, and that our input is vital to the Administration's substantive vetting of potential nominees.

To read Chris' posting on the White House Initiative on Asian Americans and Pacific Islanders Blog, entitled, "Federal Judges That Resemble the Nation They Serve," go to:
<http://www.whitehouse.gov/blog/2012/03/29/federal-judges-resemble-nation-they-serve>.

To read my posting on the American Constitution Society's Blog about NELA's report on "Judicial Hostility To Workers' Rights: The Case For Professional Diversity On The Federal Bench" go to:
<http://www.acslaw.org/acsblog/professional-diversity-also-needed-in-the-federal-judiciary>.

To read Lauren Ketchum's Gavel Grab posting "Professional Diversity is Important to Selecting Judge" referring to NELA's report, go to: <http://www.gavelgrab.org/?p=34152>.

NELA Meets With Key Congressional Offices On Its Platform Legislative Issues

Arbitration Fairness Act of 2012 (AFA)

On April 9, 2012, NELA Board Member and Vice President of Public Policy, Daniel B. Kohrman, and I met with Elizabeth ("Peach") Momoko Soltis, Senator Al Franken's (D-MN) labor and economic counsel, to discuss the next crucial step in advancing the Arbitration Fairness Act (AFA) this Congressional session – the recruitment of Republican co-sponsors in both the Senate and the House.

The Senate bill, S. 987, currently has 16 co-sponsors; all Democrats – including Senator Robert "Bob" Menéndez [D-NJ] (joined July 11, 2011), Senator Barbara Mikulski [D-MD] (joined November 30, 2011), Senator Benjamin Cardin [D-MD] (joined January 26, 2012), and Senator Maria Cantwell [D-WA] (joined March 19, 2012). The House bill, H.R. 1873, introduced by Representative Henry "Hank" Johnson (D-GA) currently has 80 co-sponsors – all Democrats.

The AFA's lack of Republican support in both chambers is the by-product of one of the most partisan Congressional sessions on record. Our discussion with Peach focused on potential Republican members most likely to co-sponsor the AFA, including a short-list of female members of Congress who might want to take on the civil rights aspect of the bill as it relates to fairness in the workplace. NELA members with friendly ties to any Republican offices are encouraged to contact me at egutierrez@nelahq.org or (202) 898-2880, ext. 115.

Civil Rights Tax Relief Act of 2012 (CRTRA)

Dan and I also had a follow-up meeting with Representative Pat Tiberi's (R-OH) staffer, Brad Bailey, to discuss the Congressman's potential co-sponsorship of the CRTRA. Congressman Tiberi is the Chairman of

the Subcommittee on Select Revenue of the House Ways and Means Committee, which most likely will take up the bill. (H.R. 3195 was referred to the House Ways and Means Committee on October 12, 2012.) In the House, the sole co-sponsor of the bill introduced by Representative John Lewis (D-GA), is a Republican – Representative James Sensenbrenner (R-WI). The Senate version of the bill, S. 1781, also has a single Republican co-sponsor, Senator Susan Collins (R-ME). Senators Jeff Merkley [D-OR] (joined December 7, 2011) and Benjamin Cardin [D-MD] (joined January 24, 2012) are the latest to support the bill. Although Brad said Representative Tiberi had not yet decided whether to co-sponsor the CRTRA, he did say that recruiting other Republican Ways and Means Committee members was a step in the right direction in bolstering future GOP support.

In conjunction with Representative Lewis' Legislative Counsel, Miguel Martinez, we identified the following key Republican Ways and Means Committee members:

- Aaron Schock (R-IL);
- Jim Gerlach (R-PA); and
- Tom Reed (R-NY).

NELA members with relationships to any of the above Republican offices are encouraged to contact me at egutierrez@nelahq.org or (202) 898-2880, ext. 115.

NELA To Submit Comments To DOL Proposed Changes To FMLA Military Family Leave

On January 30, 2012, the U.S. Department of Labor (DOL) announced proposed changes to the Family and Medical Leave Act (FMLA) regulations affecting military family leave, flight crew FMLA eligibility, and the manner in which employers calculate increments of FMLA leave. The proposed rule would implement amendments extending the entitlement of military caregiver leave to family members of veterans for up to five years after leaving the military; currently, only family members of service members who are now serving are covered. The regulatory revisions would also expand the FMLA's military family leave provisions by extending qualifying exigency leave to employees whose family members serve in the regular armed forces. Presently, only families of National Guard members and reservists are covered. In addition, the proposed rule would implement amendments that make FMLA benefits more accessible for airline flight crew employees by adding a special hours-of-service eligibility requirement for them. Also, it would add specific rules for calculating the amount of FMLA leave used, which better takes into account the unique hours worked by crew members.

NELA's comments will focus on ensuring the proposed regulations are consistent with current language and definitions outlined in the Uniformed Services Employment and Reemployment Rights Act (USERRA) as well as the FMLA. Our thanks to NELA members Kathryn S. Piscitelli, NELA's USERRA Advisor, and Elizabeth Kristen, Director of the Gender Equity & LGBT Rights Program and Senior Staff Attorney for the Legal Aid Society-Employment Law Center (San Francisco), for their work on crafting NELA's comments. The deadline for comments is April 30, 2012.

DOJ Employment Litigation Section Meeting To Discuss Potential U.S. Supreme Court Case Interpreting Supervisor Liability

On March 21, 2012, I attended an advocacy meeting held by the U.S. Department of Justice's (DOJ) Employment Litigation Section to discuss issues of importance to members of the Leadership Conference on Civil and Human Rights' Employment Task Force. Of particular interest to NELA were the pending petition for a writ of certiorari in *Vance v. Ball State University* (Case No. 11-556) and the subsequent request to the U.S. Solicitor General to file a brief expressing the views of the United States. At issue in *Vance* is the definition of supervisor under Title VII of the Civil Rights Act of 1964, as amended.

While two key Supreme Court cases, *Faragher v. City of Boca Raton* (1998) and *Burlington Industries, Inc. v. Ellerth* (1998), established employer liability for unlawful workplace harassment by those considered to be "supervisors," the Court left open the question of who qualifies as a "supervisor" for these purposes. In response to these cases and with input from NELA, the U.S. Equal Employment Opportunity Commission (EEOC) developed an "Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by

Supervisors" to fill-in the gap. In the intervening years, a split has developed within the federal circuits regarding the appropriate definition (with the Seventh Circuit having adopted a very strict interpretation that does not comport with the EEOC's guidance). The Vance case presents this issue for the Court's consideration. As part of our Amicus Program, NELA Program Director Rebecca M. Hamburg had been working with our coalition partners, even prior to this meeting, to develop a position on the petition for writ of certiorari and to provide input to the Solicitor General as he prepares the government's brief. I relayed to DOJ staff our request for a future meeting with them, other interested civil rights organizations, and the EEOC regarding potential approaches to this case. For more information on this case, please contact Rebecca at rhamburg@nelahq.org.

White House Delays Signing Of Executive Order Banning Contractors From LGBT Discrimination

White House senior officials disclosed last week that President Obama has decided to delay signing an Executive Order that would have banned workplace discrimination by federal contractors on the basis of sexual orientation. Although the President will not sign the Executive Order this year, the White House will conduct a study of workplace discrimination against LGBT employees with the expectation of gaining further understanding and support of the issue. NELA participated in a strategy meeting on the Executive Order sponsored by the Leadership Conference on Civil and Human Rights prior to the President's announcement. NELA continues to advocate for the Employment Non-Discrimination Act (ENDA) that would prohibit employers from discriminating against individuals on the basis of sexual orientation and gender.

EEOC Commissioner Stuart J. Ishimaru Resigns

Stuart J. Ishimaru, a member of the U.S. Equal Employment Opportunity Commission (EEOC) since 2003, announced that he will resign his position as Commissioner this month. Commissioner Ishimaru was nominated by President George W. Bush and is currently serving his second term that expires July 1, 2012. He served as Acting Chair from January 20, 2009 until April 7, 2010.

During his tenure, Commissioner Ishimaru worked to reinvigorate the EEOC's emphasis on race discrimination issues, and he was instrumental in the Commission's adoption of groundbreaking guidance and "best practices" to help employers from discriminating against workers who have caregiving responsibilities. He spearheaded the first public Commission meeting in years to focus on age discrimination, which examined the adverse effects of the recent recession and of U.S. Supreme Court decisions on the rights of older workers to secure equal employment opportunity. Among other achievements, Commissioner Ishimaru was the first Administration official to testify before Congress in support of the Employment Non-Discrimination Act (ENDA). He also has testified before the Senate in support of the Paycheck Fairness Act (PFA). "Commissioner Ishimaru has been a valiant champion of employee rights, and we are grateful to him for his distinguished years of public service to our country. We wish him well, and look forward to working with him in his new capacity," stated Terisa E. Chaw, NELA Executive Director.

National Equal Pay Day, April 17, 2012

National Equal Pay Day was on Tuesday, April 17, 2012. It was originated by the National Committee on Pay Equity (NCPE) in 1996 as a public awareness event to illustrate the gap between men's and women's wages. Each year, National Equal Pay Day reflects how far into the current year women must work to match what men earned in the previous year.

NELA continues to advocate for the Paycheck Fairness Act (PFA/S.797, H.R.1519), sponsored by Senator Barbara Mikulski (D-MD) and Representative Rosa DeLauro (D-CT). The bill would expand the scope of the Equal Pay Act of 1963 and the Fair Labor Standards Act (FLSA) as part of an effort to address male-female income disparity in the United States.

To read about pay equity action ideas from the American Association of University Women (AAUW), including recognizing National Equal Pay Day, go to:
http://www.aauw.org/act/issue_advocacy/actionpages/PayEquityIdeasforAction.cfm.

Former NELA President Bruce Fredrickson Recovering At Home

During NELA's Spring Seminar in Seattle, Washington, "The ABCs of Alternative Dispute Resolution in Employment Cases," Bruce Fredrickson, NELA's Immediate Past President, suffered a stroke on March 17 and was taken immediately to Harborview Medical Center, considered one of the nation's leading academic medical centers. Thanks to a superb team of medical professionals, as well as his own hard work and determination, Bruce's recovery has been remarkable. Bruce returned home on April 12, and has an even deeper appreciation for Dorothy's (The Wizard of Oz) refrain, "There's no place like home." He is grateful for the outpouring of support he has received from the NELA family, which continues to sustain him.

Sincerely,



Eric M. Gutierrez,
Legislative & Public Policy Director
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