



Founder
Paul H. Tobias

President
Kathleen L. Bogas

Executive Director
Terisa E. Chaw

NELA STRONGLY OPPOSES THE NOMINATION OF LESLIE SOUTHWICK TO THE FIFTH CIRCUIT COURT OF APPEALS

The National Employment Lawyers Association (NELA) is **strongly opposed** to the nomination of Leslie Southwick to the Fifth Circuit Court of Appeals. After reviewing Mr. Southwick's background and legal experience, we believe he is not qualified to be appointed to the federal bench.

Mr. Southwick has been nominated to the same Fifth Circuit seat that has been steeped in controversy: President Bush recess appointed Charles Pickering to the seat in January 2004 and nominated Michael Wallace to the seat in 2006. NELA strongly opposed both of those nominees and takes a similar position on Mr. Southwick's nomination.

Like Pickering and Wallace, Mr. Southwick has espoused extreme views reflecting a lack of commitment to equality and justice in the workplace. For example, Mr. Southwick joined a troubling 5-4 decision from the Mississippi Court of Appeals that excused the use of a racial slur by a white state employee. In *Richmond v. Mississippi Dep't of Human Services*¹, Bonnie Richmond, an employee with the Mississippi Department of Human Services (DHS), was terminated when she referred to an African-American co-worker as a "good ole n*****" at a meeting that included agency executives. Richmond appealed her termination to the Mississippi Employee Appeals Board (EAB). A hearing was conducted by one member of the EAB who had been designated to act as hearing officer.

Among other things, the hearing officer concluded that the "DHS overreacted" to Richmond's comments, because the term "was not a racial slur, but instead was equivalent to calling [the African-American employee] 'teacher's pet.'" The hearing officer stated, "I understand that the term 'n*****' is somewhat derogatory, but the term has not been used in recent years in the conversation that it was used in my youth, and at that point – at that time it was a derogatory remark . . . I think that in this context, I just don't find it was racial discrimination."

The majority, which included Mr. Southwick, affirmed the EAB hearing officer's decision without reservation. They found that, taken in context, the slur was an insufficient ground to terminate Richmond's employment in part because it "was not motivated out of racial hatred or racial animosity directed toward a particular co-worker or towards blacks in general." The dissent, rightly disturbed by the majority's failure to acknowledge the inherent offensiveness of the epithet, stated that "the hearing officer and the majority opinion seem to suggest that absent evidence of a near race riot, the remark is too inconsequential to serve as a basis of dismissal."

When Wisconsin Senator Russ Feingold, at Mr. Southwick's Senate Judiciary Committee hearing in May, characterized the argument relied upon by Mr. Southwick in the case as "a pretty shocking piece of analysis," Mr. Southwick even admitted that the reasoning "does not

¹ 1998 Miss. App. LEXIS 637 (Miss. App. Ct. 1998), *rev'd* 745 So. 2d 254 (Miss. 1999).

now seem convincing to me.” However, his backpedaling comes too late and fails to allay NELA’s concerns that Mr. Southwick, if confirmed to the Fifth Circuit, will turn a blind eye to discrimination in the workplace.

Indeed, NELA is troubled by Mr. Southwick’s views on other workplace issues, particularly his zealous support for the employment-at-will doctrine, a doctrine which provides that employers can fire employees for virtually any reason. In *Dubard v. Biloxi, H.M.A.*², the court addressed the issue, among others, of whether there was sufficient evidence to show that the defendant did not breach the plaintiff’s employment contract or that the defendant did not wrongfully discharge the plaintiff. In a dissenting opinion that focused less on the merits of the case and more on the virtues of the employment-at-will doctrine, Mr. Southwick goes to great lengths to justify a legal theory which is not universally accepted. He wrote: “I find that employment at will, for whatever flaws a specific application may cause, is not only the law of Mississippi but it provides the best balance of the competing interests in the normal employment situation. It has often been said about democracy, that it does not provide a perfect system of government, but just a better one than everything else that has ever been suggested. An equivalent view might be seen as the justification of employment at will.” That Mr. Southwick would use the case as a platform to propound his views, rather than as a vehicle to interpret laws is problematic and suggests that he may be unable to separate his own views from his judicial duty to follow the law.

Based on his demonstrated insensitivity to race issues, combined with his apparent inability to divorce his views from his judicial obligation to be fair and independent, NELA believes that Mr. Southwick would be in the mold of previous nominees like Charles Pickering and Michael Wallace who had never been friendly to employee rights. As such, NELA is strongly opposed to Mr. Southwick’s nomination to the Fifth Circuit Court of Appeals and believes he should not be confirmed by the Senate.

###

The National Employment Lawyers Association advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics and judicial integrity. NELA provides assistance and support to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar. It is the country's only professional organization that is exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination and other employment-related matters. NELA and its 67 state and local affiliates have more than 3,000 members.

CONTACT:

Marissa M. Tirona, NELA Program Director
415.296.7629 or mtirona@nelahq.org

² 1999 Miss. App. LEXIS 468 (Miss. App. Ct. 1999), *rev'd* 778 So. 2d 113, 114 (Miss. 2000).