



June 6, 2007

The Hon. Patrick Leahy
Chair
U.S. Senate Judiciary Committee
224 Dirksen Senate Office Bldg.
Washington, DC 20510

The Hon. Arlen Specter
Ranking Member
U.S. Senate Judiciary Committee
224 Dirksen Senate Office Bldg.
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Specter:

I am writing on behalf of the 1.8 million members of the Service Employees International Union (SEIU), including the health care, public sector and property service members who live and work in the Fifth Circuit, to oppose the nomination of Judge Leslie H. Southwick to the United States Court of Appeals. SEIU joins the civil rights organizations, professional societies and editorial boards which have stated their opposition to Judge Southwick's nomination because of his consistent record of hostility to the rights of minorities and gay parents as well as his practice of going beyond the resolution of the case at issue to inject his own views on social and legislative policies into his decisions. We write separately to express our concerns regarding Judge Southwick's rulings regarding workplace issues and his ability to fairly enforce the nation's labor and employment laws.

In his dissent in *Cannon v. Mid-South X-Ray Co.*, 738 So. 2d 274 (Miss. App. Ct. 1999), Judge Southwick argued that the claim of Annie Cannon, a worker exposed to toxic chemicals in her work place, should be rejected because it was barred by the statute of limitations. Ms. Cannon had begun to experience health problems soon after the start of her employment as a darkroom technician. However, while the severity of the problems increased over time, Ms. Cannon's condition was not diagnosed by a doctor as work related until sometime later. Based on this diagnosis, Ms. Cannon filed suit.

Judge Southwick argued that all that is necessary for the statute of limitations to run against a plaintiff's claim is that the plaintiff know of her illness, not the cause of her illness. This rule, as the eight judges in the majority recognized, places an unreasonable burden on a worker "who cannot reasonably be expected to diagnose a disease on which the scientific community has yet to reach an agreement." While Ms. Cannon knew she was sick, she did not know she had been injured by the defendants until her disease was affirmatively diagnosed by her doctor and therefore should not have been required to file a cause of action which she did not know even existed.

ANDREW L. STERN
International President

ANNA BURGER
International Secretary-Treasurer

MARY KAY HENRY
Executive Vice President

GERRY HUDSON
Executive Vice President

ELISEO MEDINA
Executive Vice President

TOM WOODRUFF
Executive Vice President

SERVICE EMPLOYEES
INTERNATIONAL UNION
CTW, CLC

1800 Massachusetts Ave NW
Washington DC 20036

202.730.7000

TDD: 202.730.7481

www.SEIU.org

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The use of a procedural device by Judge Southwick to deny an injured worker her day in court is chillingly similar to the rule announced by Justice Alito in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. -- (2007). In that case, Lilly Ledbetter's pay disparity claim was not "easy to identify" because the impact of that discrimination, like Ms. Cannon's illness, grew over time and when it reached the point that it was clear that discrimination, or work place chemicals, was the cause, an action was filed. In upholding the dismissal of Ms. Ledbetter's case, Justice Alito relied upon same statute of limitations procedural device employed by Judge Southwick in denying Ms. Cannon her day in court.

In another dissent, Judge Southwick offers a gratuitous insight into his judicial philosophy on the subject of employment at will. The employment at will doctrine, which is premised on the illusion that employers and individual workers have equal power in the employment relationship, has been consistently criticized and limited by legislative and judicial action over the last hundred years. However, in *Dubard v. Biloxi H.M.A.*, 1999 Miss. App. Lexis 468 (1999), *rev'd*, 778 So. 2d 113, 114 (Miss. 2000), Judge Southwick opines that "employment at will . . . 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 for employment at will." Judge Southwick's radical statement of judicial philosophy calls into question the legitimacy of most federal employment laws enacted in the twentieth century, from the minimum wage to the Family and Medical Leave Act, implying that they are inconsistent with a democratic system of government.

Judge Southwick's record of judicial activism evidences a willingness to erect insurmountable barriers to workers seeking access to the courts and an aversion of laws which limit the employer's unrestricted right to control the employment relationship. He should not be given a lifetime appointment to a court where he will be called upon to enforce laws that he clearly distains by injured workers who he believes have no right to ask for relief. We ask the Committee to reject the nomination of Judge Southwick to the United States Court of Appeals for the Fifth Circuit.

Sincerely,



Anna Burger
International Secretary-Treasurer

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