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ABF FELLOWS RESEARCH SEMINAR

UNCERTAIN JUSTICE

LITIGATING CLAIMS OF
EMPLOYMENT DISCRIMINATION
IN THE CONTEMPORARY U.S.





Laura Beth Nielsen

Laura Beth Nielsen is a Research Fellow at the American Bar Foundation and Assistant Professor of Sociology and Law at Northwestern University. She holds a Ph.D. from the University of California, Berkeley's Jurisprudence and Social Policy Program, and a J.D. from Boalt Hall School of Law. She is the author of numerous law review and peer-reviewed articles on civil rights, including "The Procedural Attack on Civil Rights: The Empirical Reality of *Buckhannon* for Public Interest Litigation," (*UCLA Law Review*, 2007 with Catherine R. Albiston), and has co-edited three books, including *Theoretical and Empirical Perspectives on Rights*, (Ashgate, 2007) and *Handbook of Employment Discrimination Research: Rights and Realities* (with Robert L. Nelson, Springer, 2005). Professor Nielsen's book, *License to Harass: Law, Hierarchy, and Offensive Public Speech*, (Princeton University Press, 2004), examines hate speech, targets' reactions and responses to it, and their attitudes about using law to deal with such speech.

Uncertain — Justice —

LITIGATING CLAIMS OF EMPLOYMENT
DISCRIMINATION IN THE CONTEMPORARY U.S.

The ABF Fellows Research Seminar was held on February 9 in Los Angeles, California, during the Fellows Midyear Meeting. ABF Research Fellow Laura Beth Nielsen and ABF Director Robert Nelson presented their joint research on employment discrimination litigation to an enthusiastic audience of Fellows.

Professor Theodore Eisenberg of Cornell University followed with a presentation on his own closely related research. A panel of commentators including attorneys Richard Cassidy and Janie Schulman, and the Honorable Bernice B. Donald of the U.S. District Court, Western District of Tennessee, added their perspectives and stimulated an engaging and informative discussion among the audience and presenters. The seminar was moderated by the Honorable Miriam Shearing, retired Chief Justice of the Nevada Supreme Court.

LAURA BETH NIELSEN

introduced the ongoing research project whose investigators, besides Nelson, include John Donohue III, Peter Siegelman and ABF Faculty Fellow Ryon Lancaster. Using the working title, *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States*, the project examines new data to track the changing dynamics of employment discrimination disputes. She noted that employment discrimination litigation grew dramatically – by 184% – between 1991 and 1997, followed by a steep

drop thereafter. In order to better understand these trends, as well as the relationship between the law and workplace discrimination, the current study moves beyond the narrow range of cases available from published judicial opinions or high profile media coverage, to analyze a large random sample of case filings from the period 1988-2003. Using both quantitative and qualitative data, the study tracks cases through the different stages of the litigation process (including those cases that end very early in the process) thus revealing in greater detail than previously available, how antidiscrimination law works in action, as a “sequence of alternative outcomes.”

The research project seeks to understand how employment discrimination litigation works both in society at large and on the level of the individual: does litigation provide a mechanism for systematic reform of employer practices? Does it provide a meaningful remedy for individuals who feel they have been victims of discrimination? Based on their research, Nielsen, Nelson and their co-investigators are developing an argument that the employment discrimination litigation system needs to be improved. Too often, litigants feel they do not receive justice, while defendants often view the system as a “dead weight cost for employers,” Nielsen remarked.

Nielsen introduced the audience

to the three data sets on which the study is based. Building on prior work by Donohue and Siegelman, Nielsen, Nelson, and Lancaster created a first data set by compiling a random sampling of 2,100 employment discrimination cases filed in US District Courts in New York, Chicago, Philadelphia, San Francisco, New Orleans, Atlanta and Dallas. The cases were then coded for 261 variables, with case outcome being the dependent variable. Cases that were missing key variables were dropped from the study, resulting in a final sample of 1,672 closed cases. For the second data set Nielsen and Nelson conducted 100 in-depth interviews with plaintiffs, defendants and their lawyers, to add a qualitative component to the study. The third data set consists of records of charges of discrimination, filed with the Equal Employment Opportunity Commission (EEOC) between 1991 and 2002. (1.6 million complaints were filed with the EEOC between 1988 and 2003). Nielsen, Nelson, and Lancaster were able to match 85% of the cases from the first data set with an EEOC charge file, and for cases from 1995 onward were able to examine the priority handling code assigned by the EEOC as a predictor of case outcomes.

ROBERT NELSON

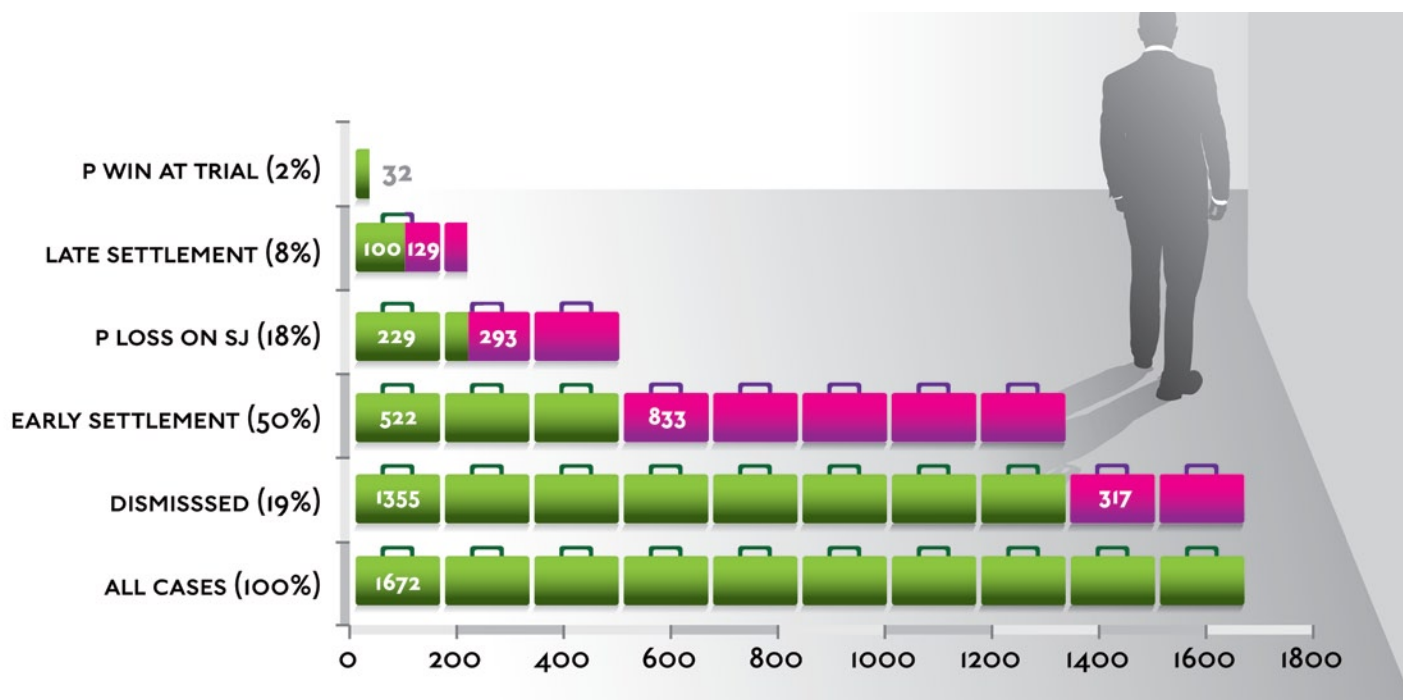
took the audience through an analysis of some project findings, after



Robert Nelson

Robert L. Nelson is the Director of the American Bar Foundation, the MacCrate Research Chair in the Legal Profession at the ABE, and Professor of Sociology and Law at Northwestern University. He holds a J.D. and a Ph.D. in sociology, both from Northwestern. He is a leading scholar in the fields of the legal profession and discrimination law. He has authored or edited 6 books and numerous articles, including *Legalizing Gender Inequality*, which won the prize for best book in sociology in 2001. His most recent book is *Urban Lawyers: The New Social Structure of the Bar*, co-authored with John Heinz, Edward Laumann, and Rebecca Sandefur, which was published by the University of Chicago Press in 2005.

PATHS OF FEDERAL EMPLOYMENT DISCRIMINATION CASES: A SEQUENTIAL MODEL OF OUTCOMES, 1988-2003



Nielsen outlined the background of the study. The researchers created a “sequential model of discrimination outcomes” for the 1,672 cases in the first data set. They found that, of the cases filed, 19% were dismissed for lack of prosecution or some procedural defect, while 50% reached early settlement. Of the cases that did not settle early, plaintiffs lost the motion for summary judgment more than half the time, or 18% of filings overall. Late settlement took up 8% of all cases, and only 2% of cases were won by plaintiffs at trial. “Clearly,” Nelson stated, “if you look at the system overall, it’s fairly perilous for the plaintiff going into this.”

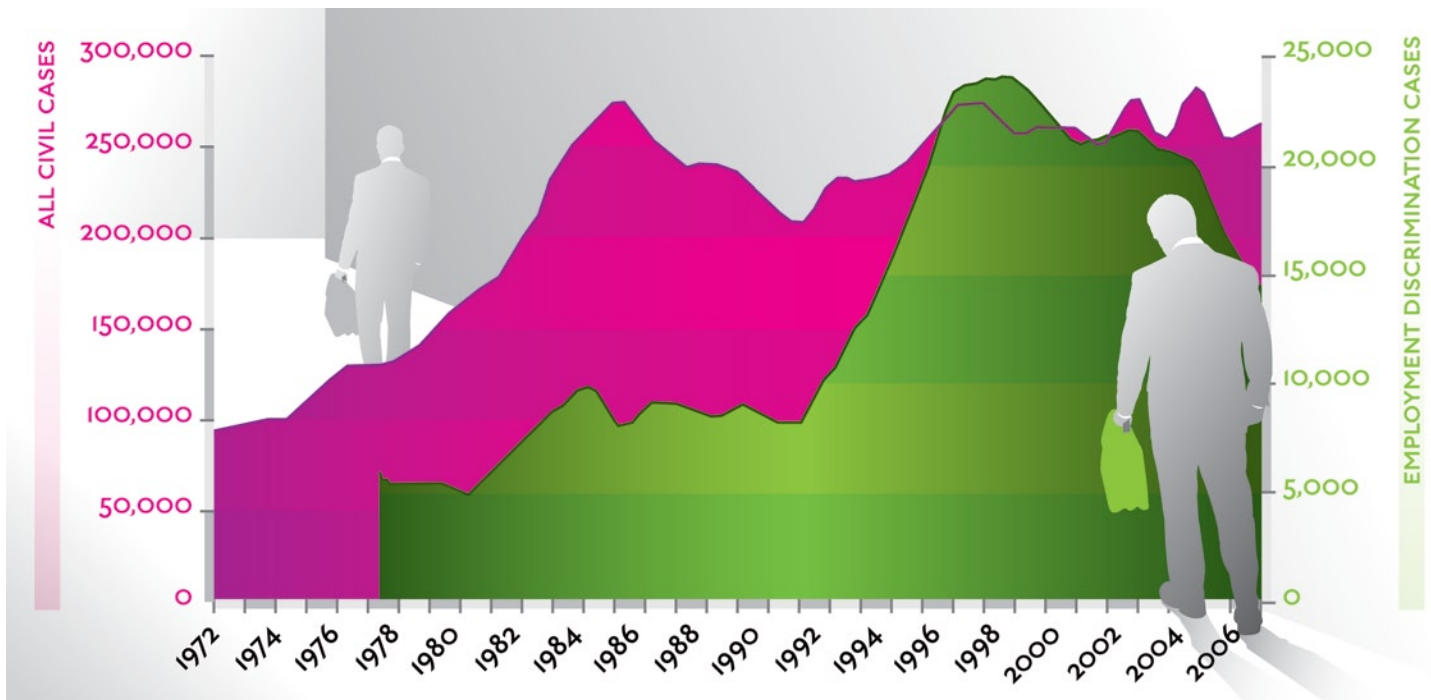
Nelson then presented findings based on the codings of cases, findings that reveal some predictors for case outcomes. For example,

the researchers found that African Americans were “twice as likely as whites” to have their cases dismissed. Public sector employees, as well, were much more likely to have their cases dismissed than private sector employees. The research shows that type of representation has a big impact on case outcomes, Nelson noted. Pro se representation brings with it a 59% probability that the case will be dismissed. Collective action cases (class actions, multiple plaintiff cases, cases with EEOC representation), which make up only a small fraction of total cases, “fare much better in the system,” according to the research.

Nelson next presented charts showing some of the results of the researchers’ multivariate analyses, where they controlled for many

of the variables in the models. Interestingly, Nelson noted, “the white/black differential persists when we control for other variables, including legal representation,” with African Americans statistically more likely to have their cases dismissed in the early stages of the process, regardless of type of representation. Like the simple cross tabulations of case outcomes, the multivariate analysis showed the most dramatic effects in the areas of representation type and collective versus individual action. Those plaintiffs who represent themselves “fare worse in the first three stages of litigation when they are more likely to be dismissed, less likely to get early settlement, more likely to lose on summary judgment,” Nelson observed. A reverse pattern holds up for collective action, in which

TOTAL NUMBER OF CIVIL CASES AND EMPLOYMENT DISCRIMINATION CASES FILED IN FEDERAL COURT, 1972-2006



plaintiffs are less likely to have their cases dismissed, less likely to lose on summary judgment and more likely to win at trial.

Finally, Nelson compared case outcomes with the third data set, the EEOC's priority codes for employment discrimination cases. Faced with a burgeoning case load, the EEOC created the A, B, C coding system in 1995, with A (20% of cases) representing those cases "most likely to prevail with further investigation;" B (60% of the cases), representing cases which might have held up with further investigation; and the C cases, (20%), which were "unlikely to prevail under further investigation." When the researchers correlated the EEOC case ratings with case outcomes, however, they learned that the A, B and C categories "have

no predictive effect on dismissals, early settlements or losses on summary judgment." Thus, the project's working title "Uncertain Justice," because, as Nelson remarked, "neither plaintiffs nor defendants can very clearly predict how these cases will evolve."

LAURA BETH NIELSEN

discussed the project's second data set, the in-depth interviews with plaintiffs and defendants. She explained that, in order to add more richness to the study, she and Nelson randomly drew cases from two cities, "one in a fairly conservative federal district and one in a fairly liberal district" and interviewed as many of the parties as they could from each case. Nielsen identified three themes that emerge from the

interviews with plaintiffs: the gravity of workplace injustices, a profound misunderstanding of the legal system, and a failed sense of accomplishing justice among both winners and losers of cases. She then presented audiotapes of interviews that illustrate the three themes.

For example, the interview with plaintiff Chris Black illustrates the theme of misunderstanding of the legal system. "He was disabled on the job at a naval shipyard and he alleged racial discrimination because he didn't receive the same set of benefits when the shipyard closed and he was on disability," Nielsen explained.

Chris Black and Wife

CB: That was all we done was filed. And go over there and I had to present my case and I didn't know what to do.

LBN: Mmm hmmm.

CB: That was the basic thing. The whole thing. All I done is file and I went before the judge and he had his, his, the lawyer for the federal government hand me a dismissal.

LBN: A motion for dismissal?

CB: And,

LBN: And, he handed it to you. He hadn't mailed it to you ahead of time?

CB: Nope, he handed it to me right there in court.

CB's wife: They had always had their minds made up. For anything to be typed up and ready.

“He’s suing in federal court and he’s suing the federal government,” Nielsen commented. “He thinks that despite receiving a motion for dismissal, no— it’s a dismissal. ‘And it was typed up and everything before I got there and the judge had his... his...the lawyer for the federal government hand me a dismissal.’ So he really perceived the judge and the attorney for the federal government to be in collusion and they dismiss it. I was in the uncomfortable position of explaining to him at the end of the interview that his case was dismissed for wont of prosecution because he did not answer the motion for dismissal,” Nielsen said.

In her concluding remarks, Nielsen discussed the implications of the research findings “for understanding legal consciousness and the relationship between law, policy, and

social change.” Because of a profound misunderstanding of the legal system, non-lawyers often emerge from their encounter with it “frustrated and confused...and depressed.” Whether these experiences are caused by problems with the regulatory system or grossly inflated expectations on the part of individuals, “from our perspective

“Rather than promoting social change, too often the legal system discourages people from using the law to remedy workplace injustice.”

as sociologists of law, the legitimacy of the legal system seems to be at stake,” Nielsen stated. Rather than promoting social change, Nielsen argued, too often the legal system discourages people from using the law to remedy workplace injustice.

As for policy implications of the research, Nielsen commented that the EEOC and the system of private representation often are not providing meaningful assistance to parties to these disputes. “There would be significant improvement in the

system with just information and basic representation [for the average person],” Nielsen observed. Providing a public forum for plaintiffs to tell their story would be helpful as well, according to Nielsen. “A lot of people just jumped at the chance to talk about this with somebody who might be able to do something about it and they knew that we weren’t going to be able to do something like reinvigorate their lawsuit, but they wanted something to come from the experiences,” she remarked. Finally, Nielsen argued, the preponderance of individual claims in the current system atomizes change; moving resources from individual claims to more systemic remedies might result in more equitable solutions for all.

THEODORE EISENBERG

then commented on Nielsen and Nelson’s project, and set it in the context of other studies, especially of summary judgment and settlement rates. “Employment discrimination litigation is distinctive in both its rates of settlement and summary judgment,” Eisenberg observed, “and so one of the things we can bring to bear on their very wonderful study...is to compare the results here with results in non-employment cases. That is, some sort of control group of non-civil rights litigation.”

Eisenberg then presented results from research by him and Charlotte Lanvers. Eisenberg and Lanvers have

studied summary judgment rates in both employment and non-employment cases in the Eastern District of Pennsylvania, the Northern District of Georgia and the Central District of California for the periods 1980-81 and 2001-02. In the Eastern District of Pennsylvania, for example, they found that the courts dismissed cases by summary judgment at noticeably lower rates in torts and contract cases than in employment cases in both the time periods. Overall, between 1981 and 2002, summary judgment rates in employment cases significantly increased in the Northern District of Georgia, decreased slightly in the Eastern District of Pennsylvania, and were low in the Central District of California in 1981 (Eisenberg and Lanvers did not analyze California data for 2002). The summary judgment rate “varied noticeably and significantly,” ranging from 24% to 5%, across districts. Most importantly, Eisenberg and Lanvers found,

the rate of summary judgment was “nearly uniformly higher in discrimination cases than in tort or contract cases.” These findings are consistent with recent findings by researchers at the Federal Judicial Center, and by work published by Steve Burbank in the *Journal of Empirical Legal Studies*, Eisenberg noted.

Eisenberg suggested that Nielsen and Nelson’s data could yield further insights if it were divided into three or five year groups where summary judgment rates could be observed over time. If the results from the seven districts they sampled could be analyzed chronologically, one could gain a better understanding of inter-district and intra-district variations in summary judgment rates, he noted.

Eisenberg then presented some findings regarding settlement in employment cases. He used data from research he conducted over the last twenty years to show how settlement rates vary between non-employment

cases and job discrimination cases. Drawing on research he published in 1988, Eisenberg demonstrated that, in three districts in 1981, Title VII and employment cases settled at a rate of between 40% and 50%, while a control group of non-civil rights cases settled at a rate of 73%. He also presented findings from his ongoing research project that demonstrate that civil rights cases in the Northern District of Georgia and the Eastern District of Pennsylvania in 1980-81 and 2001-02 had a generally lower settlement rate than non-civil rights cases. Finally, Eisenberg presented findings from a study published in 2004 in the *Journal of Empirical Legal Studies* concerning federal employment discrimination cases on appeal in the 1988-1995 period. He found that when plaintiffs appealed, they achieved reversal less than 10% of the time, while defendants who appealed a loss at trial won reversal about 40% of the time. In conclusion, Eisenberg



Theodore Eisenberg

Theodore Eisenberg is the Henry Allen Mark Professor of Law at Cornell Law School. He graduated from Swarthmore College and the University of Pennsylvania Law School, and clerked for a federal appellate court and for Chief Justice Earl Warren (Ret.). He is co-editor of the *Journal of Empirical Legal Studies*, is on the editorial board of the *American Law and Economics Review*, is Editor-in-Chief of the multi-volume treatise *Debtor-Creditor Law*, and has written two casebooks. Professor Eisenberg’s empirical studies have appeared in many leading peer-reviewed journals, student law reviews, and books. His published work covers civil rights, finance, products liability, punitive damages, judge and jury trials, the death penalty, class actions, and litigation models.

remarked upon the “dismal fate” of employment cases. Compared to other civil cases, employment discrimination cases were subject to a higher rate of summary judgment, a lower settlement rate, and a lower likelihood of success upon appeal.

RICHARD CASSIDY

began his commentary by remarking that the numbers in the study did not surprise him, except for the low rate of success for cases that go to trial. He contrasted this low rate with his perception of advances in equality in the country over the last few decades, noting that even allowing for the low rate of plaintiff victories, significant progress has been made, that “the law in this area has achieved a great deal of social change over the length of my career.” He illustrated this perception with an anecdote: early in his career, in about 1983, he began to practice labor and employment law. Working this time

“Compared to other civil cases, employment discrimination cases were subject to a higher rate of summary judgment and a lower settlement rate.”

for the defense, Cassidy interviewed a client, the Executive Director of a small non-profit organization that had five employment cases pending against it. Focusing on a pregnancy discrimination case, Cassidy asked the man what had happened. “Well, you know, Janey wasn’t really a very good worker and I had to have some reason to let her go. And she got pregnant, so I said, ‘Well, that’s a good reason to let her go,’ and I

let her go. And that’s what I told her.’ And I said, ‘So it wasn’t really why you let her go?’ To which the man answered, ‘No, no, but I thought I had to have a good reason.’ And in 1982 he thought that was a good reason,” Cassidy related. Cassidy noted that he no longer sees direct evidence discrimination cases in his practice, except occasionally in worker’s compensation discrimination cases.

Cassidy agreed with Laura Beth Nielsen’s observation that plaintiffs are largely ignorant of the realities of the litigation process. “There is profound misunderstanding and lack of sensible expectations on the part of potential plaintiffs,” he said. “They really think the system works for them when they come in my door and by the time they leave, usually they understand that the system is probably not going to work for them, because that’s what I usually tell them... very few of them have any real sense of what the law provides...



Richard Cassidy

Richard Cassidy is a principal at the Hoff Curtis law firm in Burlington, Vermont. His practice focuses on labor and employment, personal injury, and commercial litigation. He has represented individuals, management, and unions in employment-related disputes and has extensive experience in handling discrimination litigation. In addition to his work as a litigator and counselor, he has served as a mediator and arbitrator and is a member of the Panel of Early Neutral Evaluators for the United States District Court for the District of Vermont and the early neutral evaluation panels for the Vermont Superior Courts. Mr. Cassidy is a Fellow of the American Bar Foundation and a member of Board of Governors of the American Bar Association.

and none of them have any sense of how difficult it would be for them should we decide to go forward on a contingency basis.” In spite of these problems, Cassidy noted, in his practice he continues to see “a small number of good cases.”

JANIE SCHULMAN

spoke next, from her perspective as a defense lawyer and partner in the Los Angeles office of Morrison & Foerster. She organized her remarks around the two main questions Laura Beth Nielsen had posed earlier: 1) “has the law and litigation changed the way employers treat their employees with respect to discrimination?” and 2) “does litigation provide a remedy?” Schulman answered the first question in the affirmative; although incidents of discrimination persist, they are isolated; “most employers really want to do the right thing.” Schulman noted, however, that while “the law has changed the way management treats

“Employers’ fear of litigation creates situations in which they don’t know what to do, especially in cases where cultural differences divide management from employees.”

employees,” this sometimes happens in unexpected ways, with “perverse” results. Employers’ fear of litigation creates situations in which they “don’t know what to do,” especially in cases where cultural differences divide management from employees. Schulman cited her experience in the past when she represented Japanese companies doing business in California. The high profile sexual harassment class action

suit against Mitsubishi caused some Japanese businesses to try to minimize the possibility of suits by “never firing” women or not hiring women, or only hiring Japanese women, who they felt would be less likely to bring such suits against them.

While the “rogue” employee who is “just not educable” continues to cause isolated problems of sexual harassment or race discrimination, more problems remain in the area of disability discrimination, because there “you still have a lot of ignorance among employers.” Because of this ignorance some employees who shouldn’t be fired are being fired, or, more often, employers “keep people forever that they don’t need to keep and really shouldn’t be kept any longer...” Schulman remarked.

As to the question, “Does litigation provide a remedy?” Schulman postulated that it does provide a remedy, but again, “not always the right remedy” and sometimes, a rather



Janie F. Schulman

Janie F. Schulman is a partner in the Los Angeles office of Morrison & Foerster. She is engaged in the practice of all areas of employment and labor law, including litigation and counseling. She defends lawsuits alleging wrongful discharge, sexual harassment, employee privacy claims, breach of contract, employment discrimination, Family and Medical Leave Act claims and wage and hour claims. Ms. Schulman also counsels clients on these issues, as well as business immigration matters, drafts employment agreements and employee handbooks and conducts training sessions for management and non-management employees. Ms. Schulman served for three years on the firm’s Pro Bono Committee and provides substantial pro bono services to the community. In 2001, she received the Los Angeles County Bar Association Honorable Benjamin Aranda III Outstanding Public Service Award and the Being Alive Spirit of Hope Award.

“perverse” one. Because of the economics of the litigation process, some cases end with settlement figures that “have no bearing at all to the value of the case.” “You’ve got mediators who routinely tell you to evaluate your case not based on the merits of the case; but rather, how much money it will take to make the settlement worthwhile for opposing counsel. Mediators often say, ‘you know, the plaintiff’s lawyer, he’s already drafted a complaint and he’s taken some discovery, so you’ve got to think about how much money he has in the case. And he’s not going to settle this unless he gets his money out of the case,’” Schulman said.

Finally, Schulman commented on the issue of pro se representation, agreeing with the previous speakers that pro se representation had a “huge impact” on the outcome of cases. Plaintiffs choose to represent themselves for a variety of reasons, ranging from lack of access to the legal system,

“We all view things through the lens of our total selves and that includes our race, our gender and everything that makes us who we are.”

to lack of legal representation because the case promises only small damages, to stubborn insistence on pursuing cases of questionable merit. In the instance of cases that do not promise large damages, public interest law firms will sometimes represent clients, though some meritorious cases remain unfilled. Thus, while in some instances litigation appears to be “more about form over substance,” on the other hand, the system “helps vet the bad cases because the lawyers

don’t want to take them on.” Schulman concluded that though “we have a long way to go...the blatant, really horrific stuff that existed before Title VII is largely gone...this just needs a lot of fine tuning.”

JUDGE BERNICE B. DONALD

began her remarks by thanking the presenters, commending them on their “very powerful research... really important work.” Like the other panelists, she has noticed a big increase in pro se representation over time, an unfortunate trend given the widespread ignorance of the realities of the litigation process.

She also expressed personal discomfort with findings that imply pervasive dissatisfaction with the judicial system. “My job as a judge is to make certain that the litigants, whoever they are, come into the court and feel that they get justice. And when people walk out... if they feel that the system didn’t



Judge Bernice B. Donald

Bernice Donald has served as a judge of the U.S. District Court, Western District of Tennessee since January 1996. Previously, she served on the United States Bankruptcy Court and the General Sessions Criminal Court. She has served as President of the National Association of Women Judges, Association of Women Attorneys, and as a faculty member of the Federal Judicial Center and National Judicial College. Judge Donald is currently Secretary of the American Bar Foundation, and Secretary-Elect of the American Bar Association. She has received over 100 awards for professional and civic activities.


work, then it feels like an indictment against...the judiciary or the system," Donald said.

Donald suggested that including data on the demographics of judges might add an important dimension to Nelson and Nielsen's research findings. Was there a correlation between the race and gender of the judge and case outcomes, for example, in summary judgment rates, she queried. Such data might be relevant because "all of us are the sum totals of our lives' experiences and we all, to the best of our ability, are fair and just and we do the right thing. But we all view things through the lens of our total selves and that includes our race, our gender and everything that makes us who we are," Donald said.

Donald's own experience on the bench has brought her to this realization. She shared with the audience how, as an African American woman sitting on an appellate court composed of white men, she had

a "vastly different" view of what evidence supports summary judgment, a difference she ascribed to the men having never experienced discrimination. Though judges try to "objectively evaluate the facts and apply the law," Donald said, they "are viewing things through the lens of culture, through their experience, and that may impact how...much weight [they] accord to different things."

She also related an anecdote about her experience as the first African American woman in the history of the State of Tennessee to become a judge, and the importance of diversity. Appointed to county criminal court in 1982, Donald had a white male clerk of the court. When she arrived for her first day in court she found that the clerk had staffed the courtroom with two court deputies, four bailiffs and a prosecutor, all of them African American. The defendant in her first case that day—a traffic violation—was a young white male. Intimidated

by the all-black courtroom staff he faced, the man asked for a continuance and returned 30 days later with an African American defense attorney. The defendant "didn't know anything about me, I didn't know anything about him, but [his actions] made clear that diversity is important. And I told the clerk of the court...I really appreciate you wanting to make me comfortable, but we need to switch a few people out," she related. After the clerk rotated two white bailiffs into the courtroom, "that one small dynamic made a difference in the tenor of that courtroom. So... I tell you that diversity is important," Donald concluded. 

IF YOU ARE INTERESTED IN SUPPORTING RESEARCH IN EMPLOYMENT DISCRIMINATION OR OTHER IMPORTANT ABF INITIATIVES, PLEASE CONTACT LITEN SWANSON AT 312.988.6520.



Chief Justice Miriam Shearing (Ret.)

Miriam Shearing has had a long and distinguished career on the bench. Born in Waverly, New York, she received her bachelor's degree from Cornell University and her law degree from Boston College. She began her judicial career as a Justice of the Peace in Las Vegas Township in 1976, later becoming a Judge in the Nevada District Court Eighth Judicial District. In 1992 she was elected to the Nevada Supreme Court, and in 1997 became the Chief Justice, a position from which she retired in January 2005. Justice Shearing's involvement with the law extends to the American Judicature Society, where she served as Chair from 2001 to 2003, and the American Bar Foundation, where she is a Life Fellow, and serves as Chair of the Fellows Advisory Research Committee.

RESEARCHING LAW

AN ABF UPDATE

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