



July 31, 2017

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## OPPOSE THE CONFIRMATION OF ERIC DREIBAND TO SERVE AS ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS

Dear Senator,

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States, and the undersigned national and state organizations, we write to express our opposition to the confirmation of Eric Dreiband to be the Assistant Attorney General of the Civil Rights Division at the U.S. Department of Justice. Mr. Dreiband – like many other individuals who have been nominated by President Trump to lead federal offices whose missions they have challenged and opposed during their careers – is the wrong choice for this position, and we urge you to vote against him.

This year marks the 60<sup>th</sup> anniversary of the Civil Rights Division. The American people deserve a leader of that office who will embrace its historic mission and statutory obligations, and fight for the civil rights of all in this great nation. We sent a letter to the Attorney General in February outlining the key qualities necessary for an Assistant Attorney General for Civil Rights.<sup>1</sup> Mr. Dreiband falls short of the mark and is ill-equipped to serve in that position.

Mr. Dreiband has spent the vast majority of his career defending corporations accused of employment discrimination. And while a lawyer is not responsible for the conduct of his or her clients, Mr. Dreiband has been devoted to limiting the rights and remedies of discrimination victims not only in the courtroom, but also in the congressional hearing room and through his personal writings. He has testified in his personal capacity – not on behalf of clients – against important legislation to safeguard our civil rights, and he has opposed important civil rights priorities. We are particularly troubled by his personal opposition to bipartisan efforts to combat employment discrimination against women, older workers, and individuals with arrest or conviction histories.

Moreover, we are concerned that Mr. Dreiband has no known experience working on most of the Civil Rights Division's core responsibilities, such as voting rights, police reform, housing, education, and hate crimes.

**Women's Rights:** In both congressional testimony and litigation, Mr. Dreiband has fought against equal pay for women. In 2008, he opposed bipartisan legislation – the Fair Pay Restoration Act – that would have reversed the Supreme Court's infamous *Ledbetter v.*

<sup>1</sup> <http://civilrightsdocs.info/pdf/Sessions-Civil-Rights-Division-AAG.pdf>.



*Goodyear Tire & Rubber Company* decision. In testimony before the Senate Health, Education, Labor and Pensions Committee, Mr. Dreiband expressed opposition to meaningful access to the courts for women who were paid less than men for the same job.<sup>2</sup> Congress rejected Mr. Dreiband's views on the need for women to be able to remedy long-term pay discrimination, and passed the bill in early 2009.

In addition, Mr. Dreiband made arguments to limit the ability of the Equal Employment Opportunity Commission (EEOC) to bring class action lawsuits in the 2015 case, *EEOC v. Bloomberg*. In that case, Mr. Dreiband defended Bloomberg, L.P. in a company-wide discrimination and retaliation class action case brought by the EEOC alleging that Bloomberg engaged in a pattern or practice of pregnancy discrimination by reducing the pay of pregnant women and women who took maternity leave. A conservative district court judge ruled in favor of Mr. Dreiband's client.

Mr. Dreiband has also argued against the Affordable Care Act's guarantee of coverage for contraceptives. In *Roman Catholic Archdiocese of Washington v. Burwell*, he represented the plaintiff in a Religious Freedom Restoration Act challenge to the contraceptive coverage requirements of the Affordable Care Act. Mr. Dreiband's client lost in the D.C. Circuit in 2014. The Supreme Court took the case but did not rule on the merits.

**Fair Chance Hiring:** Mr. Dreiband has been a staunch opponent of bipartisan efforts to remove barriers to employment for people with arrest or conviction histories. In 2012, the EEOC updated its employer guidance on the use of background checks, advising employers that they could be in violation of Title VII if they inappropriately considered a person's arrest or conviction history in employment decisions. The guidance encouraged employers to adopt fair chance hiring policies like "ban the box" and to delay inquiry into an applicant's conviction history until later in the hiring process. In 2013, Mr. Dreiband co-authored a *Forbes* article entitled "The Government Checks Criminal Records. Why Can't Private Employers?" that erroneously criticized the EEOC for suing companies that assessed criminal histories of job applicants.<sup>3</sup> Contrary to Mr. Dreiband's allegations in the article, the guidance does not prevent employers from conducting background checks or considering an applicant's arrest or conviction history. Instead, it requires employers to make individualized assessments of an applicant's conviction history by considering the nature or gravity of the offense or conduct, the time elapsed since the conviction and/or completion of the sentence, and the nature of the job sought or held. Mr. Dreiband's position flies in the face of strong bipartisan support for policies that would limit employers' ability to unfairly use job applicants' criminal history against them in the hiring process.

In 2014, Mr. Dreiband testified in favor of three anti-worker bills that would have restricted the EEOC's power to discourage employers from considering conviction histories when making hiring decisions, established onerous EEOC reporting requirements, and made it more burdensome for the EEOC to approve litigation.<sup>4</sup> Fortunately, the bills did not pass, because they would have diminished the effectiveness of the EEOC.

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<sup>2</sup> <https://www.help.senate.gov/imo/media/doc/dreiband.pdf>.

<sup>3</sup> <https://www.forbes.com/sites/danielfisher/2013/06/21/the-government-checks-criminal-records-why-cant-private-employers/#70e546c66700>.

<sup>4</sup> [https://edworkforce.house.gov/uploadedfiles/dreiband\\_testimony.pdf](https://edworkforce.house.gov/uploadedfiles/dreiband_testimony.pdf).



**Age Discrimination:** In 2010, Mr. Dreiband testified against the Protecting Older Workers Against Discrimination Act, which would have reversed the Supreme Court's *Gross v. FBL Financial Services* decision that placed a higher burden on older workers to prove age bias under the Age Discrimination in Employment Act (ADEA).<sup>5</sup> This bill has achieved bipartisan support over the years, and the most recent version was introduced in February 2017 by Senators Casey and Grassley.

Mr. Dreiband represented R.J. Reynolds in a 2016 case, *Villarreal v. R.J. Reynolds Tobacco Co.*, in which he argued that disparate-impact hiring claims are unavailable under the ADEA. The Eleventh Circuit sitting en banc narrowly affirmed the district court opinion in favor of Mr. Dreiband's client. This ruling, over a vigorous dissent, constituted a significant narrowing of age discrimination protections.<sup>6</sup>

**Discrimination Against American Muslims:** When the EEOC sued Abercrombie & Fitch for declining to offer a religious accommodation to an applicant who wore a hijab, which did not comply with Abercrombie's dress and grooming policy, Mr. Dreiband represented the company. He argued on behalf of Abercrombie that because the applicant did not request a religious accommodation or mention religion during her interview, the company did not have actual knowledge of the religious nature of the headscarf or the applicant's need for an accommodation. The case ultimately went to the Supreme Court, which ruled 8-1 against Mr. Dreiband's client in 2015. Only Justice Thomas agreed with his extreme position.

In a 2010 case, *Ghori-Ahmad v. U.S. Commission on International Religious Freedom*, Mr. Dreiband represented the U.S. Commission on International Religious Freedom when they were sued by a Muslim woman for rescinding a job offer it had extended to her, failing to renew her temporary contract, and retaliating against her for filing an EEOC complaint. The case ultimately settled.

**Race and National Origin Discrimination:** On behalf of the Chamber of Commerce, Mr. Dreiband filed an amicus brief in support of the employer in the case *EEOC v. Bass Pro Outdoor World*. In this case, the employer was sued by the EEOC for a pattern or practice of discrimination against Black and Hispanic job applicants. In a 2016 decision, the Fifth Circuit ruled against the employer and Mr. Dreiband, concluding: "We decline to undo the structure erected by Congress in the guise of interpretation seduced by judicially preferred policy choices."<sup>7</sup> The Fifth Circuit recently denied en banc review.

In *DeJesus v. Washington Post*, a Black, 59-year-old Washington Post employee brought a race and age discrimination case against the newspaper after he was terminated in 2011. Mr. Dreiband represented the defendant, which prevailed on summary judgment at the district court but lost before the D.C. Circuit in a unanimous opinion.

**Transgender Discrimination:** As part of the legal team representing the University of North Carolina (UNC), Mr. Dreiband worked to thwart the Civil Rights Division's efforts to block a North Carolina law (HB2) restricting transgender people's ability to access public restrooms (*United States v. North*

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<sup>5</sup> <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg56416/html/CHRG-111shrg56416.htm>.

<sup>6</sup> [http://www.upi.com/Top\\_News/Voices/2017/03/23/Is-it-age-discrimination-if-you-dont-know-youre-being-discriminated-against/1011490280791/](http://www.upi.com/Top_News/Voices/2017/03/23/Is-it-age-discrimination-if-you-dont-know-youre-being-discriminated-against/1011490280791/).

<sup>7</sup> 826 F.3d 791, 806 (5<sup>th</sup> Cir. 2016).



*Carolina*). Prior to Mr. Dreiband joining its legal team, UNC made public statements denouncing HB2, but, when in court, stated that it could not disavow its obligation to follow state law. Ultimately, the district court entered a limited preliminary injunction enjoining UNC from enforcing the law only against the named plaintiffs during the pendency of the litigation. After the entry of the injunction against UNC, Mr. Dreiband, a law firm partner with significant discretion to choose his cases, volunteered to join the team opposing the Civil Rights Division's case as the matter moved to a full disposition on the merits. The Sessions Justice Department dismissed its suit earlier this year after HB2 was modified, but civil rights groups have continued to press claims against UNC and other state defendants (*Carcano v. Cooper*). As of the date of this letter, Mr. Dreiband has not withdrawn as counsel, and thus remains a member of UNC's legal defense team.

**Ideological Affiliations:** Mr. Dreiband is a longtime member of the Republican National Lawyers Association, an ideological organization which engaged in highly partisan assaults on President Obama and which recently applauded the creation of the Pence-Kobach voter suppression commission, asserting: "Secretary Kobach has long been a leader on election integrity issues such as voter list maintenance."<sup>8</sup> Mr. Dreiband is also a longtime member of the Federalist Society and served as the vice president of the organization's Chicago Lawyers Chapter. These organizations have promoted federal judges and policies that restrict civil and human rights in America. Early in his career, Mr. Dreiband worked for three years for Independent Counsel Kenneth Starr on the prosecution of Clinton Administration officials.

**Dreiband Record at EEOC:** Mr. Dreiband handled affirmative enforcement for two years as the EEOC general counsel during the Bush Administration, but this represents only a small part of his career. His supporters may note that the number of cases filed and monetary benefits recovered from litigation during his EEOC tenure exceeded the numbers during the Obama Administration, but those are misleading statistics. First, the Obama EEOC prioritized resolving cases through pre-litigation resolutions. For example, in 2004 when Mr. Dreiband was general counsel, the EEOC obtained \$251 million in monetary benefits through conciliation, mediation, and settlements; in 2013, the EEOC obtained \$372 million, a 48% increase.<sup>9</sup> Because conciliation is a predicate to an EEOC lawsuit, the agency's rising success rate in settling cases through conciliation resulted in the filing of fewer cases. Second, Mr. Dreiband had more staffing resources. In 2004, Mr. Dreiband's Office of General Counsel had 208 field attorneys, but by 2016, due to budget cuts, that number had dwindled to 173, a 17% decrease.<sup>10</sup> Finally, the Obama EEOC placed more of an emphasis on systemic investigations and litigation – which, while ultimately more efficient and impactful, is initially more resource-intensive – than did the Bush EEOC when Mr. Dreiband served as general counsel.<sup>11</sup>

After his brief tenure at the EEOC, Mr. Dreiband attempted to undermine the agency's mission and narrow its ability to bring litigation. He co-wrote an article for Law360 on March 8, 2012 entitled "The EEOC Strategy of Sue First, Ask Questions Later," in which he criticized the EEOC's use of discovery to

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<sup>8</sup> <http://www.rnla.org/eieo.pdf>.

<sup>9</sup> <https://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm>.

<sup>10</sup> <https://www.eeoc.gov/eeoc/litigation/reports/index.cfm>.

<sup>11</sup> <https://www.eeoc.gov/eeoc/systemic/review/upload/review.pdf>.



identify and seek relief for discrimination victims it hadn't known about before filing a lawsuit.<sup>12</sup> This article reflecting his personal views is consistent with many positions he has taken in litigation, where he has sought to narrow the scope of Title VII and other anti-discrimination laws – the ones he would be responsible for enforcing as head of the Civil Rights Division.

In its first six months, the Trump Administration has exhibited an open hostility to core civil rights principles. The Justice Department's Civil Rights Division must serve as a bulwark against that troubling trend. The American people need and deserve an Assistant Attorney General for Civil Rights who has a demonstrated commitment to marginalized communities and to enforcing our nation's civil rights laws. Instead, Mr. Dreiband would bring personal views that are hostile to civil rights, and the experiences and perspectives of a career spent primarily defending powerful corporations accused of discrimination. As a coalition of advocates for justice, including many law organizations, we do not attribute to Mr. Dreiband the conduct of his clients; rather, we criticize him for the anti-civil rights positions he has espoused in pursuing their interests, which mirror his own personal ideology. Mr. Dreiband is the wrong person to lead the Civil Rights Division, and we urge the Senate to oppose his confirmation.

Sincerely,

The Leadership Conference on Civil and Human Rights  
9to5, National Association of Working Women  
Advancement Project  
Alliance for Justice  
American Federation of Labor-Congress of Industrial Organizations (AFL-CIO)  
American-Arab Anti-Discrimination Committee  
Arizona Employment Lawyers Association  
Asian Americans Advancing Justice  
Autistic Self Advocacy Network  
Bend the Arc Jewish Action  
Center for Popular Democracy  
Connecticut Employment Lawyers Association  
Disability Policy Consortium of Massachusetts  
Disability Rights Education and Defense Fund  
Equal Justice Society  
Equal Rights Advocates  
Equality California  
Fair Elections Legal Network  
Family Equality Council  
Farmworker Justice  
Florida NELA  
GLSEN  
Institute for Science and Human Values

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<sup>12</sup> <https://www.law360.com/articles/314725/the-eeoc-strategy-of-sue-first-ask-questions-later>.

International Association of Official Human Rights Agencies  
Lambda Legal  
LatinoJustice PRLDEF  
League of United Latin American Citizens  
Matthew Shepard Foundation  
NAACP  
NAACP Legal Defense & Educational Fund, Inc.  
NARAL Pro-Choice America  
National Association of Human Rights Workers  
National Bar Association  
National Black Justice Coalition  
National Center for Lesbian Rights  
National Center for Transgender Equality  
National Council of Jewish Women  
National Domestic Workers Alliance  
National Education Association  
National Employment Law Project  
National Employment Lawyers Association  
National Fair Housing Alliance  
National Health Law Program  
National Hispanic Media Coalition  
National Immigrant Justice Center  
National Immigration Law Center  
The National Network for Arab American Communities  
National Organization for Women  
National Partnership for Women & Families  
National Urban League  
NELA  
NETWORK Lobby for Catholic Social Justice  
OCA - Asian Pacific American Advocates  
People For the American Way  
PFLAG National  
PICO California  
PolicyLink  
Presbyterian Feminist Agenda Network  
Pride at Work  
Service Employees International Union (SEIU)  
Southern Poverty Law Center  
Texas Employment Lawyers Association  
UnidosUS (formerly NCLR)  
Voices for Progress  
The Voter Participation Center  
Voting Rights Forward

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Wisconsin Employment Lawyers Association (WELA)  
World Without Genocide at Mitchell Hamline School of Law  
YWCA USA