



Equal Rights Advocates

Since 1974, Fighting for Women's Equality

January 9, 2006

Dear Friends:

The Board and Staff of Equal Rights Advocates are united in their opposition to Samuel A. Alito's nomination to the United States Supreme Court. Judge Alito's record on employment discrimination and Congressional authority while serving on the Third Circuit Court of Appeals is deeply troubling. He has advanced a cramped reading of the Title VII of the Civil Rights Act of 1964, which is inconsistent with the law's intent of ensuring equal opportunity for workers (including women of all backgrounds) who have long been subjected to varying forms of persistent and long-standing discrimination. In most employment discrimination cases, Judge Alito has applied a higher standard of proof than that required by the United States Supreme Court. He has written consistently that plaintiffs failed to prove that bias was the "determinative" factor in their misfortunes and that the courts should resist subjecting employers to second-guessing about routine personnel matters.

In *Sheridan v. E.I. DuPont Nemours*, a sex discrimination and sexual harassment case brought by a hotel employee against her employer, Judge Alito's lone dissent ignored circuit and Supreme Court precedent, and opposed the Supreme Court's procedural regime that recognizes the inherent difficulty of proving employers' discriminatory motivations.

In *Chittister v. Department of Community and Economic Development*, Judge Alito held that though Congress attempted to abrogate the states' Eleventh Amendment immunity, when it passed the personal leave provision of the Family and Medical Leave Act (FMLA), it did not do so validly under Section 5 of the Fourteenth Amendment. In this case, he ruled that Congress did not have the power under the Fourteenth Amendment to enact the FMLA's guarantee of up to twelve weeks of unpaid leave for personal illness. The Supreme Court's decision in *Nevada Department of Human Resources v. Hibbs* later held that Congress properly abridged the states' Eleventh Amendment immunity with respect to the family care provision of the act. Chief Justice Rhenquist wrote with great eloquence that because states had a record of administering family leave in a gender-based discriminatory and unconstitutional manner that Congress had the right to enact FMLA. The Supreme Court ruled that by enacting FMLA, Congress expressed the intent that states' should not be immune from individual lawsuits if they violate FMLA. (Private individuals cannot bring lawsuits against the state unless the state waives immunity.) Additionally, the Court noted according to this case, FMLA's aim to protect the right to be free from gender-discrimination in the workplace includes protection from the sex-stereotype that caring for family members was "woman's work." This right to be free from discrimination and stereotypes is so vital that it extends to state employees as well.

Judge Alito's record includes a narrow interpretation of the powers that authorize Congress to pass laws such as the Family and Medical Leave Act (FMLA). If Judge Alito is confirmed, there is every reason to expect that many important decisions about federal power would yield a different result. His record suggests he would become the critical fifth vote to strike down portions of federal laws expanding protections that women and workers now have.

A majority of the Supreme Court, including Justice O'Connor, held that the FMLA's entitlement to a certain amount of leave time, applied equally to men and women, was an appropriate response to a history of gender discrimination in leave policies. Judge Alito, on the other hand, stated that the

FMLA was not an appropriate response to gender discrimination because its entitlement to leave time “does much more than require nondiscriminatory sick leave practices.”

The United States needs a Supreme Court that will ensure the protection guaranteed by the Constitution and by federal laws passed by Congress to address long standing policies and practices that have disadvantaged women. If confirmed as Justice Sandra Day O'Connor's replacement, Judge Alito would have the power to move the Supreme Court decisively to the right. Finally, on the issue of choice, Judge Alito has previously indicated that he does not support a woman's right to choose when or whether to bear children. This basic and fundamental right has been critical in giving women the right to choose how they manage their lives in the home, and their careers. We cannot afford a reversal of this basic human right.

As an organization, ERA cannot in good conscious support a Chief Justice who denies the existence of pervasive discrimination that women, people of color, and members of other disenfranchised communities continue facing in the workplace.

Please contact your Senator to voice your opposition to Judge Samuel A. Alito's nomination to the United States Supreme Court.

Very Truly Yours,



Irma D. Herrera, Executive Director
EQUAL RIGHTS ADVOCATES