
To: Subcommittee on Courts, Intellectual Property, and the Internet
From: Michelle Cohen Levy, EDR Counsel for Ms. Caitlyn Clark
Date: March 17, 2022
Re: Hearing on Workplace Protections for Federal Judiciary Employees

Thank you for the opportunity to submit written testimony today. My name is Michelle Cohen Levy, and I am an attorney admitted to practice in Maryland and Florida, including the District Courts in the Southern and Middle Districts of Florida. After graduating with a B.A. from The Johns Hopkins University, I went to The University of Miami School of Law and graduated in 2009. I began my legal career working for a small firm in Miami, Florida before being recruited to an AM Law 100 Firm. During those first five years of practice, I handled a variety of civil litigation claims, including employment matters. At the time, I represented almost exclusively defendants. I was a “super star” attorney, sought out for my writing and creative arguments –developing arguments that prevailed in the trial and appellate courts.

Ultimately, I decided to open my own practice in Fort Lauderdale, Florida. Over the last 8 years, my practice has grown to employ a team of women – unintentionally, all mothers. I grew that practice during two of my own pregnancies and while parenting a one-year-old and a three-year-old during a global pandemic. I decided to focus on employment law because it has impacted me my entire working life – before, during, and after law school. Having practiced employment law for nearly a decade, I have had the privilege of litigating approximately 90% of my cases in federal court. I predominantly represent employees at all stages of their claims – from internal investigations to the EEOC process and, ultimately, in litigation. Based on my experience attempting to navigate the judiciary’s reporting procedures as counsel for a complainant, I strongly support the need for expanding statutory protections available to employees of the federal judiciary.

Over the past year, I have had the privilege of representing Ms. Caitlyn Clark with respect to her claims for pregnancy discrimination, harassment, and retaliation arising from her employment as a term law clerk for the Honorable Ashley Royal in the Middle District of Georgia. As you will no doubt hear during her courageous testimony, Ms. Clark is an intelligent, hard-working, personable attorney, wife, and mother.

In January 2020, six months into the first year of her two-year clerkship, Ms. Clark joyfully announced that she was pregnant with her second child. Suddenly, her bright career – one she hoped would continue as a staff attorney or career clerk with the federal judiciary – was derailed. In November 2019, Judge Royal offered Ms. Clark an extension of her clerkship to a four-year term, but subsequently rescinded that offer in June 2020 after Ms. Clark announced her pregnancy and complained to Judge Royal about discriminatory and harassing treatment from his career clerk. Ms. Clark’s testimony will provide the details of the treatment she received for the remaining months of her clerkship, which culminated when Judge Royal notified her of her termination just days before her maternity leave. Shortly after Ms. Clark was terminated and gave birth, the Middle District of Georgia adopted the Employment Dispute Resolution Plan, effective September 14, 2020 (“EDR”).¹ Some months later – after Ms. Clark navigated the “Informal Advice” and “Assisted Resolution” steps of the EDR Plan – she retained me to represent her through the Formal Complaint process.²

¹ Available at <https://www.gamd.uscourts.gov/sites/gamd/files/GAMD-EDR-Plan.pdf>.

For those of you who are not familiar with federal employment-discrimination claims outside of the EDR process, in order for an employee to pursue a typical claim, the employee must allege (1) membership in a protected class; (2) qualifications for the position; (3) treatment that differed from individuals not in the protected class; and (4) an adverse employment action. In order to pursue a typical retaliation claim, the employee needs to allege that she engaged in protected activity and suffered an adverse employment action as a result. In my experience, employers file motions to dismiss and/or motions for summary judgment – and prevail – based on two main theories: (1) lack of evidence of discriminatory intent; and (2) lack of temporal proximity (i.e. too much time has passed between the protected activity and the adverse employment action). In reviewing Ms. Clark’s claims, I had no doubt that Ms. Clark would be able to overcome both of those hurdles, because her case presented some of the strongest facts I’ve ever seen.

Ms. Clark had the qualifications, an offer of a raise, and an offer to extend her clerkship for two additional years because of the excellent quality of her work. But when she announced her pregnancy, all of that began to slip away. Judge Royal’s career clerk immediately expressed dismay at Ms. Clark’s pregnancy announcement, spent the next few months undermining, excluding, and excessively criticizing and harassing Ms. Clark, and finally admitted that she was “infuriated” at Ms. Clark for being pregnant. When Ms. Clark reported the career clerk’s harassment to Judge Royal, he began searching for her replacement within 24 hours. There was no indication that Judge Royal informally investigated or attempted to resolve the issue – in fact, Judge Royal admitted in his interview that he “laughed” at the suggestion that he speak with human resources. Two months later, Judge Royal rescinded his offer of the two-year extension of Ms. Clark’s clerkship. Finally, just before Ms. Clark went on maternity leave, Judge Royal informed Ms. Clark that her employment would be terminated at the conclusion of her maternity leave. More than 18 months later, Ms. Clark remains unemployed. Ms. Clark’s testimony will explain the significant, ongoing impact of this misconduct on both her personal and professional life.

This letter does not aim to speak for Ms. Clark or to tell her story, because her testimony will speak to that. Instead, the EDR process is what keeps me up at night. The idea that employees of the federal judiciary – the very same branch of government making daily determinations on claims of employment discrimination – are not entitled to have their claims independently investigated in a transparent process that protects their confidentiality is deeply disturbing. The final nail in the coffin is that, even after navigating this opaque, biased process, the employee does not have any effective remedy. In all my years litigating federal employment-discrimination claims, I have rarely – if at all – seen a complaint for discrimination, harassment, and retaliation as meritorious as this case; however, the merits of this case were irrelevant given the highly flawed nature of the EDR process itself. And although I wish I could attribute all of these flaws to the process as applied to Ms. Clark’s case or within that particular district, I’ve come to realize that these flaws are how the process is intended to work. The following sections provide a brief overview of the numerous procedural hurdles, inconsistencies, and questionable decisions I encountered as Ms. Clark’s counsel. These examples are by no means exhaustive.³

Opaque Processes and Procedures

From the outset of my involvement in this process, I came up against unnecessary, seemingly manufactured hurdles. First, despite the fact that neither Georgia nor federal law applied to Ms.

² Ms. Clark had to navigate this pre-complaint process without counsel. As I explain, *infra*, the process is not welcoming to legal representatives.

³ I have obtained Ms. Clark’s permission to discuss these particular items.

Clark's claims, the Presiding Judicial Officer ("PJO") required that I submit a motion for admission *pro hac vice* to the Middle District of Georgia.⁴ This required retaining counsel admitted to practice before the very Court that was the subject of Ms. Clark's claims. That unwritten requirement in and of itself creates a virtually insurmountable obstacle for employees of the judiciary. Employees must find an attorney willing to take on the Court – perhaps even the very Judge – before which they practice regularly. I was fortunate to find someone who was admitted to the jurisdiction but did not practice there regularly who was willing to check this box. This requirement was an unnecessary barrier given that, as the EDR Plan says, neither the rules of evidence or civil procedure apply.

After clearing that obstacle, I learned that the PJO had unilaterally scheduled Ms. Clark's "interview" to take place in person, despite being aware that I did not reside nearby. When I requested that the interview be conducted via videoconference, the PJO declined. When I requested reconsideration based on the PJO's own administrative order from only two weeks prior, which recognized that "the Covid-19 coronavirus remains a serious health crisis in the Southern District of Georgia," the PJO again denied my request. I appeared by telephone while Ms. Clark appeared in person. No explanation was provided for the repeated denials, which was particularly disturbing given the health risks posed to Ms. Clark and her children.

When Ms. Clark's interview started, we learned that the PJO had already interviewed the career clerk and the Clerk of Court and was scheduled to interview Judge Royal and his former deputy the following day. That was when we first realized that we would not have the opportunity to attend or participate in the interviews or ask any questions. None of these decisions had been conveyed to me or Ms. Clark by either the PJO or the EDR plan administrators.

Also at the outset of Ms. Clark's interview, we learned that the PJO had already requested documents from Judge Royal, his career clerk, his former deputy, and the Clerk of Court for the Middle District of Georgia. We still do not know the specifics of what the PJO requested. We still do not know what parameters were provided in asking for documents. And we still do not know what was searched. What we do know is that the time-period covered by the curated documents starts on the day that Ms. Clark announced her pregnancy, intentionally omitting everything from the first six months of her clerkship, which would be highly relevant to her complaint. We also know that, despite having retired in December 2020, the former deputy was able to contact Judge Royal's chambers and simply ask for certain documents, an opportunity that was never afforded to Ms. Clark and that flies in the face of considerations of judicial confidentiality.

We did not get the opportunity to submit our own discovery requests or access any of Ms. Clark's emails or internal messages or work product. We did not get the opportunity to speak with other witnesses like the former law clerk, part-time law clerk hired around the same time as Ms. Clark's complaint to Judge Royal, or the replacement law clerk hired immediately thereafter. Judge Royal, however, contacted the former law clerk and relayed his version of that conversation during his interview, a practice which would be highly questionable in any other proceeding.

In reviewing the interview transcripts, it was clear that Judge Royal, his career clerk, and his former deputy had all spent a significant amount of time discussing this matter with one another, even going so far as to rely on each other's documents and timelines. The PJO never asked about those internal

⁴ Under the EDR, the PJO is the Chief Judge of the Middle District of Georgia or another federal court judge appointed by the Chief Judge. In Ms. Clark's proceeding, the Chief Judge of the Middle District of Georgia appointed Judge Hall, the Chief Judge of the Southern District of Georgia. I understand that the Federal Judiciary Workplace Conduct Working Group recommended that Formal Complaints be overseen by a PJO from outside of the court where the complaint originated. In Ms. Clark's case, the PJO was from outside of the court where she filed her complaint. Nevertheless, the issues described below regarding impartiality persisted.

conversations or how much of the information each individual provided based on their personal recollection versus the recollection of the collective. I had no reason to believe that the PJO had been trained in how to conduct this investigation in a fair or impartial way.

At the end of Ms. Clark's interview, I asked the PJO how things would proceed from there given that the EDR Plan did not provide any specific guidance regarding a party's ability to conduct discovery. The PJO said that he would "send out a schedule and let [us] know what [he]'ll be seeking in terms of input and timeframe for any responses." The PJO never provided any schedule or further information. Instead, the PJO issued a proposed decision. In response, we submitted Ms. Clark's factual and procedural objections, only a handful of which were even mentioned in the final order – and then, only to dismiss them outright.

The proposed written order and final written order were, in essence, summary judgment motions. But unlike any summary judgment motion I had ever encountered before, they were based on unsworn interviews and gave weight to the testimony of one witness over another despite the inconsistencies between them. We received the transcripts less than two weeks before the PJO issued the proposed written order and had no opportunity to effectively rebut any testimony.

The entire process – conducted via email through an "EDR Coordinator" – was shrouded in secrecy, making it ripe for abuse. There was correspondence between the PJO and Judge Royal that we did not receive a copy of, only learning of it for the first time when it was attached as an exhibit to the final written opinion issued by the PJO. The absence of rules or explanation of rights regarding discovery means a judicial employee does not know what they can and cannot do. The lack of any docket for EDR complaints makes it impossible for anyone to rely on precedent.

On July 23, 2021, we filed an appeal to the Eleventh Circuit Court of Appeals. Briefing on the appeal concluded with Ms. Clark's surresponse on October 8, 2021. Since that time, we have not received any communication from the Eleventh Circuit.

The process contains too many flaws to effectuate real justice or to serve as a meaningful check on the judiciary. It's almost as if the process is created entirely from scratch for each complaint, without any of the due process protections or procedural mechanisms available to any litigant that appears before a federal court. The irony is that the PJO, who is a federal judge with his own docket, applies those processes and procedures every day in other cases; however, Ms. Clark did not receive even the benefit of a case schedule.

Lack of Meaningful Confidentiality – Risk of Retaliation

Without meaningful confidentiality – and consequences for breaching that confidentiality – any judicial employee who pursues a claim runs the risk of retaliation. While some may scoff at the idea that judges would retaliate against employees, one need only read the interview of Judge Royal to understand not only the anger and offense taken, but also the retaliatory animus. Judge Royal does not hold back in talking about Ms. Clark's "devious" and "corrupt" action in bringing her claims – the very same type of claims addressed in his courtroom on a regular basis. Judge Royal goes on to state that he discussed this matter with others in the courthouse, including other judges, and "nobody at [his] courthouse wants her back."

These comments are deeply troubling for numerous reasons. First, there is nothing devious or corrupt about using the procedures created by the judiciary to report misconduct, even if Judge Royal disagrees with the merits of Ms. Clark's case. Comments like these can only stifle others who may want to report misconduct. Second, Judge Royal made these comments in the context of a formal

proceeding before another federal judge. That the PJO did not question the propriety of these comments or the potential risk of retaliation—which the EDR Plan also prohibits, at least on paper—is highly concerning. Third, the fact that Judge Royal discussed the EDR complaint with others in the courthouse—including other judges who do not appear to be related to the case—is in and of itself appears to be a violation of the EDR policy. Fourth, Judge Royal admitted to violating the confidentiality of the EDR process in an interview with the PJO and the PJO did not address that violation in any way or express concern with how this might constitute retaliation.

Not only does the employee bringing the claim run the risk of retaliation, but also employees who are interviewed as part of any investigation run that risk as well. There is no protection whatsoever for these employees. If an employee witnesses discrimination, harassment, or retaliation, that employee could themselves be the subject of retaliation for speaking about it. These concerns are why the functions of investigation and adjudication are typically separated in our legal system; however, they appear to be of no concern in administering the EDR Plan to employees that work within that system.

Not only do judicial employees run the risk of retaliation; their representatives do as well. When I took this case, one of my first questions was where the claim was pending, because I was worried about the impact on my other clients or my own legal career. While I initially didn't think much of pursuing a claim in Georgia, I now wonder what the Eleventh Circuit Court of Appeals must think of me, particularly given that this appeal is likely the first time they've heard my name. Ideally, these matters would be handled by an independent office. And under any circumstance, one would hope that the EDR Plan's language concerning retaliation would be taken more seriously.

Complete Lack of Impartiality

This complaint involving a judge from one district was referred to a judge from another district within the same circuit. This did not insulate this process from bias. From the discovery process through the final order, the entire process has been fraught with what are essentially ex parte communications between the PJO and the employees of the Middle District of Georgia who are the subject of Ms. Clark's complaint. Any other litigant in any other action would have filed a motion to recuse the PJO. Even now, we ask judges to recuse themselves when they own stock in a company – how can we not insulate this process that has a significantly more direct impact on the legitimacy of the judiciary?

At the conclusion of Ms. Clark's interview, I initially felt reassured when the PJO informed us that he would issue a schedule and some guidance. He went so far as to say that “there probably would be a fair amount of disputed facts in this case” when discussing the possibility of a hearing. Despite those statements, he entered a proposed written order without issuing a scheduling order, without allowing Ms. Clark to pursue any discovery, without giving Ms. Clark the opportunity to request a hearing, and without holding a hearing. He then issued a final written order over Ms. Clark's factual and procedural objections.

There were several questions of fact that, in any other litigation, would have precluded the entry of summary judgment. From the career clerk's admission that she was “infuriated” to the patriarchal comments that permeate the interviews of Judge Royal and his former deputy, there are questions about the motivation for rescinding the extended clerkship and ultimately terminating Ms. Clark's employment. In any other litigation, the parties would have been permitted to engage in discovery to further flesh out statements like that of Judge Royal saying that when Ms. Clark returned from leave they would “just kind of put her out to pasture[.]”

At minimum, I cannot imagine a tribunal entering summary judgment – especially without discovery – where the employer admitted on the record that the day after an employee complained of discrimination, the employer began looking for the employee’s replacement. That seems particularly true when that employer has already offered the employee a two-year extension because of the employee’s work.

At the outset of every interview, the PJO explained the process of the interview and what he would do with the information and documentation. Notably, at the outset of his interview of Judge Royal, the PJO did not provide any such guidance. Instead, he and Judge Royal immediately launched into discussion, as if they already had a separate conversation. As the interview progressed, the PJO interceded at times to guide Judge Royal’s statements in a particular direction, highly unusual for a purportedly impartial investigation.

Lack of Effective Remedies

Virtually every other employee in the country – especially those who work for the federal government – have a mechanism for addressing workplace harassment/discrimination and retaliation. The laws designed to protect employees from discrimination and retaliation do not apply to the federal judiciary. The EDR talks about those laws and dismisses their applicability, but then tells the presiding judicial officer to look at them as a “guide.”

Under normal circumstances, an employee would be entitled to back pay, front pay, compensatory damages, interest, and attorney fees. Under the EDR, the employee might be entitled to – at most – some amount of back pay. This discourages an employee from pursuing a claim since there is effectively no upside and the downside is high: to do so is tantamount to career suicide. It also makes it even more difficult to obtain legal representation since pursuing a claim on behalf of an employee of the judiciary can also be career suicide. The judicial employee needs to essentially be independently wealthy or hope to obtain pro bono representation.

In conclusion, this process undermines the legitimacy of the judiciary by holding the judiciary to a completely different standard. Not only is the standard applicable to the judiciary different from any other employer, the judiciary is fully aware of the standards that apply to all other employers because the federal judiciary is charged with resolving those disputes. In allowing the judiciary to operate as its own investigator and arbiter, there is no meaningful path for a judicial employee to make a confidential complaint, obtain an independent investigation of that complaint, and, if dissatisfied with the outcome of that investigation, pursue their claim through the means available to virtually every other employee.

Respectfully,



Michelle Cohen Levy