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Judith L. Lichtman
Women's Legal Defense Fund

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Hot Topic "Future Worker
Management"

WOMEN'S LEGAL DEFENSE FUND

Oral Statement of Judith L. Lichtman, President,
Women's Legal Defense Fund

on Alternative Dispute Resolution

Before the Commission On the Future of Worker/Management
Relations

September 29, 1994

Good morning. I am Judith Lichtman, President of the Women's Legal Defense Fund, and I am pleased to have the opportunity to present testimony before you today on alternative dispute resolution. WLDF is a national women's advocacy organization that has worked since its inception in 1971 for strong antidiscrimination laws and policy, designed to guarantee all women -- white women and women of color -- the ability to participate in a workforce, and society, free of invidious discrimination. As part of our efforts, WLDF monitors the enforcement of antidiscrimination provisions by the EEOC and other agencies and advocates policies that strengthen women's economic status.

We join with the other women's groups here today to encourage the Commission to pursue its stated objective of reducing employment disputes, not by creating a new alternative dispute resolution system for EEO claims, but by strengthening the legal rules and the enforcement of those rules that prohibit employment discrimination. A strengthened system of antidiscrimination law, including a full panoply of remedies and

swift, sure enforcement, is the best way to reduce discrimination in the workplace. Rather than trying to dilute the deterrent value of stiff monetary penalties imposed on discriminatory employment practices, we should create more incentives for employer compliance through improved, rigorous and effective enforcement of the laws. We in the women's rights community have fought long and hard for our current public enforcement schemes; we are not willing to forfeit the rights we've only so recently gained -- such as jury trials and compensatory and punitive damages -- in exchange for a new system that allows employers to avoid such sanctions for their unlawful acts. We therefore do not recommend, and indeed would strongly oppose, the creation of any system to resolve discrimination complaints that undermines these hard-won sanctions.

Existing laws and enforcement mechanisms can be strengthened in a number of ways to create greater incentives for employer compliance, as well as stronger protections for individual workers. As our joint testimony advocates, labor laws should be changed to improve the ability of employees to form strong and effective unions, which give women workers greater bargaining power, reduce the incidence of employment disputes, and can represent employees when disputes do arise. These changes could include the recommendations made by the AFL-CIO in its testimony before this Commission on September 8, and should certainly include measures to insure that the contingent workforce does not continue to be relegated to second-class status.

In addition, the Equal Remedies Act, a law that would eliminate the caps imposed by the Civil Rights Act of 1991 on compensatory and punitive damages available to victims of discrimination, must be enacted. These caps are unfair because they apply only in cases involving discrimination on the basis of gender and disability. And they are arbitrary because their limits, based on the size of the employer, do not link employer liability with employer culpability, and thus reduce the incentive for employers to take proactive steps to end discrimination against women in their workplaces.

Alternative dispute resolution, if properly limited, may well have some role to play in the fight against discrimination. While we are committed to strengthening the existing system of legal remedies and enforcement, we recognize that employers and employees often prefer to resolve discrimination complaints through some form of ADR, and that the enforcement agencies themselves sometimes practice some form of ADR to resolve disputes. Such uses of ADR may well be beneficial to employees, by providing them with less costly, quicker, and more accessible methods for resolving their disputes with their employers.

However, we remain very concerned about the potential for abuse of ADR created by the imbalance of power between employer and employee, and the resulting unfairness to employees who, voluntarily or otherwise, submit their disputes to ADR. These concerns are obvious if the process is controlled unilaterally by employers, such as when employees are required to sign mandatory arbitration clauses as a condition of employment; union

representation may greatly reduce this disparity. Furthermore, ADR may result in lower awards than litigation; for example, it is our understanding that complainants using the EEOC's pilot mediation program have received lesser average backpay awards than complainants who go through the usual EEOC process.

Some of these concerns may be alleviated by the implementation of safeguards that may vary with the form of ADR used. For example, due process concerns such as notice, discovery, and written decisions, are more relevant when the ADR mechanism includes a decision-maker such as an arbitrator. Parity of bargaining power becomes a paramount concern in forms of ADR in which the parties are assisted in coming to their own agreement, such as mediation. Regardless of the particular ADR mechanism used, and regardless of whether a private company or a public agency administers the process, any resolution of a discrimination claim that does not include appropriate safeguards should be unenforceable. There is precedent for this approach under the Age Discrimination in Employment Act, which allows employees to waive their right to sue for age discrimination only in carefully proscribed circumstances, and requires employers to prove that such a waiver was properly obtained before an employee will be prevented from bringing a lawsuit.

In conclusion, we share the Commission's concern that the present system of resolving employment disputes can be costly, time-consuming, and inaccessible for many employees, and we recognize that ADR, if carefully controlled and circumscribed, may have a beneficial role to play in enhancing workplace

satisfaction. But the primary cause of disputes over employment discrimination is not employee litigiousness; the cause is discrimination itself. By strengthening our laws that prohibit discrimination and mandating tough enforcement of those laws, discrimination in employment -- and thus, litigation of employment discrimination disputes -- will certainly be reduced.