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ABSTRACT

This document gives in broad outline the contours of the notion of affirmative goals and timetables, as adopted in the Four Agency Agreement developed by the Justice Department, EEOC, the Department of Labor, and the Civil Service Commission. Two appellate court decisions dealing with the issue of affirmative hiring relief are discussed. (MJM)

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U. S. DEPARTMENT OF JUSTICE

BEFORE

FEDERAL BAR ASSOCIATION CONVENTION

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"ADMINISTERING A SOLUTION--GOALS VERSUS QUOTAS"

Good Afternoon.

I appreciate the opportunity to be here this afternoon to participate in this discussion on goals versus quotas, a subject which has attracted great attention in the areas of equal employment opportunity and college admissions.

As all of you know, the concept of specific numerical hiring or promotion obligations, and the uses to which that concept has been put by various courts and executive enforcement agencies, have been the subject of considerable controversy--and growing resentment--in various segments of society. Much of the resentment is, I believe, a product of misunderstanding of what is involved. So I would like to describe for you the efforts we have made in the federal government to define the "goals and timetables" concept, and to fix for ourselves as enforcement agencies the permissible limits within which this particular device may be used.

Almost two years ago, the Equal Employment Opportunity Coordinating Council, which was created

by the Congress in the Equal Employment Opportunity Act of 1972, undertook as one of its first substantive pieces of business the drafting of a uniform set of guidelines governing the uses of the "goals and timetables" devices. The product of that effort is the so-called Four Agency Agreement executed on March 23, 1973, by the Justice Department, EEOC, the Department of Labor, and the Civil Service Commission--the four federal agencies with operating authority in the field of equal employment.

The immediate concern of the Four Agency Agreement was what some perceived to be conflicting requirements of merit selection systems and affirmative numerical hiring obligations. The Agreement addressed itself primarily to public employers, newly covered by Title VII under the 1972 Amendments. But the policies and distinctions drawn in the Agreement are applicable to the private sector as well, and bear careful consideration.

The central thesis of the Four Agency Agreement is that there is no necessary conflict between a system of goals and timetables on the one hand, and a system

of hiring and promoting on the basis of ability to succeed on the other. I say that there is no "necessary" conflict. But harmony between affirmative action and merit hiring depends entirely upon two things: Some precision of thought in understanding what each of these principles is designed to achieve, and a little care in adhering to these principles in the actual hiring and promotion practices. A careful resolution of these apparently conflicting principles is a role that we as lawyers, above all, must play if the requirements of law and a good policy are to be met. And certainly there is no reason that we cannot do so more successfully: every day we as lawyers must translate into action legal distinctions and principles more complicated than those involved in affirmative action and merit system fields.

Unfortunately, however, too many employers and their counsel are slipping in their adherence to sound legal distinctions. As a result of this slippage, myths about the law requiring quotas actually begin to control employers' behavior, and resulting abuses sadly begin

to characterize the entire affirmative action concept.

What are the characteristics of illegal reverse discrimination and compromises of merit hiring which we typically refer to as a quota system? What are the characteristics of a lawful and sensible system of affirmative action designed ultimately to do nothing more than serve the most fundamental concept of the common law--provide remedies where rights have been denied?

The major complaint about affirmative action today is what is seen as an inflexible requirement to hire a fixed number or percentage of minorities or women regardless of realistic assessments of the vacancies in the employer's work force, regardless of the availability of interested and qualified minorities and women to fill the set number of those positions, and regardless of the availability of equally or better qualified white male applicants who might also apply for the same jobs. This kind of system, it is pointed out, will inevitably lead to the hiring of unqualified or lesser qualified people, thereby lowering standards of performance, mocking merit as the basis for advancement, and violating

the spirit and letter of the Constitution itself by discriminating against persons--in this case white males--solely on the account of their race or sex.

If this system were actually required by the law, something would be wrong with the law, and the resentment which occasionally arises today about affirmative action would be both understandable and justified. But the law does not require employment behavior of this kind, and anyone who engages in it is either misunderstanding what the law requires, or petulantly indulging excesses in a sloppy form of "affirmative action with a vengeance."

If this rigid system--which we call a "quota system"--is not required, what is? The characteristics of a lawful and sensible system of numerical objectives--which we have called a "goal system"--needs to be examined. (Incidentally, attaching the word "goals" to a lawful system is not a semantic trick to identify a rose or a quota by some other name. Frankly, it does not matter what names we give to what we have described as a quota system and a goal system. Call them what you wish--the alpha process, the beta process, or something else. What

matters, of course, is how the systems operate, and the real, not just semantic, distinctions between them.

First, in a goal system, the size of the numerical objective which the employer will work toward should be fixed based on a realistic estimation of the number of vacancies expected, and a realistic estimation of the number of qualified applicants of the relevant group who are available for and interested in the particular jobs in question.

When the goal has been selected through this process, the employer's obligation is to do his best to achieve it. But doing his best does not mean hiring unqualified applicants. Nor does it mean hiring less qualified applicants <u>if</u> the standards for measuring qualifications are truly valid--that is, if they really predict the job applicant's ability to do the job. That has become a big "if," as you know. But it is a legitimate question, and the need for valid selection criteria is not a legalistic "Catch 22" designed to eliminate all tests or selection criteria

in order to pave the way for quota hiring. More on tests in a moment.

Unlike quotas, a goal will help the employer to focus on process, not just arbitrary results.

A meaningful goal can be set only if the employer realistically examines his vacancies, his hiring practices, and his potential for fair employment gains. In this sense, goal setting is an inducement to adopt sound employment practices, and is not a short-cut end in itself which, if reached by any means, serves the law or, for that matter, his enterprise.

A goal also serves as an objective to be reached, but unlike quotas, a goal should not become carved in stone. Changing circumstances beyond the employer's control, or estimations which prove through experience to have been unrealistic when made, can impair an employer's ability to achieve a goal regardless of his good faith efforts to do so. The key here, and one of the major distinctions between the use of a goal which is permissible and the imposition of a quota which is not, is flexibility. If the employer's goal has been realistically set, he is expected to do his

best to achieve it by using fair, non-discriminatory processes, and thereby achieving the elimination of unlawful exclusion from his work force. But if he does his best, and fails nevertheless, he ought not be sanctioned for his failure. To be sure, failure to meet such goals ought to prompt a critical re-examination of the goals, and a search for alternatives or modifications which might prove more effective. But it ought not, without more, provoke sanctions against the employer.

By contrast, a system where the numerical or percentage goals themselves become the object of the exercise, where failure to achieve the required numbers would subject the employer to sanctions regardless of what his efforts had been, or how realistic his expectations had been, would constitute an unlawful quota.

I mentioned that the flexibility inherent in a properly constructed system of goals was one of the major distinctions between that system and a quota system. The other principal distinction is suggested by the first. A fixed, inflexible system of quotas could require an employer to hire people who are not qualified to perform

the jobs he is trying to fill. Such a result would, of course, be inefficient, unfair, and unlawful in the effort to end the effects of prior unlawful exclusion. Again, both the Four Agency Agreement and the courts which have dealt with this issue have made clear that no permissible system of affirmative goals and timetables can require an employer to hire unqualified applicants.

Of course, the whole area of permissible ways and means for measuring qualifications, implicit in what I have just said, is itself the subject of debate, as Mr. Goodman's remarks this morning suggested. I will not attempt to cover the ground that he covered again, but I would like briefly to describe for you the position of the Four Agency Agreement on the question of measuring qualifications.

As I said, both the courts and the federal executive agencies working in this field have recognized employers' needs to be free to hire only qualified applicants. But continued exercise of that appropriate discretion carries with it the obligation on the part of employers to use criteria which do in fact measure qualifications--that is, that they validly predict successful performance on

the job. A corollary of this obligation is that where an employer wishes to use a selection device to rank order applicants, and intends to select in accordance with the rank order, he must be willing to show that the selection device validly predicts relative likelihood for successful performance among a group of candidates, all of whom are "qualified" in that they meet basic qualifications. This standard can be a difficult one to satisfy, particularly when it is used to select for entry level jobs requiring only general or very basic skills.

I have so far attempted to give you in broad outline the contours of the notion of affirmative goals and timetables, as adopted in the Four Agency Agreement. Before I conclude I would like to mention two recent appellate court decisions dealing with the issue of affirmative hiring relief.

The Fifth Circuit has recently had occasion to consider the efficacy, propriety, and constitutionality of affirmative numerical hiring relief in two cases challenging the hiring practices of the state police

forces of Mississippi and Alabama. I think those opinions, when read together, demonstrate both that the courts are coming increasingly to consider affirmative hiring relief as not merely appropriate, but required under some circumstances, and that, while recognizing that necessity, courts will nevertheless continue carefully to safeguard the constitutional and proprietary interests of employers and other affected employees or applicants.

In Morrow v. Crisler, the Fifth Circuit sitting en banc was faced with an undisputed finding by the district court that the Mississippi Highway Patrol had unconstitutionally excluded blacks from virtually all jobs on the patrol. The district court had ordered a variety of changes in the recruiting and hiring practices of the patrol, but had declined to order specific numerical goals. The Fifth Circuit, with the benefit of several years' experience under the district court's decree before it, held that the relief ordered by the district court had been insufficient, and that the district court's obligation was to fashion a decree "which will have the certain result of increasing the number of blacks on the Highway Patrol."

Leaving no doubt what it had in mind, the appellate court went on to say that "it will be incumbent on the district court to order some affirmative hiring relief," with those affirmative obligations to last until the district court "is convinced that the measures undertaken by the Patrol effectively offset the effects of past discrimination." The court pointed out in this connection that there was no requirement that the Patrol mirror the population, but placed on the Patrol the burden of demonstrating that affirmative relief was no longer necessary.

In the second case I want to mention, involving the Alabama State Police, the district court had ordered affirmative hiring relief, the constitutionality of which was challenged on appeal. The Court of Appeals rejected contentions that the affirmative hiring relief required discrimination against white applicants, and that it required the patrol to appoint less qualified black applicants before more qualified white applicants. The court disposed of these contentions by pointing out that the selection procedure previously used in Alabama

had itself been unlawful, and there could therefore have been no constitutionally protected "right" to employment vested in those who had qualified through its use. In the words of the Circuit Court, "Until the selection procedures used by the defendants here have been properly validated, it is illogical to argue that quota hiring produces unconstitutional 'reverse' discrimination, or a lowering of employment standards, or the appointment of less or unqualified persons." I should note that Judge Clark, in writing for the Court of Appeals, used the word "quota" to describe the affirmative hiring decree under review, but his opinion makes clear that the hiring of unqualified applicants could not be required. And it was assumed, both in the district court and in the court of appeals, that the affirmative relief would apply to filling of actual, existing trooper vacancies, so there was never any question of hiring unneeded people simply to meet a goal or quota or whatever one might call a specific numerical level of employment. Thus, while Judge Clark speaks of "quotas" and "color

conscious hiring," upon examination one can easily see that the system approved in his opinion has the characteristics I described earlier of a system of goals and timetables.

The device of specific affirmative hiring obligations, both those undertaken voluntarily and those ordered by courts, has now been a part of equal employment opportunity long enough to permit some assessment of its usefulness and some analysis of its weaknesses. The Four Agency Agreement represents an attempt to identify and eliminate some weaknesses, and I think the appellate opinions I have described, while soundly ratifying use of the concept, were also careful to build in safeguards against its misuse. When properly safeguarded, and when administered in the proper spirit, the use of numerical goals can be an effective tool in the continuing effort to eliminate all remnants of employment discrimination. What we need now is the same care and devotion to the law and its important distinctions that we daily apply to other fields of law. The importance of equal employment opportunity to ourselves and our country deserves no less.

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