Commentary

Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!

Clarence Thomas*

Given all the media hoopla over the Supreme Court's recent approval of racially and sexually defined employment goals and timetables,[1] one would think that a weapon of awesome power and broad scope had been added to the enforcement arsenal of the Equal Employment Opportunity Commission [EEOC or the Commission].[2] I am sorry to disappoint you, but the availability of goals and timetables will not mean the end of employment discrimination. Goals and timetables, long a popular rallying cry among some who claim to be concerned with the right to equal employment opportunity, have become a sideshow in the war on discrimination. The vast majority of all charges of employment discrimination now filed with the EEOC involve violations for which goals and timetables are not

* Chairman, U.S. Equal Employment Opportunity Commission. J.D., Yale Law School, 1974. The views expressed in this article do not necessarily represent EEOC policy. The Commission is a collegial body, generally composed of five members, which adopts policies by majority vote. I wish to thank Paul Bogas for his assistance in the preparation of this article.

1. A "goal" is a numerical target, usually expressed as a percentage, for the hiring or promotion of persons of a particular group. "Timetables" are the deadlines for reaching the numerical goals. Goals and timetables are sometimes voluntarily adopted, sometimes included in a settlement agreement between an employer and the EEOC, and sometimes imposed by a court after a finding of discrimination.

2. The Supreme Court's approval of race-conscious relief came in four decisions: United States v. Paradise, 107 S.Ct. 1053 (1987) (a one-black-for-one-white promotion requirement for Alabama state troopers, where the state was guilty of a long and shameful record of delay and resistance to a court order to integrate, does not violate the equal protection clause); Johnson v. Transportation Agency, Santa Clara County, California, 107 S.Ct. 1442 (1987) (a state employer may take gender into account and promote a woman over a better qualified man where the job category was traditionally segregated and women were manifestly underrepresented, even though the employer had never discriminated against women); Local 28, Sheet Metal Workers v. EEOC, 106 S.Ct. 3019 (1986) [hereinafter *Local 28*] (a 29.23% nonwhite union membership goal, imposed by court decree after a finding of egregious and longstanding discrimination by a recalcitrant discriminator, was not a violation of the Equal Protection Clause or Title VII of the Civil Rights Act of 1964); Local 93, Firefighters v. Cleveland, 106 S.Ct. 3063 (1986) (Title VII does not preclude entry of a consent decree that may benefit individuals who are not actual victims of an employer's discriminatory practice).

appropriate as a form of relief. Even in those circumstances where goals are available as a remedy, there are generally tougher and more effective alternatives available. Despite my personal disagreement with the Court's approval of numerical remedies,[3] as Chairman of the EEOC, I am nevertheless grateful that the legal debate over goals and timetables has been resolved so that attention can be focused on the facts and the real issues in the EEOC's battle against employment discrimination.

I. Past Uses of Goals and Timetables

To explain why I consider goals and timetables to be at best a relatively weak and limited weapon against existing forms of discrimination, I offer some background on the Commission's enforcement efforts. During the mid- and late-1970s, the Commission concentrated its efforts to enforce Title VII on suits that would affect large numbers of people. The EEOC first obtained authority to litigate employment discrimination suits under a 1972 amendment to the Civil Rights Act of 1964.[4] At that time, blatant discrimination was still prevalent. Many employers openly maintained "No Blacks/Women Need Apply" policies, and many others had moved such practices underground. Minorities and women were not advancing into the workforce in as great numbers as many had hoped.

The Commission, confronted with the enormity of the problem and limitations on its litigation resources, took a "bang for the buck" approach to fighting discrimination. Although Title VII guaranteed *individuals* the right to be free of discrimination in employment, the Commission did not attempt to right every wrong individually, a task for which its litigation machinery was not prepared. Instead, the Commission tried to make quick statistical progress by funneling resources into challenges against the hiring practices of some of the country's largest employers. During this period, suits were brought against such companies as American Tele-

3. I continue to believe that distributing opportunities on the basis of race or gender, whoever the beneficiaries, turns the law against employment discrimination on its head. Class preferences are an affront to the rights and dignity of individuals—both those individuals who are directly disadvantaged by them, and those who are their supposed beneficiaries. I think that preferential hiring on the basis of race or gender will increase racial divisiveness, disempower women and minorities by fostering the notion that they are permanently disabled and in need of handouts, and delay the day when skin color and gender are truly the least important things about a person in the employment context.

4. Pub. L. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e-5(f) (1981)).

phone and Telegraph, General Electric, Ford Motor, General Motors, and Sears Roebuck.

The use of remedies that included racially defined goals and timetables was a necessary consequence of the emphasis on this kind of litigation. Under then-prevailing judicial standards, many of these cases were based solely on statistical disparities. Frequently, all that was known was that members of one group were substantially underrepresented in the employer's workforce. It was rarely possible to say which of the many rejected applicants would have been hired absent discrimination, since many of the jobs in question required only unskilled labor and records of unsuccessful job applicants were incomplete. In such cases, back pay for actual victims was not an available form of relief. Therefore, the Commission would agree to settlements or would seek relief under which other members of the victims' class were given positions as substitutes for those who would have been employed had nondiscriminatory selection criteria been used.

This emphasis on "systemic" suits led the Commission to overlook many of the individuals who came to our offices to file charges and seek assistance. If an individual's allegations did not involve a priority issue or apply to other members of a class, the Commission was unlikely to go to bat for the individual in court.

The Commission has now entered a new stage in its enforcement work. Although systemic litigation is still an area of emphasis for the Commission, it no longer need consume our resources to the exclusion of other types of cases. Many of the very large employers who once appeared to discriminate have been brought into compliance through lawsuits and Commissioner Charges.[5] Other large and sophisticated employers, in response to the publicity surrounding the Commission's efforts, voluntarily changed their discriminatory practices and sought to remedy the continuing effects of those practices. Now, for the first time, the Commission has the luxury and freedom to fight to vindicate the Title VII rights of every individual victim of discrimination. The Commission has committed itself to a policy of seeking full relief for every victim of discrimination who

5. In general, the Commission must receive a charge from someone alleging discrimination before an investigation can commence. In special circumstances, however, a Commissioner may initiate an investigation by filing a charge alleging that an employer is discriminating unlawfully. *See* Equal Employment Opportunity Act of 1972, § 706(b), 42 U.S.C. § 2000e-5(b) (1981). *See also* 29 C.F.R. § 1601.11. This authority is often used to investigate the practices of employers whom the Commission suspects of discrimination, but against whom no one has filed a charge.

files a charge.[6] In addition, the Commission has developed and implemented policies designed to make itself more effective in obtaining necessary information from uncooperative employers, thereby speeding along investigations.[7] The new enforcement stance has already begun to have positive effects. In fiscal year 1986, the Commission filed over five hundred suits—more than ever before—and this year we are ahead of last year's pace.

It is now more likely that the Commission will be able to identify the discriminatees entitled to back pay or placement after making a finding of discrimination in hiring or promotion. Our emphasis on helping all individuals who come to the Commission's offices with claims of discrimination means that in most cases we will know who the victims are. Even many of our larger class action cases are set in motion by complaints filed by individuals rather than by the observation of a statistical disparity. Needless to say, the Commission's ability to produce flesh-and-blood victims is very helpful when we go to court to prove discrimination.

In addition, most of our cases involve discrimination by a particular manager or supervisor, rather than a "policy" of discrimination. Many discriminating employers first responded to Title VII by turning from explicit policies against hiring minorities and women to unstated ones. Now even such veiled policies are uncommon; discrimination is left to individual bigots in positions of authority. As a result, the discrimination that we find today more often has a narrow impact, perhaps influencing only a few hiring decisions, and does not warrant the use of a goal that will affect a great number of subsequent hires or promotions.

II. Weaknesses of Goals and Timetables

Even in those situations in which goals and timetables are available, one should not overlook other remedies in the rush to achieve statistical equality. This is not because goals and timetables are too "tough" a remedy. On the contrary, although group-defined numerical relief is a somewhat imaginative extension of Title VII principles, these remedies are fairly easy on *employers*. In many cases, there are tougher and more effective remedies available.

6. *See* Statement of Enforcement Policy, Daily Labor Rep. No. 177, at D-1 (Sept. 12, 1984); *see also* Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination, Daily Labor Rep. No. 25, at E-1 (Feb. 6, 1985).

7. *See* Investigative Compliance Policy Statement, Daily Labor Rep. No. 135, at A-9 (July 15, 1986).

One of the first things I noticed when I came to the Commission was that often it was the employer who pushed for the use of numerical goals in a settlement agreement. Employers seek such a resolution even before the Commission has shown that it can identify actual victims. The reason for this is obvious. In those cases where numerical relief is possible—that is, where there has been a pattern or practice of discrimination affecting a large class—every identified victim has a right to "make whole" relief.[8] Giving back pay to each actual victim can be quite expensive, but the cost of agreeing to hire a certain number of blacks or women is generally *de minimis*. The employer's expense for "make whole" relief may also include extensive hearings to determine who among rejected applicants would have been hired. There is, in other words, an economic incentive for an employer to settle the case before it becomes necessary to identify actual victims.[9] It should therefore come as no surprise that large firms such as E.I. Dupont de Nemours, Inc. and Potomac Electric Co. and groups such as the National Association of Manufacturers were falling over each other to applaud the Court's approval of affirmative action.[10] The recent decisions will decrease the chances that employers will be forced to hire those persons actually discriminated against (who would be entitled to back pay) and will increase the probability that employers will escape fully addressing discrimination by merely hiring a certain number of blacks or women (who are not entitled to back pay). Moreover, the approval of goals and timetables allows yet-undetected discriminators to create a numerical smokescreen for their past or present violations.[11] The use of affirmative action, rather than a victim-specific form of relief, effectively allows employers to shift the cost of the remedy from themselves to the actual victims of their past discrimination, who never receive the back pay and jobs to which they are entitled, and to the qualified persons who will be deprived of an employment opportu-

8. *See, eg.*, Kraszewski v. State Farm Ins. Co, 41 FEP Cases 1088 (N.D. Cal. 1986).

9. Courts also yield to the temptation to settle for group relief in order to avoid the difficult task of determining exactly who the victims are. *See, e.g.*, Segar v. Smith, 738 F.2d 1249, 1289 n.36 and 1290 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).

10. *See* Berry & Seaberry, "Firms Praise Affirmative Action Ruling," Washington Post, Mar. 29, 1987, at H1.

11. Professor Drew Days III, Assistant U.S. Attorney General for Civil Rights during the Carter Administration, believes that the affirmative action plan in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), was adopted by Kaiser Aluminum and Chemical Corp., at least in part, to "divert attention from the fact that it had long been engaged in discriminatory employment practices that violated federal law." Days, "Fullilove," 96 Yale L.J. 453, 461 (1987). Days notes that previously Kaiser had been forced to pay out $225,000 to blacks who challenged its employment practices at a nearby plant.

nity because someone else was given a preference under the remedial plan.

Goals and timetables are sometimes defended, not as a way of making up for yesterday's discrimination, but as a way of monitoring a past discriminator to ensure that he or she is extending an equal opportunity to today's applicants and employees.[12] However, once again, numerical goals are a relatively ineffective way to accomplish the stated ends. The use of goals to monitor a past discriminator is based on the assumption that, absent discrimination, members of various groups would reap the benefits of occupational opportunities in proportion to their representation in the relevant labor market. When the employer begins to hire members of the victimized group at levels that mirror their availability, it is presumed that discrimination has ceased.

Even granting the dubious assumption that absent discrimination workforce representation of all groups would precisely mirror their availability in the workforce, this policy fails because it allows an employer to hide continuing discrimination behind good numbers. For example, in *Connecticut v. Teal*,[13] the Supreme Court found that while an employer had a good "bottom line" number of black hires, one component of the selection process nevertheless impermissibly discriminated against minorities. A preference for minorities at some other point in the process produced hiring that mirrored availability, but a discriminatory written test[14] had been used that unfairly excluded some blacks from consideration. *As a group*, blacks received their fair share of positions, but the Court recognized that numerical justice did not eviscerate the right of individual black applicants to receive nondiscriminatory consideration. This distinction is not merely abstract. Some better-qualified blacks were eliminated from consideration by the discriminatory test. Giving preference to another, less-qualified, black was little consolation to the qualified person who had been passed over. Moreover, because some of the better qualified blacks were excluded by the invalid test, one can expect that black members of the workforce would be less likely to rise to positions of authority where they could help assure fair treatment and hiring of others.

12. *See, e.g., Local 28*, 106 S.Ct. at 3051 (goals are a "benchmark" against which to gauge whether the employer is now providing equal opportunities). *See also* Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

13. 457 U.S. 440 (1982).

14. For purposes of this analysis, I assume that the test was indeed discriminatory.

In another case, the Commission found that a fire department that until 1978 had employed no blacks had adopted a policy of reserving a number of positions exclusively for black firefighters.[15] The department held to this quota, and even went so far as to replace blacks who left with other blacks, and whites with other whites, presumably under the impression that this was what was meant by equal opportunity. However, lurking behind the numbers was continued discrimination. The blacks hired under the program were subjected to racial harassment and generally did not advance. One black firefighter, who resigned after four years with the department, said that blacks knew they were there "because they need a quota."[16] The policy, far from eliminating consideration of race in the workplace, actually seems to have encouraged the treatment of blacks as fungible and fundamentally unlike non-blacks.

III. Alternative Enforcement Strategies

Reliance on numerical targets to determine whether a past discriminator has foresworn illegal practices will sometimes lead us to overlook continuing discrimination. One alternative monitoring technique would be to require that the employer submit detailed information on all hiring and promotion decisions. Of course compliance with this requirement is tougher on employers than simply reporting the number of group members hired, but it also provides the Commission with more of the information necessary to determine whether each individual is receiving fair consideration. Evaluating this data would also be more burdensome for the Commission than merely checking to see that a quota had been met. However, in my opinion, it is worth the additional effort to have as much information as possible about a discriminator's activities. At the very least, this approach would provide the statistical evidence that is obtained by using a numerical goal, without resort to an explicitly race-conscious remedy.

Goals are also sometimes extolled for their ability to force a recalcitrant discriminator into line.[17] There are, however, tougher means of deterrence. One such approach would be for courts to impose heavy fines and even jail sentences on discriminators who defy court injunctions against further discrimination. I am not aware of any

15. *See* Kurtz, "In N. Carolina Town, Racism Seen as a Daily Reality," Washington Post, Oct. 22, 1986, at A1.

16. *Id.* at A10.

17. *See, e.g.*, Schnapper, The Varieties of Numerical Remedies, 39 Stan. L. Rev. 851 (1987).

case where a court has resorted to such measures, and I must wonder why they are so reluctant. To those of us who consider employment discrimination not only unlawful but also a moral abomination, such measures are altogether fitting.

Another way to stop a recalcitrant discriminator would be for a court to hand over control of an employer's personnel operations to a special master. The special master would handle personnel decisions such as hiring and promotion, and we could be certain that discrimination would be discontinued immediately. The use of special masters is provided for by Rule 53 of the Federal Rules of Civil Procedure, and special masters have been used with great success in some school desegregation cases.[18] Wresting personnel decisions from the employer would be tougher and more effective than using the quotas of which employers are so fond.

The courts have also occasionally looked to goals as a means of eliminating the continuing effects of past discrimination.[19] By this is meant two things: first, an employer's reputation for discrimination may discourage members of the victimized group from applying, even after the employer stops discriminating;[20] and second, the results of past discrimination may cause a facially neutral recruitment or selection procedure to adversely affect persons on the basis of race or sex. An example of the latter would occur where past discriminatory hiring practices had produced an all-white workforce, which was then perpetuated both by the employer's facially neutral policy of giving hiring preferences to family members of current employees and by a recruitment program consisting largely of referrals from current employees.

Although hiring goals are offered as a solution to this problem, they do not directly address it. Numerical targets are expected to encourage the employer to adopt other facially neutral means of recruitment and hiring that will more rapidly lead to integration of the workforce. However, the tougher and more direct approach would be for the Commission to seek specific changes in recruitment and hiring practices. In the example above, a court could require the employer to eliminate the family member preference and place "help wanted" ads in media outlets that reach members of the previ-

18. *See, e.g.*, Hart v. Community School Bd. of Brooklyn, 383 F. Supp. 699, 758-69 (E.D.N.Y. 1974) (appointing a special master and providing a brief history of the use of special masters by courts).

19. *See, e.g., Local 28*, 106 S.Ct. at 3050.

20. *See, e.g.*, International Brotherhood of Teamsters v. United States, 431 U.S. 324, 365 (1977) (recognizing that a history of discrimination can deter potential applicants).

ously excluded group. Employers naturally prefer numerical goals that leave the particulars of how those goals are to be reached to their discretion. As in *Teal*, many employers will no doubt choose a quick fix that meets the target without actually purging discrimination from the process. By seeking specific changes in recruitment and hiring practices, however, the Commission could ensure the institution of a self-perpetuating fair process, not just the several years worth of "equal" results that a quota would yield.

Proponents of affirmative action also argue that goals offer a way to compensate for socially created "headwinds" against achievement by certain groups. For example, many blacks attended schools that were denied the resources provided to schools that whites attended, and many women were shepherded away from analytic curricula. Hiring targets are said to be a way to make up for these disadvantages, or headwinds, created by prior discrimination. One problem with this approach, as Professor Drew Days has noted, is that concentrating on societal discrimination rather than the discrimination by a particular institution "discourages the search for evidence of past discriminatory practices and for remedies tailored to rectify that discrimination."[21]

Moreover, there are more effective and direct ways of addressing the problem. To the extent that some have been unfairly deprived of education, training, and other advantages, the obvious solution is to provide training and education to those who have gone without. Rather than offer the individuals pity or handouts, we should provide them with the tools that may allow them to help themselves. The need for remedial education and training is especially urgent as widespread technological advances and the shift from a manufacturing to a services-based economy increasingly affect the employability of the unskilled.[22] In the future, proper skills will be so important that employment preferences will not be able to compensate for their absence. Moreover, to whatever extent we do want to give preferences to compensate those who have been unfairly deprived of certain advantages, we should do so in a manner that is just. Any preferences given should be directly related to the obsta-

21. Days, *supra* note 11, at 458 n.21.

22. A study completed by the EEOC in 1986 indicated that as Americans experience widespread technological advances and the shift from a manufacturing to a services-based economy, training will become an increasingly essential part of providing realistic equal opportunities. *See* U.S. Equal Employment Opportunity Commission, Project 2000: Job and Training Opportunities for Minorities and Women (1986) (on file with the Yale L. & Pol'y Rev.).

cles that have been unfairly placed in those individuals' paths, rather than on the basis of race or gender, or on other characteristics that are often poor proxies for true disadvantage.[23]

Conclusion

The legal debate over affirmative action, which has so long and so bitterly divided those who are concerned with civil rights, is behind us, and there is now an opportunity for cooperation and progress. As we begin, I would like to caution again that numerically based affirmative action is the easy, but rarely the best, solution. Goals and timetables are easy on employers who want to avoid back pay liability and easy on interest groups that are more concerned with advancing group interests than with the rights of particular individuals. They are especially easy on the Commission in that they offer a remedy that requires no lengthy investigation to identify actual victims, no task of crafting specific changes in an employer's practices, and no burden of evaluating reams of records. Unfortunately, the use of numerical goals is tough on those actual victims of discrimination who are never identified or compensated and on those victims down the line for whom filling a quota never quite adds up to a truly equal opportunity. The temptation to do things the easy way is always great, but before we succumb we should remember these victims, and then choose the tougher course that promises to yield genuine and lasting equal opportunities.

23. *See* DeFunis v. Odegaard, 416 U.S. 312, 320-48 (1974) (Douglas, J., dissenting) (suggesting that law schools evaluate applicants' prior achievements in light of any barriers they faced).