

TESTIMONY OF

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BEFORE THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

REGARDING
“STRIKING A BALANCE:
EEO, DIVERSITY, AND AFFIRMATIVE ACTION”

February 28, 2007

My written statement today is divided into two parts. First, I am resubmitting the statement and appendices--with only minor edits--I sent to the Commission last April when I was scheduled to testify then. There was nothing in there that I wish to retract. Second, I am submitting this brief supplement to that earlier statement, to reflect developments that have occurred over the past eight months or so.

1. *Feedback.* I would like to report that I wrote to all the companies that I listed in my earlier testimony as having illegally discriminatory programs, enclosing that testimony and flagging the programs. None denied having the programs and none took issue factually with the way I described them (although, to be sure, few companies responded at all). None of the companies denied having the programs in any of the news stories I saw either.

I also received a number of supportive emails or letters from employees at various companies, the government, universities, and law firms.

2. *News stories.* *DiversityInc.* reported in a June 2006 article: "Note that 96 percent of The 2006 DiversityInc Top 50 Companies link executive compensation to diversity achievements." A *Wall Street Journal* article in December 2006 said that at one company, for instance, "25% of executives' bonuses are linked to diversity objectives independent of financial performance, such as hiring or training minority staff." Another article early this year reports that that Santa Clara County Bar Association "has also encouraged law firms to provide incentives, such as financial bonuses, for partners to work to improve diversity"; yet another article the same week focused on how the law firm Fenwick & West in Mountain View, California, "closely ties diversity goals to partners' compensation" (partners at the firm are "to make sure the staff assigned to cases is diverse, to make sure staffers of both genders and all races and sexual orientations have significant client contacts, to take part in minority recruiting fairs, to foster good networking opportunities for minority attorneys and to do pro bono work that deals with issues of diversity").

One of the issues I raised in my original testimony was affirmative discrimination in law firms, especially at the behest of corporate clients. This topic has been much in the news. I would cite, in particular, a *New York Times* story about the important work done by UCLA law professor Richard Sander, who has concluded that such discrimination actually hurts the supposed beneficiaries. See Richard H. Sander, "The Racial Paradox of the Corporate Law Firm, 84 *N.C. L. Rev.* 1755 (2006). Another article early this year reports that business members of the Santa Clara County Bar Association's "commission on diversity, such as Intel, Google, and Yahoo, have openly requested their outside counsel better reflect the diversity of the global and local markets" There have also been news stories about the pressure that McKesson Corp. and Wal-Mart have put on their law firms to get their numbers right, including in particular how McKesson cut Gibson, Dunn & Crutcher from its list of firms that would be considered for doing the company's legal work. I mentioned earlier the news story highlighting the diversity efforts of the firm Fenwick & West, the chairman of which acknowledged: "It's also just plain good for business. Our clients care about diversity."

That article also reported that “Other large Bay Area firms, for their part, are putting work into meeting diversity goals.”

3. *Reports, papers, and books.* With regard to Wal-Mart, another company I mentioned in my April testimony, I should mention that the National Legal and Policy Center released a report last month on the company’s policies, criticizing, among other things, its “race and gender quotas” (<http://www.nlpc.org/pdfs/Wal-MartSpecial%20Report.pdf>, page 16).

There was an article in the *Washington Post* on January 15, 2007 about a paper by Cedric Herring of the University of Illinois at Chicago, with parts of the article suggesting that greater diversity leads to greater business success. But, in fact, the study really seems to find only that larger companies tend to be more diverse, which is unsurprising.

Likewise, the title of Scott Page’s new book *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* might lead one to believe that it proves racial and ethnic diversity is good for business, but in fact its claims are more limited than that. Indeed, much of what Professor Page has to say is similar to part III of my April testimony--specifically, that for many jobs diversity of any sort is irrelevant; that in any event it is what he calls “cognitive” diversity that ultimately matters, not skin-color diversity per se; and that employers should “avoid lumping by [racial] identity” and should “avoid stereotypes” (and, of course, Professor Page does not address the legal prohibition on racial discrimination, even when it is said to be justified by believed “cognitive” differences).

4. *Judicial rulings.* On the legal point, I should bring the Commission’s attention to a recent decision by the U.S. Court of Appeals for the Seventh Circuit, *Alexander v. City of Milwaukee*, No. 06-1505 (Jan. 18, 2007). The case, in which the city was found to have illegally discriminated against white males in firefighter promotions, is instructive in a number of ways. Here is the bean-counting this time: “white men were under-represented” and “African-Americans were identified as over-represented”; “although women were slightly over-represented in the command staff and Asians, Hispanics and Native Americans were under-represented, a difference of one individual would reverse the percentages.” The promotion policy’s consideration of race was found not to be narrowly tailored as a constitutional matter (let alone consistent with Title VII), given its “loose and indeed effectively standardless approach.” Of course, if race is weighed too mechanically, *that* violates the Constitution, too; it seems to me, then, that the best approach is not to weigh race at all. Certainly “Race-based preferences must be constructed carefully to discriminate no more than necessary to meet whatever compelling state interest is at issue.” The findings of individual liability for compensatory and punitive damages against the various city commissioners for their discrimination were upheld, since the discrimination at issue was deemed to have violated “clearly established law.”

Finally, indications are that the new appointees to the Supreme Court are likely to make it even less receptive to companies' discrimination. As Chief Justice Roberts observed in his first major civil-rights opinion: "It is a sorry business, this divvying us up by race."

In sum, there's a very simple and straightforward way to separate good and legal diversity efforts from bad and illegal ones: Just ask, Are people being treated differently because of race, ethnicity, or sex?