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RESPONSE

The EEOC Is Meeting the Challenge: Response to David Rose

*R. Gaull Silberman**

In his recent article, *Twenty-Five Years Later: Where Do We Stand On Equal Employment Opportunity Law Enforcement?*,¹ David Rose declares, "The time is ripe for review."² Mr. Rose argues that "effective enforcement of the equal employment opportunity law in the next decade is a necessary, if not sufficient, predicate for the social and economic well being of the Nation."³ From my perspective as Vice Chairman of the Equal Employment Opportunity Commission (EEOC or Commission), I heartily agree with both points. I must take issue, however, with Mr. Rose's assessment of developments in federal equal employment opportunity law over the last twenty-five years⁴ by focusing specifically on the last six years at the EEOC under the leadership of Clarence Thomas. I write to set the factual record straight.

Mr. Rose notes that Clarence Thomas, who became Chairman in 1982, devoted substantial time and effort in his first two years to correcting the bookkeeping and other financial problems of the Commission.⁵ The problems that greeted Thomas were orders of magnitude greater than Mr. Rose suggests. In fact, Thomas did spend two full years making the Commission function, but this task required a great deal more than paying the overdue bills: an entire infrastructure was needed.

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1. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121 (1989).

2. *Id.* at 1122.

3. *Id.* at 1123.

4. *Id.* at 1135-80.

5. *Id.* at 1158.

Thomas's reorganization and management overhaul were underway by late 1984. The EEOC then turned to consider the mission of the agency: how best to eliminate employment discrimination in order to assure equal employment opportunity. The strategies of earlier commissions, including rapid charge processing, goals, and timetables, had proved problematic. The duality of the EEOC's mission to vindicate the rights of individuals and to cure broad-based societal discrimination proved most confounding.

The Norton Commission's solution had been a two-pronged approach to enforcement. As Mr. Rose notes, prong one, rapid charge processing, proved successful in moving thousands of cases and reducing the Commission's enormous backlog of individual charges.⁶ The Norton Commission's second prong was the attack on patterns and practices of discrimination with large, nationwide, all bases, all issues cases, but it never really got started.⁷ Although Mr. Rose correctly observes that as of 1981 the only broad, pattern and practice, systemic case in litigation was *EEOC v. Sears, Roebuck & Co.*,⁸ he fails to mention that after millions of dollars and thirteen years, even that one case ended with a bruising decision critical of the EEOC's sole reliance on statistics.⁹

In 1984 the Systemic program spent .5 million dollars with only six cases in litigation when the General Counsel's entire litigation budget was only 3.6 million dollars.¹⁰ Of the top seven monetary settlements that year, only the seventh was litigated by the headquarters' Systemic unit.¹¹ Systemic clearly was an unconscionable drain on EEOC re-

6. *Id.* at 1150. Rapid charge processing required that all individual charges of discrimination be settled without investigation unless they involved novel legal issues or had broad implications.

7. The EEOC has two principal sources of authority to enforce Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253 (1964) (codified as amended at 42 U.S.C. § 2000e (1982)). Section 706(f) authorizes the Commission to file suit based on charges of discrimination from aggrieved individuals or members of the Commission, after certain procedural prerequisites are satisfied. *See* 42 U.S.C. § 2000e-5(f) (1982). Section 707 authorizes suits against "patterns or practices" of discrimination. *See id.* § 2000e-6. Although the EEOC must have a charge of discrimination in order to proceed under Title VII, § 706 authorizes members of the Commission to file charges when they have reason to believe that unlawful employment practices have occurred. *See id.* § 2000e-5(b); 29 C.F.R. § 1601.11 (1988). *See generally* *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984). The EEOC created its Systemic program to develop and investigate commissioner charges under §§ 706 and 707 of Title VII, which typically allege "patterns or practices" of discrimination.

8. Rose, *supra* note 1, at 1151; *see also* *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

9. *Sears, Roebuck*, 839 F.2d at 308-09. *But cf.* *EEOC v. General Tel. Co. of the Northwest, Inc.*, 50 Fair Empl. Prac. Cas. (BNA) 1316 (9th Cir. Sept. 12, 1989) (rejecting the *Sears, Roebuck* approach as placing an undue burden on the plaintiff with respect to establishing the probative-ness of the plaintiff's statistical analysis).

10. Office of Gen. Counsel, EEOC, Financial Records (Feb. 1985) (unpublished document).

11. Office of Gen. Counsel, EEOC, Litigation Tracking System (1985) (unpublished document).

sources. It was ripe for review. Review and restructuring commenced in the summer of 1985 and resulted in a revitalized Systemic program. The following facts taken from 1988 attest to the success of this restructuring: The Commission had 103 cases on its systemic docket in various stages of investigation or conciliation;¹² the Systemic program secured, through compliance, 9,617,935 dollars in monetary relief;¹³ the commissioners signed eleven new systemic charges and approved forty other actions in systemic cases;¹⁴ and twenty-one systemic cases were in active litigation.¹⁵

Systemic cases usually rely on extensive statistical analyses and often involve adverse impact theory. How, therefore, does Mr. Rose conclude that Clarence Thomas's alleged "hostile" views "were sufficient to discourage law suits either to enforce the adverse impact branch of Title VII or to prove purposeful discrimination through the use of statistics"?¹⁶ In fact, Thomas personally has signed nineteen commissioner charges during his tenure.¹⁷ A race, age, and sex discrimination charge against Honda that resulted in a widely publicized settlement¹⁸ and compliance throughout the auto industry¹⁹ was one of the most significant of the commissioner charges signed by Thomas. This result was the sort of change envisioned in section 707 of the Civil Rights Act.²⁰ Moreover, other commissioners signed, and the agency actively investigated, seventy-nine commissioner charges from 1982 to 1989.²¹ In addition, the EEOC prosecuted at least 170 charge-initiated class cases as broad, pattern and practice actions based on statistics from 1985 to 1988.²² Disparate impact theory, pattern and practice

12. OFFICE OF PROGRAM OPERATIONS, 1988 EEOC ANN. REP. 22 [hereinafter 1988 PROGRAM OPERATIONS REPORT].

13. *Id.*

14. *Id.* The 40 actions approved were 19 final decisions on the merits, 7 withdrawals, 9 settlements, and 5 conciliations. *Id.*

15. Office of Gen. Counsel, EEOC, Litigation Tracking System (1989) (unpublished document). The totals for fiscal year 1989 are expected to match or exceed these. *Id.*

16. Rose, *supra* note 1, at 1159.

17. EEOC, Systemic Investigations and Individual Compliance Programs' Fiscal Year 1988 Operating Statistics (internal report to the Office of Program Operations Director James Troy) [hereinafter Systemic Investigations].

18. See, e.g., *Cultures Clash in Japan's U.S. Plants*, Akron Beacon J., Mar. 27, 1988, at A1; see also EEOC, Press Release: EEOC, Honda of America Mfg., Inc. Settle Age Discrimination Investigation (June 1, 1987); EEOC, Press Release: EEOC, Honda of America Mfg., Inc. Settle Title VII Investigation (Mar. 23, 1988).

19. See *supra* note 18.

20. See 42 U.S.C. § 2003-6 (1982).

21. Systemic Investigations, *supra* note 17.

22. These include suits filed by the EEOC based on charges received from the public, charges filed by members of the Commission, or both. One of the most notable charge-initiated class cases prosecuted as a broad, pattern and practice action based on statistics is the Hilton age and sex discrimination case that brought victims a \$38 million jury verdict. The EEOC intervened to pros-

cases, and statistical proof are still alive and well at the EEOC.

Another fundamental development was taking place, however, during this same period. Five commissioners with different points of view unanimously agreed that only through credible, predictable law enforcement could the EEOC fulfill its mission.²³ All charges were to be fully investigated and conciliated, and if that conciliation failed, the EEOC would be prepared to prosecute on behalf of charging parties. Thus, the Thomas Commission has pursued the course that Mr. Rose recommends with respect to investigations since 1984. Policies on enforcement, remedies, investigative compliance, and review of no-cause determinations were issued and implemented. The Thomas Commission also undertook an ambitious public education program aimed at respondents, the bar, constituency groups, and the news media. Each of these policies has been important in changing the culture of the agency within and the perception of the agency without.

This perception obviously is not shared by Mr. Rose. He states: "Although the EEOC now has a less active role in enforcing employment discrimination laws, basic management problems continue."²⁴ Again, facts belie Mr. Rose's statement. In 1988 the EEOC filed a record 555 legal actions, capping seven years of vigorous legal activity.²⁵ Overall, the EEOC resolved 2522 direct suits, interventions, and subpoena enforcement actions from 1982 to 1988.²⁶ While Mr. Rose ignores this remarkable increase in enforcement activity, he does not ignore an increase in the EEOC's chronic charge-driven backlog from 1985 to 1987. Although it is true that this backlog increased over these years, this increase was a direct result of the EEOC's 1984 enforcement policy that mandated complete investigations for all charges.²⁷

Furthermore, "backlog" is a misnomer. In 1988 the EEOC closed approximately 12,000 more charges than it took in.²⁸ The "pending inventory" continues to decline in 1989. At the end of the second quarter

ecute violations of the Age Discrimination in Employment Act (ADEA), Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1982 & Supp. V 1987)), on both disparate impact and treatment theories. See *Brooks v. Hilton Casinos*, 714 F. Supp. 1115 (D. Nev. 1989); *Judge Sustains \$45 Million Verdict Against Las Vegas Hilton in Bias Suit*, [Current Developments] Daily Lab. Rep. (BNA) No. 170, at A-6 (Sept. 5, 1989) (noting the Ninth Circuit's decision to uphold damages on claims of age discrimination, wrongful termination, and breach of contract).

23. EEOC, POLICIES OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (1985) (unanimously adopted Feb. 5, 1985).

24. Rose, *supra* note 1, at 1160.

25. OFFICE OF GEN. COUNSEL, EEOC, A REPORT ON THE OPERATIONS OF THE OFFICE OF GENERAL COUNSEL OCTOBER 1987 THROUGH SEPTEMBER 1988, at 1 (1989) [hereinafter GENERAL COUNSEL OPERATIONS REPORT].

26. *Id.* at 2.

27. See *supra* note 23 and accompanying text.

28. 1988 PROGRAM OPERATIONS REPORT, *supra* note 12, at 32-33.

there were 951 fewer charges pending than the year-end 1988 figure.²⁹ If receipt and closure rates remain the same through the third and fourth quarters of 1989, the year-end pending inventory will be reduced by more than ten percent.³⁰ Moreover, the average processing time has decreased significantly.³¹ Thus, Mr. Rose's statement that few charges are investigated and resolved promptly³² is inaccurate.

Both inaccurate and baffling is Mr. Rose's further comment that few charges are investigated and resolved on the merits.³³ The EEOC's field offices resolved more than 70,700 charges of discrimination during fiscal year 1988.³⁴ Of these, 37,086 were determined on the merits after a full investigation.³⁵

As for management during this period of increased activity, the EEOC's commitment to enforcement, to litigating each cause determination that failed conciliation, made confrontation and resolution of the inherited problems imperative. Chairman Thomas imposed standards of professionalism and productivity throughout the agency, committed resources to investigative training, and, perhaps most important, provided a state-of-the-art computer system. The Office of Management and Budget's 1988 Director's Award to the EEOC testifies to the Commission's success.³⁶

Mr. Rose concludes by recommending that the Commission adopt a scheduled procedure for notifying charging parties of the status of their charges and of their right to obtain right-to-sue letters.³⁷ This suggestion would supplement current notice procedures well, and easily can be implemented by the EEOC because of the Commission's computerization.

A far more exciting prospect for the use of computers, however, is in the area of systemic and class investigation and litigation. This capability comes at a critical time when fewer private class actions are being brought. As Mr. Rose knows from his experiences in the Civil Rights Division of the Department of Justice, private class actions were a cru-

29. Office of Program Operations, EEOC, Second Quarter Report for Fiscal Year 1989, at 4 (unpublished document).

30. 1988 PROGRAM OPERATIONS REPORT, *supra* note 12, at 14.

31. *Id.* In some offices the average processing time is down to 4 to 5 months; laggards take fewer than 300 days. *Id.*

32. *See* Rose, *supra* note 1, at 1174.

33. *Id.*

34. 1988 PROGRAM OPERATIONS REPORT, *supra* note 12, at 3.

35. *Id.* at 34.

36. This award was presented as part of the President's Productivity Improvement Program.

37. Rose, *supra* note 1, at 1173. Specifically, Mr. Rose suggests that the Commission "notify each charging party of the status of the charge every ninety days," and, "after the passage of 180 days or the period of reference to a state or local agency, the charging party should be notified of her right to obtain a 'right-to-sue' letter upon request." *Id.*

cial force in reforming discriminatory employment practices in the early days of Title VII. In 1977, for example, 1138 private class actions were filed—approximately twenty percent of all employment discrimination cases.³⁸ In 1988 only forty-six private class cases were filed—a mere one-half of one percent of all employment discrimination cases.³⁹

Much of this decline might be attributed to developments in the law making it more difficult to maintain private class actions.⁴⁰ Fortunately, the EEOC has established favorable case law making it easier for the Commission to pursue broad class cases.⁴¹ The EEOC filed more class cases last year than ever before. Eighty-two of our two hundred and ninety-nine Title VII cases were class or pattern and practice.⁴² Recent Supreme Court decisions make the EEOC's role even more important in the class action arena. *Wards Cove Packing Co. v. Atonio*⁴³ places a greater burden on the plaintiff to prove class disparate impact. Thus, we expect a greater call on EEOC resources as charging parties look for the complete investigation and rigorous statistical analysis that the Supreme Court now requires and the Commission now can provide.

In conclusion, Mr. Rose correctly links the social well-being of the United States with effective enforcement of nondiscrimination in employment laws.⁴⁴ Mr. Rose also is correct in asserting that the EEOC must play a preeminent role in making effective enforcement a reality.⁴⁵ However, if Mr. Rose reviews the facts from 1985 to the present, he will realize that the EEOC already is playing a major role in enforcing the laws against employment discrimination. The EEOC is meeting the challenge envisioned when Title VII of the Civil Rights Act created the Commission twenty-five years ago and is poised and ready to meet the challenges of the future.

38. Brief for the Equal Employment Opportunity Commission as *Amicus Curiae* at 16, *Black Grievance Comm. v. Philadelphia Elec. Co.*, 690 F. Supp. 1393 (E.D. Pa.), *appeal docketed*, No. 88-1564 (3d Cir. Nov. 10, 1988).

39. *Id.*

40. See, e.g., *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) (limiting the amount of expert witness fees provided by FED. R. CIV. PROC. 54(d)); *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) (delineating standards for class certification under FED. R. CIV. PROC. 23); *Rodriguez v. East Tex. Motor Freight*, 505 F.2d 40 (5th Cir. 1974) (ruling that a consent decree in a prior case did not prohibit class members from obtaining relief in this case), *vacated on other grounds*, 431 U.S. 395 (1977).

41. See, e.g., *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984); *General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980).

42. GENERAL COUNSEL OPERATIONS REPORT, *supra* note 25, at 3.

43. 109 S. Ct. 2115 (1989).

44. Rose, *supra* note 1, at 1169.

45. *Id.* at 1170-73.