

Mr. DAYS. I followed his testimony and I know something about his practices, and certainly he has said here that he is in favor of those techniques, and I do not doubt that response.

Senator HATCH. In the EEOC, under his jurisdiction, they have been forcing business that have not been doing right to use those techniques.

Mr. DAYS. That is correct.

Senator HATCH. Do you disagree with that, Professor Edley?

Mr. EDLEY. No, I do not disagree, I just do not understand his position. I do not understand how he distinguishes his support for that form of affirmative action from his opposition to stronger forms of affirmative action.

Senator HATCH. You mean quotas—

Mr. EDLEY. I do not understand it, but I agree with your statement.

Senator HATCH. You means quotas and preferences?

Mr. EDLEY. No, I mean—no, I don't mean quotas and preferences. I mean more affirmative steps, I mean goals, flexible goals.

Senator HATCH. When I discussed it with him last week, he covered everything except quotas and preferences.

Let me go to you, Professor Lawrence. Do you agree that he basically has been for those type of approaches?

Mr. LAWRENCE. Yes, as far as I am able to determine from his testimony and earlier writings, that the limited approaches he—

Senator HATCH. I presume, from your testimony here today, you have examined his service at the EEOC?

Mr. LAWRENCE. Yes, I did.

Senator HATCH. And certainly, if it stands for anything, it stands for that, plus many, many other things. But under this form of affirmative action, once these steps are taken to widen the applicant pool, and then the actual decision to hire or promote is to be made without regard to race or gender on a nondiscriminatory basis, that has been his position.

I might add that another form of affirmative action goes beyond this. and tell me, if you will, if this is a fair summary: This form of affirmative action takes race and gender into account in the actual selections for training, hiring and promotion. Here the persons preferred for these selections would not have obtained them, but for their race or gender.

Now, this kind of affirmative action is sometimes justified as a voluntary effort to reach some level of racial and gender parity in a job, including, but not limited to jobs where there are few or no minorities or women. Now, here in these cases there is no finding of discrimination against the employer.

The other justification for this form of affirmative action is as a remedy, after a finding that the employer engaged in egregious, persistent, intentional discrimination. Now, the persons who lose out may have greater seniority, as in the *Weber* case, or are regarded as better qualified, even if only slightly so.

Now, Judge Thomas, it is clear from his testimony here and his speeches and efforts in the past, he has criticized this form of affirmative action, and I take it that many in the traditional civil rights leadership favor that type of affirmative action.