The Jack Pemberton Lecture Series

A Tribute to Professor John de J. Pemberton Jr. at the Commencement of the Jack Pemberton Lecture on Workplace Justice*

By WILLIAM B. GOULD IV**

I WOULD LIKE TO THANK the University of San Francisco School of Law, friends, and family for giving me the opportunity to pay tribute to my good friend, Professor Jack Pemberton. I would also like to acknowledge his family, Nancy, Carol, and Jim—some of whom I met in those early days, in the 1970s at Page Street, where Jack lived and where we would so frequently get together.

I also want to reiterate what Dean Brand has said about how significant it is that both Professor Maria Ontiveros and Professor Michelle Travis are following in Jack's wake. I think their commitment to the law school and their involvement in the employment law field is also a vivid testimony to his important work as well.

I think that there are two themes, or two threads, to Jack Pemberton's life that cut through his entire professional career, and in some measure, his personal life as well. The first is teaching. His commitment to and passion for students came full circle: he began teaching at Duke Law School shortly after his graduation from Harvard Law School; the last position he held professionally before going off to the Equal Employment Opportunity Commission ("EEOC") was as a professor at the University of San Francisco School of Law. His commitment to teaching extends even beyond the classroom and beyond students to the practice of law as well. The second

* Based upon remarks delivered on March 15, 2005 at the United States Court of Appeals for the Ninth Circuit.

** Charles A. Beardsley Professor of Law, Emeritus, Stanford University; Chairman of the National Labor Relations Board, 1994–98. I would like to thank Courtney Mascarin of the *U.S.F. Law Review* for her hard work on the footnotes.

overarching theme I think of in connection with Professor Pemberton is a commitment to justice. Thus, it is so important and appropriate that this lectureship on workplace justice be established in his name.

I first came to know Jack when he worked at the EEOC in the 1970s. The major issue then, and it remains a major issue today, was race discrimination. But Jack was also concerned and committed to eliminating sex discrimination, national origin discrimination, and all forms of discrimination. His daughter Nancy has reminded me of Jack's commitment to prohibiting workplace discrimination based on age. Age discrimination during those days—prior to the amendments to the Age Discrimination Act[1]—was such that he was forced to retire from the University of San Francisco School of Law. This mandatory retirement propelled him into a fitting new career at the EEOC where he was able to work on age discrimination in the workplace. Thus, on behalf of so many who know him, for his work and service in the Bay Area and those from far off places like New York, Washington, and Minnesota where his professional career brought him previously, and those who have just admired him from afar, I extend heartiest congratulations to the University of San Francisco School of Law for creating this lectureship in honor of my friend and esteemed colleague Professor John de J. Pemberton Jr. Named for a distinguished lawyer and law professor for more than a half century, the Pemberton lectureship will help to preserve his name and his contributions and thus augment our recollection of him and his work.

Much of my most frequent contact with Jack Pemberton took place in the 1970s—a few years after we became good friends—when we were co-counsel for plaintiffs in some major and furiously fought class actions brought under Title VII of the Civil Rights Act of 1964.[2] In the fall of 1973, just a few weeks after Jack arrived at the University of San Francisco School of Law, my client prevailed in the first employment discrimination punitive damage award. Its size of $4 million with back pay and front pay (it was the first case ever to award front pay) yet to be calculated for 400 employees and an undetermined number of applicants sent shock waves through the country at that time. The defendants immediately retained recently resigned Secre-

1. 42 U.S.C. §§ 6101–6107 (2000).

2. *See* Stamps v. Detroit Edison Co., 365 F. Supp. 87 (E.D. Mich. 1973), *rev'd in part, aff'd in part sub nom.* EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *vacated by* Local 223, Util. Workers Union of Am. v. EEOC, 431 U.S. 951 (1977) (remanding for further consideration in light of International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)); Jones v. Pac. Intermountain Express, No. C-73-2296, 1975 WL 185 (N.D. Cal. Apr. 23, 1975).

tary of State William Rogers to get the verdict overturned. I was fortunate enough to more than counter that move by bringing Jack onboard the plaintiffs' side.

In 2004 this would have been like obtaining Curt Schilling rather than Alex Rodriguez, a simile which would be lost upon Jack. At most, the former Secretary of State would invite Schilling-Rodriguez comparisons only because, as Jack wryly noted in one of our earlier meetings on the appeal, in his Justice Department days (Rogers had been both Attorney General and Deputy Attorney General under Eisenhower) Rogers had appointed most of the judges in the Eisenhower and Nixon administrations. Though it took nearly a decade to do it, Jack gave us that championship in the form of the largest per capita discrimination award ever obtained at that time. (Perhaps it still stands as a record now!) In any event, Jack's litigation savvy and deep understanding of Title VII were the *sine qua non* for our ability to carry the day.

One of my earliest and most indelible memories of Jack in those days is from March 1974, when the defendants were seeking to vacate the entire award before the Court of Appeals for the Sixth Circuit while the appeal itself was pending. Rogers and his firm filed a withering brief to which Jack and I responded. Rogers's position denigrated our theories with particularly choice and scathing language and, in so doing, upset me much more than Jack. Of course, I had more of an intellectual and emotional investment in the case, having tried it on behalf of private plaintiffs in Detroit prior to the appeal. Jack, on the other hand, added just the right amount of experienced detachment and the professional wisdom that comes with it.

The night before my departure for Detroit to put the finishing touches on our work in the local counsel's office Jack said, "Now, Bill, when you get on the plane have a good stiff Manhattan [they were still serving such drinks on commercial airliners in those days], take a deep breath, and reread the defendants' papers with care before you organize the final draft." That avuncular and unflappable behavior often gave me the lift that I, and so many others, needed in those tumultuous days.

We prevailed at the Court of Appeals in Cincinnati that month.[3] As a result of this victory, many Black workers in Detroit began to obtain promotions and hiring opportunities long denied. Jack Pemberton was a good and wise co-counsel throughout that entire

3. *See* EEOC v. Detroit Edison Co., 515 F.2d at 317.

case and, indeed, other cases where the luck of the judicial draw was not to be with us. Jack and I worked assiduously to put together a brief attacking "last hired, first fired" in the trucking industry.[4] This involved racial and national origin discrimination here in the Bay Area and was an even more attractive case on the facts and the merits than that which had been heard in Detroit.[5] We were able to get the Court of Appeals for the District of Columbia to void a consent decree entered into between the U.S. Justice Department, the trucking industry, and the International Brotherhood of Teamsters and its locals.[6] But a very different judge in San Francisco produced a different result on our "last hired, first fired" theories and our attempt to get additional seniority credits for Black and Mexican-American applicants and local drivers.[7]

Still, these were heady and exciting days in the employment discrimination arena coming in the wake of the Supreme Court's unanimous decision creating disparate impact theory in Title VII cases in *Griggs v. Duke Power Co.*[8]—a case that Chief Justice Burger described in a CBS interview as the most significant decision issued by his Court.[9] This period also witnessed the rise of class actions, monetary relief goals, and timetables for hiring and promotion.

I first met Jack at the beginning of what seemed to be a new and exciting era in early 1971 when he was Deputy General Counsel of the EEOC in Washington. The Commission had decided to hold hearings on discrimination in the utility industry, the defendant in our Detroit case being part of the electric power industry. I think that Jack was very impressed with the plain spoken authenticity of our witnesses in those hearings, and at the conclusion of the hearing he walked down from the platform where he had sat with the Commissioners and spoke to both our witnesses and me. This brief and cordial discussion was really the beginning of a friendship that could flourish more when we both arrived on the West Coast within a year of one another.

During the 1970s, we had a whole host of meetings about our litigation and moot court oral argument sessions that Jack organized

4. *See* Jones v. Pac. Intermountain Express, 536 F.2d 817 (9th Cir. 1976).

5. *Compare id.* at 819, *with* EEOC v. Detroit Edison Co., 515 F.2d at 306.

6. *See* United States v. Trucking Employers, Inc., 561 F.2d 313 (D.C. Cir. 1977). Even though I am the only counsel mentioned—I argued the case to the Court of Appeals—Jack Pemberton was part of the team for intervenors.

7. *See Jones*, 1975 WL 185.

8. 401 U.S. 424 (1971).

9. *See* WILLIAM B. GOULD IV, BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES 92 (Cornell Univ. Press 1977).

at the University of San Francisco. In both the '70s and '80s Jack and I combined our employment discrimination law seminars and we met each week alternating between Stanford and the University of San Francisco. From our work together on the litigation front, I already knew that Jack possessed a first-rate legal mind. These seminar sessions, however, showed me that he was a very fine teacher indeed and put on display, again, the humanity and warmth towards students, as well as others, that sometimes the properly credentialed—Jack, after all, was both a Harvard Law School graduate and an editor on the Harvard Law Review—do not always possess in abundance.

Professor Pemberton's teaching put on display for me and the students a courtliness of which I was previously aware and a sympathetic helping hand toward students. His raw intelligence and ability as a lawyer were the characteristics that account for the fact that Jack was the first to receive a Most Valuable Teaching Award at the University of San Francisco School of Law. This reiterates a few of the basic themes that run throughout Jack's entire professional life.

From the very beginning of our friendship at the conclusion of the EEOC utility industry hearings in Washington, I had a sense of Jack's deep commitment to attacking racial and other forms of injustice in our country. His commitment to the objective of equality was always unqualified. But what I did not know much about at that time was the vast track record that he had compiled just the previous decade before we met in the 1970s.

Of course, I was always aware that Jack Pemberton was the executive director of the American Civil Liberties Union ("ACLU") in the 1960s. Our relationship in the 1970s with that organization that funded our litigation under the leadership of Legal Director Mel Wulf was considerable, and Jack provided me, and others, with valuable insight into the ACLU's inner workings and its personalities.

The job of Executive Director of the ACLU not only made Jack more knowledgeable and objective than just about anybody around regarding the behavior of America's premier civil liberties organization—it also put Jack on the firing line with most of the important national policy issues of the 1960s. Jack, I subsequently discovered, was frequently called upon to develop positions and to issue statements—many of which were frequently quoted by newspapers like the *New York Times*—on issues as diverse as loyalty testing,[10] the right of troops

10. *See* Peter Khiss, *Loyalty Testing on Docks Scored: Coast Guard is Questioning Sea and Pier Applicants*, N.Y. TIMES, May 22, 1963, at 18.

to engage in political expression,[11] the prohibition of the death penalty,[12] as well as the *Miranda v. Arizona*[13] decision involving the rights of criminal suspects. Meanwhile, Jack was increasingly drawn to the civil rights struggle involving race in the 1960s and was responsible for involving the ACLU in that debate as well. Jack was among the first to see the connection between the so-called civil rights issue and the more traditional civil liberties matters that the ACLU had been involved in since its inception. Illustrative of this work was his prompt protest of the FBI investigation of Martin Luther King, Jr.

All of this seems so obvious and clear today in 2005—but I assure you that it was not so in the 1960s—Jack was pushing this forward.

Jack was very much at the forefront of the other major issues of the time, such as protests against the Vietnam War in the '60s and early '70s that involved free speech issues. Here also the ACLU became increasingly involved under Jack's tenure.

Jack was intimately involved with the events arising in the wake of the decisions in which the Court first proclaimed adherence to freedom of association—*NAACP v. Alabama*[14] and its progeny. His work was to bring the ACLU beyond its valuable support of free speech, association, religion, and procedural rights and into the struggle for racial equality. He saw the connection between freedom of association and the pursuit of racial equality. For instance, when attacking New Jersey's "harassment and intimidation"[15] of its New Jersey affiliate that distributed leaflets to get evidence about the destruction of Black-owned shops during the Newark riots, the State's Deputy Attorney General said that it was "shocking that the A.C.L.U. could descend from its conventional function of individual rights to inciting to riot."[16] Said Jack Pemberton in a response both resolute and rapid, "[T]here is no doubt that the flyer which the ACLU distributed is fully protected under the First Amendment guarantees of freedom of speech and press."[17]

Finally, it is obvious that Jack knew something about the practice of the law before he went to the ACLU and EEOC experiences. He was in the general practice of law in Minnesota in the 1950s and, as his

11. *See Civil Liberties Union Protests Radio-TV Ban on Communists*, N.Y. TIMES, Mar. 6, 1964, at 63.

12. *See A.C.L.U. to Seek End of Death Penalty*, N.Y. TIMES, June 21, 1965, at 23.

13. 384 U.S. 436 (1966).

14. 357 U.S. 449 (1958).

15. Homer Bigart, *Civil Liberties Union Scores Hughes*, N.Y. TIMES, Aug. 4, 1967, at 12.

16. *Id.*

17. *Id.*

co-counsel, I benefited from that background as well as his experience on a wide variety of fronts with the ACLU. These traits served the San Francisco EEOC well when Jack put his litigation skills into action with good effect on its behalf in a wide variety of discrimination actions.[18] The country benefited from the actions he pursued through the EEOC.

Thus, it is meet and right that the University of San Francisco School of Law honors Professor Pemberton with the creation of this lecture series. This lectureship is an important part of assuring that his name and work will transcend our lives and the students who knew him to generations still unborn. Congratulations to both Jack and the University of San Francisco School of Law for the beginning of the Pemberton Lectureship. We are, and will always be, the beneficiaries of Jack Pemberton.

18. *See, e.g.*, EEOC v. County of San Benito, 818 F. Supp. 289 (N.D. Cal. 1993); EEOC v. Tortilleria "La Mejor", 758 F. Supp. 585 (E.D. Cal. 1991); EEOC v. Willamette Indus., Inc., No. CV-F-90-606, 1991 WL 110208 (E.D. Cal. Mar. 25, 1991); EEOC v. Kamehameha Sch./Bishop Estate, 780 F. Supp. 1317 (D. Haw. 1991); EEOC v. Davey Tree Surgery Co., 671 F. Supp. 1260 (N.D. Cal. 1987).