

ASSOCIATION OF AMERICAN LAW SCHOOLS
SECTION ON LABOR RELATIONS AND EMPLOYMENT
LAW: TRIBUTES HONORING SENIOR LAW PROFESSORS

A TRIBUTE HONORING JAMES E. JONES, JR.*

Professor Vicki Schultz:** Good morning. I'm Vicki Schultz, the 2004 Chair of the Labor and Employment Law Section of the Association of American Law Schools. Last year, my predecessor, Professor Roberto Corrada, initiated a practice of having our section honor someone who has made a significant contribution to our field. This morning, it is my great pleasure to be able to honor my dear friend and colleague James E. Jones, Jr., the Nathan P. Feinsinger Professor of Labor Law, Emeritus at the University of Wisconsin Law School and the School of Labor and Industrial Relations.

There is so much to say about this brilliant and big-hearted man; I can't even begin to cover his many achievements in the time available. So, let me simply touch on a few of his most significant contributions to the law, the field, and the university he loves so much, and to his students and colleagues, who, in turn, love him so much.

I. DEVELOPING EARLY AFFIRMATIVE ACTION LAW

Before he joined the legal academy, Professor Jones had already had a significant career in the United States Department of Labor. He began as a legislative attorney, progressed to Counsel for Labor Relations, Director of the Office of Labor Management Policy Development, and then became Associate Solicitor, Division of Labor Relations and Civil Rights in the Office of the Solicitor of Labor. During that phase of his career, Professor Jones played an important role in developing and defending the emerging concept of affirmative action in employment. In fact, it is no overstatement to

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** Ford Foundation Professor of Law, Yale Law School. Chair, American Association of Law Schools, Labor Relations and Employment Law Section 2004.

say that Professor Jones is one of the architects of the modern concept of affirmative action in employment.

If you've read Professor Jones' work,¹ you know that the concept of affirmative action was not created primarily in the courts, but in the executive branch. In 1941, President Franklin Delano Roosevelt issued an executive order establishing the Fair Employment Practices program and declaring it the government's policy to "encourage full participation in the national defense program by all citizens of the United States, regardless of race, creed, color, or national origin."² This order applied to all defense contracts, to federal government employment, and to vocational and training programs set up by federal agencies.

It wasn't until 1961, however, that the term "affirmative action" was used in a presidential order. President John F. Kennedy issued Executive Order 10,925, which not only prohibited discrimination because of race, religion, color and national origin by federal contractors, but also required them to take "affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."³ This same affirmative action obligation is continued in the current Executive Order 11,246.⁴

President Kennedy created the Committee on Equal Employment Opportunity and gave it jurisdiction over both the federal civil service and federal government contracting and subcontracting.⁵ Unlike its predecessors, this new Committee had enforcement authority, including the authority to recommend action by the Justice Department or to institute administrative proceedings to terminate present government contracts and bar future ones. Chaired by Vice President Lyndon B. Johnson and vice-chaired by Secretary of Labor Willard Wirtz, the committee was staffed primarily by Labor Department attorneys like Professor Jones.

1. See, e.g., James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901 (1985). The description of early enforcement efforts contained in this section draws heavily on Professor Jones's article as well as an article by David L. Rose, who was involved in early enforcement efforts at the United States Department of Justice. See David L. Rose, *Civil Rights Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?* 42 VAND. L. REV. 1121 (1989).

2. Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943 Comp.).

3. Exec. Order 10,925, 3 C.F.R. 448 (1959-1963 Comp.).

4. Exec. Order 11,246, 12935, 3 C.F.R. 339 (1964-1965 Comp.), reprinted in 29 U.S.C. 2000e app. (2000).

5. Id.; Exec. Order 11,114, 123 Fed. Reg. 6485 (1963).

Professor Jones was one of the principal draftsmen of the first set of rules and regulations issued by the Committee under Executive Order 10,925. These rules preserved the broad duty of affirmative action, but did not define it. After that, Professor Jones worked to nurture and flesh out the undefined affirmative action obligation in the policies and practices of federal contracting agencies and in early cases enforcing Title VII of the Civil Rights Act of 1964. The Department of Labor took an aggressive enforcement stance, sometimes requesting assistance from the Department of Justice in cases involving the building trade unions, with whom the federal government had no direct contractual relationship. Early cases, such as *United States v. Local 189, Papermakers*,⁶ established the important principle that seniority systems which perpetuated the effects of pre-Act discrimination, and which therefore had a disparate impact on African Americans, violated both Executive Order 11,246 and Title VII. This recognition of the disparate impact principle helped lay the groundwork for numerical goals and timetables,⁷ which were a central feature of the "affirmative action" obligation that emerged from early enforcement efforts.

Professor Jones's contributions didn't end there. He also drafted, and wrote the memorandum in support of, perhaps the key initiative that consolidated and helped establish the validity of goals and timetables as a means of accomplishing affirmative action: the revised Philadelphia plan. Promulgated in 1969 by staff attorneys under the supervision of President Richard Nixon's Assistant Secretary of Labor Arthur Fletcher, the Plan required bidders on federally assisted construction contracts in the Philadelphia area to set numerical goals for employing African Americans and other racial minorities in the building trades. The building trades unions strongly opposed the Plan, and after the Justice Department finally approved it, the Comptroller General ruled that it violated Title VII. In response, Labor Secretary George Schultz sought a written opinion from the Attorney General, which was binding on the executive branch unless overturned by a competent court. The opinion, which was prepared under the supervision of Assistant Attorney General William Rehnquist and signed by Attorney General John Mitchell, stated that the Philadelphia plan was authorized under Executive

6. 282 F. Supp. 39 (E.D. La. 1968).

7. See Alfred Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 6 (1987).

Order 11,246 and valid under Title VII. When the Plan was later challenged in court, it was upheld under both provisions by the United States Court of Appeals for the Third Circuit.⁸ Further, when Congress passed the Equal Employment Opportunity Act of 1972⁹ to amend Title VII, Congress defeated a series of amendments designed to block the enforcement of goals and timetables. Thus, by 1972, all three branches of government had approved the approach to affirmative action crafted by Labor Department lawyers, including Professor Jones.

The adoption of the Philadelphia Plan by the Department of Labor, and its approval by the President, the Attorney General, and the courts, had significant results. The Department of Labor issued similar plans for the building trades in most large urban areas. More importantly, numerical goals and timetables became part of the affirmative action obligation of all federal procurement contractors and subcontractors.¹⁰ Empirical studies suggest that this approach succeeded and that these contractors employed more racial minorities as a result of the federal contract compliance program.¹¹

II. CREATING THE FIELD OF EMPLOYMENT DISCRIMINATION LAW

In 1969, after working on the Philadelphia Plan, Professor Jones was recruited to the University of Wisconsin to teach labor law in the Law School, with a quarter-time appointment to the Graduate School of Labor and Industrial Relations. Although Professor Jones began as a Visiting Professor, he was given tenure in the spring of 1970, in his first year of teaching. Little wonder, for Professor Jones published four articles not long after he arrived.¹² This was no small feat, even for someone of Jones's talent. Add to this the fact that Professor Jones was the first Black professor at the University of Wisconsin

8. *Contractors Ass'n of E. Pa. v. Sec'y of Labor*, 442 F.2d 159 (3d Cir. 1971).

9. Pub. L. No. 92-261, 86 Stat. 104, *codified as amended at* 42 U.S.C. §§ 2000e to 2000e-17 (2000).

10. 41 C.F.R. pt.60-2 (2005).

11. See, e.g., Jonathan Leonard, *The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment* 4 J. ECON. PERSPECTIVES 47 (1984); Jonathan Leonard, *What Promises are Worth: The Impact of Affirmative Action Goals*, 20 J. HUMAN RES. 3. (1985).

12. See James E. Jones, Jr., *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341; James E. Jones, Jr., *Federal Contract Compliance in Phase II - The Dawning of the Age of Enforcement*, 4 GA. L. REV. 756 (1970); James E. Jones, Jr., *The Role of Law in Improving Minority Group Employment Opportunities*, 16 LAB. L. DEV. 198 (1970); James E. Jones, Jr., *To Rouse "A Slumbering Giant" - Government Contracting and Equal Employment Initiatives for the 1970's*, 17 LAB. L. DEV. 151 (1971).

Law School, and one of the first Blacks in the legal academy anywhere, and it becomes apparent that he was indeed a pioneer.¹³

During his first few years at Wisconsin, Professor Jones helped found the field of employment discrimination law. The four articles he wrote that year all helped introduce the fundamentals of the subject to lawyers and labor relations people. In the spring of 1970, Professor Jones taught a course on this subject matter from materials that he compiled on his own. Until then, there was no such field as “employment discrimination law.” In fact, at the time, the course was so new that the AALS didn’t recognize it as a subject in its own right, but listed it, at first, under “constitutional law,” and later, under “civil rights.” In one of his articles, Professor Jones laughingly recounts that for thirty years he was known as a civil rights lawyer,¹⁴ even though he has always insisted (correctly, in my view) that employment discrimination law is also a branch of labor and employment law.

In 1971, selections from Professor Jones’s original teaching materials became the core of one of the first casebooks on employment discrimination law, published by West Publishing Company under the auspices of the Labor Law Group. From 1971 through 1987, Professor Jones co-authored four more editions of this casebook, *Cases and Materials on Discrimination in Employment*.¹⁵ From 1978 to 1982, Professor Jones chaired the Labor Law group, which put out six books on various aspects of labor and employment law, including the one on employment discrimination. Jones’s casebook continues to exist (it’s now on its seventh edition), though it now has a slightly different title and it no longer bears Professor Jones’s name.¹⁶ Among his other noteworthy publications, Professor Jones also co-edited with University of Wisconsin Professor Herbert Hill the award-winning book, *Race in America*.¹⁷ Through this casebook and his other scholarship, Professor Jones helped create

13. James E. Jones, Jr., *Some Observations on Teaching from the “Pioneer” Generation*, 5 MICH. J. RACE & L. 229, 229 (1999). This section draws heavily on this article, as well as on a private communication from Professor Jones to the author. Email from Professor James E. Jones, Jr. to Professor Vicki Schultz, Dec. 11, 2003.

14. Jones, *supra* note 13, at 230.

15. *Id.* at 234 & n.11, 235; see also JAMES E. JONES, JR. ET AL., *CASES AND MATERIALS ON DISCRIMINATION IN EMPLOYMENT* (5th ed. 1987).

16. See ROBERT BELTON ET AL., *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* (7th ed. 2004).

17. HERBERT HILL & JAMES E. JONES, *RACE IN AMERICA: THE STRUGGLE FOR EQUALITY* (1993).

and shape the canon of employment discrimination law. Even today, one can't teach the course properly without teaching the core cases and concepts his original casebook introduced. Nor can one understand the history of employment discrimination law or race in America without reading his articles and books.

As all of us know, the field has grown tremendously over the years. By 1983, 128 law schools were offering seminars or courses in employment discrimination law, and in 1985, the AALS finally recognized a separate section on employment discrimination law. The AALS directory for 2004-05 lists 399 teachers of employment discrimination law, who offer courses at 171 different law schools. Employment discrimination law makes up a significant portion of the courts' caseload, so there's a real-world need for students to know about it. Not only that: It's also a field in which some of the most intellectually, empirically, and practically significant scholarship is being done. Today, employment discrimination law is a widely recognized and respected field of law, thanks in no small part to the efforts of Professor Jones.

III. SERVING THE UNIVERSITY AND THE LARGER SOCIETY

In addition to fashioning early affirmative action law and founding the field of employment discrimination law, Professor Jones also found time to devote himself to the University of Wisconsin and to the larger society. In the interests of time, I'll focus most of my remarks on his University activities, but I think you'll be able to see how these undertakings served not only the University but also the State of Wisconsin and the larger world in which it's located.

By now, you won't be surprised to hear that two of Professor Jones's most significant initiatives had to do with equal opportunity – this time, in the context of education rather than employment. Professor Jones helped shape the University of Wisconsin System's basic policy on minority and disadvantaged problems, including the legal educational opportunity (LEO) program. He was a member of the Regents' Ad Hoc Committee that drafted the policy in 1970, and he continued to provide technical support and advice about the University's administration and implementation of this program until 1997. The Law School's LEO program, which began in 1967 with the recruitment of four African-American students and two Latino students, took off under Professor Jones' leadership and became a nationwide model for recruiting and retaining students of color and

disadvantaged students. Today, its alumni number well over 1,000 African-American, Asian-Pacific-American, American Indian, and Latino-American graduates, many of whom are leaders in Wisconsin and around the world.

Professor Jones was a moving force in creating another well-known program for minority students, the William H. Hastie Fellowship Program. Established in 1973, the program was named after William H. Hastie (1904-1976), a lawyer, teacher, jurist, and civil rights advocate who championed the importance of high-quality legal education. The Hastie program provides opportunity for law school graduates of color to prepare for a career in law teaching. For two years, the fellow works closely with members of the University of Wisconsin law faculty to produce a thesis that demonstrates his or her ability to perform high-quality legal scholarship. The program has been highly successful in producing law teachers, including such prominent leaders as Professor Daniel Bernstine, now the President of Portland State University and a former Dean and Professor at the University of Wisconsin Law School. As of 2003, there had been thirty-two Hastie fellows, of whom twenty-one were or had been in law teaching in law schools throughout the United States.

These two initiatives would have been more than enough for most people, but they weren't enough for Jim Jones. At the University of Wisconsin, Professor Jones served in a number of additional leadership roles. He was an Associate of the Institute for Research on Poverty and Director of the Center for Equal Employment and Affirmative Action of the Industrial Relations Research Institute from 1974 to 1993. He served several terms in the University Senate and on the University Athletic Board from 1972 to 1989. A firm believer in the Wisconsin idea, Professor Jones also served various levels of government. He was appointed by the President of the United States to the Federal Service Impasses panel, where he served from 1978-1982. He was named by the Governor of the State of Wisconsin to the Manpower Planning Council, where he served from 1971 to 1976, and to the Wisconsin Task Force on Comparable Worth, where he served from 1984-1986. He was appointed by the Mayor of the City of Madison to the Police and Fire Commission, where he served from 1973 to 1977 and again from 1994-1995. He has also been a member of the United Auto Workers Board of Review since 1970, and has served as a labor arbitrator in countless cases over the years.

IV. BEING A MODEL MENTOR AND COLLEAGUE

Despite his involvement in all these activities and more, Professor Jones has always found plenty of time to be available to his students and colleagues. I know, because for six years I shared an office next to him on the sixth floor of the tower at the University of Wisconsin Law School.

Professor Jones helped recruit me to the University of Wisconsin Law School as an assistant professor. I had been working as a trial attorney in the Employment Litigation Section of the United States Department of Justice, Civil Rights Division, bringing Title VII pattern or practice cases. I loved employment discrimination law almost as much as Jim Jones, and, to his credit, he saw that right away. He had the generosity of spirit to offer to give up teaching his beloved Employment Discrimination Law course, so that I could teach it, if only I would come to Wisconsin. Professor Jones may not realize this, but he is one of the major reasons I chose Wisconsin (over two other schools who were offering higher salaries), and one of the main reasons why the school has remained so dear to my heart over the years. His willingness to hand over his course to me spoke volumes about the kind of man he was and mentor he would be. What a wonderful opportunity it was to have this amazingly brilliant but modest, learned yet enormously practical, morally upright while also downright *fun* man to inspire and guide me!

Professor Jones's door was always open, and he was always full of sound advice and splendid conversation. I haven't always followed his advice, but I would be better off if I had done so. I shall never forget his generosity, his wisdom, and his moral example. Professor Jones was always kind and patient with me (even when I didn't deserve it), but I can tell you that he didn't always suffer other fools gladly. He was the moral conscience of the faculty, and if anyone dared forget that the University of Wisconsin was an exceptional law school – one committed to excellence and inclusion at the same time – Jim Jones didn't hesitate to remind them. We were, in no small part, *Professor Jones's* law school, the one he had helped bring into being and nurtured as the living embodiment of the principles he had fought for and lived by all his life.

Over the years, it wasn't only me and my colleagues who benefited from Professor Jones's presence: The students did also. Scores of law students appeared at his door, at all hours of the day and evening, and Professor Jones always took them in. Many of them

weren't even enrolled in his courses; they just knew it was important to seek out Professor Jones's advice. Unlike many law professors, Professor Jones didn't limit the time he would see students to office hours; he welcomed them any time. Perhaps this is one of the reasons that when he assumed emeritus status in 1993, former students came from all over the country to attend his retirement dinner. It's not often that one has an opportunity to recognize – and honor – such a remarkable man.

We are fortunate, indeed, to have another such occasion today. Let us stand and celebrate this great and wonderful man, one of the founding fathers of employment discrimination law, Professor James E. Jones, Jr.