The College of Labor & Employment Lawyers

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FOURTH ANNUAL LECTURE SCHEDULED FOR APRIL 26th

The College's Fourth Annual Lecture, scheduled for Friday, April 26th, will feature Arnold R. Weber, President Emeritus of Northwestern University. The event will take place at the Sheraton Chicago Hotel at 3:30 in the afternoon and will be followed by a cocktail reception immediately after Mr. Weber's speech.

Mr. Weber adds to an ever growing list of recognized leaders worthy of recognition by the College. The lecture series was first held in 1999 in Washington, DC with the Honorable Abner Mikva, former Council to the President, Congressman and Court of Appeals Judge, as the inaugural speaker. He was followed by the Honorable Richard Posner, Chief Judge of the Seventh Circuit Court of Appeals, who presented a speech at the University Chicago Law School, an event that was held in conjunction with a dedication to Fellow Emeritus, Professor Bernard Meltzer. Last year, the event was held in Washington, DC, featuring Theodore St. Antoine, Professor Emeritus at the University of Michigan and renowned labor arbitrator. This year, the series returns to Chicago for its fourth annual lecture featuring Arnold Weber, President Emeritus of Northwestern University. Mr. Weber will speak on "Issues and Trends in Labor Relations: A View from the Board of Directors" at the Sheraton Chicago Hotel on Friday, April 26th at 3:30 pm. A reception will immediately follow his presentation.

NORTHWESTERN'S PRESIDENT EMERITUS TO BE COLLEGE'S FEATURED SPEAKER

The College gladly announces that Arnold R. Weber will be the fourth speaker at this annual lecture event. His speech, entitled "Issues and Trends in Labor Relations: A View from the Board of Directors" should prove to be a timely subject and one that will interest lawyers and professionals of all fields. Mr. Weber, President Emeritus of Northwestern University since July of 1998, was elected the 14th president of Northwestern University in September of 1984 and presided over a decade of growth and prosperity. With a host of credentials that date back forty years, he has a strong background in academia and economics that provide a perfect complement to a perspective of the labor and employment law field.

As the author of eight books, monographs and numerous articles on economic policy, industrial and labor relations, and higher education, Mr. Weber has become a regular contributor to various business publications. He also is a member of the Industrial Relations Research Association, and has been an arbitrator on the labor panel for the American Arbitration Association. In addition, he has been inducted into the National Academy of Arbitrators and the National Academy of Public Administration. His academic background is similarly as strong. A member of the faculty of the Graduate School of Business at the University of Chicago from 1958 to 1973, Mr. Weber was the Isidore Brown and Gladys Brown Professor of Urban and Labor Economics at Chicago from 1971 to 1973. He also has been a member of the faculty at Stanford University and the Massachusetts Institute of Technology. In addition, he served as president of the University of Colorado from 1980 to 1985, and was provost and professor of economics and public policy at Carnegie Mellon University from 1977 to 1980, where he also served as dean of the Graduate School of Industrial Administration at Carnegie Mellon from 1973 to 1977.

Mr. Weber's service in the federal government is as impressive as his academic career. He served as a Presidential appointee and an

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PRESIDENT'S PERSPECTIVE

It is my distinct pleasure and a great honor to be selected as the College's President for the year 2002. I am fortunate to follow Harold Datz and hopefully will be able to continue the initiatives he implemented and build upon his successful presidency. We are also quite fortunate to have as our Executive Director Susan Wan. While it may seem to the Fellows that the College is a seamless operation, that is only due to the hard work and dedication of Susan.

While each of these video projects is important by itself, the Board of Governors believes that the totality of the video project will be greater than the sum of the videos.

Fourth Annual Lecture

On Friday, April 26th, we will hold our Fourth Annual Lecture in Chicago at the Sheraton Chicago Towers. We are indeed fortunate and honored that Arnold R. Weber, President Emeritus of Northwestern University, has agreed to be our lecturer. His lecture, titled "Issues and Trends in Labor Relations: A View from the Board of Directors" is sure to be a interesting and informative.

Fellows Nomination Process

The remarkable success and reputation of the College during its short tenure is due in large part to the quality and accomplishments of our Fellows. Nominees must have at least twenty years of labor and employment law experience and have proven to their peers, the bar, bench and public that they possess the highest professional qualifications and ethical standards; the highest level of character, integrity, professional expertise and leadership; a commitment to fostering and furthering the objectives of the College; and significant evidence of scholarship, teaching, lecturing, and/or distinguished published writings on labor and employment law. Nomination forms, which were due by March 1st, have been sent to the Credentials Committee in the Circuit where the nominee resides. We are indebted to the Fellows who serve on these committees for their efforts in shepherding the applications through the process. After the Circuit Credentials Committees finish their work, their reports are forwarded to a committee of the Board of Governors for review. Then, the entire Board of Governors reviews each application to finalize its results. One of the reasons being a Fellow is such an esteemed accomplishment is because Fellows are selected by their peers based upon their reputation, experience and civility. Each year the Circuit Credentials Committee as well as the Board are asked to make some difficult decisions and close calls on the applications. I am encouraged by the amount of time that the Circuit Credentials Committee and the Board of Governors, all of whom are busy practitioners, take in this process as well as their diligence and fairness. The strength and reputation of our organization is only going to be as good as the Fellows who are members.

Seventh Annual Induction Dinner

We will hold our Seventh Annual Fellows Induction Dinner on Sunday, August 11 commencing at 7:00 p.m. in the spacious Atrium of the International Trade Center/ Ronald Regan Building in downtown Washington, DC. As usual we will commence the festivities with a cocktail reception. We are also reviewing the induction ceremony and will revise it to reflect the honor and solemnity of the occasion. We are mindful of trying to strike a balance between the appropriateness of the occasion and avoid taxing the patience of our Fellows by a lengthy induction procedure. Hopefully a combination of oral remarks and printed materials will accomplish this goal. If it does not, I am confident that the Fellows will let me and the rest of the Board of Governors know and we will continue to work on refining the process.

Video History Project

The video history project continues to be a successful endeavor. We have completed the video project for Chief Judge UW Clemon. The list of other candidates is a long and prestigious one and the Video History Committee and our producer are working toward scheduling several more video productions this year. While each of these video projects is important by itself, the Board of Governors believes that the totality of the video project will be greater than the sum of the videos. The ultimate goal is to be able to combine various aspects of all the completed videos for use as training films, recruiting, presentations and educational pieces. As you know, we were awarded a grant from the ABA's Labor and Employment Law Section, along with modest contributions from the College, toward producing these projects. However, to finance future videos, we will commence the process of seeking contributions from charities and

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WHAT'S WORK HAVE TO DO WITH IT?

IMPLICATIONS OF TOYOTA MFG., KY., INC. V. WILLIAMS

*By Jeff Wray**

In determining whether an employee is substantially limited in the major life activity of performing manual tasks, and thus qualifies for protection under the Americans with Disabilities Act (ADA), the focus should not be on the employee's inability to perform the tasks associated with her job, the Supreme Court recently ruled in *Toyota Motor Mfg., Ky., Inc. v. Williams*. In a unanimous opinion by Justice O'Connor, the Court ruled that the central inquiry must instead be whether the claimant is "unable to perform the variety of tasks central to most people's daily lives," including tending to personal hygiene and performing household chores. While the holding is narrow in scope, the content and tenor of the opinion are likely to impact many ADA cases.

While the holding is narrow in scope, the content and tenor of the opinion are likely to impact many ADA cases.

Ella Williams, an assembly line worker at Toyota's Georgetown, Kentucky, automobile plant who had a history of carpal tunnel syndrome, was assigned a job which required her to work with her arms extended at shoulder level for several hours at a time. Shortly thereafter, she began experiencing pain in her neck and shoulders, and was diagnosed as having myotendinitis and other conditions affecting her nerves, muscles and tendons. She requested to be reassigned to her previous duties, which she said she could still perform. She alleged that Toyota refused her requests to accommodate her condition and eventually terminated her because of her disability. Toyota claimed she was terminated for attendance problems.

Williams sued under ADA, the Family and Medical Leave Act, and Kentucky law. She alleged that she was substantially limited in performing manual tasks, doing housework, gardening, playing with her children, lifting, and working, all of which she argued constitute major life activities. She also claimed to meet the alternative tests for qualifying as disabled, i.e., having a record of disability and being regarded as disabled. The district court granted summary judgment to Toyota on all of Williams' claims, and Williams appealed to the Court of Appeals for the Sixth Circuit. The Court of Appeals reversed in part the district court's determination, finding that Williams was disabled at the time she sought accommodation because she was substantially impaired in the major life activity of performing manual tasks. Because of that finding, it did not address the issue of whether Williams was substantially impaired in working or qualified as disabled on other grounds.

In determining that Williams was substantially impaired in performing manual tasks, the Court of Appeals borrowed from the analysis in *Sutton v. United Air Lines*, 527 U.S. 471 (1999), where the Supreme Court ruled that to be substantially impaired in the major life activity of working, an individual must be unable to perform a class or broad range of jobs. While it conceded that working is a different activity from performing manual tasks, the Sixth Circuit panel decided, based on the language of the Act, EEOC's interpretations, and *Sutton* that "in order to be disabled the plaintiff must show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks at work." *Williams v. Toyota Motor Mfg. Ky., Inc.*, 224 F.3d 840, 843 (6th Cir. 2000). It concluded that the employee's impairments prevented her "from doing the tasks associated with certain types of manual assembly line jobs, manual product handling jobs and manual building trade jobs (painting, plumbing, roofing, etc.) that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." The fact that she could perform "isolated, non-repetitive manual asks performed over a short period of time," such as tending to personal hygiene or carrying out personal or household chores, "does not affect a determination that her impairment substantially limits her ability to perform the range of manual tasks associated with an assembly line job." *Id*.

The Supreme Court found the circuit court's focus too narrow. It began with the premise, based on its reading of the statute and its own prior decisions, that Congress intended to "create a demanding standard for qualifying as disabled." *Slip op*. at 12. It wrote that "major" in "major life activities" means "important," and that "major life activities" therefore "refers to those activities that are of central importance to daily life." Thus, for performing manual tasks to fit into this category, the manual tasks in question individually or collectively "must be central to daily life." *Id*. "Substantially" in the phrase "substantially limits," the Court wrote, suggests "to a large degree," and "clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities." *Slip op. at* 11. The Court accordingly concluded that "to be substantially limited

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The tone of the opinion leaves little doubt, however, that the Court would have found no disability were it resolving the issue.

Toyota *(cont'd. from pg. 3)*

in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term." *Slip op. at* 12-13.

The Court found that although Williams could not perform some of the manual tasks required by the specific demands of her former job at Toyota, she was generally able to perform most of the manual tasks associated with most people's daily lives. More specifically, although her ailments required her to cut back on dancing and some other activities, Williams was able to tend to her personal hygiene and carry out a variety of personal and household chores. Accordingly, it held that it was error for the circuit court to determine as a matter of law that Williams was disabled.

It was error for the Court of Appeals to rely on *Sutton*, the Court ruled. It stated that nothing in the statute, regulations, or its prior opinions indicated that inability to perform a "class" of work-related tasks demonstrated substantial limitation in the major life activity of performing manual tasks. It observed that otherwise inability to perform a single job could "be recast as an inability to perform a 'class' of tasks associated with that specific job." *Slip op. at* 15-16.

The Court's holding is limited. It remanded the case for further proceedings without determining that Williams was not disabled. Accordingly, some may argue that the case merely stands for the obvious proposition that a court cannot disregard evidence relevant to the determination when entering judgment as a matter of law. The tone of the opinion leaves little doubt, however, that the Court would have found no disability were it resolving the issue.

An obvious question, given the appellate court finding that Williams could not perform a substantial number of a assembly line, product handling, and building trades jobs, is whether on remand the lower courts will determine that Williams is impaired in the major life activity of "working." In that regard, it is noteworthy that the Court again expressed skepticism, as it had in *Sutton*, concerning whether "working" is a major life activity, and emphasized that it has yet to decide that issue. The Court is likely to have to face that issue soon, as its holding in *Williams* effectively leaves individuals who are unable to perform their jobs, but whose impairments are limiting solely or largely only in the workplace, with no other route to ADA protection. Even if the Court ultimately upholds EEOC's regulation to the effect that "working" is a last-ditch "major life activity" available when no other life activity is limited, however, the tone of *Williams* suggests that it will interpret the requirement that the individual be unable to perform "class or broad range of jobs" strictly. It will be the rare individual indeed who has no other major life activities which are substantially limited, but who is nonetheless limited in the major life activity of working.

From a practice standpoint, the decision will likely result in even more cases being brought by plaintiffs under state human rights laws, especially where the statute defines " disability" differently or the courts are under no mandate to conform the interpretation of the state statute with federal law. In California, for example, an impairment need only "limit," not "substantially limit," a major life activity. In states such as Texas where *Williams* will be applied as precedent in both federal and state actions, careful client screening will be imperative for plaintiffs' counsel. Careful defense counsel will ensure that the record of plaintiff's deposition reflects exhaustion of the plaintiff's claims concerning the limitations on both work and "daily life" activities.

**Mr. Wray, a partner in the law firm of Fulbright & Jaworski LLP in Houston, Texas, was inducted as a Fellow of the College in 1997.*

D.C. CIRCUIT UPHOLDS RIGHT OF NON-UNIONIZED EMPLOYEES TO CO-WORKER REPRESENTATION AT INVESTIGATORY INTERVIEWS

In our August 2000 Client Alert,* we reported on the decision of the National Labor Relations Board ("NLRB") in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92 (2000), where the NLRB reversed a long-standing precedent and ruled that non-unionized employees are entitled upon request to have a co-worker present during an interview that may lead to disciplinary action. In a decision issued in early November, the United States Court of Appeals for the D.C. Circuit affirmed the NLRB's decision. *Epilepsy Foundation v. NLRB*, 268 F.3d 1095, (DC Cir. Nov. 2, 2001). The DC Circuit Court's decision is an important development for employers because failure to comply with the NLRB's rulings in this area can result in an order to rescind disciplinary action or to reinstate a discharged employee with back pay.

The DC Circuit Court held that the NLRB's interpretation was reasonable, and therefore entitled to deference.

The NLRB had purported to base its decision on the Supreme Court's 1975 "*Weingarten* rights" opinion, in which the Court held that a union-represented employee has the right to union representation at an investigatory interview if the employee reasonably believes the interview may lead to disciplinary action again the employee. *See NLRB v. J. Weingarten, Inc.*, 420 US 251 (1975). *Weingarten* was based on the right of employees under Section 7 of the National Labor Relations Act ("NLRA") to engage in "concerted activities for the purpose of collective bargaining or other mutual aid in protection." The NLRB in *Epilepsy Foundation* ruled that the procedural rights from *Weingarten* should apply to non-unionized employees because a request for co-worker representation at an investigatory interview would enhance the ability of employees to act in concert to prevent the imposition of unjust discipline, and therefore constituted "concerted activity" for the purpose of mutual aid or protection. The DC Circuit Court held that the NLRB's interpretation was reasonable, and therefore entitled to deference.

Although it has the potential to alter significantly the relationship between employers and their non-union employees, the DC Circuit Court's decision is not particularly surprising. The NLRB first ruled, in 1982, that *Weingarten* rights should be extended to non-union employees, *Materials Research Corp.*, 262 NLRB 1010, and this ruling was upheld by a federal appellate court, *E.I. du Pont de Nemours & Co.*, 724 F.2d 1061 (3d Cir. 1983). After a change in membership three years later, the NLRB reversed course and decided that Section 7 compelled the conclusion that *Weingarten* rights did not apply to non-union employees, *Sears, Roebuck & Co.*, 274 NLRB 230 (1985), but this view was rejected by the Third Circuit Court in *E.I. du Pont de Nemours & Co.*, 794 F.2d 120 (3d Cir. 1986). The NLRB then ruled that, although *Weingarten* rights could be applied in a non-union setting, it would not do so as a matter of policy, *E.I. du Pont de Nemours & Co.*, 289 NLRB 627 (1988), a ruling that also was upheld by a federal appellate court, *Slaughter v. NLRB*, 876 F.2d 11 (3d Cir. 1989). As the DC Circuit Court noted in *Epilepsy Foundation*: "It is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board. Because the Board's new interpretation is reasonable under the [NLRA], it is entitled to deference." 268 F.3d at 1097.

Accordingly, it may be risky for non-union employers to assume that other federal appellate courts will disagree with the DC Circuit Court. On the other hand, the federal courts would likely uphold a different interpretation of Section 7 if the NLRB were to reverse course once again. This could happen as President Bush fills vacancies at the NLRB.

**This December 2001 Client Alert was courtesy of O'Melveny & Myers.*

SECTION UPDATE

125th ABA Annual Meeting in Washington, DC

The 125th Annual Meeting of the American Bar Association will take place in Washington DC from August 8-13, 2002. The Section of Labor and Employment Law's activities at the meeting will take place at the Washington Hilton Hotel from August 10-13. The Annual Meeting offers an unparalleled opportunity to earn a year's worth of CLE credit, network with colleagues and hear outstanding speakers on a wide-range of topics that are of interest to you.

This year's meeting features a number of changes designed to allow attendees to tailor the meeting to best fit individual needs. For the first time, the meeting features a significantly reduced registration fee and offers the option of paying for only the educational programs that you select. Meeting registrants will have the opportunity to either pay for only the Section CLE courses that they attend or purchase a passport that will allow unlimited access to all of the programs for which the Section of Labor and Employment Law is the primary sponsor. There is no additional charge to attend any meetings that are not awarding CLE credit.

This year's meeting features a number of changes designed to allow attendees to tailor the meeting to best fit individual needs.

One thing that won't change at this year's meeting is the high quality programming that our members have come to expect. The Section's Annual Meeting Committee, Mark Carter, Barry Kearney, Mary O'Melveny and Arnold Pedowitz, has designed an exceptional program that will benefit all attendees regardless of their area of practice or level of expertise. As always, our programs are designed to present all perspectives of the issues with experienced litigators from the defendant, plaintiff and public bars participating in the sessions.

The Section's CLE programming will begin on Saturday, August 10 with our "basics" sessions. These introductory level courses will teach practitioners the essentials of various areas of labor and employment law concentration, including ERISA, Employment Rights and Responsibilities, Equal Employment Opportunity law, Occupational Safety and Health law, National Labor Relations Act practice, and the Family Medical Leave and Fair Labor Standards Acts.

From Sunday on, programs will include update sessions outlining recent developments on a number of topics of interest to Labor and Employment practitioners, among them EEO, ERISA, ADR as well as an update of legislative issues currently before Congress. Attendees will also have the opportunity to attend the CLE programs that are produced by the Section's committees. Each of the Section's 22 committees will have an opportunity to produce a program or conduct a meeting that will be of particular interest to its members. This year, the committee meetings and programs have been divided between Sunday afternoon and Monday morning to allow individuals to attend sessions sponsored by more than one committee. The Section is also pleased to announce that Eugene Scalia, the new Solicitor of Labor will speak at our Plenary Session on Monday, August 12 addressing critical issues facing the Department of Labor.

The Section Reception will take place at Sequoia Restaurant on Monday, August 12 from 7:00 – 11:00. Located at the Washington Harbor on the Potomac River, Sequoia offers great views of the Kennedy Center and the Watergate Complex. Join your colleagues in this informal setting after the day's meetings are over. Shuttle service between the Washington Hilton and Sequoia will be provided. The Section's schedule also includes our Annual Section Luncheon on Tuesday, August 13th, and our Leadership Development Initiative Luncheon on Monday, August 12th. The Leadership Development Initiative Luncheon provides a forum for the Section's Council members and committee chairs to interact with Section members who want to learn more about the Section and its leadership opportunities. Additionally, there will be a reception on the evening of Saturday, August 10th honoring first-time Annual Meeting attendees.

Watch the Section website at www.abanet.org/labor for updated Annual Meeting schedules, information on social events and registration information. And please plan to join your colleagues in Washington this August.

The Newsletter Committee continues to strongly encourage all Fellows to submit for publication any honors, accomplishments or other notable relative information.

ANNE HARMON MILLER

The College acknowledges sadly the passing of Anne Harmon Miller. An inductee in the inaugural class, Mrs. Miller was also the only woman Fellow Emeritus. She passed away on December 4, 2001 and is survived by her husband Edward Miller, former Chair of the National Labor Relations Board, and currently of Seyfarth Shaw in Chicago.

Mrs. Miller had a long and distinguished legal career. After receiving her J.D. from Loyola University School Law School in 1968, she spent one year as an NLRB Field Attorney. She then began her twenty-five year long career as an arbitrator. Mrs. Miller was the Co-Editor of Labor Arbitration Development, published by the ABA Section of Labor and Employment Law and The Bureau of National Affairs, Inc. She was also a member of the General Electric-IUE National Panel of Arbitrators.

She made valuable contributions to numerous professional committees and was a member of the Council of the Labor and Employment Law Section of the ABA, and the National Academy of Arbitrators. Mrs. Miller also served as a member of the CCH National Panel of Labor Law Experts, and served as a member of the College's Seventh Circuit Credentials Committee.

***President's Perspective** (cont'd. from pg. 2)*

foundations. We anticipate that we will be successful in this endeavor but that the charities or foundations will make some of their contributions contingent upon matching funds from the College. In recognition of this, some of the College members have already made significant donations to the video project and the Board of Governors has agreed to do so as well.

In conclusion, I think 2002 will be an exciting and successful year for the College. I appreciate the opportunity to serve you and I welcome your bouquets as well as your brickbats.

SLATE OF OFFICERS FOR 2002

At a December meeting of the Board of Governors, John E. Higgins, Jr., was unanimously elected to serve as Treasurer of the College. The slate of officers for 2002 is as follows:

Stephen P. Pepe, Newport Beach, CA – President

Robert M. Dohrmann, Los Angeles, CA – Vice President

Joseph D. Garrison., New Haven, CT – Secretary

John E. Higgins, Jr., Washington, DC – Treasurer

***Weber** (cont'd. from pg. 1)*

economic advisor, executive director of the Cost of Living Council in 1971, associate director of the Office of Management and Budget in 1970-71, and assistant secretary of manpower in the U.S. Department of Labor in 1969-70. He was also appointed chairman of the Presidential Railroad Emergency Board No. 182-183 in August 1982 to intervene in a threatened strike by the nation's locomotive engineers. Mr. Weber was a member of the Economic Advisory Committee to the Secretary of Commerce from 1980 to 1982, an economic consultant to the Secretary of the Treasury from 1976 to 1979, and an academic advisor to the Board of Governors of the Federal Reserve System from 1973 to 1984. He has also served as a consultant to major corporations and as a member of the board of directors of several corporations including PepsiCo. Inc., Aon Corporation, Burlington Northern Santa Fe, Inc., DiamondCluster International, John Deere & Company, and Tribune Co.

It is with great pleasure and anticipation that the College welcomes Mr. Weber as the fourth speaker of our lecture series event. His credentials alone lead one to believe that his presentation will be stimulating and timely. Mark your calendars now and plan to join us in Chicago for what will prove to be a compelling program.

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