The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed.

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NLRB PROPOSES FAST TRACK UNION ELECTIONS

By Eric Paltell

As most of our readers know, organized labor expected that the election of President Obama would trigger the enactment of the Employee Free Choice Act ("EFCA"). If EFCA had been passed by Congress, the President would have signed it, and unions would now be able to organize employees without secret ballot elections. In the wake of the shift in power that came with the 2010 elections, it now appears that EFCA is dead legislatively -- but a new proposal by the National Labor Relations Board may do almost as much for union organizing as EFCA was expected to do.

The NLRB proposal, which was published in the June 22, 2011 Federal Register, calls for fast track NLRB elections, deferred litigation of voter eligibility issues, and a seven day window within which to raise any issues regarding the composition of the bargaining unit or the details of the election. The most significant change is a compression of the timeframe within which an election will be held. Currently, the NLRB conducts elections within 40 to 45 days from the date the union files it election petition. ***The proposed rule would reduce this timeframe to 10 to 21 days***. The result is that employers presented with a union petition will have only two to three weeks to mount a campaign, while unions will continue to have as long as they wish to try to organize employees.

Compounding the hurdles that an expedited election presents is a new proposal to require that all pre-election issues be raised in a "statement of position" submitted at a pre-election hearing. ***This hearing would be scheduled to be held within seven days of service of the election petition on the employer.*** The employer would be required to raise issues such as the appropriateness of the bargaining unit in the statement of position, and would be precluded from later challenging any issue which was not raised. Given that many employers will not understand the issues that can be raised (such as whether the employees share a community of interest), much less have access to knowledgeable counsel when they receive the petition, it seems unduly harsh to impose a seven day window within which to raise any legal challenges or forever waive them.

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SUPREME COURT GIVES WAL-MART SOME BIG SAVINGS... NO SEX BIAS CLASS ACTION LAWSUIT

By Randi Klein Hyatt

In one of the most discussed Supreme Court decisions this term, the Supreme Court issued its 5-4 decision in *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, June 20, 2011, which dismissed the class action lawsuit filed on behalf of 1.5 million current and former female Wal-Mart employees.

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ARBITRATION FOLLIES

By Pete Saucier

Labor arbitrators often can be counted upon to produce curious and bizarre outcomes. An Assembler at Goebel Fixture Company in Minnesota reached the terminal state of the attendance policy. The employer used a no-fault attendance policy that assigned points for various offenses. The Assembler accumulated all the points for termination, the last one-quarter of a point coming for tardiness when he clocked in late to work. He explained to the employer that he had been "detained for speeding by a local police officer . . . ." According to the Assembler, "he was stopped for going two miles per hour over the stated speed limit of thirty." The Assembler did not have a ticket to show because the officer supposedly gave him a warning and let him go.

The no-fault attendance policy at Goebel had been found reasonable in a prior case. Remarkably, this arbitrator accepted that the Assembler, who was one tardy away from termination, and who then was tardy, had been stopped by a police officer while going two miles per hour over the speed limit and released without written verification. She ordered that the Assembler be returned to work with full back pay for all time lost.

The Assembler at Goebel was not the only employee to find himself in police trouble. A Utility Person at Granite City Works was under a last chance agreement for positive drug tests. Under the last chance agreement, the Utility Person agreed to "totally abstain from the use of any alcohol, illegal drugs, or drugs not prescribed for his personal use . . . ."

On the night of December 25, leading into early December 26, the Utility Person fully celebrated the holiday, was ejected from a bar, following which he returned waving a weapon. A video from the bar showed that Utility Person in an argument with the bouncer, following which the Utility Person pointed a gun in the bartender's direction and appeared to fire a shot. The firing of the shot was not on the video. Witnesses at the bar testified that the Utility Person appeared intoxicated.

The Utility Person claimed that he began suffering from anxiety disorders and stress on December 26, and that the symptoms got worse each day, so he called into work and missed because of his stress symptoms. He insists that he had not been drinking alcohol and was not intoxicated on the evening of December 25-26.

Remarkably, the arbitration decision turned upon whether the Utility Person should be terminated for violating the last chance agreement, because, in large part, he lied to the company. The police had come to the company looking for him on December 29. On December 31, the employer asked him why the police had a warrant for his arrest. The Utility Person denied that there was a warrant for his arrest. When it was learned later that the warrant had been issued on December 30, the Utility Person said he thought the employer was asking him why there had been an arrest warrant for him on December 29, when he knew there had not been one until December 30.

After a hearing, the arbitrator found that the company did not "establish a sufficient nexus or connection between [the Utility Person]'s off-duty conduct and his employment relationship with the company to justify the company disciplining him for that conduct." The arbitrator did not agree "that what [the Utility Person] did in this off-duty bar altercation, where there was no connection to his employment, properly can relied upon to establish that he poses an intolerable risk of future violence in the workplace." The arbitrator decided that the company did not have proper cause to discharge the Utility Person, and he was reinstated without loss of seniority.

MEDICAL MARIJUANA STATUTE: NO BASIS FOR WRONGFUL DISCHARGE CLAIM

By Cliff Geiger

Sixteen states, plus the District of Columbia, have some sort of medical marijuana law. Such laws typically decriminalize the use of marijuana to treat conditions involving chronic or severe pain, nausea, seizures, severe and persistent muscle spasms, glaucoma, cancer, HIV/AIDS, and the like.

Some other states, such as Maryland, have not decriminalized medical marijuana use, but have greatly reduced the maximum penalty for medical marijuana use. How do medical marijuana statutes affect an employer's ability to fire an employee for a positive drug test? One court recently decided a case involving the Washington State Medical Use of Marijuana Act (MUMA), *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC* (Wash., No. 83768-6, June 9, 2011).

Jane Roe suffered from debilitating migraine headaches that caused chronic pain, nausea, blurred vision, and sensitivity to light. After trying conventional medications with very little success, Roe saw Dr. Thomas Orvald of The Hemp and Cannabis Foundation Medical Clinics. Roe reported that she already used marijuana, but she would use 50% more if it was easier and cheaper to obtain. Dr. Orvald determined that Roe was suffering from a debilitating condition, as defined by MUMA, and that in his medical opinion, the potential benefits of using marijuana

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KOLLMAN & SAUCIER NAMED ONE OF MARYLAND'S TOP FIRMS FOR 8TH STRAIGHT YEAR

On June 10, 2011, Chambers and Partners announced that Kollman and Saucier has been ranked as one of the top management-side labor and employment firms in Maryland. This is the eighth consecutive year that our attorneys have been honored by Chambers as one of the premier firms in the region.

In the 2011 rankings, Eric Paltell, Darrell Van Deusen, and Frank Kollman were listed as three of the top experts in employment law in Maryland. Additionally, Eric was one of only six lawyers in the state to receive a "Band 1" ranking--the highest rating possible from Chambers. According to one client, Eric is "one of the most talented employment lawyers around."

The Chambers rankings are based on extensive research conducted by Chambers and Partners Legal Publishers, a highly respected English publisher of directories assessing and ranking the world's leading lawyers. Unlike other publishers that allow firms to purchase a mention or ranking, Chambers' listings are based solely on outside evaluations of merit. Its researchers investigate law firms and lawyers in each US state through an exhaustive process of interviewing clients and competitors in major areas of business law.

The full listings of firms and attorneys in the Chambers survey is accessible on line at http://www.chambersandpartners.com/USA/Editorial/43038#per_173870.

MEDICAL MARIJUANA CLAIM SNUFFED OUT

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to treat Roe's symptoms would likely outweigh the health risks. After receiving Dr. Orvald's authorization, Roe began using medical marijuana in compliance with MUMA. Roe used marijuana only in her home, and it greatly improved her headache pain with no side effects.

In October 2006 Roe was offered employment as a customer service representative for a telemarketing and telesales firm. The employer, TeleTech Customer Care Management, made the offer contingent on the results of reference checks and a drug screen. Under Teletech's drug policy, an individual whose drug screen is positive is not eligible for employment. Roe told TeleTech about her medical marijuana use. She also offered to produce a copy of her authorization from Dr. Orvald, but TeleTech declined. Not surprisingly, Roe's drug test was positive. Roe continued to work for about a week after TeleTech learned of her positive drug test, but her employment was eventually terminated.

Roe sued TeleTech for wrongful termination. Employment generally is at-will, meaning an employer may fire an at-will employee with or without cause. In addition to the many statutory exceptions to the employment at-will doctrine, such as the various anti-discrimination laws, there is a narrow exception that prevents an employer from discharging an employee if the discharge would violate some clear public policy. Typically, this exception to the at-will doctrine prevents an employer from firing an employee for: (i) refusing to commit an illegal act, (ii) performing an important public function; or (iii) exercising a legal right or privilege which involved a clear mandate of public policy. This is why an employee cannot be discharged for performing jury duty or filing a workers' compensation claim, for example.

Roe claimed that she was discharged in violation of a clear public policy, embodied in MUMA, favoring medical marijuana use. According to Roe, the purpose of MUMA is to protect the right of qualifying patients to use medical marijuana in accordance with the advice and supervision of their physicians. MUMA's only reference to the employment relationship is a statement providing that employers are not required to accommodate "on-site" medical use of marijuana in any place of employment. Roe argued that, under these circumstances, an employer must accommodate an employee's use of medical marijuana outside of the workplace.

The Washington state appellate court determined that MUMA's scope is much more limited. According to the court, MUMA permits patients with terminal or debilitating illnesses to use marijuana by providing qualifying physicians and patients an affirmative defense to a drug crime. The court determined that MUMA does not create a clear public policy that would provide an unimpeded right to use medical marijuana or prohibit an employer from discharging an employee for medical marijuana use. The court was also troubled that federal law prohibits marijuana use and recognized that a claim for wrongful discharge in these circumstances would require an employer to permit its employees to engage in illegal activity.

This last point is important. So long as using or possessing marijuana is illegal under federal law, it is hard to imagine the circumstances under which an employer would have to accommodate medical marijuana use by creating an exception to its drug policy.

WAL-MART CLASS ACTION DISMISSED

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The plaintiffs had claimed that Wal-Mart's policy of permitting local supervisors to have discretion in making pay and promotion decisions provided a common factual issue (and related legal issues) that were best resolved in a class action, rather than with a slew of individual lawsuits. Back in April 2010, the Ninth Circuit Court of Appeals had affirmed certification of a class that could have included 1.5 million current and former female Wal-Mart employees.

The employees alleged that the retailer violates Title VII of the Civil Rights Act of 1964 by discriminating against women nationwide in its pay and promotion practices. The Ninth Circuit concluded that the statistical evidence of pay and promotion practices, anecdotal evidence of sex bias, and expert testimony regarding the corporate culture that made Wal-Mart "vulnerable" to sex discrimination, had satisfied the commonality requirement. That decision set the stage for a class action that could have included every current and former female employee who had worked at any of Wal-Mart's 3400 stores nationwide. Wal-Mart's potential financial exposure involved billions of dollars.

Justice Scalia, writing for the Court, held that the proposed largest class of plaintiffs to date did not have a common question of law or fact sufficient to satisfy the requirements for a proper class action. He explained: "In a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction." That being said, commonality requires the plaintiff to establish that the class members have suffered the same injury, which does not mean that they have suffered a violation of the same provision of law. Justice Scalia further explained that the class action claims must depend upon a "common contention – for example, the assertion of discriminatory bias on the part of the same supervisor." That common contention must be of such nature that it is capable of "classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."

The Court concluded that the plaintiffs were, in essence, suing about potentially millions of employment decisions at once, that did not have any "glue" holding the alleged reasons for all of those decisions together. Indeed, the only policy that the plaintiffs had identified was Wal-Mart's policy permitting local supervisors to have discretion over employment decisions. That policy, reasoned Scalia, is the opposite of a uniform employment practice; indeed, it is a policy against having a uniform employment practice.

The Supreme Court, therefore, recognized that different supervisors left to their own designs would have differing decisions on pay and promotions of subordinates, and that it would be "quite unbelievable" that "all managers" at Wal-Mart would exercise their discretion in a sexually discriminatory manner. The plaintiffs had failed to identify a specific employment practice that tied all 1.5 million claims together. Showing the existence of a Wal-Mart policy that has produced an overall sex-based disparity was not sufficient to pass the class action threshold.

While most employers are not Wal-Mart sized employers, the decision to prevent the class action from moving forward is welcome news to the business community, as we undoubtedly would have seen a surge of class action lawsuits if this case were permitted to proceed as planned.

HOW TO STAY ON THE EEOC'S GOOD SIDE

By Darrell Van Deusen

In 2010, the Equal Employment Opportunity Commission received nearly 100,000 new charges of discrimination nationwide. In the Baltimore Region, there are now approximately 3,300 pending charges with about 13 investigators to handle them.

The EEOC gets a bad rap from both the plaintiffs' and defense bar, usually because it takes so long to get a decision. Even mediation can take months to schedule. Faced with a charge, some employers think they can simply refuse to cooperate. That is a bad idea; when the EEOC gets mad, it has the tools at its disposal to get its way nearly all the time. This article does not provide you the location of a magic wand for a better experience at the EEOC. It does, however, provide some guidance on how to approach dealing with a charge to avoid getting on the EEOC's bad side.

1. *Getting Notice of the Charge.* With an increased workload, the EEOC has taken to giving employers "notice" of a charge being filed, without any actual allegations. This is because, by law, the EEOC needs to give an employer notice of a charge within 10 days of receipt of information constituting allegations of discrimination. In *Federal Express v. Holowecki*, 552 U.S. 389 (2008), the Supreme Court, largely deferring to the EEOC, said all that is needed to have a "charge" is enough substance so that it be "reasonably construed" as a request for EEOC to take action to protect the employee's rights. A letter from an employee still needs to be converted into the formal Charge of Discrimination (EEOC Form 5). The EEOC will not send allegations in that form until they have been drafted by an investigator and signed by the charging party, something that can take months.

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NLRB LOOKING FOR A QUICKIE

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The proposal would also limit an employer's right to litigate voter eligibility issues prior to an election. Under the proposal, if a disagreement about eligibility concerns less than 20% of a proposed bargaining unit, the election will go forward, and the voters in question will vote subject to challenge. The challenges will be resolved only if the challenged ballots are sufficient to alter the outcome of the election. What this means is that employers will go to an election without knowing who ultimately will be part of the union if the employer loses the election.

One more significant change under the NLRB's proposal concerns the provision of *Excelsior* lists. An *Excelsior* list provides the names of voters to the union. Currently, these lists must be provided to the NLRB within seven days of the direction of an election, and need only include employee names and addresses. The new rule would require that the list be provided to the NLRB within two days, and include telephone numbers and email addresses, as well as work locations, shifts, and job classifications.

The NLRB's proposal appears to be a blatant attempt to achieve through rulemaking what could not be achieved in Congress. Although it is somewhat surprising to me that the NLRB would take on this issue at a time when it is facing strong opposition concerning the Boeing *Dreamliner* case, the Board's action may be explained by the fact that the terms of two of the three pro-union members of the NLRB expire in 2011. Organized labor and its supporters may realize that the window of time for them to advance a pro-labor overhaul of the National Labor Relations Act is rapidly closing, and they will likely advocate very rigorously for the enactment of these proposals.

The Board's proposal is subject to a 60 day comment period, as well as a two-day public hearing in Washington, D.C. on July 18 and 19. More information about the proposal, as well as a link to make comments, is available at http://www.nlrb.gov/node/525.

BOY SCOUTS NOT OBLIGATED TO PROVIDE SIGN LANGUAGE INTERPRETER FOR DEAF SCOUT

By Mike Severino

The federal trial court in Maryland recently ruled that the National Capital Area Council of the Boy Scouts of America ("BSA"), a charter of the National Council of the Boy Scouts of America, does not need to provide a sign language interpreter for a deaf scout under the Americans with Disabilities Act. The court permitted the plaintiffs to engage in limited discovery, however, to determine whether the BSA is required to provide an interpreter under the Rehabilitation Act, who prohibits any program or activity receiving federal funding from discriminating or excluding someone with a disability.

The case, *Staley, et al. v. National Capital Area Council, Boy Scouts of America*, was filed on behalf of Wolfgang Staley, a 13-year-old Boy Scout who has been deaf since birth, by his mother, after the BSA failed to provide a sign language interpreter for Staley during his troop's weekly meetings and camping trips. While Staley's elementary school had provided him an interpreter for the troop's weekly meetings, Staley was not provided an interpreter when he entered middle school. After the BSA denied Staley's request for an interpreter, he and his mother filed a two count complaint against the BSA alleging violations of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*., and Rehabilitation Act, 29 U.S.C. § 790 *et seq*. The BSA argued that because it is a private club, it is exempt from the public accommodation provisions of the ADA. The BSA also argued that because it does not receive any federal funding, it is not covered by the Rehabilitation Act.

The trial court agreed that the BSA is a private club and exempt from the ADA's public accommodation provisions. In doing so, the court borrowed a test the Seventh Circuit articulated in *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir. 1993). Evaluating a private club within the parameters of Title VII of the Civil Rights Act of 1964, the *Welsh* Court outlined the following factors: (a) the membership's control over the operations of the establishment, (b) the history of the organization, (c) the use of facilities by nonmembers, (d) the club's purpose, (e) whether the club advertises for members, (f) whether the club is nonprofit or a for-profit organization, and more importantly, (g) the selectivity of the group.

Like the *Welsh* Court, the Maryland federal trial court noted that the BSA is not open to everyone, but rather only to those boys who willingly recite the Boy Scout oath, affirm their belief in God, and commit to keeping themselves physically strong, mentally awake and morally straight. The court also noted the BSA's long history of adhering to these requirements, its non-profit status, and had little difficulty finding the BSA a private club.

The court did not summarily dismiss Staley's Rehabilitation Act claim though. While the BSA argued that it does not receive federal funding, the Court permitted Staley to take limited discovery on that issue. A final ruling is expected later this year.

HOW TO KEEP THE EEOC HAPPY

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The take away: When you get "notice" of a charge, collect all available information. Make sure nothing is purged. Unless your witnesses are expected to be unavailable in a few months, however, it probably is not necessary to try and draft a response to the charge, particularly because you do not have the allegations anyway.

2. *Consider mediation.* When you get the Charge of Discrimination with the allegations, the EEOC will always include a request to mediate. Scheduling mediation will postpone the filing of a response (if the matter is not resolved), and eliminate the need for one if the mediation is successful. It may be a few months before the mediation occurs. You will need to have the investigation into the allegations completed, so you can tell the story accurately at the mediation.

The take away: If you want to resolve the matter and are willing to give up something, mediation is worth considering. Do not, however, go into mediation thinking you will get the charging party to recognize the error of her ways and go home with nothing.

3. *Responding to the Allegations.* If mediation is not an option, let the EEOC know when you will respond. It is more important to provide a well written response than to meet an arbitrary time line. The key to a good response is to tell the story clearly, concisely, and accurately. Include supporting documentation. Sometimes the EEOC sends out "requests for information" seeking lots of information, but that does not mean you need to respond to each request. EEOC investigators will most likely share your response with the employee (and the employee's lawyer), so keep that in mind if you are comparing the employee's circumstances with those of co-workers.

The take away: This may seem self serving, but responding effectively to the EEOC at this stage involves knowledge of the "rules of the game." Let knowledgeable counsel do the job for you. It is better to get the facts straight and the story well told out of the gate. If you try to tell a different story later, you can bet that a claim of "pretext" will rear its ugly head.

4. *Interacting with the EEOC.* Be nice, be civil. Realize that 99% of the time you are dealing with a truly over-worked government employee who is just trying to do his or her job, and is looking at a stack of over 200 charges to investigate.

The take away: My mother told me "you can catch more flies with honey than with vinegar." B. Franklin "'Poor Richard's Almanac" (1744).

5. *When the EEOC gets angry*. You will not like it. Although it does not happen very often, if the EEOC senses that an employer is not providing the information that it needs to conduct its investigation, it can bring to bear the full force and effect of the Federal government. Title VII, the ADEA, and the ADA grant the EEOC broad subpoena power to elicit information relevant to discrimination charges, which the EEOC may enforce in federal court. Federal courts most often will side with the EEOC if it gets to that point. Recently, the Fourth Circuit upheld enforcement of an EEOC subpoena seeking information surrounding a restructuring, over objections of legislative immunity and privilege. *See EEOC v. WSSC*, 631 F.3d 174 (4th Cir. 2011).

The EEOC's subpoena authority does have its limits. For a court to enforce an administrative subpoena, the EEOC must show that "(1) it is authorized to make such investigation; (2) it has complied with statutory requirements of due process; and (3) the materials requested are relevant." *EEOC v. City of Norfolk Police Dep't,* 45 F.3d 80, 82 (4th Cir. 1995). Thus, in *EEOC v. UPMC*, 2011 U.S. Dist. LEXIS 55311 (May 24, 2011), the court refused to enforce a subpoena in an ADA case where the EEOC sought corporate-wide information unrelated to the underlying individual charge of discrimination, finding that the subpoena "constitutes a 'fishing expedition' to discover the existence of other potential claimants rather than a reasonable effort to develop information that is relevant to [the] . . . charge."

The take away: Avoid facing an EEOC subpoena; respond to inquiries from the EEOC with an eye toward compliance. If you believe that the EEOC is over-reaching, and it sometimes does, be sure to consult counsel familiar with the process to make the experience as (relatively) painless as possible.

SUPREME COURT SETS TEST FOR AWARD OF ATTORNEYS' FEES TO DEFENDANTS

By Kelly Hoelzer

Federal law authorizes the award of reasonable attorneys' fees to the prevailing party in civil rights and Title VII cases. Prevailing plaintiffs normally benefit from this provision. The law also permits a court to award attorneys' fees to a defendant who defeats a plaintiff's frivolous claim. As the Supreme Court has said, however, "litigation is messy," and most cases involve multiple legal theories and claims, some of which may be frivolous and some not. In these instances, how does a court determine the amount of attorneys' fees for a prevailing defendant?

In June 2011, the U.S. Supreme Court answered this question in *Fox v.*

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SUPREME COURT SETS NEW TEST FOR ATTORNEYS FEES

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Vice, No. 10-114, 2011 WL 2175211 (June 6, 2011).

In a unanimous opinion authored by Justice Kagan, the Court held that where a civil rights plaintiff's lawsuit involves both frivolous and non-frivolous claims, a winning defendant is entitled to an award of fees incurred solely in the defense of the plaintiff's frivolous claims.

The *Fox* case stemmed from political shenanigans during the 2005 election for the Town of Vinton, Louisiana police chief. After Ricky Fox announced his candidacy to displace incumbent Billy Ray Vice as the Town police chief, Vice sent Fox an "anonymous" letter attempting to blackmail Fox into not running for office, and engaged in other scurrilous campaign tactics. Fox brought suit in Louisiana state court against Vice and the Town, alleging his civil rights were violated under federal law and other state claims. The case was removed to federal court, and Fox ultimately conceded, after discovery, that his civil rights claim was meritless. The court dismissed his federal claim and remanded the rest of the case back to state court.

Vice and the Town moved for attorneys' fees pursuant to 42 U.S.C. § 1988, arguing that Fox's federal claims were frivolous, unreasonable and without foundation. The district court granted that motion. On Fox's appeal, the Fifth Circuit affirmed, finding that because litigation of the interrelated state and federal claims was focused primarily on Fox's frivolous federal claim, Vice was entitled to reasonable fees. On November 1, 2010, the Supreme Court granted Fox's petition for writ of *certiorari*.

The Supreme Court held that when a plaintiff's civil rights suit involves both frivolous and non-frivolous claims, Section 1988 permits an award of attorneys' fees to a prevailing defendant. That award is limited, however, to those costs the defendant would not have incurred but for the frivolous claims.

Acknowledging the complicated nature of litigation, often involving multiple legal theories and claims (some viable and some not), the Court reiterated that plaintiffs are entitled to fee awards under Section 1988, even if they are not successful on every claim. Defendants also may be entitled to attorneys' fees, even where some of the plaintiff's claims are not frivolous. When a plaintiff brings meritless allegations against a defendant, the Court reasoned that the plaintiff should pay for the reasonable costs those claims imposed on the defendant, even if the plaintiff has also asserted non-frivolous claims in the same litigation.

The Court recognized that under its "but for" test, a defendant may recoup fees for work relating to both frivolous and non-frivolous claims. For example, as in Fox, a frivolous claim enabled removal to federal court, which in turn drove up litigation expenses. The "but for" test would permit awarding fees for work relevant to both claims in order to reflect the increased costs of the federal forum. The key question, however, is not whether the fees "relate" to a non-frivolous claim, but whether the defendant's costs would have been incurred in the absence of such a claim.

As for Fox's case, the Court pointed out that Fox's state and federal claims were interrelated and that Vice's attorneys likely would have conducted the same or similar fact-finding activities -- such as depositions and document production -- in defense of all of claims. The Court vacated the judgment of the Fifth Circuit and remanded the case for a redetermination of the fee award.

The *Fox* decision unmistakably limits a defendant's recovery of attorneys' fees in a civil rights case. While a defendant can recoup fees for the successful defense of a frivolous claim, it will be difficult to do so in civil rights litigation involving multiple claims. Most litigation activities uncover facts relating to all claims and defenses in the case, not each cause of action piecemeal. Allocating attorney work time, by practitioners and judges alike, where there is some overlap of both frivolous and non-frivolous claims will likely require more "green-eyeshade" accounting than the Supreme Court intended.

DOL CREATES APP TO TRACK HOURS

By Adam Simons

This could be a sign of the Apocalypse: the United States Department of Labor, Wage and Hour Division, has developed an app (short for applications) that allows employees to keep track of their working hours on their smart phones or other mobile devices. The app is free for download from DOL's website. It is currently only compatible with the IPhone and Ipod Touch, but the DOL is trying to make it work with Blackberry and Android phones as well.

The DOL app is essentially an electronic time sheet. It allows employees to track their hours and determine the amount of straight time and overtime they are due. Users press a button in the app when they start their shift, and press it again when they stop working. Then they enter their hourly rate and they get their wages calculated for them. The app will email a report to them so that they have an electronic record, and even comes with a glossary of terms and some relevant wage and hour laws. For employees, this may just be the beginning of a new wave of high tech tools to help purse claims against their employer.