

**AKRON BAR ASSOCIATION**  
**LABOR & EMPLOYMENT SECTION ☪ SEPTEMBER 2011 CASE UPDATE**

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**Arbitration**

***Hergenreder v. Bickford Senior Living Group, LLC***, No. 10-1474, --- F.3d ---  
(6<sup>th</sup> Cir. Aug. 30, 2011)

**Holding:** Where there is no evidence that an employee was shown a copy of the employer's mandatory arbitration policy, the fact that the employee handbook mentions that there is some kind of dispute resolution policy (but does not include the separate arbitration policy) does not make an arbitration policy enforceable under the FAA. An employee handbook is not generally a contract, and even if it were, nothing in the handbook in this case notified the employee that continuing to work for the company would be construed as her assent to be bound to an arbitration agreement.

**Attorney's Fees**

***Fox v. Vice***, 563 U.S. ---, 131 S.Ct. 2205, (June 6, 2011)

**Holding:** When some of a civil rights plaintiff's causes of action are found to be frivolous, but others are held not to be frivolous, a defendant can recover the attorney's fees it spend to defend against only the frivolous claims, not for the entire fee bill.

This case arises out of a dirty political campaign for the office of chief of police of Vinton, La. Apparently, incumbent Billy Ray Vice wanted to keep his job awfully badly. During the campaign, he sent letters to his opponent, Ricky Fox, warning that if Fox didn't withdraw from the race, Vice would spread tales that Fox had engaged in dire misconduct. When that didn't work, Vice had a third party publicly accuse Fox of using racial slurs, and file a criminal complaint against Fox for the alleged slurs. When local prosecutors ignored the criminal complaint, Vice leaked it to the press.

It all backfired; not only did Fox win the election, but Vice ended up being successfully prosecuted for extortion because of his electoral shenanigans.

But Fox couldn't let it go. So, he filed suit in state court against Vice and the town of Vinton, claiming (among other things) defamation and violations of his civil rights under 42 U.S.C. § 1983, and the defendants removed the case to federal court.

The district court dismissed Fox's federal claims on summary judgment, and, disclaiming jurisdiction on the state-law claims, remanded Fox's case back to Louisiana's courts.

In the meantime, Vice asked the federal court to grant him attorney's fees under 42 U.S.C. § 1988, claiming that Fox's federal claims were meritless and therefore frivolous. The district court agreed, but did not require Vice to segregate out the time his

lawyers spent defending against the federal claims from the time they spent on the state-law claims. The court of appeals didn't either.

The Supreme Court, however, did, in an opinion written by Justice Kagan, who specifically reiterated that different standards apply to an award of attorney's fees under § 1988 to a prevailing plaintiff (who need not win all of her claims to be awarded her full fees), versus to a defendant (who can receive fees only for claims that are determined to be "frivolous, unreasonable, or without foundation"). A plaintiff is permitted her entire fee because, even if she prevails on only one claim, she has vindicated Congress' purposes in enacting the civil rights laws; a defendant is permitted its fees only to defend against claims that the plaintiff was legally wrong in pursuing.

In addition, a defendant is only permitted to recover the fees and costs that it would not have incurred *but for* the specific frivolous claim. It cannot recover the attorney time and costs, for example, for a deposition that covered a frivolous and a nonfrivolous claim at the same time.

The decision resolves a conflict between the Circuits, and overturns the Sixth Circuit's holding in *Balmer v. HCA, Inc.*, 423 F.3d 606 (6<sup>th</sup> Cir. 2005), that unless *all* of the plaintiff's claims are frivolous, a defendant cannot recover any of its attorney's fees.

## **Discrimination**

***Staub v. Proctor Hosp.***, 562 U.S. ---, 131 S.Ct. 1186, --- L.Ed.2d --- (March 1, 2011)

**Holding:** An employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision.

Vince Staub was an angiography technician at Proctor Hospital. But he was also a member of the U.S. Army Reserve, which required him to drill one weekend a month, and to train full time for two to three weeks per year. His immediate supervisor and her immediate supervisor were hostile to Staub's military obligations. His immediate supervisor not only scheduled Staub for additional work shifts without notice to specifically "get even" with him for his Reserve obligations, but she routinely complained to his co-workers how much she resented his military status and requirements. She also fabricated reasons to discipline him.

When other co-workers began to complain about Staub's "unavailability," upper management directed Staub's supervisors to form a plan to correct his "availability" issues. They again fabricated a reason to discipline him, which led upper management to terminate Staub.

Staub sued under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 *et seq.*, claiming that his termination was motivated by his supervisors' animosity toward his service. A jury awarded him more than \$57,000 in damages, but the Seventh Circuit reversed, holding that because Staub had not proven that the employees with the anti-military animus had not played a significant role in making the decision to terminate him, the hospital was entitled to judgment.

The Supreme Court disagreed. Writing for a unanimous court (except that Alito and Thomas concurred, and Kagan recused herself), Justice Scalia reached back to agency and general tort law and the fact that there can be several proximate causes for the same injury to hold that Proctor Hospital was liable. “So long as the agent intends, for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable under USERRA.”

### **First Amendment Retaliation**

***Borough of Duryea, Penn. v. Guarnieri***, 564 U.S. ---, 131 S.Ct. 2488 (June 30, 2011)

**Holding:** In addition to free speech rights, public employees’ rights to petition the government for redress of grievances are protected, and can be enforced through 42 U.S.C. § 1983--but only where their petition addresses a matter of public, rather than private, concern.

After Charles Guarnieri won his job back as Duryea’s chief of police in a union arbitration, the borough council issued 11 directives meant to govern Guarnieri’s job performance. He filed a new grievance about these directives, and the arbitrator instructed the council to withdraw or modify the directives, because they were variously overbroad, vague, or violations of the collective bargaining agreement.

Guarnieri also sued the borough and its council members under § 1983, claiming that they had retaliated against him for filing his first grievance, which he claimed was in retaliation for his exercise of his rights under the First Amendment’s petition clause. After he filed the suit, the council also denied him less than \$400 in overtime compensation. He added this to his lawsuit, claiming the denial of overtime pay was in retaliation for filing the suit.

Under Third Circuit precedent, it didn’t matter that Guarnieri’s “petitions” (his grievance and lawsuit) were about matters of his (private) concern; the borough could not obtain judgment as a matter of law on these grounds, as it would have in other Circuits. The case went to trial, and Guarnieri won \$45,000 in compensatory and \$24,000 in punitive damages for the directives, \$358 in compensatory and \$24,000 in punitive damages for the denial of overtime pay, and \$45,000 in attorney’s fees. The Third Circuit affirmed everything but the punitive damages awards.

The Supreme Court, in a nearly unanimous decision, held that in order for a public employee to bring a § 1983 retaliation case implicates the petition clause, the petition at issue must be about a matter of public, rather than private concern. This mirrors the Court’s long-standing mandate that public employee speech cases must also be about speech on matters of public concern; see *Connick v. Myers*, 461 U.S. 138 (1983).

Justice Thomas filed a concurring opinion, and Justice Scalia concurred in judgment but dissented in part. They would hold that a lawsuit does not constitute a “petition” for First Amendment purposes.

## **Fair Labor Standards Act**

***Kasten v. Saint-Gobain Performance Plastics, Inc.***, 563 U.S. ---, 131 S.Ct. 1325, --- L.Ed.2d --- (March 22, 2011)

**Holding:** Under the FLSA, an employee's oral complaint to a supervisor of a potential violation of the FLSA is sufficient protected activity to trigger the antiretaliation provision's operation (29 U.S.C. § 215(a)(3)). A formal or written complaint to the Department of Labor is not required. The decision affirms the Sixth Circuit's holding in *Moore v. Freeman*, 355 F.3d 558 (6<sup>th</sup> Cir. 2004).

***Solis v. Laurelbrook Sanitarium and School, Inc.***, No. 09-6128, --- F.3d --- (6<sup>th</sup> Cir. April 28, 2011)

**Holding:** Under the "primary benefit test," students receiving vocational education training are not employees under the FLSA, because only the students, not the school, receive any benefit from the students' efforts. The students' work, then, does not constitute a violation of the child labor laws. (Note that the "primary benefit test" is applicable only to the education context.)

## **Public Employee Immunity**

***Engel v. Univ. of Toledo College of Medicine***, --- Ohio St.3d ---, 2011-Ohio-3375 (July 13, 2011)

**Holding:** A doctor who was a volunteer instructor at a state-supported university's medical school was not a state employee entitled to immunity in a patient's medical malpractice action.

After two minor surgeries went bad and necessitated a third surgery, Mr. Engel filed a medical malpractice action against Dr. Marek Skoskiewicz, who practiced surgery at the hospital where the procedures were performed, and who performed the first two surgeries in the presence of a third-year U.T. medical student. The doctor claimed that because he was also a volunteer clinical faculty member at U.T., he was immune from suit as a state employee.

So, Engel filed suit against U.T. in the Court of Claims, mostly to determine whether the doctor was indeed immune, and his medical malpractice case was put on hold. The Court of Claims found that the doctor was immune, and so did the 10<sup>th</sup> District Court of Appeals.

The Ohio Supreme Court disagreed. The doctor, the Court said, was not a "state employee," for the following reasons: 1) he was not under contract with U.T.; 2) U.T. did not control the doctor or his practice; 3) he was not paid by U.T.; and 4) even though the doctor was "appointed" as a faculty member, his "appointment" was not to a state office or position.

***Zumwalde v. Madeira & Indian Hill Joint Fire Dist.***, 128 Ohio St.3d 492, 2011-Ohio-1603, 946 N.E.2d 748

**Holding:** When a public employee files an employment action against the political subdivision employer and a co-worker, R.C. § 2744.09(B) removes political subdivision immunity only from the political subdivision, not the co-worker.

This wasn't Barbara Zumwalde's first legal battle against the Madeira & Indian Hill Fire District.

She had already sued the district once for discrimination. As part of the resolution of that case, the district offered her a full-time job, contingent upon her passing a physical examination. She did, and began work in July 2005.

In September that year, Zumwalde was injured in a training exercise. The district approved her for workers compensation benefits. But, during his investigation of her claim, Chief Stephen Ashbrock discovered that Zumwalde had claimed on her pre-employment physical questionnaire that she had not had any previous injury, when she had received chiropractic treatment for lower back pain in May 2005. Ashbrock suspended her without pay for 30 days for violating the district's personnel policies, and the district's equivalent of a civil service commission affirmed Ashbrock's conclusions, but reduced the suspension to 20 days without pay.

Zumwalde sued the district and Ashbrock, claiming retaliation on the bases of her previous lawsuit and her workers compensation claim. Ashbrock argued in his summary judgment motion that he was immune from suit under R.C. § 2744.03(A)(6). The trial court disagreed, and the court of appeals affirmed, holding that R.C. § 2744.09 (B), which carves out an employment-matters exception to political subdivision immunity, also applies to employees.

The Ohio Supreme Court, however, held that the plain language of R.C. § 2744.09 (B)--which exempts from Chap. 2744's immunity provisions "Civil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision"--by its plain language applies only to political subdivisions, not to political subdivisions and their employees. Therefore, Zumwalde could recover from the district, but not from Ashbrock personally.

## **Procedure**

***Wal-Mart Stores, Inc. v. Dukes***, 564 U.S. ---, --- S.Ct. --- (June 20, 2011)

**Holding:** Where the company gave its individual store managers discretion to establish store-by-store pay and promotion policies, as many as 1.5 million female workers who were suing the company for sex discrimination could not sue in a class action, as they lacked commonality.

Wal-Mart has long been infamous for allegedly paying women less than men, and for denying women promotions. This case attempted to establish as a class all or nearly all of Wal-Mart's female employees, under the intertwined theories that the unfettered discretion the company gave to its (overwhelmingly male) managers to set employees'

pay rates and promote workers had a negative disparate impact on female workers, and that the company's grant of this unfettered power to its managers was actually a calculated policy of turning a blind and permissive eye to discrimination, which itself was disparate treatment discrimination. The Ninth Circuit held that certifying the massive class was proper.

The Supreme Court disagreed. In a 9-0 decision written by Justice Scalia, the Court held that there wasn't enough commonality in the women's claims to meet Fed.R.Civ.P. 23(a)(2), which requires questions of law or fact that are common to the class, or Rule 23(b), which additionally requires that the party opposing class certification has acted on grounds that apply generally to the class, so that final injunctive or declaratory relief is appropriate for the class as a whole.

In support of the class, the representative plaintiffs presented statistical evidence about pay and promotion disparities between men and women at Wal-Mart, anecdotal reports of discrimination, and the testimony of a sociologist. Wal-Mart countered that, among other things, the women's claims for back pay would be impossible to litigate in a class under Rule 23(b).

The Court held that commonality requires more than just an assertion that the same law (ex: Title VII) is being violated; there must be a common contention that is capable of a class-wide resolution. In other words, there must be a common question that, once answered, resolves in a single stroke an issue that is central to the validity of each and every one of the class members' claims.

This wasn't present in this case. The company's *laissez-faire* attitude toward its managers' decisions wasn't enough to establish a policy that applied in the same way to all of the potential class members, especially when the class members' expert couldn't determine with any precision just how many employment decisions companywide had been tainted by alleged sexism. The women had not identified a "common mode of exercising discretion that pervades the entire company" that would justify class certification.

Finally, the Court held that claims for monetary awards may not be certified under Fed.R.Civ.P. 23(b)(2) where the monetary relief is not incidental to a demand for injunctive or declaratory relief.

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