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## ARTICLES

# Misappropriating Data to Further a Claim—Theft or Protected Conduct?

By Kevin J. O'Connor

With the advent of technology in the modern workplace, an enormous amount of data is created and has the potential to end up in the hands of an employee who is pursuing an employment-based claim against his or her employer. The proliferation of such data increases the risk that such an employee will gain access to sensitive data, either legally or illegally, and turn it over to counsel for use in the litigation. Another possibility is that the employee will disseminate the data to similarly situated employees to assist in their pursuit of similar claims. Is such an employee protected from termination or some other adverse employment action on the ground that he or she has engaged in protected activity?

In some instances, employees may set out to “create” evidence by, for example, surreptitiously recording managers or co-employees to preserve statements that can be used to support ongoing litigation against the employer, or by hacking into an email account to find incriminating evidence. The question that is often raised in such circumstances is whether the employee’s act of furnishing this information to his or her attorney is, itself, protected activity, and if so, whether an employer who disciplines the employee in such circumstances may be found liable for retaliation.

Many state and federal statutes exist to protect employees from retaliation for opposing unlawful practices or otherwise participating in litigation over such practices. By way of example, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, provides as follows:

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, **assisted, or participated in any manner** in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623 (d) (emphasis added).

In recent decades, case law from a number of federal and state courts demonstrates a broad consensus that an employee who engages in illegal or tortious acts to pilfer data in an attempt to discover evidence for the prosecution of a civil-rights lawsuit will be hard-pressed to successfully claim that he or she was only engaging in protected conduct, and cannot be

disciplined for the misconduct. For example, in *Watkins v. Ford Motor Co.*, 2005 U.S. Dist. LEXIS 33140 (S.D. Ohio 2005), an employee was pursuing a race-discrimination claim against Ford and stumbled across a binder of personnel profiles that he claimed was left lying around for anyone to read, and not marked as confidential. The employee reviewed the binder, copied its contents, and gave the copies to his attorney. Ford later terminated him for doing so. The court held that he was not protected from firing by dint of having participated in opposition activity or other protected conduct: “Far from being entitled to protection under the law, plaintiff’s conduct was counterproductive, wrongful, and a breach of his employer’s trust.” *Id.* \*7.

The Ninth Circuit reached a similar result in *O’Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9th Cir. 1996), where an employee of a helicopter company went into a supervisor’s desk and rummaged through a file marked “personal/sensitive,” which contained a list of employees ranked for layoff. He copied the file and shared it with an employee on the layoff list. After being denied a promotion and eventually laid off, the employee sued the company for age discrimination and sought to use the file he copied in the litigation. During discovery, the helicopter company learned of the employee’s unauthorized access and dissemination of the confidential file and used this information to defeat the employee’s discrimination claim under the after-acquired-evidence doctrine. While the employee argued that the company could not have legally discharged him for accessing and using the information under the ADEA’s anti-retaliation clause, the Ninth Circuit ruled that this conduct was not protected activity, stating that “[t]he opposition clause [of the ADEA] protects reasonable attempts to contest an employer’s discriminatory practices; it is not an insurance policy, a license to flaunt company rules or an invitation to dishonest behavior.” *Id.* at 763–64.

The Fourth Circuit ruled in a similar manner in *Laughlin v. Metropolitan Washington Airports Authority*, 149 F.3d 253, 259–261 (4th Cir. 1998), when it held that Title VII’s anti-retaliation provision does not permit an employee to claim that his or her acts of improperly accessing, copying, and disseminating confidential documents to a coworker were protected activity.

More recently, in *Niswander v. Cincinnati Insurance Co.*, 529 F.3d 714, 717 (6th Cir. 2008), the Sixth Circuit adopted a six-part test to determine whether an employee’s act of improperly accessing, copying, and disseminating data should be protected in the context of an Equal Pay Act and Fair Labor Standards Act class action. The court declined to give protected status to the employee’s actions of improperly accessing data on her computer system, although the employee’s purpose was to discover evidence of discrimination.

The decision of the Eighth Circuit in *Kempcke v. Monsanto Co.*, 132 F.3d 442 (1998) offers some good advice to employers and employees alike when dealing with this subject. There, the employee accessed documents that he believed reflected a pattern of age discrimination by his employer, Monsanto, and he gave them to his attorney. When Monsanto demanded that he return the documents, he referred it to his attorney to negotiate their return. Monsanto subsequently



terminated the employee. The district court granted summary judgment to Monsanto, holding that the employee's refusal to return the documents was not protected activity.

The Eighth Circuit, however, reversed and remanded the case back to the district court for trial. The circuit court found it significant that the employee "innocently acquired the documents"; that the documents had not been safeguarded by the employer (such as marking them as confidential and locking them up); and, further, that there was a dispute about whether the employee had shared them with anyone other than his attorney.

In December 2010, the New Jersey Supreme Court was presented with the opportunity to weigh in on this subject in *Quinlan v. Curtiss-Wright*, 204 N.J. 239 (2010). In that case, the court adopted a seven-part test for determining whether an employee who copies data and turns it over to his or her attorney engages in legitimate oppositional or participatory activity protected under the law. The plaintiff in *Quinlan* began working in the human resources (HR) department at defendant Curtiss-Wright in 1980, and signed a confidentiality agreement with the company, agreeing not to disclose any confidential information she obtained through her employment. She also signed a code of conduct that prohibited her from using her position to gain a private advantage in other matters. In July 2000, Curtiss-Wright hired an outsider, Lewis, to work in the plaintiff's department, and several years later promoted Lewis to a position above the plaintiff. The plaintiff believed that Lewis was unqualified and that she was not promoted to the position given to Lewis because of her gender.

After filing suit for gender discrimination in November 2003, the plaintiff began to review documents in the HR department and to copy files she felt were helpful to her case, feeding them to her attorney for use in the litigation. She delivered a total of 1,800 pages of materials to her attorney, much of which was confidential. In turn, the plaintiff's attorney produced these documents to defense counsel. The plaintiff continued to copy materials until it became clear to Curtiss-Wright that she was taking confidential information from the work premises (the plaintiff's counsel sprang one of the documents on Lewis at his deposition), and she was terminated. The plaintiff later amended her complaint to sue for retaliation premised on this discipline. The court ruled that the plaintiff had engaged in protected conduct in both copying confidential data in the workplace and feeding it to her attorney for use in her ongoing discrimination lawsuit.

The New Jersey Supreme Court's December 2, 2010, decision in *Quinlan* has spurred a great deal of debate among legal commentators about whether the New Jersey Supreme Court has opened a Pandora's box and sanctioned employee theft of documents. In this author's opinion, however, a close review of the decision shows that the legal commentators have likely overreacted, and that *Quinlan* provides a workable, seven-part test (adapted from the balancing tests articulated in the above-referenced federal-circuit-court cases) to be applied in determining whether an employee's theft of documents in the workplace can constitute protected activity under state employment statutes.



Regardless of their correctness, however, *Quinlan* and the other decisions discussed in this article should cause employers to keep close tabs on and clearly mark and limit disclosure of confidential data. Meanwhile, employees who come across such data in the course of their duties would be well advised to consult with counsel on the best course of action and in no circumstances should they disseminate the documents to others. Most certainly, the decisions discussed herein should prompt employers to closely analyze their employee handbooks and written policies to ensure they clearly articulate that any unauthorized access and dissemination of confidential information will result in appropriate discipline, including termination. However, a decision by an employer to discipline an employee for such conduct should always be carefully made with the assistance of qualified legal counsel. In the words of the Ninth Circuit in *O'Day* (which was relied upon by the Appellate Division in *Quinlan*), “[a]n employee’s opposition activity is protected only if it is ‘reasonable in view of the employer’s interest in maintaining a harmonious and efficient operation.’” *O'Day*, 79 F.3d at 763. Just as the employer in *O'Day* was fully justified in terminating an employee who broke into his supervisor’s office, rummaged through his files, copied confidential documents, and provided them to a coworker, so too will an employer be justified in enforcing its own *written* policies and procedures.

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**Keywords:** employment and labor relations law, ADEA, *Quinlan*, *O'Day*, Laughlin, Niswander, Kempcke

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## A HIPAA Privacy Primer for Health-Related Employment Claims

By Laurie E. Martin

Parties and counsel on both sides of health-related employment claims must be familiar with the contours of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). HIPAA issues will undoubtedly arise in litigation under the Americans with Disabilities Act (ADA) or the Family and Medical Leave Act (FMLA). Working knowledge of HIPAA's privacy rule can prepare you to spot privacy issues and advise clients appropriately, and may be essential to obtaining the information you need to effectively develop or defend a claim.

Lawyers for covered entities have additional reason to get comfortable with HIPAA's privacy requirements. Business associates of covered entities—including lawyers—are now directly subject to HIPAA's privacy rule and other requirements as well as new enhanced enforcement provisions under the Health Information Technology for Economic and Clinical Health (HITECH) provisions of the American Recovery and Reinvestment Act of 2009.

### **HIPAA and HITECH**

HIPAA is broadly intended to protect the portability of health coverage, although privacy protection for health information is perhaps the act's most visible component. The privacy rule, 45 CFR Part 160 and Subparts A and E of Part 164, implements the privacy requirements of Title II of HIPAA. Employment litigators should be comfortable with the bounds of the privacy rule and also aware of—and hopefully able to avoid direct familiarity with—the enforcement rule.

#### *Privacy Rule Basics*

The privacy rule establishes national standards to protect individuals' medical records and other personal health information, sets limits on disclosures that may be made of such information without authorization, and gives patients certain rights concerning their information.

**Who is covered?** The privacy rule applies to “covered entities”—healthcare clearinghouses and healthcare providers who transmit health information in electronic form in specific transactions.

Under HITECH, the privacy rule also applies directly to “business associates” of covered entities. Business associates are non-employees who handle individually identifiable health information in capacities including claims processing, utilization review, billing, or the provision of professional services for a covered entity, including legal services “where the provision of the service involves the disclosure of individually identifiable health information.” 45 C.F.R. § 160.103. Lawyers litigating claims for covered entities or responding to requests for health information in connection with such claims could very well be business associates directly subject to HIPAA.

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**What is PHI?** The privacy rule protects individually identifiable health information held or transmitted by a covered entity or its business associate in any form or media, referred to as protected health information (PHI). Health information created by a covered entity is individually identifiable if it identifies the individual or provides a reasonable basis to believe it could be used to identify the individual. 45 C.F.R. § 160.103.

Whether the individual subject of the health information can be identified based on the data contained therein is a key aspect to whether health information is “protected.” PHI can be de-identified by removing specified identifiers if the covered entity has no actual knowledge that the remaining information could be used to identify the individual. 45 C.F.R. § 164.514(b). The regulations provide a “safe harbor” permitting disclosure of de-identified health information, provided the covered entity follows detailed guidelines for removal of specified identifiers.

**How can PHI be used?** A covered entity may not use or disclose protected health information except as permitted by the rule or as authorized in writing by the individual who is the subject of the information. 45 C.F.R. § 164.502(a). The privacy rule specifies several instances where covered entities may use or disclose protected information without authorization. *See* 45 C.F.R. § 164.502(a). The rule permits uses and disclosures for litigation, without authorization, under provisions for judicial and administrative proceedings, 45 C.F.R. § 164.512(e), or as part of the covered entity’s healthcare operations, 45 C.F.R. § 164.506(a), or in connection with worker’s compensation actions, 45 C.F.R. § 164.506(l).

A covered entity must make reasonable efforts to disclose only the minimum amount of protected health information needed to accomplish its intended purpose. 45 C.F.R. §§ 164.502(b) and 164.514 (d). There are no limits on use or disclosure of “de-identified health information. *See* 45 C.F.R. § 164.514(b).

**Application to employers generally.** The privacy rule does not directly regulate employers or other plan sponsors that are not HIPAA covered entities. An entity that conducts both covered and non-covered functions can elect to be a “hybrid entity.” Thus, an employer that is self-insured for employees’ medical benefits may be covered by HIPAA in that capacity. Conversely, covered entities, such as hospitals or long-term care providers, which are also employers, may not be subject to HIPAA in their capacity as employer. *See* 45 C.F.R. § 160.103 (employment records held by a covered entity in its role as employer are not protected health information, even where such records include individually identifiable health information).

Thus, an employer that is not a covered entity does not become subject to HIPAA merely because it finds itself with medical information about an employee. Although other laws, including the ADA, may require such information to be kept confidential, HIPAA’s privacy rule generally does not limit the use of personnel records in litigating employment matters.



Where a covered entity is a party to a legal proceeding, the covered entity may use or disclose protected health information for purposes of the litigation as part of its healthcare operations to the extent the action is related to its healthcare functions. See 45 C.F.R. § 164.501. However, to the extent that a covered entity is a party to a proceeding solely related to non-covered functions, including in its capacity as an employer, it is not subject to HIPAA's privacy rule requirements.

Where information is sought from a covered entity that is not a party to the proceeding, the covered entity may disclose protected health information pursuant to the individual's authorization or, absent authorization, pursuant to a court order, subpoena, discovery request, or other lawful process, provided the applicable requirements discussed below are met.

### *Enforcement Basics*

The HIPAA privacy rule is enforced by the Health and Human Services Office for Civil Rights (OCR). OCR may investigate compliance and impose a civil penalty per violation, subject to an annual cap. Violators can also face criminal penalties including fines and imprisonment for knowing disclosures, with increasing penalties if the conduct involves false pretenses or intent to sell, transfer, or use the information for personal gain of malicious harm. HITECH also gives state attorneys general enforcement capabilities.

According to the federal circuits that have addressed the issue, individuals cannot recover directly from an employer or other entity for an alleged improper disclosure of confidential health-related information pursuant to HIPAA. See *e.g.*, *Carpenter v. Phillips*, 419 Fed. Appx. 658, 658 (7th Cir. 2011); *Dodd v. Jones*, 623 F.3d 563, 569 (8th Cir. 2010); *Crawford v. City of Tampa*, 397 Fed. Appx. 621, 623 (11th Cir. 2010); *Seaton v. Mayberg*, 610 F.3d 530, 533 (9th Cir. 2010), *cert. denied*, 131 S.Ct.1534 (2011); *Wilkerson v. Shinseki*, 606 F.3d 1256, 1267 n.4 (10th Cir. 2010); *Miller v. Nichols*, 586 F.3d 53, 59 (1st Cir. 2009), *cert. denied*, 130 S.Ct. 1911 (2010); *Acara v. Banks*, 470 F.3d 569, 572 (5th Cir. 2006).

### **Authorizations and Protective Orders**

Authorizations and protective orders are the two key mechanisms that parties must use to obtain protected health information when litigating employment matters. Employee plaintiffs may be asked to provide an authorization for the release of protected health information. To obtain such information from covered entities and protect privacy rights during the litigation, the parties may also be required to put a qualified protective order in place.

### *Authorizations*

Disclosure of protected health information is permitted with written authorization from the patient. Counsel should develop and keep an updated authorization form for use in health-related employment claims. A valid authorization under this section must be in plain language and identify at least the following:

- the information to be disclosed



- who is authorized to disclose it
- to whom it may be disclosed
- the purpose of the disclosure
- an expiration date or event relating to the purpose of the disclosure
- the signature and date of the individual

45 C.F.R. § 164.508. If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual must also be provided.

An authorization must also indicate adequate notice of (1) the individual's right to revoke the authorization in writing, (2) either exceptions to the right to revoke and a description of how the individual may revoke the authorization or, if necessary, a reference to the covered entity's notice, (3) whether the covered entity may condition treatment, payment, enrollment, or eligibility for benefits on whether the individual signs the authorization, and (4) the potential for information disclosed pursuant to the authorization to be re-disclosed by the recipient and therefore no longer be protected by HIPAA's privacy protections.

### *Assurances Required for Disclosure in Judicial or Administrative Proceedings*

A covered entity may disclose PHI for use in judicial or administrative proceedings if it receives satisfactory assurances (a written statement and accompanying documentation from the requestor) indicating adequate notice to the individual about whom PHI is sought along with an opportunity to object, or satisfactory assurances that a qualified protective order has been either agreed to or sought by the requestor. Alternatively, the covered entity may notify the individual or seek a qualified protective order. To the extent that the subpoena or other request itself demonstrates sufficient notice to the individual, no additional documentation is required.

To be effective, a qualified protective order must (1) prohibit the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested and (2) require the return to the covered entity or destruction of the protected health information (including any copies) at the end of the litigation or proceeding. 45 C.F.R. § 164.512(e)(1)(v). At least where covered entities are parties, such orders should also ensure that other legal counsel, jury experts, document or file managers, investigators, litigation support personnel, or others hired by the lawyer to assist in providing legal services to the covered entity will also safeguard the privacy of the protected health information received.

### **Additional Confidentiality Considerations**

Employers and employees must also be aware of other confidentiality obligations that may protect medical information relevant to an employment claim. Even if employee medical information in a personnel or medical file is not, in the hands of the employer, protected health information subject to HIPAA, other statutes, including the ADA, the Genetic Information Nondiscrimination Act (GINA), and state privacy laws may impose separate requirements.



Further, employers typically have policies and procedures requiring employees to maintain confidentiality of such information.

### *Employees' Duties to Maintain Confidentiality*

Employees must ensure that they comply with employers' confidentiality policies even when pursuing a claim before the Equal Employment Opportunity Commission (EEOC). In *Vaughn v. Epworth Villa*, 537 F.3d 1147 (10th Cir. 2008), the Tenth Circuit Court of Appeals examined whether the employer, Epworth Villa, lawfully terminated its employee, Bernadine Vaughn, after she disclosed several pages of unredacted medical records to the EEOC to support her claim of age and race discrimination. Epworth Villa terminated Vaughn's employment while the charge was still pending, after learning of the disclosure. Vaughn filed suit, alleging that she was terminated in retaliation for her participation in the EEOC process.

The Tenth Circuit held that Vaughn's actions were "protected activity" under Title VII. However, because her actions were a violation of Epworth Villa's confidentiality policies, the disclosure provided a legitimate basis for her termination, and Vaughn's retaliation claim was found to be unsubstantiated absent proof that other employees violated the company policy against disclosure.

### *ADA and the Rehabilitation Act*

Both the ADA and the Rehabilitation Act require that all information obtained regarding the medical condition or history of an applicant or employee be maintained on separate forms and in separate files and be treated as confidential medical records. This confidentiality requirement applies to all medical information, including medical information that an individual voluntarily discloses to an employer, without regard to whether the individual has a disability. See 29 C.F.R. § 1630.14. Improper disclosure is potential basis for ADA liability. See *Bennett v. U.S. Postal Serv.*, 2011 WL 244217 (EEOC Jan. 11, 2011).

### *GINA*

Title II of the Genetic Information Nondiscrimination Act (GINA), which makes it illegal to discriminate, harass, or retaliate against employees or applicants based on genetic information, also strictly limits the disclosure of genetic information by an individual's employer. With respect to confidentiality, genetic information must be kept confidential and in a separate medical file, such as the employer's ADA-compliant medical file. 29 C.F.R. § 1635.9.

### *State Law*

HIPAA establishes a national minimum standard for privacy of health information, but parties must also be aware of state laws that may provide additional protections. For instance, under Illinois law, even redacted medical records generally are not to be disclosed in judicial proceedings. 735 ILCS 5/8-802; *Dept. of Prof'l Reg. v. Manos*, 761 N.E.2d 208, 216–17 (2001). However, such state restrictions may not impose state evidentiary privileges on suits to enforce federal law. *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 925 (7th Cir. 2004) (finding a more



stringent state law may be applied (1) when the suit is in state court, or (2) in federal court when “state law provides the rule of decision.”).

### **Conclusion**

HIPAA’s privacy rule is not without teeth, and for good reason. Notwithstanding, even basic knowledge of who must comply, what is protected, and how to obtain protected health information within the bounds of the act—including the requirements for appropriate authorizations and qualified protective orders—can help avoid protracted discovery battles and potentially illegal inadvertent disclosures.

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**Keywords:** employment and labor relations law, HIPAA, HI-TECH, PHI, Office for Civil Rights, confidentiality, ADA, Genetic Information Nondiscrimination Act

## Could Employee Criminal Background Checks Violate Title VII?

By Holly J. Clemente

In 2009, the Equal Employment Opportunity Commission (EEOC) indicated that it was making plans to revisit and possibly update its 1987 Policy Statement on the Issue of Conviction Records under Title VII of the 1964 Civil Rights Act, which explains when employers can use arrest and conviction records as pre-employment screening criteria. As part of the EEOC's "E-RACE Initiative" (Eradicating Racism and Colorism from Employment), the commission has taken a specific interest in focusing on different aspects of the employee-hiring process. Although no new guidance on this topic has been forthcoming from the EEOC, the issue of liability for employers who currently use criminal-background checks when making hiring decisions, and rights of employees who are denied employment on the basis of a previous conviction, remains undetermined.

On January 18, 2011, President Barack Obama issued Executive Order 13563, which called for all agencies in the executive branch to undergo a process of increased regulatory review. This meant that each agency was to review its current protocols and procedures to determine if there existed any that could be considered outdated or totally obsolete. On May 24, 2011, in response to the president's order, the EEOC released the "Equal Employment Opportunity Commission Preliminary Plan for Retrospective Analysis of Existing Rules."

Prior to its release, the EEOC sought comments from the public at large. The most striking comments included the recommendation by the AARP and comments from both the National Partnership for Women & Families and the National Leadership Conference on Civil and Human Rights, urging the EEOC to issue guidance on discrimination against the unemployed; guidance on employer use of credit checks in hiring; and *updated guidance on the use of arrest and conviction records for screening*. These groups noted that the EEOC had held meetings about these topics in recent years, most notably the following: (1) November 20, 2008: Employment Discrimination Faced by Individuals with Arrest and Conviction Records; (2) October 20, 2010: Employer Use of Credit History as a Screening; and (3) July 26, 2011: Arrest and Conviction Records as a Hiring Barrier.

It can be surmised that these various entities wanted and needed more clear-cut guidance on how employers could better tailor their hiring practices to comply with state and federal law and what employees should expect when filling out job applications. With the current state of the U.S. economy, the possibility of substantial legal changes regarding the use of criminal-background checks in employment could have drastic and dire effects on both employer and potential employee alike. For the employer, proposed changes against the use of an applicant's criminal

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history could include stiff monetary sanctions. Conversely, unemployed Americans seeking jobs should be aware that a previous conviction could prevent them from even receiving a call for an interview, much less an offer of employment.

To be clear, Title VII does not prohibit an employer's use of an applicant's criminal history when making employment decisions. 42 U.S.C. § 2000e-2(a), (h), (k). It does, however, prohibit any blanket policy of excluding all job applicants with conviction records in certain circumstances. On December 1, 2005, the EEOC issued informal guidance that stated that

an employer who uses a "blanket" policy of not hiring any applicant who has a history of arrest or convictions violates Title VII of the Civil Rights Act because such a policy disproportionately excludes members of certain racial and ethnic groups, *unless* the employer can demonstrate a business need for use of this criteria.

The EEOC, in its 1987 Guidance, maintained that to establish that a business necessity exists, an employer must take into account the following criteria: (1) the nature and gravity of the offense, (2) the amount of time that has passed since the conviction, and (3) the nature of the job sought.

Despite the EEOC's guidance on the topic, employers have notoriously erred on the side of caution when it came to the hiring or recruiting of applicants with prior arrest and conviction records. Employers have supported this position by reasoning that their fear of civil liability for negligent hiring justifies their consideration of an applicant's criminal history. Additionally, employers support the notion that criminal-background checks contribute not only to workplace safety, but also to the public's confidence in their business. A recent survey conducted by the Society for Human Resource Management found that more than 90 percent of employers claim to conduct background checks for certain positions, and that nearly three-quarters of employers do so for all applicants.

The EEOC, the agency tasked to ensure effective enforcement of federal equal-employment-opportunity laws, has taken a distinctly different position on employers' use of criminal background checks. Title VII does not prohibit pre-employment inquiries about an applicant's criminal history, but it does prohibit both disparate-treatment and disparate-impact discrimination in the use of the information *obtained* through such an inquiry. Disparate treatment occurs when a person's race, color, sex, religion, or national origin is all or part of the motivation for an employment decision. Disparate-impact discrimination, on the other hand, occurs when a uniformly applied neutral selection procedure disproportionately excludes people on the basis of race, color, religion, sex, or national origin and the procedure is not job-related and consistent with business necessity, or when the employer's business goals can be served in a less discriminatory way. Here, the EEOC claims that the use of criminal-background checks and a company's refusal to hire anyone with a criminal record has a disparate impact on African-Americans and Hispanics, and thus constitutes a violation of law under Title VII unless the



company's policy is job-related and consistent with business necessity. *See EEOC v. Freeman*, Case No. RWT 09cv2573 (D. Md. 2010).

Although representing only 25 percent of the world's population, the United States maintains the highest rate of incarceration, with the African-American community disproportionately represented. One in twelve African-Americans are behind bars in this country, compared with one in eighty-seven Caucasians. Statistically, an African-American male between the ages of 20 and 34 who lacks a high-school diploma is more likely to be in prison than to be employed. Those ex-offenders who find themselves fortunate enough to be employed can expect an 11 percent reduction in hourly wages compared to non-offenders. With the unemployment rate for African-Americans hovering above 15 percent and Hispanics at 12 percent (compared with 8.7 percent for whites), the correlation between previous incarceration and lack of employment can hardly be ignored. The EEOC has also taken issue with the accuracy, or lack thereof, when it comes to an applicant's criminal-background check. According to [The Attorney General's Report on Criminal History Background Checks](#), (June 2006), FBI background checks are out of date 50 percent of the time and often fail to reflect whether an arrest led to a conviction.

Due to the nature of this debate—an intersection between equal employment, employer's rights, and racial equality—the courts were bound to get involved and did so in the landmark case *El v. Southeastern Pennsylvania Transit Authority (SEPTA)*, 479 F. 3d 232 (3d. Cir. 2007). In *SEPTA*, the Third Circuit upheld an employer's policy that barred applicants who had a previous criminal record. Douglas El was employed as a paratransit driver for SEPTA, which operates Philadelphia's mass-transit system. El's primary passengers were physically and mentally disabled. Shortly after his employment began, it was discovered that El had been convicted, at the age of 15, of second-degree murder 40 years earlier. Upon this discovery, SEPTA terminated El's employment. El sued on a disparate-impact theory, but lost on summary judgment.

The court held that SEPTA had demonstrated that individuals with violent convictions are a greater risk for committing violent acts in the future, and that people suffering from mental and physical disabilities run a higher risk of being victims of abuse and as such, SEPTA's policy was a justified business necessity. Although the Third Circuit ruled for SEPTA, the reservations the court showed for the lower court's ruling and the concern over El's failure to offer expert testimony rebutting the defense's expert testimony—leading criminologist Dr. Alfred Blumstein—which stated that someone who has committed a violent crime in the past is more likely to commit a violent crime in the future, should give pause to any premature judgments on the future of pre-employment background checks. In fact, the court noted that, if the plaintiff had provided evidence to refute Dr. Blumstein's testimony, it would have been a "different case."

The significance of this case is evidenced not only by the court's refusal to adopt the three-part test the EEOC had created to determine "justified business necessity," but also in the court's outright criticism of the EEOC's historical enforcement guidance. In its opinion, the court stated, "[t]he EEOC's Guidelines . . . do not speak to whether an employer can take these factors into

account when crafting a bright-line policy, nor do they speak to whether an employer justifiably can decide that certain offenses are serious enough to warrant a lifetime ban.” *Id.* at 243. Instead, the court ruled that an employer must show “empirical evidence” justifying a challenged screening policy to establish business necessity, thereby going beyond the EEOC’s historical three-part enforcement guidance and focusing on whether the results of SEPTA’s screening process could be squared with the recidivism statistics, and particularly with the statistics suggesting that the risk of recidivism declines as the time “clean” since release from incarceration increases.

After the Third Circuit’s decision in *SEPTA*, the EEOC pursued other disparate-impact lawsuits against employers resulting from their conviction-based screening policies. In September 2008, the EEOC filed a suit against Peoplemark, Inc., alleging the corporation violated Title VII when it refused to hire anyone with a criminal record because such a policy has a disparate impact on African-Americans. Although the case was dismissed in Peoplemark’s favor, the court’s decision is indicative of the standards of proof required if an employer wishes to defend its screening policy citing “business necessity.”

Undeterred, on September 30, 2009, the EEOC filed a nationwide-action lawsuit alleging that Freeman Co. had unlawfully discriminated against African-American, Hispanic, and male job applicants by using criminal-background checks as one of its selection criteria. *EEOC v. Freeman, supra*. The EEOC alleged that the use of screening criteria such as criminal-background checks: (1) is *not* job related; (2) is *not* consistent with business necessity; and (3) ignores other less discriminatory procedures that are available. Ultimately, the significance of the *Freeman* case is that it addressed the applicable statute of limitations in pattern-and-practice litigation initiated by the EEOC; the court did not, unfortunately, state its position on the merits of the EEOC’s disparate-impact-discrimination claims.

The third significant setback for the EEOC’s position came in *NASA v. Nelson*, 131 S.Ct. 746 (2011). In *NASA*, the Supreme Court, in an 8–0 unanimous decision, acknowledged an employer’s legitimate interests in conducting employment-related background checks. Here, 28 employees at NASA’s Jet Propulsion Laboratory in California were, after working without incident for a number of years, required to undergo background checks. This consisted, in part, of each employee completing Standard Form 85. The form asks, *inter alia*, whether the employee has used or possessed any illegal drugs within the past year, and for any details regarding any treatment that the employee may have received for illegal drug use. The court dismissed the plaintiffs’ claims by stating, “[l]ike any employer, the Government is entitled to have its projects staffed by reliable, law-abiding persons who will ‘efficiently and effectively’ discharge their duties.” The court also referenced a study that negatively correlates illicit drug use with workplace productivity as a rationale for the drug-use inquiries.

To date, there is no clear answer regarding possible changes the EEOC may implement to its 1987 policy. Although there seems to be ample evidence that the use of background checks,



when used to obtain information wholly unrelated to the nature or function of an employee's job, result in disparate-impact discrimination against countless individuals. However, the rights of employers to maintain a safe work environment continue to counterbalance these concerns.

The aforementioned cases underscore the fact that all employers, whether public or private, must draw a clear corollary between the role-related risks of the job and the type and scope of background checks they will perform. For employers, an undeniable dichotomy exists that must be contended with until clear guidance is given by the EEOC: (a) If employers' conduct overzealous background checks, they are subject to investigation and litigation by the EEOC; or (b) if the employers are not careful enough, they open themselves up to liability from a negligent hiring standpoint. Employers, as a matter of due diligence, should periodically review its selection and screening criteria and be able to validate the criteria used as being consistent with a genuine business need. Most importantly, employers with conviction-based screening policies should monitor developments, not only with respect to the EEOC's enforcement guidelines, but also at the state level, making certain that they are in compliance with all state fair-employment laws.

As for the EEOC, if it declines to issue updated guidance regarding employers' use of arrest and conviction records, it is highly likely that the courts will continue to uphold employers' rights to conduct criminal-background checks on employees, provided that the employer refrain from a blanket policy regarding all applicants. If the EEOC *does* choose to update its 1987 Guidance Policy, potential applicants and current employees alike should be aware that they could be facing a whole new set of problems. A possibility exists that a bar of background checks in the employment process could lead to an increase in workplace discrimination. Studies have found that employers who use background checks are in reality more likely to hire African-Americans than employers who do not use background checks. In the absence of accurate information about individuals' criminal histories, employers who are interested in weeding out those with criminal records may choose to rely instead on racial and gender stereotypes. In effect, employers may be more likely to assume the prejudicial view that non-whites have criminal records, absent the ability to discover this information through background screens.

Should the EEOC issue a ban on the use of background checks, employers will not be at an insurmountable disadvantage. There are several alternative steps that employers may take. For example, an applicant's education history could be verified, *in writing*, to counter applicants who exaggerate their level of education or degrees earned to boost their résumés. The applicant's work history may also be scrutinized with greater care, coupled with seeking detailed information to explain extended gaps in employment.

No matter the outcome, both employers and employees should be honest, forthcoming, and accountable with matters concerning employment. An individual who has moved on with his or her life and is seeking gainful employment generally should not be excluded from a pool of applicants because of a 40-year-old conviction; however, applicants also have a responsibility



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not to provide a potential employer with half-truths and unsubstantiated facts about a past criminal history.

Signing the Second Chance Act into law, former President George W. Bush stated:

This country was built on the belief that each human being has limitless potential and worth. Everybody matters. We believe that even those who have struggled with a dark past can find brighter days ahead. One way we can act on that belief is by helping former prisoners who have paid for their crimes. We help them build new lives as productive members of our society. . . . A high recidivism rate places a huge financial burden on taxpayers. It deprives our labor force of productive workers and it deprives families of their daughters and sons, husbands and wives and moms and dads.

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**Keywords:** employment and labor relations law, EEOC, SEPTA, E-RACE, Second Chance Act

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## The ADA and Employer Websites

By Michael P. Goodwin

The Internet has revolutionized employer hiring and recruiting practices, with many employers posting job openings on their own websites or in online job banks. It goes without saying that Internet and web-based platforms have become essential to many job-related functions.

The growth of online recruiting and web-based job functions may pose barriers for individuals with disabilities, particularly individuals with visual impairments. Most visually impaired people who use the Internet do so with the help of assistive technology, such as software that converts textual and graphical information on a screen into speech or Braille. To be compatible with such programs, graphical information on the web must be coded with alternative text that allows the screen reader to describe graphics appearing on the screen. The site must also be navigable with a keyboard instead of a mouse and must provide adequate labels and prompts for online forms.

Sites that are not designed with these assistive technology features in mind can be impossible for visually impaired users to navigate. For example, in *Access Now v. Southwest Airlines*, the plaintiffs sued because the airline's "virtual ticket counters" were inaccessible to visually impaired individuals who use screen-readers to navigate the Internet. 227 F.Supp.2d 1312, 1318 (S.D.Fla. 2002), *aff'd*, 385 F.3d 1324 (11th Cir. 2004). In a similar case against the retailer Target, the plaintiffs alleged that it was "literally impossible for blind users to even complete a transaction on [Target.com]" due to a lack of alt-text coding and inadequate labeling of online forms. Complaint, *National Fed'n of the Blind v. Target*, 452 F.Supp.2d 946 (N.D.Cal. 2006).

Most of the case law applying the Americans with Disabilities Amendment (ADA) to electronic media has centered on the issue of whether a website is a "place of public accommodation." Title III of the ADA prohibits discrimination against individuals with disabilities "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. 12182(a). Some courts have concluded that a website is subject to the ADA to the extent that it offers either the same services as a physical place of public accommodation or a service that affects access to a physical place of public accommodation. *See, e.g., Target*, 452 F.Supp. at 956. Some courts have gone further, suggesting that the ADA applies equally to electronic and physical spaces. *See, e.g., Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (*dicta*). The Department of Justice has adopted the broader position, commenting in a 1996 letter that a covered entity that chooses to communicate through the Internet "must be prepared to offer those communications through accessible means as well." Letter of Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Dept. of Justice, to Sen. Tom Harkin, Sept. 9, 1996.

Although most of the case law applying the ADA to electronic media arises in the public-accommodations context, it is not difficult to see how inaccessible electronic media could form the basis of an ADA claim against an employer. Title I of the ADA, which applies to employment, prohibits discrimination “on the basis of disability in regard to job application procedures.” 42 U.S.C. 12112(a). The Equal Employment Opportunity Commission’s (EEOC) Technical Assistance Manual, first developed when the Internet was in its infancy, notes that “job information in an employment office or on employee bulletin boards should be made available, as needed, to persons with visual or other reading impairments.” EEOC, Technical Assistance Manual §5.2 (1992). Additionally, the Technical Assistance Manual provides that “[r]ecruitment activities that have the effect of screening out potential applicants with disabilities may violate the ADA.” *Id.* at §5.4. By way of example, the Technical Assistance Manual provides that recruitment activity that is conducted at a place that is physically inaccessible or inaccessible to people with visual, hearing, or other disabilities, may subject an employer to liability. Reasonable accommodations can include “modifications or adjustments to a job application process that enable a qualified individual to be considered for the position such qualified applicant desires.” 29 C.F.R. 1630.2(o)(1)(i).

*Rendon v. Valleycrest Products, Ltd.*, a Title III case, illustrates how an inaccessible employment application process could give rise to a discrimination claim. In *Rendon*, the Eleventh Circuit held that the telephone selection process for the game show *Who Wants to Be a Millionaire* was a “discriminatory screening mechanism” that deprived individuals with hearing disabilities and finger mobility conditions of the chance to compete on the show. 294 F.3d 1279, 1286 (11th Cir. 2002). That the alleged discrimination occurred “at a distance” made the discrimination no less real than if it had occurred at the studio door. The same rationale could apply to an electronic employment-application process that screens out visually impaired individuals because it is incompatible with assistive technology.

In another case, a federal appeals-court judge noted the problems that an inaccessible website could pose to a job applicant with visual impairments. In *Allied Technology Group v. U.S.*, the losing bidder challenged the Department of Justice’s decision to award a contract to develop an Internet job-listing site to a bidder despite the bidder’s “minor” deviation from the electronic-access standards required by section 508 of the Rehabilitation Act. In dissent, Judge Bryson recognized that even a purportedly minor noncompliance with the section 508 standards could pose a significant barrier to a disabled individual:

[I]f an otherwise compliant website provides a job application form, but the ‘Submit’ button is an image file lacking a text equivalent, a blind person can fill out the entire form yet be unable to submit it because a screen-reading program cannot pronounce the “Submit” button due to the lack of a meaningful text equivalent. Similarly, without keyboard accessibility, a blind person will be unable to use software or websites that require a mouse.



*Allied Tech. Group, Inc. v. United States*, No. 2010-5131, 2011 U.S. App. LEXIS 11687, \*40–41 (Fed. Cir. June 9, 2011) (Bryson, J., dissenting). An inaccessible employment-application process such as that described by Judge Bryson could have the effect of screening out an individual with disabilities, giving rise to a potential discrimination claim.

Unlawful discrimination may also occur when an employer uses web- or computer-based programs that are inaccessible to employees with visual impairments. Title I also prohibits discrimination in “other terms, conditions and privileges of employment.” 42 U.S.C. 12112(a). This includes fringe benefits, training, and social and recreational programs sponsored by the employer. *See* 29 C.F.R. 1630.4. Access to certain tools and programs, such as web- or computer-based work platforms, are also likely to be covered by this provision. For example, in New Jersey, employees of various state agencies filed a complaint in May 2011 alleging that the software used for employee timekeeping and attendance tracking was inaccessible to blind employees using screen-access technology. A visually impaired employee in Maryland recently filed suit after her employer switched to a database program that was allegedly incompatible with Braille conversation software.

Although applicable only to the federal government, section 508 of the Rehabilitation Act provides useful guidance for employers looking for a standard by which to measure compliance. Generally, section 508 requires each federal department or agency and the U.S. Postal Service to ensure that individuals with disabilities who are federal employees have access to and use of electronic and information technology that is comparable to that of individuals who do not have disabilities, unless an undue burden would be imposed on the agency. *See* 36 C.F.R. § 1194.1. The regulations provide technical standards by which to determine comparable access for Internet and web-based content. *See* 36 C.F.R. 1194.22. The standards prescribe specific design criteria for software and websites, requiring keyboard accessibility, text equivalents for non-text elements, and accessibility of forms. The Website Accessibility Initiative, upon whose guidelines many of the section 508 regulations are based, provides additional accessibility suggestions at its [website](#).

The constant evolution of technology presents challenges as well as opportunities under the ADA. Although the scope of an employer’s obligations with respect to the web are not well defined, employers can look to the section 508 standards for guidance in making their online spaces fully accessible to individuals with disabilities. As employers upgrade office technology, it makes sense to do so with the section 508 standards in mind.

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**Keywords:** employment and labor relations law, *Access Now v. Southwest Airlines*, EEOC, Rendon, *Allied Technology Group*

**NEWS & DEVELOPMENTS**

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## **Wal-Mart Prevails Before U.S. Supreme Court in Discrimination Case**

The wait is over. In a much anticipated decision, the U.S. Supreme Court in [\*Wal-Mart Stores, Inc. v. Dukes et al.\*](#), issued a ruling on June 20, 2011, in favor of Wal-Mart in what it called “one of the most expansive class actions ever.” The U.S. Supreme Court reversed the Ninth Circuit Court of Appeals and ruled that the certification of the plaintiff class was not consistent with Federal Rule of Civil Procedure 23(a), and the backpay claims were improperly certified under Rule 23(b)(2). The district court and the Ninth Circuit previously approved the certification of a class comprising about one and a half million plaintiffs, current and former female employees of Wal-Mart who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII of the Civil Rights Act of 1964 by discriminating against women. In addition to injunctive relief and declaratory relief, the plaintiffs sought an award of backpay.

### **The Supreme Court’s Decision**

The Supreme Court reversed the Ninth Circuit’s decision. In doing so, the Court found that the class was not consistent with Rule 23(a). Rule 23(a)(2) requires a party seeking class certification to prove that the class has common “questions of law or fact.” The Court found that proof of commonality necessarily overlapped with the plaintiffs’ merits contention that Wal-Mart engages in a pattern or practice of discrimination. However, the crux of a Title VII inquiry revolves around “the reasons for a particular employment decision,” *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984), and the class sued for millions of employment decisions at once. The Court found this problematic. According to the Court, “[w]ithout some glue holding together the alleged reasons for those decisions, it will be impossible to say that examination of all the class members’ claims will produce a common answer to the crucial discrimination question.”

In support of its reasoning, the Court cited to *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), as the proper approach to commonality. According to the Court, on the facts of the *Dukes* case, the conceptual gap between an individual’s discrimination claim and “the existence of a class of persons who have suffered the same injury,” *id.* at 157–158, must be bridged by “[s]ignificant proof that an employer operated under a general policy of discrimination.” *Id.* at 159. The Court found that such proof was absent in this case. In coming to this conclusion, the Court looked at the evidence of both parties. Wal-Mart provided, inter alia, its policy against sex discrimination and its penalties for denials of equal opportunity. The class member’s only evidence of a general discrimination policy was a sociologist’s analysis asserting that Wal-Mart’s corporate culture made it vulnerable to gender bias. Because the sociologist could not estimate what percent of Wal-Mart’s employment decisions might be determined by

stereotypical thinking, his testimony was, according to the Court, “worlds away” from “significant proof” that Wal-Mart “operated under a general policy of discrimination.”

The Court did note that Wal-Mart’s corporate “policy” giving local supervisors broad discretion over employment matters, in a largely subjective manner, could create issues. However, according to the Court, although such a policy could be the basis of a Title VII disparate-impact claim, recognizing that a claim “can” exist does not mean that every employee in a company with that policy has a common claim. The Court stated that in a company of Wal-Mart’s size and geographical scope, it is unlikely that all managers would exercise their discretion in a common way without some common direction (i.e., the “glue” holding it together). Likewise, the Court found the class members’ statistical and anecdotal evidence “too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory.”

The Court also held that the class member’s backpay claims were improperly certified under Rule 23(b)(2) because the claim for monetary relief was not incidental to the requested injunctive or declaratory relief.

Justice Scalia delivered the opinion of the Court, in which Justices Roberts, Kennedy, and Alito joined, and in which Justices Ginsburg, Sotomayor, and Kagan, joined in part. Justice Ginsburg filed an opinion concurring in part and dissenting in part, in which Justices Breyer, Sotomayor, and Kagan joined.

— [John A. Ybarra](#) and [Michael A. Wilder](#), *Littler Mendelson, P.C., Chicago, Illinois*.

**Keywords:** Wal-Mart v. Dukes, class certification, class action

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## Supreme Court Establishes New Obstacle for Defense Attorney Fees

On June 6, 2011, the U.S. Supreme Court added a new hurdle for prevailing defendants seeking to recover attorney fees under 28 U.S.C. § 1988 in multiple-claim suits. In [Fox v. Vice, No. 10-114](#), 563 U.S. \_\_ (June 6, 2011), a unanimous decision authored by Justice Kagan, the Court confirmed that a defendant in a civil-rights fee-shifting case can recover attorney fees only if the plaintiff’s claim was frivolous, while also setting forth an additional requirement—a defendant must now prove that he or she would not have incurred certain fees but for the frivolous claim. Accordingly, if the litigation involves multiple claims, some of which are frivolous and some of which are not, a defendant can recover attorney fees, but only fees related to the frivolous claims and only if he or she can prove that certain fees are attributable exclusively to the defense of that frivolous claim and not the litigation generally.

Justice Kagan’s opinion addresses and analyzes the theoretical basis for an award of attorney fees to a defendant under section 1988. Specifically, the Court noted that “[Section 1988] serves to relieve a defendant of expenses attributable to frivolous charges . . . and a court may reimburse a defendant for costs under § 1988 even if a plaintiff’s suit is not wholly frivolous.” (Slip Op., p. 7). In other words, the Court recognized that fee-shifting for defendants is not an all-or-nothing concept. Nevertheless, the Court further held that “Section 1988 allows a defendant to recover reasonable attorney’s fees incurred because of, but only because of, a frivolous claim . . . [and] if the defendant would have incurred those fees anyway, to defend against non-frivolous claims, then a court has no basis for transferring the expense to the plaintiff.” (Slip Op., pp. 8–9).

Practically, this new rule minimizes the likelihood that a defendant can obtain reasonable attorney fees in a case involving both frivolous and non-frivolous claims. Consider the following hypothetical: A plaintiff asserts race and gender claims under Title VII, as well as a claim under the Americans with Disabilities Act (ADA). The plaintiff relies on a timely filed Equal Employment Opportunity Commission (EEOC) charge to satisfy his or her jurisdictional prerequisites. However, neither the underlying EEOC charge nor any other documentation submitted to the EEOC makes any mention of a claim of disability discrimination. In fact, there is simply no basis for an argument that an ADA claim grows out of the EEOC charge. Based on these facts, the plaintiff’s ADA claim could be frivolous.

Prior to the *Fox* decision, the defendant in the above hypothetical could argue that he or she is entitled to a reasonable percentage of the total fees related to the defense of the litigation. The *Fox* rule, however, now requires that the defendant not only establish that the plaintiff’s ADA claim was frivolous, but also prove that certain work related only to that claim and would not have been undertaken but for that claim. As a result, the defendant cannot recover fees for generally taking the plaintiff’s deposition, but instead must prove that a certain subset of the deposition involved questions related only to the ADA claim. The defendant can recover fees for only that portion of the deposition. Likewise, the defendant must prove that a certain amount of the fees attributable to a summary-judgment motion were specifically undertaken only to draft the section of the motion related to the ADA claim. Case law on the issue of attorney fees in fee-shifting scenarios has long recognized the difficulty with attempting to accurately record the apportionment an attorney’s time and effort in this manner. Nonetheless, such a record of apportionment is now required for defendants in fee-shifting cases.

Ultimately, while theoretically sound, the *Fox* decision makes it nearly impossible for a defendant to recover reasonable attorney fees. Absent the establishment of billing practices that break down tasks by each individual claim—a practice that courts addressing attorney fees often have held is impracticable—defense counsel should not expect to be successful in pursuing a claim for attorney fees under section 1988. Subsequent to this decision, counsel for defendants should consider a potentially frivolous claim at the outset of the litigation and record all time and costs attributable specifically to that particular claim, if possible. Otherwise, attorney fees likely will be difficult to recover, if not unavailable altogether.



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