

**Managers Now Face Personal Liability under the FMLA and CFEPA**

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The Second Circuit Court of Appeals, which covers Connecticut, found that managers who hold significant authority over a company's administration of the Family and Medical Leave Act (FMLA) can be held personally liable for violations of the law. [\*Graziadio v. Culinary Inst. Of America.\*](#)

In *Graziadio*, an employee requested FMLA leave to care for a son suffering from diabetes. Shortly thereafter, she asked for a second leave to care for another son who broke his leg playing basketball. While her leave requests were initially granted, the company's HR Director requested additional medical documentation to substantiate the need for each leave. Although the employee attempted to comply with the information request, the HR Director fired the employee when the Director determined the employee was being unresponsive in providing the documentation.

The employee brought suit against the company, and the HR Director personally, claiming FMLA interference, FMLA retaliation, and violation of the ADA. The District Court granted defendants' motion to dismiss. The Second Circuit reversed, except as to the dismissal of the ADA claim.

In reinstating the FMLA claim against the individual HR Director, the Appeals Court reviewed whether the Director met the definition of an "employer" under the FMLA. As part of its analysis, the Court noted that several other Circuits have applied the definition of "employer" used in the Fair Labor Standards Act (FLSA) to the FMLA. The FLSA relies on the "economic

reality test” to analyze employer status. The test is often used to determine whether a worker is in “economic reality” an employee dependent on the employer for wages, or an independent contractor who relies on a wider range of clients for income.

More specifically, under the FLSA the courts have analyzed economic reality by reviewing the totality of circumstances using a number of nonexclusive and overlapping factors. These factors include whether the alleged employer (1) had the power to hire and fire the employee, (2) supervised and controlled the employee’s work schedule or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records regarding the employee.

In the FMLA setting, these factors boil down to “whether the employer controlled in whole or in part the employee’s rights under the FMLA.”

In the instant case, the Court found the HR Director played an important role in the decision to fire the employee, even though a more senior manager formally held the authority to terminate. Because the more senior manager effectively delegated his authority and duty to the HR Director, the Director was found to have controlled the termination decision, and thus met the first prong of the FLSA test outlined above.

Also, because the HR Director directly administered the FMLA program, including the right to return to work, she was found to have met the second prong of the test as well.

In making its ruling, the Court emphasized that the HR Director was personally liable as an “employer” because she reviewed the employee’s FMLA paperwork, determined its adequacy, controlled the employee’s ability to return to work, and handled all communications with the employee, including the termination letter.

Separately, the Court held for the first time that the elements a plaintiff must prove to establish a prima facie case of FMLA interference are (1) that she is an eligible employee under the FMLA, (2) that the defendant is an employer as defined by the FMLA, (3) that she was entitled to take leave under the FMLA, (4) that she gave notice to the employer of her intention to take leave, and (5) that she was denied benefits to which she was entitled under the FMLA.

Additionally, the Court reiterated the elements to establish a FMLA retaliation case, (1) the employee exercised rights protected under the FMLA, (2) the employee was qualified for the position, (3) the employee suffered an adverse employment action, and (4) the adverse action occurred under circumstances giving rise to an inference of retaliatory intent. If the employee makes this showing, the employer must demonstrate a legitimate, non-discriminatory reason for its actions. If it does so, the employee must then prove that the employer's proffered explanation was pretextual.

Finally, the Court declined to determine whether the U. S. Supreme Court's decision in [\*University of Texas SW Medical Center v. Nassar\*](#), which held that in Title VII cases an employee must show that the desire to retaliate was the "but for" reason for the adverse action, also applies to FMLA cases, or whether such desire need only be a "motivating factor."

### **CFEPA Retaliation**

In an unrelated case, the District Court for Connecticut held that individual managers can be held personally liable for acts of retaliation under the Connecticut Fair Employment Practices Act (CFEPA). [\*Ferguson v. Fairfield Caterers\*](#). In that case, a long term manager was fired after she refused to persuade her father, who had also worked for the company, to drop his age discrimination claim against the company. The company claimed the manager was actually

terminated for taking vendor bribes. The jury found for the manager and assigned liability for the illegal firing to the two individual owners of the company instead of the corporate entity.

The two owners appealed their assignment of personal liability by claiming the corporate entity, and not they individually, terminated the manager. However, the Court found that the retaliation section of CFEPA, 46a-60(a)(4), prohibits “*any person*” from acting to discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or has filed a complaint. Also, the Court noted that § 46a-60(a)(5) prohibits “*any person*” from aiding or abetting the doing of any act declared to be a discriminatory employment practice. Therefore, an individual and not just a corporate entity can be held liable for retaliation, as well as for aiding and abetting. The Court went on to find that the jury’s decision to hold the owners personally liable was reasonable, and permissible under the Act.

### **Conclusion**

These cases point out the need for individual managers to know the law and fully comply with it in order to avoid personal liability. Even managers or directors who are not imbued with the ultimate authority to fire can be held responsible for termination decisions they are involved with, and played a substantial role in. Adding individual managers as named defendants can lead to sleepless nights, and significantly alter a company’s settlement position.

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