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Supervisor to Employee: "You Want FMLA Leave? No Problem!"

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"For unto whomsoever much is given, of him shall much be required." Luke 12:48

Take a good look at written job descriptions of supervisory employees who work for companies covered by the Family and Medical Leave Act of 1993 ("FMLA") and you will be hard-pressed to find any warnings about the potential legal risks and liability that come with the job. Until recently, that may have been understandable. Not anymore. Employers that wish to be honest with supervisory employees who field and handle the administration of requests for leaves of absence made pursuant to the FMLA should consider including the following admonition in these employees' job descriptions:

"Warning: Acceptance of this job may enhance your career. It may also get you sued."

I recently wrote in this space about the potential individual liability of supervisory employees for violations of the wage-payment obligations prescribed by the Fair Labor Standards Act of 1938 ("FLSA"). Such liability is now fairly well-established. It now appears that individual (and potentially significant) liability of supervisors can arise under the FMLA as well. In *Shockley v. Stericycle, Inc.* (a 2013 case that involved analysis of the legal sufficiency of a plaintiff's complaint), the United States District Court for the Northern District of Illinois ruled that three supervisory employees employed by Stericycle who had been sued by a former employee who asserted violations of the FMLA, and who tried to get off the hook because none of them was the "employer," were out of luck. The plaintiff's claims against the three supervisors may eventually fail, but that possibility may be of little comfort to them (or their employer) as long as they find themselves on the business-end of an embarrassing, expensive and now very public lawsuit.

The plaintiff sued not only his nominal employer (a medical waste disposal firm), but also the three individuals who had varying degrees of authority over the terms and conditions of his employment. Specifically, he sued the company's "Leave of Absence Administrator," its "Director of Human Resources," and its "Director of Financial Shared Services." In January 2011, the plaintiff told his "immediate supervisor" (Marie Blue, whom, notably, the plaintiff did not sue) that he "needed to take medical leave due to his father's illness." According to the plaintiff's complaint (the content of which is all that mattered at this stage of the case), Stericycle and its representatives then engaged in a comedy of errors, lapses in judgment, and ham-handed communications in the handling of his request, all of which resulted in the plaintiff's termination. In his complaint, the plaintiff asserted that the company and its "Leave of Absence Administrator" had "interfered with his FMLA rights by disciplining" the plaintiff for use of "qualified FMLA days" and that all individual defendants "had the ability to control whether Stericycle would interfere with his FMLA rights and whether absences under the FMLA would count against Plaintiff in his performance evaluations." The plaintiff further claimed that all of the defendants had interfered with his FMLA rights and retaliated against him for trying to exercise them. The FMLA nominally applies only to employers that employ 50 or more employees within a

defined area, and it obviously occurred to the individual defendants, who merely worked for Stericycle, that they hardly fit that bill. They, therefore, understandably asked the District Court to dismiss the claims made against them personally, asserting that the plaintiff had "failed to allege their liability as individuals under the FMLA."

The Court, at this preliminary stage of the case, would have none of it. It noted that, despite the fact that the FMLA has been around for about 20 years, the United States Supreme Court has never "directly addressed the issue of individual liability under the FMLA," but that some federal district courts "have found that individuals can be held liable under the FMLA, and have relied on the" FLSA "to guide the interpretation of the FMLA." The Court further noted that courts typically look to the FLSA to "determine whether an individual is liable as an employer under the FMLA," because the FLSA defines "employer" in language that is "almost identical to the FMLA." The Court took it for granted that an individual may be held to be an "employer" who is "subject to individual liability" under the FLSA, and therefore under the FMLA, if only two conditions are met:

"(1) the individual had supervisory authority over the plaintiff; and

(2) the individual was at least partly responsible for the alleged violation."

(Emphasis supplied). Notably, the Court observed that, in accordance with the FLSA, " 'even if a defendant does not exercise exclusive control over all the day-to-day affairs of the employer, so long as he or she possesses control over the aspect of employment alleged to have been violated,' that individual could be held liable as an employer....'The FLMA's reach is not limited solely to those who possess "unilateral" authority over the conditions of employment. Rather, because of the expansive interpretation given to the term "employer" in the FLSA, we believe the FMLA extends to all those who controlled "in whole or in part" Plaintiff's ability to take a leave of absence...' " (emphasis supplied) (internal brackets omitted).

The individual defendants sought absolution by claiming that the plaintiff had identified only Marie Blue as his possibly culpable "supervisor" (who, presumably, did not appreciate the defendants' attempt to pass the buck) "and failed to identify the individual Defendants as supervisors and further failed to allege facts demonstrating the individual Defendants" had taken any actions against the plaintiff.

The Court, again, was not buying, and observed that the plaintiff was not required to claim that the individual defendants "were his immediate supervisors" in order to assert FMLA claims against them. In deciding whether to grant the individual defendants' requests to dismiss the claims, the Court was persuaded that the company's Director of Human Resources "exercised at least some degree of control over Plaintiff's terms of employment," that the company's "Leave of Absence Administrator" must have had some "authority regarding Plaintiff's eligibility to obtain qualified FMLA leave," and that the company's "Director of Financial Shared Services," who was allegedly "the director of the department" in which the plaintiff worked, had some "authority over Plaintiff." The Court also noted that the plaintiff had claimed that each of the individual defendants "had the ability to control, at least in part, Plaintiff's ability to exercise his rights under the FMLA." The Court, therefore, refused to let the individual defendants off the hook. As though to drive the point home, the Court repeated that an individual "can be held liable under the FMLA" "[s]o long as he or she possesses control over the aspect of employment alleged to have been violated."

Shockley is the quintessential "canary in the coal mine." The individual defendants may be able to obtain dismissal of the claims against them later in the case, perhaps as a result of a motion for summary judgment, which will require much more time and expense than a "motion to dismiss" based upon the pleadings alone. Even so, it seems apparent that supervisors charged with responsibility for knowing how to handle and administer requests for FMLA leave can, in the right circumstances, be held personally liable for getting it wrong. If that is now the case – and there is little reason to doubt that it is – then it seems only fair and

appropriate that employers covered by the FMLA should put all such supervisory employees on clear notice of the fact that their roles could land them in legal hot water. Employers should regularly educate their supervisory employees regarding the thorny complexities of the FMLA, not only to enhance the probability that the employer will comply with the FMLA and thus avoid expensive claims that it has failed to do so, but also to enable supervisory employees to avoid the distressing prospect of being sued personally. Informed supervisors will surely appreciate it. The employer, moreover, will have done itself a valuable service by trying to avoid a train wreck of the kind that resulted in the *Shockley* case which, at least for the time being, will be Exhibit "A" in every lawyer's discussions with potential clients interested in asserting violations of the FMLA.

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