

OFLA-FMLA Violations Trigger Liability For Individual Managers

A Cautionary Fable

Once upon a time, in a land not so far away, there lived a human resources director named Helga R. who worked for the Kingdom Corp., a company with 75 employees. Eddy E. was a Kingdom employee with a serious absence problem. However, his absence reports were often incomplete, and usually just stated that some undefined "condition" he claimed to have was acting up. Because Eddy's absences were causing problems in his department, Helga terminated him for excessive absenteeism. But Helga never inquired whether his "condition" qualified as a serious health condition, and as it turns out, Eddy did have a chronic serious health condition. Not surprisingly, he filed a lawsuit. At trial, the jury determined that Eddy's termination violated the Family and Medical Leave Act, and awarded him close to \$1 million in damages. The jury also determined that Helga was liable for half of those damages. Helga lost her job and could not pay her share of the verdict. She had to declare bankruptcy, lost her house, and she lived unhappily ever after.

The Reality

Helga and Eddy are not real people, of course, but based on recent court decisions, Helga's predicament could easily become a reality for unwary human resource professionals, managers, and supervisors. In fact, most courts examining the issue have held that individual human resource personnel, managers, and supervisors can be held personally liable for violations of the Federal Family and Medical Leave Act (FMLA).

In November of 2005, two federal courts in Ohio and Tennessee joined that majority. In *Brown v. CBK*, 2005 WL 3263873 (WD Tenn), a Tennessee court rejected a manager's argument that she could not be held individually liable because she was not an owner, officer, or member of senior management. However, the court noted that FMLA defines employer to include "any person who acts, directly or indirectly, in the interest of an employer," and that the majority of courts have looked to that definition in finding individual liability. Accordingly, because the manager was a member of management, had counted the employee's FMLA-qualifying absences against her, and then had terminated the employee for violating the company's attendance policy, a finding of individual liability could be justified.

In *Mize v. Mendoza Company*, 2005 WL 3088526 (SD Ohio), an Ohio court reached a similar conclusion. In that case, the owner of a company supervised an employee, and after the employee had an on-the-job injury, the owner terminated him for poor performance and violations of company policies. Like the majority of other courts, the Ohio court held that the supervisor was personally liable because he exercised sufficient control over the decision to terminate.

Oregon state courts have not yet ruled on the issue of individual liability. However, the Federal court of appeals that governs Oregon has indicated that individual managers may face liability, and it is likely that Oregon state courts would follow suit. *Hibbs v. Department of Human Resources*, 273 F3d 844, 871-72 (9th Cir 2001). Furthermore, although the Oregon Family Leave Act (OFLA) has some different provisions from FMLA (including a slightly different definition of "employer"), OFLA is generally construed in accordance with FMLA (unless the two laws directly conflict). Accordingly, it is likely that individual managers could face liability for OFLA violations as well as FMLA violations.

How Can Managers Protect Themselves?

Family leave laws create extremely thorny situations for managers and human resource professionals. Consequently, to protect both your company and your managers, it makes sense to take extra care in dealing with leave issues. Here are some tips:

1. Obtain as much information as possible about the reasons for employees' absences, and document that information thoroughly. Doing so will help you identify situations where OFLA or FMLA may apply, so you can offer OFLA-FMLA leave request forms when appropriate. When in doubt, offer a leave request form.
2. Develop and use a consistent, integrated process for handling employee absences and leave requests and thoroughly document individual leave requests.
3. Properly train supervisors, managers, and human resource personnel regarding their responsibilities in the leave process. For example, front-line supervisors should be responsible for obtaining information about employee absences, but should not make decisions about whether absences are protected.
4. Don't be shy about requesting a medical certification in appropriate circumstances. Information from the employee's physician will help you properly determine whether or not the requested leave is protected. (But remember, you should not request medical certification for parental leave or for the first three instances of sick child leave.)
5. Limit disciplinary authority for attendance problems to upper level managers who have thorough training on family and medical leave issues.
6. Be extremely careful when disciplining employees for attendance problems. Also exercise caution when disciplining employees who have recently requested or taken OFLA or FMLA leave.
7. Ask for help if you need it! Family leave laws are complicated, and unusual situations frequently occur. If you're not sure what to do in a particular case, talk to an employment attorney.

If you have any questions about OFLA or FMLA or other employment law issues, please do not hesitate to call the employment advisors at Hershner Hunter, LLP: Andy Lewis and Amanda Walkup. Hershner Hunter's employment advisors also offer OFLA-FMLA training for managers and supervisors and can assist companies with developing OFLA-FMLA compliance systems.

This memorandum provides general information and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. If you have specific legal questions, you are urged to consult with a lawyer.