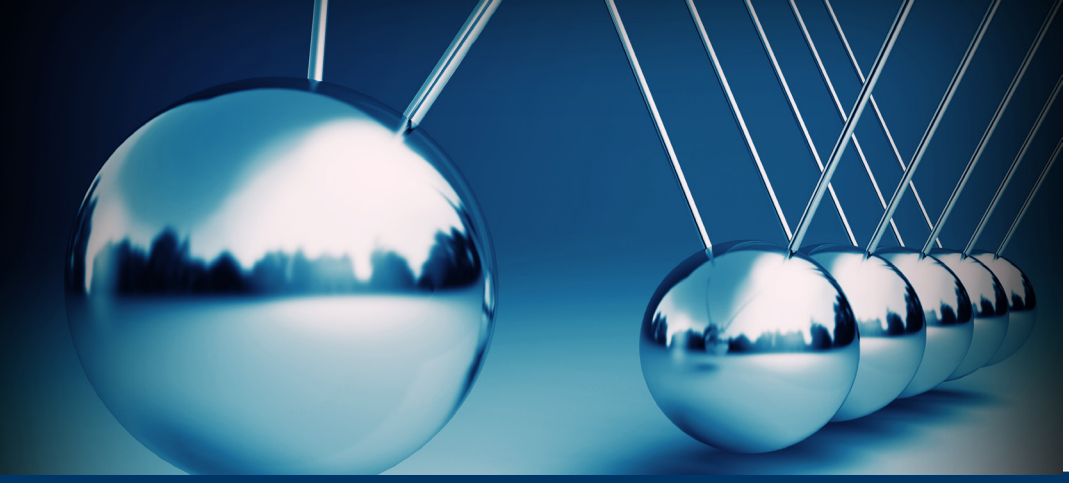

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HUMAN RESOURCES DIRECTOR CAN BE HELD PERSONALLY LIABLE UNDER FMLA

By Barry J. Waters

On March 17, 2016, the Second Circuit Court of Appeals ruled that a Human Resources Director can be held personally liable, under a broad reading of what constitutes "an employer" under the FMLA. Graziadio v. Culinary Institute of America, 2016 U.S. App. LEXIS 4861 (2d.Cir. 2016).[1] Ms. Graziadio had also sued her direct supervisor, but on appeal Ms. Graziadio conceded that her direct supervisor was not personally liable.

Ms. Graziadio had been a Payroll Administrator for the Culinary Institute of America ("CIA") for five years before she told her supervisor that she would need to leave work because her seventeen-year-old son had been hospitalized as a result of previously undiagnosed Type I diabetes. Ms. Graziadio left work on June 6 and returned on June 18. She submitted a medical certification supporting her need for leave to care for her son on June 27, nine days after she returned to work. That same day, her twelve-year-old son fractured his leg playing basketball and underwent surgery for the injury. Ms. Graziadio informed her supervisor that she would need leave to care for her younger son and that she expected to return the week of July 9, "at least part time." When July 9 arrived, the supervisor asked for an update on her status. Ms. Graziadio responded that she would need to work a reduced, three-day work week until mid-to-late August but could return to work on July 12 if that schedule were approved. She asked if CIA needed any further documentation.

The supervisor then referred the matter to the Human Resources Director. Reading between the lines, CIA may have concluded at this point that the leave was abusive, and it appears the Human Resources Director (on her own or by directive) became skeptical of, if not downright hostile toward, Ms. Graziadio's entitlement to leave. What followed was a series of unanswered calls and e-mail exchanges about a medical certification, and a proposed meeting that never was scheduled. The Second Circuit's recitation of the facts read like two ships passing in the night, with little successful communication about the leave request, at least as required by statute. The Second Circuit characterized the Human Resources Director's requests for "paperwork" as "oblique". Eventually, the (unsuccessful) communications involved lawyers for both sides. On September 11, after two months of miscommunications, CIA terminated Ms. Graziadio "for abandoning her position."

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[1] The Second Circuit hears appeals from the United States District Courts in Connecticut, New York and Vermont.

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The Human Resources Director repeatedly stated in e-mails that she needed "updated paperwork" – without being specific or sending FMLA forms to the plaintiff. The facts raised serious doubts about Graziadio's good faith efforts to demonstrate her entitlement to the second leave (perhaps because she knew her absence was not a qualifying one). But the Court found that "a jury could conclude that Graziadio attempted in good faith to comply with CIA's certification and that defendants' conduct excused any residual failure in compliance." Under the FMLA, an "employer" includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." The Second Circuit found that because the CIA's Human Resources Director had: reviewed plaintiff's FMLA paperwork; determined its (in)adequacy; controlled Ms. Graziadio's ability to return to work and under what conditions; and had sent Ms. Graziadio nearly all Company communications about Ms. Graziadio's absence, including her termination letter, the Human Resources Director could be found to be an "employer," and thus, could be liable.

Here are some noteworthy points made by the Court:

1. An employee is not required to provide a medical certification at the time of her request for leave, and in fact she does not need to provide one at all unless and until one is specifically requested by her employer. 29 C.F.R. §825.305(a).
2. At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of the employee's failure to provide adequate certification. 29 C.F.R. §825.305(d).
3. The employer's handbook stating that it required medical certification to justify a leave does not meet the "specific request" requirement. An employer must give notice of the certification requirement each time leave is requested, or it waives the right to require one. Here, CIA apparently felt that Ms. Graziadio knew well that CIA required a certification based on the Employee Handbook and on the fact that Ms. Graziadio had provided one just a month earlier relating to her other son's serious health condition.
4. The employer should request the certification at the time the employee gives notice of the need for leave or within five business days thereafter. 29 C.F.R. §825.305(b). However, the employer may request certification at a later date if the employer later has reason to question the appropriateness of the leave or its duration.
5. An employee has fifteen days after the request for certification to provide it. 29 C.F.R. §825.305 (b). This time limit is avoided if "it is not practicable under the peculiar circumstances to do so despite the employee's diligent, good faith efforts" or the employer grants more time.
6. The employer must advise an employee whenever the employer finds a certification incomplete or insufficient, "and shall state in writing what additional information is necessary to make the certification complete and sufficient". 29 C.F.R. §825.305(c).
7. Employers are expected to responsibly answer questions from employees concerning their rights and responsibilities under the FMLA. 29 C.F.R. §825. 300(c)(5).

Take-Aways:

1. Keep a copy of the FMLA Regulations handy and read them.
2. Have standard letters ready to send to employees who take leave.
3. Use the forms found at Appendix B to 29 C.F.R. Part §825.

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