

Public Sector Supervisors Can Be Personally Liable for Violations of the FMLA

February 9, 2012 by [Adam Santucci](#)

A recent Third Circuit Court of Appeals decision has made clear that supervisors in public agencies may be subject to individual liability under the Family and Medical Leave Act (FMLA). The court previously has held that public employers, private employers, and supervisors in the private sector may be liable for FMLA violations. Now, for the first time, in [Haybarger v. Lawrence County Adult Probation and Parole](#), the court has extended FMLA liability to supervisors in the public sector.

The facts in *Haybarger* may seem eerily familiar to many of you. A public-sector employee took FMLA-covered absences for a number of different health issues. The supervisor, who served as the Director of the Probation and Parole Office, believed that the employee was under performing and that her attendance problems contributed to her poor performance. The supervisor wrote in the employee's performance evaluations that she needed to improve her overall health and cut down on the days that she missed due to illness (red flag!). The supervisor also formally disciplined the employee, placing her on probation for six months, which required weekly formal progress assessments and monthly meetings. While it is unclear who specifically made the ultimate decision to terminate the employee, she was terminated when her performance did not improve.

Not surprisingly, following her termination the employee brought suit raising a number of claims against the County, the Probation and Parole Office, and the supervisor. After many of the claims were dismissed, and a few were settled, all that remained for the court to decide was the FMLA claim against the supervisor. The supervisor argued that he was not liable under the FMLA.

Unfortunately for public sector supervisors, the court disagreed and held that public sector supervisors can be individually liable for violations of the FMLA.

This decision is scary for public sector supervisors, who now may be personally liable for back pay and other damage awards where their individual actions and decisions violate the FMLA. Whether or not an individual is a supervisor under the FMLA will depend on the facts and circumstances. While there might be a debate regarding who constitutes a supervisor in a particular situation, the message of *Haybarger* is clear: where a supervisor exercises supervisory authority over the complaining employee, and is responsible, in whole or part, for the alleged violations of the FMLA while acting in the employer's interest, that supervisor may face liability under the FMLA.

In *Haybarger*, the court concluded that the Director of Probation and Parole Office was a supervisor with respect to the particular employee. When acting on behalf of the employer (*i.e.*, within the scope of his authority), he had control over the termination decision (even though he was not the final decision maker), he supervised her work, he completed her performance evaluations, and he had the authority to discipline the employee; as a result, the court concluded that he could be individually liable for FMLA violations that were a product of his supervisory actions.

With this decision, the court set up what is known as a circuit split, meaning that the different appeals courts around the country have decided the same issue differently. Often in these situations, the Supreme Court of the United States will step in and decide the issue to ensure consistency across the country. For now, though, the *Haybarger* decision is the law only in the Third Circuit, *i.e.* Pennsylvania, New Jersey, Delaware and the U.S. Virgin Islands.

Employers, both public and private, should make sure that supervisors receive regular FMLA training. While supervisors do not necessarily need to become experts, they should know: how to recognize a potential FMLA-covered absence; that employees cannot be disciplined for FMLA-covered absences; and that FMLA-covered absences should not be referenced in performance evaluations, among other things. In addition, employers should ensure that supervisory decisions related to the discipline and discharge of employees who are out of work on, or have recently returned from, FMLA leave are given more rigorous scrutiny.

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