

IF YOU HAVE QUESTIONS REGARDING  
THIS MATTER, PLEASE CONTACT:



**MONICA A. VELAZQUEZ**  
Associate, Collin County  
2801 Network Boulevard., Suite 600  
Frisco, Texas 75034  
469.287.3905  
monica.velazquez@strasburger.com

#### EDITORS

Kathryn Midboe Darling  
Brian G. Hamilton  
Laura Reilly O'Hara

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\*Not licensed to practice in the state of Texas

## THE FAMILY AND MEDICAL LEAVE ACT: WHY YOUR SUPERVISORS MAY BE INDIVIDUALLY LIABLE

Individual supervisors are generally not liable as employers under most employment discrimination or retaliation statutes. At least that was the case until the Fifth Circuit Court of Appeals recently issued a novel opinion finding a public employee individually liable for a violation of the Family and Medical Leave Act (FMLA).

In *Modica v. Taylor*, 465 F.3d 174, 181 (5th Cir. 2006), the Court very broadly interpreted the definition of "employer" under the FMLA. Generally, under the FMLA, an "employer" is any person engaged in commerce who employs at least 50 employees during a specified period of time. The term includes public agency employers. The FMLA definition of an "employer" includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." In interpreting this FMLA definition, the *Modica* Court held that if a public employee "acts, directly or indirectly, in the interest of an employer," he satisfies the definition of employer under the FMLA, and therefore, may be subject to liability in his individual capacity. Since a manager had terminated Ms. Modica for failing to return to work from FMLA leave, the manager could be individually liable as an "employer."

Despite this holding, the manager was ultimately held to be not liable under a qualified immunity defense because it was not clearly established that public employees could be individually liable under the FMLA at the time the manager terminated Plaintiff in 2003. Although the manager in the *Modica* case was spared, what does the decision mean for your supervisors? Given the *Modica* court's expansive interpretation of an "employer," you should expect that future FMLA lawsuits may include claims against individual managers and it may be very difficult to get these individual managers dismissed from FMLA lawsuits. (Not every company is a public employer who could rely on a qualified immunity defense). It is hard for individual managers to simply avoid having to deal with FMLA issues because the day-to-day aspects of their jobs often require them to step into the hyper-technical and confusing triangle created by the interaction of the FMLA, the Americans with Disabilities Act, and the workers' compensation system. As such, the best defense is thorough and consistent training for all managers as to the handling of FMLA situations.

Effective training doesn't require that supervisors understand every nuance of the law, but training is the best form of protection. All supervisors can be trained to identify potential FMLA traps, such as: How to respond to an employee's request for leave? Does an employee qualify for FMLA leave? What forms must an employee fill out? What must an employer do to designate the leave? What are an employer's notice requirements? What information can an employer request while the employee is on leave? What to do when an employee fails to return from leave? Training should also include quick and consistent involvement by human resources management when these issues arise. In the end, effectively-trained supervisors will be less likely to issue communications or take actions that become the basis for an FMLA claim and, as such, become the basis for the supervisor's individual liability.

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