

## Publications

### **Labor and Employment Alert: Second Circuit Says HR Manager May Be Individually Liable For FMLA Violations**

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The Second Circuit Court of Appeals (with jurisdiction over New York, Connecticut, and Vermont) recently held that a director of Human Resources may be an “employer” and thus can be held individually liable for violating the Family and Medical Leave Act (FMLA). Under the FMLA, an individual may be held liable only if he or she is deemed to be an “employer,” meaning “any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer.”

In *Cathleen Graziadio v. Culinary Institute of America* (CIA), a former employee sued CIA and the company’s director of Human Resources after being terminated while taking leave to care for her two children with medical issues. Basically, Graziadio and the HR director engaged in extensive and, as the Court put it, “excruciating,” correspondence concerning FMLA documentation; ultimately, Graziadio was terminated for job abandonment after failing to provide a return to work date. Graziadio then sued CIA and the HR director for FMLA interference and FMLA retaliation. The trial court granted summary judgment to CIA and to the HR director on the basis that the HR director is not an “employer” under the FMLA. The Second Circuit, however, reversed.

In a matter of first impression, the Second Circuit adopted the “economic realities” test to determine whether an individual exercises sufficient authority over FMLA matters so as to be deemed an “employer” and thus subject to individual liability. This is similar to the test used by courts under the Fair Labor Standards Act for determining employer status. The Court articulated four factors for considering whether an individual had the authority to control an employee’s rights under the FMLA: (1) whether the person had the power to hire and fire the employee; (2) whether the person supervised and controlled the employee’s work schedule or conditions of employment; (3) whether the person determined the rate and method of payment; and (4) whether the person maintained employment records.

Turning to these factors, the Court found that the HR director “appears to have played an important role in the decision to fire Graziadio” because CIA’s vice president who had final termination authority did

not independently examine Graziadio's issues but, instead, relied upon the HR director. Thus, a jury could reasonably find that Graziadio would not have been terminated "but for the substantial authority wielded by" the HR director.

Next, the Court examined testimony that HR "alone, handled any employee's return to work after FMLA leave or that required work accommodations." In light of this, the Court found that the HR director "exercised control over [the employee's] schedule and conditions of employment, at least with respect to her return from FMLA leave."

As to whether the HR director maintained employment records, the Court noted that this cut against individual liability because FMLA paperwork was handled by CIA's payroll department. The Court further noted that neither party put forth evidence as to the rate and method of payment factor, so this factor was neutral.

Finally, the Court discussed the "the overarching question" of whether the HR director "controlled [Graziadio's] rights under the FMLA" and concluded "there seems to be ample evidence to support the conclusion that she did." For instance, the HR director reviewed Graziadio's FMLA paperwork, determined its adequacy, controlled Graziadio's ability to return to work and under what conditions, and sent Graziadio nearly every letter (including the termination letter) concerning her leave. Given this, the HR director "exercised sufficient control over Graziadio's employment to be subject to liability under the FMLA."

The opinion is an important reminder of the potential individual liability lurking in various statutes and highlights the importance of training managers (including HR managers) who have authority over FMLA issues in order to minimize FMLA liability. Contact your Vorys lawyer if you have questions about the FMLA or related training.