

Personal Liability and Human Resource Decision Making

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Abstract

Human Resource decision makers and other members of management involved in human resource decision making, have in recent years increasingly been held “personally liable” under federal and state employment laws (Deschenaux, 2007). While federal courts have not imposed personal liability on decision makers for violation of most nondiscrimination laws, that is not the case with a number of state nondiscrimination laws. The purpose of this paper is to examine the potential for personal liability for managers involved in human resource decision making, recent court cases, and what human resource decision makers can do to reduce their exposure to personal liability.

Keywords: Personal liability, human resource decisions

Personal Liability and Human Resource Decision Making

Introduction

A number of federal and state laws have been interpreted to hold human resource decision makers personally liable. Federal statutes include the Fair Labor Standards Act, the Equal Pay Act, the Family Medical Leave Act, the Consolidated Omnibus Budget Reconciliation Act (COBRA) the Occupational Health and Safety Act, the Employee Retirement Income Security Act, and the Immigration Reform and Control Act (South Carolina Employment Law Letter, 2004). U.S. Department of Labor (DOL) regulations also provide for individual liability under Sarbanes-Oxley (Delikat, Rosenberg, and Phillips, 2005). Decisions that can give rise to personal liability for decision makers include decisions to deny overtime and leaves of absence, equal pay, notification of the extension of benefits, workplace safety, and I-9 Form issues. In addition to being held personally liable under specific statutes, a number of other laws and legal theories may give rise to personal liability for supervisors or managers:

- Defamation
- Intentional Infliction of Emotional Distress
- False Imprisonment
- Battery
- Wrongful Discharge
- For race discrimination in violation of Section 1983 of the Civil Rights Act 1871 (HR Matters, 2005, South Carolina Employment Law Letter, 2004 and Fredericksen, 1997, 2006).

Personal liability under Section 1983 of the Civil Rights Act of 1871 is associated with managers and supervisors of federal, state, or local government entities. In *Knussman v. Maryland*, a state personnel officer was held to be personally liable for \$375,000 in emotional damages caused by her failure to grant leave to a male employee because of his gender (HR Matters, 2005). In another case, a sheriff, along with her county employer, was held personally liable for over \$500,000 in punitive damages “for intentionally making racially based employment decisions” (HR Matters, 2005).

With respect to defamation allegations, courts have generally ruled that negative statements made by supervisors about an employee’s job performance are not grounds for defamation. Supervisors that tinge their criticism with “actual malice or language which is intemperate or disproportionate in strength” may jeopardize the protection, commonly referred to as “qualified or conditionally privileged” courts usually afford to relevant statements about a current or former employee (Isler, Ray, and Bodley, 2000, 2006). Isler, Ray, and Bodley cited a case example where “a truck driver was terminated for attempting to convince a mechanic to adjust the speed governor on his

company truck, the driver was successful in his defamation action against his manager who told other employees he had been fired for bribery”(Isler, Ray, and Bodley, 2000,2006).

False Imprisonment and battery claims may give rise to criminal prosecutions. In false imprisonment claims, if a supervisor brings an employee into a room to discuss discipline, if the employee attempts to leave in the middle of the conversation and the manager “blocks the employee’s egress, even without any physical touching”, the manager “may have engaged in the tort of false imprisonment” (Isler, Ray, and Bodley, 2000,2006). The tort of battery “involves an unwanted touching, but does not require anything so violent as a shove or punch. Rather, any offensive touching will do” (Isler, Ray, and Bodley, 2000, 2006). These claims often accompany sexual harassment claims but also occur when managers become angry with an employee and “physically grabs, pushes, or strikes an employee”(Isler, Ray, and Bodley, (2000,2006).

With respect to Title VII of the 1964 Civil Rights Act, the primary nondiscrimination statute at the federal level, eleven of the twelve circuit courts of appeal have ruled that Title VII does not provide for liability against individuals. One circuit, the First Circuit Court of Appeals, and the U.S. Supreme Court have not addressed the issue (Sperino, 2006). Courts that have addressed the individual liability issue under both the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA) have also not extended personal liability for employees, managers or company officials in lawsuits under these statutes (Fredericksen, 1997, 2006).

A number of state nondiscrimination laws have extended personal liability to individuals. For example, in 1999, the Iowa Supreme Court in *Vivian v. Madison* ruled that supervisory employees were subject to individual liability for race and sex discrimination under that states civil rights act (Bliss, 2000). In *Brown v. Scott Paper Worldwide Company*, a Washington state appeals court “ruled that workers may have claims against individual managers for sex discrimination and sexual harassment under a state discrimination statute, even if the employer is not held liable” (Bliss, 2000). The Colorado Discrimination Act (Colo. Rev. Stat. 24-34-402) prohibits discriminatory or unfair employment practices, and has a broad definition of the term “employer” in allowing for individual liability under that statute (Kay, 2005). In Missouri, the Missouri Court of Appeals has held that the Missouri Human Rights Act (MHRA) definition of employer “can include individual employees and can subject them to individual liability” (Halquist, 2006).

In some states the law is not clear on the question of individual liability and in others, courts have consistently held there is no individual liability. In New Hampshire for example, courts have consistently held that supervisors cannot be held individually liable in wrongful termination claims (Bailey, 2005). In Virginia, Virginia Code Ann. § 2.1-716 expressly limits personal liability by defining the employer as “any employer

employing more than 5 but less than 15 employees” (Kay, 2005). In California and New York the state law is not as clear. In California, the California State Supreme Court in *Reynolds v. Bement* (2005) held that individual officers, directors, and shareholders could not be held personally liable for nonpayment of overtime wages under California law. The court did note “several instances, however, in which state wage and hour law may subject individuals to personal liability” (Winikow, 2006). In New York, the U.S. District Court for the Northern District of New York noted that individual liability is sometimes possible under the New York Human Rights Act (NYHRL), N.Y. Exec. Law, which makes it an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under the NYHRL or to attempt to do so (*EEOC v. Rotary Corporation, Keith Barry, and Alan Makarwich*, 2003). The “aid and abet” concept extends potential personal liability to individual employees, including coworkers or supervisors without personnel decision making authority (Epstein, Becker & Green, 2006). Citing *Mitchell v. TAM Equities, Inc.*, Epstein, Becker, & Green note that under New York law, “individual employees may be liable for employment discrimination in at least three different ways, if they (1) have an ownership interest in the company, (2) are supervisors or managers with significant personnel decision making authority, or (3) are coworkers who actually participate in the discriminatory conduct, thereby aiding and abetting their employers in unlawful conduct” (*Mitchell v. TAM Equities, Inc.*, 2006).

Employees do escape individual liability under New York’s Human Rights Act general discrimination provision (*EEOC v. Rotary Corporation, Keith Barry, and Alan Makarwich*, 2003). The two most often cited federal statutes that expose individual members of management involved in human resource decision making in the private sector to personal liability are the Family Medical Leave Act (FMLA) and the Fair Labor Standards Act (FLSA). The key to the imposition of personal liability on decision makers under these two statutes is determined by how the term “employer” is defined under the statutes. Under the FMLA, the term employer is defined as “any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer” (29 U.S.C. § 2611(4)(A)(ii)(I)). The FMLA regulations provide that this definition applies to individuals such as corporate officers acting in the interest of an employer (29 C.F.R. § 825.104(d)). Under the FLSA, “an employer is any person acting in the interest of an employer in relation to an employee” (29 U.S.C. § 203(d)). These two definitions of the term “employer” have been described as being “nearly identical” by various courts (*Mize v. Mendoza Company*, 2005). Another view cited in recent court decisions is that “neither the FLSA nor the FMLA were intended to impose liability on mere supervisory employees as opposed to owners, officers, etc.” (*Stuart v. Regis Corp and Kimberly Christensen*, 2006, *Chao v. Hotel Oasis, Inc.*, 2007, and *Brunelle v. Cyro Industries*, 2002).

Recent Court Cases

In June of 2007, the First Circuit Court of Appeals decided *Chao v. Hotel Oasis, Inc.* a case that in part examined the personal liability of the company president and violations of the Fair Labor Standards Act (FLSA) (*Chao v. Hotel Oasis, Inc., 2007*). In that case, the company and the company's president, Lionel Lugo-Rodriguez ("Lugo"), were appealing a district court's finding of multiple minimum wage and overtime violations and judgment against the Hotel Oasis and its president. The appeals court agreed with the district court that Lugo, the president of the corporation, ran the hotel and managed its employees. In reaching its decision, the court identified several factors that were important to the personal liability analysis, including the individual's ownership interest, degree of control over the corporation's financial affairs and compensation practices, and role in "caus[ing] the corporation to compensate (or not to compensate) employees in accordance with the FLSA" (*Chao v. Hotel Oasis, Inc., 2007*). The appeals court up-held the district court's judgment holding Lugo personally liable for Hotel Oasis's compensation decisions, holding that "he had ultimate control over the business's day-to-day operations" (*Chao v. Hotel Oasis, Inc., 2007*). The court of appeals further noted that, "Lugo was the corporate officer principally in charge of directing employment practices, such as hiring and firing employees, requiring employees to attend meetings unpaid, and setting employees' wages and schedules. He was thus instrumental in "causing" the corporation to violate the FLSA" (*Chao v. Lugo, 2007*). It would appear that under the FLSA, corporate officers who are involved in day-to-day operations of a business and are directly involved in decisions and practices that may give rise to FLSA violations may be held to be personally liable.

Under the Family Medical Leave Act (FMLA), even though the definitions of the term employer have been described as being "nearly identical", the issue of personal liability, especially with respect to supervisors and HR practitioners is somewhat confusing. In *Mize v. Mendoza Company*, the district court for the Southern District of Ohio held that private-sector supervisors may be held individually liable for violation of the FMLA (*Mize v. Mendoza Company, 2005*). In this case, Alex Mendoza, in addition to being Mize's supervisor, was also the president and co-owner of the company.

In *Brown v. CBK and Paula Pardue*, Michelle Brown sued her former employer and manager, alleging they violated the FMLA in part because she had attempted to exercise her FMLA rights (*Brown v. CBK; and Paula Pardue, 2005*). Pardue argued that the FMLA did not impose individual liability on employees of covered employers under the act and attempted to have the claim against her dismissed. The court disagreed and said that in the Sixth Circuit, the focus should be on "the individual supervisor's control over a plaintiff's FMLA rights" and, that when such control is found to be sufficient, that a separate "employment relationship" exist between the supervisor and the plaintiff (*Brown v. CBK; and Paula Pardue, 2005*). In this case, the court found

that the allegation that the manager (Paula Pardue) was a “member of management” who violated the FMLA was sufficient to state a claim. Pardue asked the court to hold that, to establish individual liability under the FMLA, that a plaintiff must show that the defendant: (1) was a “corporate officer” of the covered employer, and (2) held a “significant ownership interest” in the covered employer, and (3) exercised” operational control of significant aspects of the corporation’s day to day functions (Brown v. CBK; and Paula Pardue, 2005). This rationale is in line with the “economic realities” test usually employed in the FLSA individual liability context (Brown v. CBK; and Paula Pardue, 2005, and United States DOL v. Cole Enters., Inc., 1995). The court in this case focused on the amount of control over the aspect of employment alleged to have been violated in applying the FMLA to Pardue.

In *Stuart v. Regis Corp. and Kimberly Christensen*, the United States District Court for the District of Utah, Northern Division determined that Kimberly Christensen, Stuart’s supervisor was not an employer under the FLSA and was not subject to personal liability under the act (*Stuart v. Regis Corp and Kimberly Christensen*, 2006). Stuart was the manager of the Harrisville, Utah SmartStyle hair salon and Kimberly Christensen was her direct supervisor. Stuart alleged that Regis Corp. and Christensen interfered with her ability to exercise her rights under the FMLA and that the legitimate reasons offered by Regis for her termination were a pretext for discrimination. In determining that Christensen did not qualify as an employer under the FMLA, the court reiterated the view noted in *Chao v. Hotel Oasis, Inc.*, that Neither the FLSA nor the FMLA were intended to impose liability on mere supervisory employees as opposed to owners, officers, etc. (*Stuart v. Regis Corp. and Kimberly Christensen*, 2006). While there does appear to be some consistency in court decisions with respect to personal liability and the FLSA, there also appears to be a developing split among the Federal Court districts with respect to the application of personal liability under the FMLA.

Policy and Practice Recommendations

“Your odds of buying a ticket to the employee litigation sweepstakes can be dramatically reduced if you exercise awareness, prudence and common sense in your daily behavior” (Bliss, 2000, 216). There is a great deal of consistency with respect to the recommendations associated with reducing personal liability for individuals involved in human resource decision making. First and foremost, individuals involved in human resource decision making must realize the potential for personal liability exist in a number of areas. With respect to federal laws, including FLSA, FMLA, COBRA, OSHA, ERISA, IRCA, and Sarbanes Oxley there are either regulations or court precedents that permit individual decision makers to be held personally liable (See the Appendix for an overview of what each of these statutes regulates). So, at a minimum, individuals involved in a wide range of decisions covering compensation, benefit, safety and a wide range of reporting requirements must know the law – “ignorance is no defense” (Kay,

2005). Virtually all federal and state statutes dealing with human resource decision making have numerous required activities which include recordkeeping, reporting, posting, and training. Additionally, most describe basic actions that are prohibited, including discriminatory acts and or policies (Bliss, 2000). Where the statutes and agency regulations have been tested in courts, individual decision makers must stay up to date as changes occur. Numerous court decisions in recent years have reiterated the importance of training, especially as directed to decision makers, in preventing and responding to allegations of wrong doing and to minimizing liability.

Training of new supervisors is particularly important. Bliss provides a number of “commonsense management practices” that all new supervisors should be trained in:

- Handle discipline and terminations in a private setting.
- Give specific and truthful reasons for the decisions made.
- Focus on discussion of the employee's problem behaviors rather than criticism of the employee's "attitude" or personality traits.
- Discuss the steps taken to make the decision. This will help show employees that they were given "due process."
- Show compassion about the impact the decision will have on the employee.
- Express willingness to assist the employee to adjust to new circumstances (e.g., by providing information about benefits available or answering other questions).
- Avoid acting explosively or with the intent to demean or embarrass employees, especially in public.
- Think before speaking off-the-cuff to avoid making irrevocable employment decisions in the heat of the moment.
- Listen carefully and non-judgmentally when employees express anger or disappointment. (This way employees don't feel it's necessary to use the legal system to be heard.)
- Respect the confidentiality of personnel and medical information.
- Steer clear of inappropriate comments, jokes or teasing; do not permit such behavior in your presence (Bliss, 2000).

To reduce exposure to battery and false imprisonment allegations, all managers should be trained that when they are “participating in investigative or disciplinary meetings with employees, avoid forcing an employee to remain in a room against his/her will or creating the appearance that the employee is being blocked from leaving” (Arryo and Prine, 2003). Additionally, managers should be reminded that “except in situations of self-defense or defense of others being physically attacked, avoid grabbing or touching an employee against his/her will or threatening to do so by verbal statements or physical actions” (Arryo and Prine, 2003).

Another reoccurring theme in the literature in this regard, is consistency. Organizations must take steps to make sure their policies and practices “are in-step with the law and best practices” (Kay, 2005). To facilitate consistency in this regard, organizations should conduct “regular HR audits to insure legal compliance and internal organizational application and consistency-it is not good enough to simply have a policy;

it must be communicated, supported, and used appropriately” (Kay, 2005).

Documentation of decisions is another reoccurring theme with respect to reducing exposure to litigation and personal liability. The documentation should be detailed and accurate. Additional important issues with respect to documentation include:

- The specific facts of the situation (date, times, names, actions of involved parties, etc.).
- The process used to reach your decision (investigation, parties interviewed, records reviewed, experts consulted, etc.).
- Reasons for the actions taken by you and the organization.
- Expectations of, and consequences for, the employee.
- The employee’s reaction to your decisions or actions.
- Copies of relevant policies, records, data forms, letters, or memos (Bliss, 2000)

The FMLA has been described as a law that can “create extremely thorny situations for managers and human resource professionals” and, the following tips can help individuals and organizations “take extra care in dealing with leave issues”:

- 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 FMLA may apply, so you can offer FMLA leave request forms when appropriate. When in doubt, offer a leave request form.
- Develop and use a consistent, integrated process for handling employee absences and leave requests and thoroughly document individual leave requests.
- 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.
- 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.)
- Limit disciplinary authority for attendance problems to upper level managers who have thorough training on family and medical leave issues.
- Be extremely careful when disciplining employees for attendance problems. Also exercise caution when disciplining employees who have recently requested or taken FMLA leave (Hershner Hunter, 2007).

On final suggestion for employees of employers that have Employment Practices Liability Insurance. Individual decision makers should determine if they are covered under the company’s policy and if not, does the employer have a policy with respect to when they will and will not defend and indemnify managers if they are sued when acting on behalf of the employer (Arroyo and Prine, 2003).

Summary and Conclusions

Personal liability is becoming an increasingly significant risk in the workplace for managers and executives. As a result, managers and executives should be made aware of the risks involved. They should be provided training on this topic, and liability insurance should be provided. Companies and managers/executives run a grave risk by ignoring the tremendous financial consequences of doing nothing to combat this threat.

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Appendix

FLSA – Fair Labor Standards Act: prescribes standards for the basic minimum wage and overtime pay, affects most private and public employment. It requires employers to pay covered employees who are not otherwise exempt at least the federal minimum wage and overtime pay of one-and-one-half-times the regular rate of pay. For nonagricultural operations, it restricts the hours that children under age 16 can work and forbids the employment of children under age 18 in certain jobs deemed too dangerous. For agricultural operations, it prohibits the employment of children under age 16 during school hours and in certain jobs deemed too dangerous. The Act is administered by the Employment Standards Administration's Wage and Hour Division within the U.S. Department of Labor (<http://www.dol.gov/compliance/laws/comp-flsa.htm>).

FMLA – Family Medical Leave Act: FMLA applies to all public agencies, all public and private elementary and secondary schools, and companies with 50 or more employees. These employers must provide an eligible employee with up to 12 weeks of unpaid leave each year for any of the following reasons:

- for the birth and care of the newborn child of an employee;
- for placement with the employee of a child for adoption or foster care;
- to care for an immediate family member (spouse, child, or parent) with a serious health condition; or
- to take medical leave when the employee is unable to work because of a serious health condition.

Employees are eligible for leave if they have worked for their employer at least 12 months, at least 1,250 hours over the past 12 months, and work at a location where the company employs 50 or more employees within 75 miles (<http://www.dol.gov/dol/topic/benefits-leave/fmla.htm>).

COBRA – Consolidated Ob Benefit Reconciliation Act: COBRA requires that group health plans sponsored by employers with 20 or more employees in the prior year offer workers and their families who lose their health benefits the right to choose to continue group health benefits provided by their group health plan for limited periods of time under certain circumstances such as voluntary or involuntary job loss, reduction in the

hours worked, transition between jobs, death, divorce, and other life events. Qualified individuals may be required to pay the entire premium for coverage up to 102 percent of the cost to the plan (<http://www.dol.gov/dol/topic/health-plans/cobra.htm>).

OSHA – Occupational Safety and Health Act: the Occupational Safety and Health Act of 1970 (OSH ACT) covers all employers and their employees in the 50 states, the District of Columbia, Puerto Rico, and other U.S. territories. Coverage is provided either directly by the federal Occupational Safety and Health Administration (OSHA) or by an OSHA-approved state job safety and health plan. Employees of the U.S. Postal Service also are covered. The law was enacted to "assure safe and healthful working conditions for working men and women" (<http://www.dol.gov/compliance/laws/comp-osh.htm>).

ERISA –The Employee Retirement Income Security Act of 1974: ERISA is a federal law that sets minimum standards for retirement and health benefit plans in private industry. ERISA does not require any employer to establish a plan. It only requires that those who establish plans must meet certain minimum standards. ERISA covers retirement, health and other welfare benefit plans (e.g., life, disability and apprenticeship plans). Among other things, ERISA provides that those individuals who manage plans (and other fiduciaries) must meet certain standards of conduct. The law also contains detailed provisions for reporting to the government and disclosure to participants (http://www.dol.gov/ebsa/compliance_assistance.html).

IRCA – Immigration Reform and Control Act: IRCA is actually an amendment to a 1952 federal statute, the Immigration and Nationality Act. The statute sets forth the conditions for the temporary and permanent employment of aliens in the United States and includes provisions that address employment eligibility and employment verification. These provisions apply to all employers (<http://www.dol.gov/compliance/laws/comp-ina.htm>).

Sarbanes Oxley – The Corporate and Criminal Fraud Accountability Act (CCFA) of 2002: The act is commonly referred to as SOX or Sarbox. With respect to human resource decision making, the most relevant part of the act is Section 806. Employees who work for publicly traded companies or companies that are required to file certain reports with the Securities and Exchange Commission (SEC) are protected from retaliation for reporting alleged violations of mail, wire, bank, or securities fraud; violations of rules or regulations of the SEC; or federal laws relating to fraud against shareholders. Section 806 of the act is enforced by the U.S. Secretary of Labor through the Occupational Safety and Health Administration (<http://www.osha.gov/dep/oia/whistleblower/acts/ccfa.html>).