

INDIVIDUAL LIABILITY UNDER FEDERAL EMPLOYMENT LAWS

By: James J. Powers

As a labor and employment law practitioner who counsels public employers, I often have robust discussions with public agency department heads, human resource professionals and first-line supervisors about how to address problem employees. In some cases, the public employer wishes to terminate or discipline the subordinate employee for misconduct that the employer feels is inconsistent with the public agency's operations and values. In other cases, subordinate employees may be suffering from medical conditions that prevent them from adequately performing their essential job functions (or perhaps not performing them at all due to a prolonged medical leave of absence). In almost all cases, however, management officials often voice frustration about the subordinate employee and push for quick and decisive action.

More times than not, however, I find that a manager's willingness to pursue a risky legal strategy changes the minute he or she hears that they may be held personally liable for any adverse employment action taken against the subordinate employee. Contrary to popular belief, a variety of federal employment laws allow plaintiffs to sue those management officials responsible for taking an adverse action against them. In turn, management officials may not be quite as "adventurous" once they learn that their personal finances (including houses, cars, and the ability to send their children to college) might be at stake. Many times public employers limit these concerns by indemnifying the acts of their officials and by providing joint representation, but even when an employee is fully indemnified and provided with the best possible legal counsel, seeing your own name listed as a defendant in your personal capacity can be exceedingly stressful.

While public officials often must put aside their personal finances when making the employment decision that is in the best interests of their employing public entity, it can't hurt for

a management official to at least consider the personal liability that might flow from some of the more aggressive options being considered. To help with that decision-making process, here is a brief primer on those federal employment laws that either definitely (or potentially) could lead to a plaintiff suing a management official in his or her personal capacity.

1. Fair Labor Standards Act (“FLSA”). The FLSA broadly defines an “employer” as “any person acting directly or indirectly in the interest of an employer in relation to any employee.” 29 U.S.C. § 203(d). By extension, most federal courts have found that when a managerial employee exerts control over an employee’s terms and conditions of employment (including when and how to pay the employee for overtime), that managerial employee may be sued in his individual capacity. This is often called the “economic reality” test. *See Goldberg v. Whitaker House Co-op, Inc.*, 366 U.S. 28, 33 (1961). For example, in *Arteaga v. Lynch*, 2013 WL 5408580 (N.D. Ill. Sept. 26, 2013), a manager was held liable for FLSA violations where, among other things, he was responsible for setting employee work schedules and overseeing whether subordinates worked overtime. Under this test, most first- and second-line supervisors who set work schedules and approve/deny overtime likely could be liable for overtime violations. In turn, human resources personnel who play a role in deciding whether subordinates should be exempt under the FLSA could face liability if they get the exempt status “wrong.”

Managers who are sued under the FLSA can find themselves personally liable for back wages, liquidated damages, and attorney’s fees.

2. Family & Medical Leave Act (“FMLA”). Federal courts are split on the issue of whether supervisory personnel who work for public employers can themselves qualify as “employers” under the FMLA. Many courts hold that management officials can indeed be sued in their individual capacities for FMLA violations. *See, e.g., Haybarger v. Lawrence Cty. Adult*

Probation & Parole, 667 F. 3d 408, 415-17 (3d Cir. 2012); *Darby v. Bratch*, 297 F. 3d 673, 683 (8th Cir. 2002) (public employer supervisors can be sued); *Rasic v. City of Northlake*, 563 F. Supp. 2d 885, 888-92 (N.D. Ill. 2008). Other courts have held that public supervisors cannot be held individually liable. *See, e.g., Dawkins v. Fulton Cty. Gov't*, 733 F. 3d 1084, 1090 (11th Cir. 2013); *Diaz v. Mich. Dep't of Corrs.*, 703 F. 3d 811, 829 (6th Cir. 2003). As a result, the geographic location of your public employer may dictate whether you can be sued in your individual capacity.

Managers who are sued under the FMLA may find themselves personally liable for any lost compensation resulting from the denied FMLA leave, backpay (in termination cases), prejudgment interest, liquidated damages, and attorney's fees.

3. Uniform Services Employment and Reemployment Rights Act ("USERRA").

Almost all courts that have addressed the issue have found that aggrieved parties can sue management officials in their individual capacities under USERRA when the managers are personally responsible for the employment decision in question. *See Bello v. Vill. of Skokie*, 151 F. Supp. 3d 849, 859 (N.D. Ill. 2015) (personnel manager and police chief could be personally liable for refusing to allow a police officer to avoid scheduling his days off on military drill weekends); *Craft v. Vill. of Newark*, 35 F. Supp. 3d 359, 367-68 (W.D.N.Y. 2014); *Risner v. Ohio Dep't of Rehab. & Corr.*, 577 F. Supp. 2d 953, 967 (N.D. Ohio 2008); *Brandsasse v. City of Suffolk*, 72 F. Supp. 2d 608, 618 (E.D. Va. 1999).

Managers who are sued under USERRA can find themselves personally liable for backpay, liquidated damages and attorney's fees.

4. 42 U.S.C. § 1981. Public employees often find it more convenient to sue for race discrimination under 42 U.S.C. § 1981 due to the relatively longer statute of limitations and the

lack of the procedural requirement of first filing a charge of discrimination with the U.S. EEOC. Instead, the plaintiff can proceed directly to federal court. In some cases, another advantage of filing suit under 42 U.S.C. § 1981 is the fact that management personnel can be sued in their individual capacities (unlike Title VII of the Civil Rights Act of 1964, where employees cannot sue individual supervisors).

Managers who are sued under 42 U.S.C. § 1981 can find themselves personally liable for backpay, compensatory damages (*e.g.*, pain and suffering), punitive damages, and attorney's fees.

5. 42 U.S.C. § 1983. Most claims for the deprivation of a public employee's constitutional rights will include a personal claim against the management official who allegedly was responsible for the "deprivation." Unless the management official can escape liability under an absolute or qualified immunity defense, the management official can find himself or herself being personally liability for backpay, compensatory damages (*e.g.*, pain and suffering), punitive damages, and attorney's fees.

Concluding Thoughts: Beyond the scope of this article are other potential legal defenses upon which individual management officials might be able to rely, including for example sovereign immunity defenses (if the manager works for a state government agency). Alternatively, most public agencies have liability insurance policies that may cover some or all of an individual manager's non-punitive damages. Nevertheless, being sued is never a "fun thing," and can be quite troubling to those who are navigating the process for the first time.

In that respect, this article is by no means intended to scare public sector managers into "settling" when confronted by a subordinate employee's legal claim. Nor should managers refrain from taking the appropriate employment action when circumstances call for it. On the other hand,

most employment issues are complex enough that multiple options for addressing an issue usually present themselves. In turn, some of those options may be more or less feasible depending on management's appetite for personal litigation and liability. As a result, the possibility of personal liability is one of the many factors that should be considered when your public employer is deciding on the best way to address a problem employee, and is one of the many reasons why consulting with legal counsel before taking significant disciplinary action against even at will employees can be beneficial.

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