

THE
Extra Mile
GOING THE EXTRA MILE SO YOU DON'T HAVE TO

Public Officials May Be Personally Liable for Violations of the Family and Medical Leave Act

Public employees, like their private sector counterparts, are entitled to the leave protections of the *Family and Medical Leave Act of 1993* (“FMLA”) provided the employees meet the FMLA’s eligibility requirements. Administering FMLA leave requests can be a time consuming and difficult task for those who are unfamiliar with the FMLA’s requirements. Adding to the difficulty, two federal district courts recently held that supervisory employees may be sued in their individual capacity for alleged violations of the FMLA.

“Individuals acting directly or indirectly, in the interest of an employer to any of the employees of such employer’ fall within the statutory definition of ‘employer’ and thus may be subject to individual liability.”

According to the facts presented in *Rasic v. City of Northlake*, 563 F.Supp.2d 885 (N.D. Ill. June 2008), Daniel Rasic, a police officer, took FMLA leave due to the birth of his child and to care for his father who underwent several unexpected surgeries during the same time period. While on leave, Rasic complied with the City of Northlake’s requirement that he call his status in weekly. During one of the telephone calls, the police chief asked Rasic when he was planning to return to work, and allegedly

made several comments suggesting he did not approve of the use of FMLA leave (e.g., “you’re not taking the whole summer off”; “everybody else has kids and has had to deal with elderly parents”; “a lot of people are having to fill in for you”). Subsequently, the police chief directed Rasic to return from leave early to appear in court in response to a subpoena and Rasic refused. Prior to his scheduled return from FMLA leave, Rasic was suspended and ultimately terminated. Rasic filed suit against the City of Northlake, and the

police chief in his individual capacity, alleging that each interfered with his rights under the FMLA when they attempted to induce him to return to work prior to the expiration of his approved FMLA leave. In a motion to determine whether the chief was a proper defendant, the court found the police chief was an “employer” within the meaning of the FMLA because it determined that “individuals acting ‘directly or indirectly, in the interest of an employer to any of the employees of

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- **2009 IAPD/IPRA Annual Conference.** Please join Cindi DeCola on Thursday, January 29, 2009 as she presents a pre-conference workshop, *Supervisory Boot Camp* from 1:00 to 4:30 p.m. in room Continental C of the Hyatt Regency Chicago.
- **Bob Kohn and Cindi DeCola will present an education session *For Board Members Only: A Primer on Board Powers and Duties* from 12:30 to 1:45 p.m. in Conference Room 4F of the Hilton Chicago on Saturday, January 31, 2009.**

HLEK congratulates Steven Richart on becoming a LEED (Leadership in Energy and Environmental Design) accredited professional. Please contact Steven with questions about your “green” building projects and guaranteed energy savings contracts.

To receive each publication of this newsletter electronically, contact us at:

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Each edition will be delivered directly to your inbox with convenient web links to information mentioned in our articles.

Final Family Medical Leave Act Regulations Issued

On November 17th, the United States Department of Labor (“DOL”), the federal agency responsible for enforcing the *Family and Medical Leave Act of 1993* (“FMLA”), issued its long awaited final rule to implement the FMLA’s new military leave entitlements and to update and clarify the existing regulations.

The final rule became effective January 16, 2009, and makes significant changes to the existing FMLA regulations with the goal of clarifying and improving a regulatory framework to permit both workers and employers to be informed of their responsibilities and rights under the FMLA.

Some of the significant topics addressed in the final rule include: (1) the new military caregiver leave and

qualifying exigency leave entitlements; (2) the medical certification process and related forms; (3) the clarification of the definition of “serious health condition”; and (4) the employers’/employees’ notice obligations.

You may obtain a copy of the Final Rule at <http://www.dol.gov/esa/whd/fmla/finalrule.htm>. In light of this final rule, all public employers should review and update their existing FMLA policies to include the two new military leave entitlements and to ensure compliance with the newly revised rule. HLERK has an updated model FMLA policy, as well as a number of other model policies, available for purchase.

Contact Cindi DeCola or John DiJohn with your FMLA inquires generally or with questions concerning the Final Rule.

Illinois Supreme Court to Decide Freedom of Information Act (“FOIA”) Court Ruling

The Illinois Supreme Court has decided to hear an appeal involving a question which has divided the Illinois Appellate Courts: whether employment contracts are subject to public release under FOIA. In *Stern v. Wheaton-Warrenville Community Unit School District 200*, a trial court in DuPage County initially held that a retired Wheaton-Warrenville superintendent’s employment contract was *per se* exempt from disclosure under the FOIA as a part of the superintendent’s personnel file. This was consistent with the reasoning of the Third District Appellate Court in *Copley Press, Inc. v. Board of Education for Peoria School District No. 150*, which held that a Peoria superintendent’s performance evaluations and reasons for dismissal were a part of her personnel file and were *per se* exempt from disclosure.

However, the Second District Appellate Court disagreed with the trial court’s analysis on appeal. The appellate court in *Stern* relied on the Fourth District Appellate Court’s decision in *Reppert v. Southern Illinois University*, which held that public employees’ employment contracts were not *per se* exempt and, thus, subject to disclosure under FOIA. The Second District

noted that the contract contained information bearing on the public duties of a public employee and wrote, “we decline to hold that, merely because an item is contained in a personnel file, it is *per se* exempt.” According to the Second District, the trial court should have determined, through an *in camera* inspection of the file, whether the requested information was exempt as a clearly unwarranted invasion of personal privacy, and whether the presence of exempt private information could be cured through redaction. In addition, the Second District noted that the superintendent had previously released the contract to local newspapers, and by so doing, he may have waived any exemption he might have otherwise claimed.

Until this question is resolved, public employers receiving any FOIA requests for documents contained in an employee’s personnel file (*e.g.*, employment contracts, performance evaluations, severance agreements) should consult with legal counsel concerning the request.

Contact Cindi DeCola or Steve Richart for questions regarding the impact of Stern on your district or other FOIA inquiries.



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FMLA Cont.

such employer’ fall within the statutory definition of ‘employer’ and thus may be subject to individual liability.”

Similarly, in *Barnes v. LaPorte County*, 2008 WL 111019 (N.D. Ind. Jan. 2008), the court held that a public official could be subject to individual liability.

As also reported in this edition of *The Extra Mile*, the FMLA has become even more complex with the addition of the two new military leave entitlements.

Please contact John DiJohn with questions regarding Rasic v. City of Northlake or Barnes v. LaPorte County.



“Study nature, love nature, stay close to nature. It will never fail you.”
Frank Lloyd Wright



Americans with Disabilities Act Amended

On September 25, 2008, President Bush signed into law the *ADA Amendments Act of 2008* (“Act”), which became effective January 1, 2009. The Act amends the *Americans with Disabilities Act* (“ADA”) by broadening the class of individuals who may be determined to be “disabled.”

The Act redefines “disability” by specifically rejecting the United States Supreme Court’s rulings in *Sutton v. United Air Lines*, and in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.

In *Sutton*, the Court held that corrective and mitigating measures should be considered when determining whether a person qualifies as “disabled” under the ADA. The Supreme Court found in *Sutton* that a person was not “disabled” under the ADA because wearing corrective contact lenses fully corrected that person’s vision impairment.

In *Toyota*, the Court held, among other things, that the terms “substantially” and “major” in the ADA definition of “disability” are to “be interpreted strictly to create a demanding standard for qualifying as disabled.”

Both of these cases narrowed the scope of individuals who fell under the protections of the ADA.

As a result of the ADA Amendments, more persons will likely qualify as disabled and be afforded the protections under the ADA.

The Act, however, specifically overrides these holdings by stating that “while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the *Rehabilitation Act of 1973*, that expectation has not been fulfilled.” One of the purposes of the Act, therefore, is to reinstate a “broad scope of protection to be available under the ADA.” Consequently, more persons will likely qualify as disabled and be afforded the protections under the ADA.

Park districts should contact their legal counsel to discuss what changes may need to be made to their medical certification forms and disability policies, as well as to discuss any requests by employees for reasonable accommodations.

For further information on the Americans with Disabilities Act Amendments and to discuss how this will impact your agency, please contact Ellen Rothenberg.

HLERK WISHES YOU AND YOUR PARK DISTRICT A PEACEFUL NEW YEAR

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