EXAMINING THE POLICY IMPLICATIONS OF THE SPLIT AMONG CIRCUIT AND DISTRICT COURTS IN REGARDS TO CAUSES OF ACTION AGAINST PUBLIC EMPLOYERS UNDER THE FAMILY AND MEDICAL LEAVE ACT, PARTICULARLY IN VIEW OF THE RECENT DECISION IN *SADOWSKI V. U.S. POSTAL SERVICE*, 643 F. SUPP. 2D 749 (D. MD. 2009).

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INTRODUCTION

The Family and Medical Leave Act of 1993[1] (FMLA) was intended to provide unpaid family and medical leave to employees suffering from a serious medical condition, or to employees having to take care of an immediate family member–including a foster or adoptive child–for up to twelve weeks.[2] As part of the FMLA, an employee who has worked for an organization employing at least fifty individuals and who has been employed for at least twelve months with a minimum of 1250 work hours, is entitled to twelve weeks of leave in any 12-month period.[3] Under a separate provision of the Act, an

[1] Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (West, Westlaw through P.L. 112-3).

[2] 29 U.S.C.A. § 2612(a)(1) (West, Westlaw through P.L. 112-3).

[3] *Id.* *See* 29 U.S.C.A. § 2611(2) (West, Westlaw through P.L. 112-3) (defining "eligible employee"). Under a separate provision of the FMLA, the spouse, son, daughter, parent or next-of-kin of a service member with a serious injury or illness may take up to twenty-six weeks of leave during a 12-month period. *See id.* § 2612(a)(3).

employee who enjoys the benefits of FMLA leave is entitled to be restored to her original position, or one equivalent to it, without any loss of accrued benefits.[4] However, in order to prevent potentially retaliatory action by employers under the Act, Congress provided for a cause of action to employees adversely affected by the conduct of their employers.[5] It is "unlawful for any employer to interfere with, restrain, or deny the exercise of" rights under the FMLA.[6] Employees deemed to have been adversely affected by an employer's retaliatory or discriminatory conduct as regards the FMLA can recover lost wages and employment benefits, plus interest.[7] Remedy under the FMLA may be accomplished in one of two ways. First, an employee may directly seek civil action for damages or equitable relief.[8] Employees may seek injunctive relief in the form of a restoration of one's previous position prior to termination or a position that the employee would have attained were it not for the unlawful termination.[9] In addition, an FMLA plaintiff may file a complaint with the Secretary of Labor, who then has authority to investigate.[10] However, plaintiffs may not recover punitive

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[4] 29 U.S.C.A. § 2614(a)(1)-(2) (West, Westlaw through P.L. 112-3).

[5] 29 U.S.C.A. § 2615(a)(1)-(2) (West, Westlaw through P.L. 112-3); 29 U.S.C.A. § 2617 (West, Westlaw through P.L. 112-3); 29 C.F.R. § 825.220(c) (West, Westlaw through Mar. 31, 2011). Under the FMLA, adverse employment action by an employer may include "undeserved negative job evaluations, demotions, disadvantageous transfers, or toleration of harassment . . . ." Graham v. State Farm Mut. Ins. Co., 193 F.3d 1274, 1283 (11th Cir. 1999).

[6] § 2615(a)(1).

[7] *See* Sheaffer v. Cnty. of Chatham, 337 F. Supp. 2d 709, 729 (M.D.N.C. 2004). One commentator has noted that, given the FMLA's lag time in redressing injury, even under an injunctive form of relief, individuals might suffer additional mental and emotional distresses that are not covered under the Act. *See* Robin R. Cockey*, The Family Medical Leave Act: What You See and What You Get,* 12 AM. U.J. GENDER SOC. POL'Y & L. 1, 1-2 (2004).

[8] *See* Nancy R. Daspit, *The Family and Medical Leave Act of 1993: A Great Idea but a "Rube Goldberg" Solution?*, 43 EMORY L.J. 1351, 1358 (1994).

[9] *See* 29 U.S.C.A § 2617(a)(1)(B) (West, Westlaw through P.L. 112-3).

[10] *See* Daspit*, supra* note 8, at 1358. The Secretary of Labor has authority to investigate workplace filings under the Fair Labor Standards Act (FLSA). *Id.*

damages or damages for emotional distress resulting from a FMLA violation.[11]

As interpreted by most federal courts, an employee wishing to file suit under the private remedy section of the FMLA must satisfy a three-part test that is analogous to similar tests under federal law intended to establish a prima facie case of discrimination.[12] Thus, the employee typically must show:

> (1) that he or she engaged in FMLA-protected activity; (2) that the employer took an adverse employment action against the plaintiff; and (3) that there is a causal connection between the plaintiff's protected activity and the employer's adverse employment action.[13]

As will be discussed in greater detail *infra*, courts look to the FLSA for a significant amount of guidance in interpreting enforcement of the FMLA.

[11] *See Sheaffer,* 337 F. Supp. 2d at 729.

[12] *See, e.g.*, *id*. at 726 (arguing that the FMLA standard test for a prima facie showing of retaliation is analogous to that employed in the Title VII context under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). An employee in the context of an FMLA suit must, by analogy to *McDonnell-Douglas*, satisfy a pronged approach that requires the plaintiff to show that her activity was protected and the employer's proffered actions were pretextual, and thus, an employee seeking remedy under the FMLA must show:

> (1) she is an eligible employee under the FMLA, (2) defendant is an employer subject to the requirements of the FMLA, (3) she was entitled to leave under the FMLA, (4) she gave notice to the defendant of her intention to take FMLA leave, and (5) the defendant denied her the benefits to which she was entitled under the FMLA.

Parker v. Hahnemann Univ. Hosp., 234 F. Supp. 2d 478, 483 (D.N.J. 2002).

[13] *Sheaffer*, 337 F. Supp. 2d at 726-27 (further citation and internal quotations omitted omitted). *See also* Darby v. Bratch, 287 F.3d 673, 679 (8th Cir. 2002) (citing Richmond v. ONEOK, Inc., 120 F.3d 205, 208 (10th Cir. 1997)).

Although under 29 U.S.C.A. § 2615(a)(1) the employee may file suit against an employer who has taken retaliatory action, circuit courts to date have not consistently defined the meaning of "employer" for purposes of liability under the FMLA. Although the FMLA discusses a cause of action against an "employer" under 29 U.S.C.A. § 2615(a)(1), the definition of "employer" is not consistently interpreted by either circuit or district courts. Under the FMLA, an "employer" includes any person engaged in "commerce or in any industry or activity affecting commerce who employs 50 or more employees".[14] However, an employer also includes " any 'public agency,' as defined in section 203(x) of this title."[15] The placement of both public agency, § (iii) and the General Accountability Office (GAO) and Library of Congress, § (iv), under the § (ii), "includes" provision, has caused courts to disagree as to whether or not Congress intended public agencies to be treated just as other entities in regards to those who act "directly or indirectly, in the interest of an employer" as well as "successors in interest."[16] Moreover, the fact that under the FMLA, as contrasted with statutes containing similar language, such as the Fair Labor Standards Act (FLSA), a public agency is set off in a separate section under the definition of employer, seems to suggest, at least to some courts that take a more narrow view, that Congress intended a different cause of action against public employers.[17]

The division among courts at both the circuit and the lower district court levels has several major policy implications, as I will discuss further below. Most importantly, resolving the apparent statutory "dilemma" has the greatest relevance to

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[14] 29 U.S.C.A. § 2611(4)(A)(i) (West, Westlaw through P.L. 112-3).

[15] *Id.* at § 2611(4)(A)(iii).

[16] *See* Mitchell v. Chapman, 343 F.3d 811, 825-33 (6th Cir. 2003) (noting that the narrow issue is whether FMLA segregation of the definition of employers from specific provision regarding public agencies imposes individual liability on public agency employers). *See also* Rasic v. City of Northlake, 563 F. Supp. 2d 885, 889-90 (N.D. Ill. 2008) (detailing split of authority).

[17] Under the FLSA, an employer is "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ." 29 U.S.C. § 203(d) (West, Westlaw through P.L. 112-3).

plaintiffs wishing to pursue a private cause of action against supervisors in the public workplace. Although one criticism is that expanding the FMLA's right-to-sue provision against supervisors unnecessarily goes beyond the remedial purpose of the Act,[18] both a textual and legislative analysis of the FMLA suggests that this expanded function was deliberate, as I will address below.

In the first section, I discuss the ways in which a number of courts have interpreted the statutory language of the FMLA from a textual, historical and legislative context. Approaches that both expand and limit the individual employer liability are addressed. Next, I provide the statutory and factual background to the specific issues involved recently in *Sadowski v. U.S. Postal Service*,[19] a case that represents some of the major concerns at play in the circuit and district court splits. Finally, I discuss both the flaws and merits of the circuit court approaches and the specific holding in *Sadowski*, and suggest a possible remedy.

HISTORY AND BACKGROUND OF THE COURT SPLIT ON FMLA'S PUBLIC EMPLOYEE PROVISIONS

The circuit and district court split in interpreting the meaning of "employer" under the FMLA, and the lack of the Supreme Court's granting of certiorari on this issue has essentially left many would-be FMLA plaintiffs without clear guidance in regards to suits brought against individual supervisors in the public agency context. Textually, the FMLA seems to offer little direction in understanding what the boundaries of an "employer" encompass. As a consequence, courts have not agreed as to how to construe certain subsections of the FMLA, which ostensibly define the term, "employer."[20]

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[18] *See* Boyd Rogers, Note, *Individual Liability Under the Family and Medical Leave Act of 1993: A Senseless Detour on the Road to a Flexible Workplace*, 63 BROOK. L. REV. 1299, 1336 (1997) (reasoning that to hold individuals personally liable under FMLA would run contrary to the intent of Congress).

[19] Sadowski v. U.S. Postal Serv., 643 F. Supp. 2d 749 (D. Md. 2009).

[20] 29 U.S.C.A. § 2611(4)(A)(i)-(iv) (West, Westlaw through P.L. 112-3).

For example, sub-sections (iii) and (iv) under the Act seem to separate causes of action against public agencies, the General Accountability Office (GAO) and the Library of Congress, all public entities, from private entities "affect[ing] commerce" under the preceding § (i).[21] Some courts have construed this separate placement as suggesting a different understanding of "employer" in the public entity context.[22]

Moreover, the arguably "odd" placement of several subsections might indicate a desire by Congress to separate causes of action for public and private employers. For example, subsections (iii) and (iv), which pertain to public agencies, and the Government Accountability Office and Library of Congress, respectively, are separate from subsection (ii), which pertain to persons acting in the interest of an employer.[23] A number of courts have viewed the statutory separation of public agencies from supervisory and successor liability under sub-section (ii) as indicating Congress' intent not to impose supervisory or successor liability in the public agency context.[24]

Another seemingly problematic aspect of the text of 29 U.S.C.A. § 2611(4)[25] is that language defining "employer" seems, at times, to be both repetitive and conflicting. For example, under § 2611(4)(A)(i) an employer is defined, in pertinent part, as a "person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees" for a

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[21] *Id.*

[22] S*ee, e.g.*, Mitchell v. Chapman, 343 F.3d 811, 832-33 (6th Cir. 2003). *See also* Keene v. Rinaldi, 127 F. Supp. 2d 770, 775 (M.D.N.C. 2000). *Mitchell's* line of reasoning is representative of several courts that have construed the FMLA right-to-sue provisions in a more limited fashion. The primary basis for this approach is the separation of key language referring to an "employer" and a "public agency" in both the FMLA as well as federal regulations that interpret the FMLA. *See Mitchell*, 343 F.3d at 832-33.

[23] 29 U.S.C.A. § 2611(4)(A)(i)-(iv) (West, Westlaw through P.L. 112-3).

[24] *See Mitchell*, 343 F.3d at 829 (reasoning that "public agency" is separated from the supervisory and successor in interest provisions; two sections should not be construed as inter-related); *Keene*, 127 F. Supp. 2d at 775 (reasoning that placement of supervisory and successor in interest provisions separate from, and before, public agency provisions indicates that supervisors of a public agency are not subject to individual liability).

[25] 29 U.S.C.A. § 2611(4) (West, Westlaw through P.L. 112-3).

specified number of days of the year.[26] Under § 2611(4)(A)(iii) the statute states "includes any 'public agency' as defined under § 203(x) of this title."[27] Some courts view Sections (i) and (iii) as incompatible and separate. These courts reason that to construe the two provisions together would be redundant, as § 203(x) already defines an agency as "the government of a State or political subdivision thereof; any agency of . . . a State, or a political subdivision of a State."[28] Moreover, a second provision of the FMLA qualifies the meaning of "public agency" under § 2611(4)(B) as "a person engaged in commerce or in an industry or activity affecting commerce".[29] This language seems to be redundant, given § 2611(4)(A)(i).[30]

As I discuss in the following two sections, courts have grappled with these issues in determining whether a FMLA plaintiff has a cause of action against public employers in their individual capacity. Because the Supreme Court has not definitively weighed in on the FMLA cause-of-action provisions, federal courts have been left to their own creative means in determining the extent of individual supervisor liability under the FMLA.[31] In turn, federal courts have relied predominantly upon a textual reading of both the FMLA and the FLSA from which much of the FMLA language is derived.[32]

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[26] § 2611(4)(A)(i).

[27] § 2611(4)(A)(iii).

[28] Knussman v. Maryland, 935 F. Supp. 659, 663 (D. Md. 1996) (quoting 29 U.S.C.A. § 203(x) (West, Westlaw through P.L. 112-3) (internal quotations omitted)).

[29] § 2611(4)(B) (West, Westlaw through P.L. 112-3).

[30] § 2611(4)(A)(i). *See* Mitchell v. Chapman, 343 F.3d 811, 830 (6th Cir. 2003) (reasoning that Congress would not have redundantly defined employer and agency separately if the two were intended to be read together, and treating public employers as separate from the narrow definition of employer).

[31] *See* Sadowski v. U.S. Postal Serv., 643 F. Supp. 2d 749, 753 (D. Md. 2009) (noting that there is currently no applicable Supreme Court authority on individual liability in the public agency context under the FMLA, and also noting the split among circuit as well as district courts on the issue).

[32] For a criticism of courts' arguably overly-textual approach to construing the various subsections of the FMLA, s*ee* Sandra F. Sperino, *Chaos Theory: The*

COURTS ALLOWING A PRIVATE CAUSE OF ACTION AGAINST PUBLIC OFFICIALS ACTING IN AN INDIVIDUAL CAPACITY UNDER THE FMLA

Most courts that allow a private cause of action against individual supervisors have drawn support from a "plain reading" of the FMLA.[33] Accordingly, for example, the definition of "employer" and public agency should be read together using a plain text approach.[34] A fundamental advantage of this approach is that it does not require courts to engage in complicated analyses of grammar and "em-dashes" in construing the FMLA's provisions.

For example, the Eighth Circuit, in *Darby v. Bratch* reasoned that a plaintiff could sue several public officials working for Kansas City, Missouri and the Kansas City, Missouri Police Department in their individual capacities because there was no suggestion in the FMLA that public officials constitute a separate category from other employers.[35] The *Darby* court

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Unintended Consequences of Expanding Individual Liability Under the Family and Medical Leave Act, 9 EMP. RTS. & EMP. POL'Y J. 175, 178-79 (2005).

[33] *See* Modica v. Taylor, 465 F.3d 174, 187 (5th Cir. 2006) (noting that plain reading of FMLA allows public employers to be held individually liable); Darby v. Bratch, 287 F.3d 673, 681 (8th Cir. 2002) (same).

[34] *See Modica*, 465 F.3d at 185 (reasoning that the em-dash and use of the conjunction "and" between subparts of 29 U.S.C. § 2611(4)(A) (1994) suggests that "there is some relationship between clauses (i)-(iv)"). *See also* Hewett v. Willingboro Bd. of Educ., 421 F. Supp. 2d 814, 818-19 (D.N.J. 2006) (similarly reasoning that all clauses of FMLA are meant to be read together); Sheaffer v. Cnty. of Chatham, 337 F. Supp. 2d 709, 728 (M.D.N.C. 2004) ("The simplest reading of the statutory text compels the conclusion that public employees who act, directly or indirectly, in the interest of the public agency for which they work, may be held individually liable under the FMLA."); Carter v. U.S. Postal Serv., 157 F. Supp. 2d 726, 728 (W.D. Ky. 2001) ("[c]ommon logic and standard rules of grammar" require that public officials should be individually liable).

[35] *See* Darby v. Bratch 287 F.3d 673, 681 (8th Cir. 2002). *See also Sheaffer*, 337 F. Supp. 2d at 728.

viewed the statutory definition of an employer as including public employers in their individual capacities as well.[36]

The *Darby* court drew further support from a comparison of the FMLA to the Fair Labor Standards Act (FLSA), arguing that the FMLA has "language . . . very similar to the definition of employer under the FLSA."[37] Under the FLSA, an employer is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ."[38] Courts that find no separate cause of action in the private and public realm have held that the FMLA and FLSA are significantly similar and are meant to be read together.[39]

Similarly, in *Modica*, the Fifth Circuit held that an employee could, in theory, sue his supervisor in an individual capacity under the FMLA; the court reasoned that the separate provisions of § 2611(4)(A) of the FMLA should be textually read together because the word "and" linked clauses (i)-(iv).[40] Moreover, a separate provision under § 2611(4)(B) defining a public agency as "a person engaged in commerce or in an industry or activity affecting commerce" would not be superfluous because "the definition of employer refers back to the word employer itself."[41] In addition, a purpose of providing a definition of a public agency under § 2611(4)(B) would be to relieve the employee of having to prove that the public agency is engaged in commerce.[42]

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[36] *Darby*¸ 287 F.3d at 681.

[37] *Id.*

[38] 29 U.S.C.A. § 203(d) (West, Westlaw through P.L. 112-3).

[39] *See* Wascura v. Carver, 169 F.3d 683, 686 (11th Cir. 1999) (holding that because Congress chose to define "employer" in materially the same way under both statutes, decisions interpreting the FLSA are meant to offer guidance in interpreting FMLA). *See also* Knussman v. Maryland, 935 F. Supp. 659, 664 (D. Md. 1996) ("Liability under the FMLA is essentially the same as liability under the FLSA.").

[40] Modica v. Taylor, 465 F.3d 174, 185 (5th Cir. 2006).

[41] *Id.* (further citation and internal quotations omitted).

[42] *Id.* at 186.

Although the *Modica* court established that under the FMLA a supervisor may be sued in her individual capacity, on the specific facts it determined that there had not been any clear judicial guidance on the issue at the time that the supervisor had terminated the plaintiff employee.[43] The court cited a lack of clear guidance from the Supreme Court and furthermore that it had not been clearly established that public employees are subject to individual liability under the FMLA.[44] On these grounds, the court granted the defendant supervisor summary judgment.[45]

In *Hewett v. Willingboro Board of Education*, the United States District Court for the District of New Jersey found that public supervisor liability could attach under the FMLA because Congress could have easily stipulated in the language of the FMLA that liability for public supervisors does not exist.[46] In *Hewett*, the plaintiff, a public school teacher, sued her supervisors for violations of the FMLA after she had been terminated for taking unpaid leave to treat a foot fracture.[47] The court cited language in the FLSA where Congress had explicitly stipulated exceptions to employer liability for labor organizations, noting that Congress could have stipulated similar exceptions in the FMLA as well.[48] Furthermore, as was the case in *Modica*, the *Hewett* court reasoned that by a plain meaning interpretation, sub-sections (i)-(iv) of §2611(4)(A) were meant to be read together.[49] Similarly, the court rejected *Mitchell*'s reasoning construing § 2611(4)(B) as "superfluous"

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[43] *Id.* at 188.

[44] *Id.*

[45] *Id.*

[46] Hewett v. Willingboro Bd. of Educ., 421 F. Supp. 2d 814, 821 (D.N.J. 2006).

[47] *Id.* at 815-16.

[48] *See id.* at 821. (FLSA provides employer exception to "any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.") (quoting 29 U.S.C.A. § 203(d) (West, Westlaw through P.L. 112-3)).

[49] *Id.* at 819.

and thus indicative of an intent to separately treat public agencies.[50]

These courts draw additional support from regulatory language that highlights the similarities between the FMLA and FLSA. "The definition of 'employer' under the FMLA is very similar to the definition of 'employer' under the FLSA.[51] The *Knussman* court, later overturned by *Sadowski*, reasoned that, in addition to the statutory similarity between the FMLA and FLSA, the implementing regulations to both statutes held that individuals "acting in the interest of the employer" are individually liable for FMLA violations.[52]

Like S*adowski*, which is discussed below, numerous courts disagree that the FMLA and FLSA contain essentially identical definitions of 'employer,' even though there is significant textual overlap in both statutes, as *Darby* suggested.[53] For example, the FLSA includes "a public agency" in its definition of "employer".[54] By contrast, the FMLA seems to suggest—at least to courts that construe a private/public divide—that such a difference exists by placing a public agency in a separate category from other employers.[55] These differences, and the approach by courts rejecting individual employer liability, will be explored in greater detail in the section that follows.

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[50] *Id.* at 820.

[51] Modica v. Taylor, 465 F.3d 174, 186 (5th Cir. 2006) (citing 29 C.F.R. § 825.104(a) (West, Westlaw through March 31, 2011). *See also* Knussman v. Maryland, 935 F. Supp. 659, 664 (D. Md. 1996) ("[T]he FMLA's implementing regulations state that the FMLA is intended to parallel the FLSA.") (further citation omitted).

[52] *Knussman*, 935 F. Supp. at 664. *See* 29 C.F.R. § 825.104(d) (West, Westlaw through Mar. 31, 2011) (defining "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee."). *But see* Sadowski v. U.S. Postal Serv., 643 F. Supp. 2d 749, 757 (D. Md. 2009) ("[U]nder the FMLA, the individual liability provision and the public agency provision are separate and distinct from one another.").

[53] *See* Darby v. Bratch 287 F.3d 673, 681 (8th Cir. 2002) (comparing textual similarities in definition of employer under FMLA and FLSA).

[54] *See Sadowski*, 643 F. Supp. 2d at 756-57 (citing 29 U.S.C.A. § 203(d) (West, Westlaw through P.L. 112-3)).

[55] *See id.*

COURTS REJECTING A PRIVATE CAUSE OF ACTION AGAINST PUBLIC OFFICIALS ACTING IN AN INDIVIDUAL CAPACITY UNDER THE FMLA

A number of circuit and district courts view a textual reading of the FMLA as indicating a separate understanding of causes of action against private and public employers.[56] This view is supported by the suggestion that a textual reading providing for a private cause of action against public employers would render much of FMLA's provisions superfluous. For example, under the more expansive reading it would appear redundant for Congress to define a "public agency" under subsection (iii) if that section itself were subsumed under the section (i) meaning of "employer."[57] Instead, for courts adopting the more limited view of employer liability, the explicit division between employer and "public agency" in these two subsections of the FMLA reveals a legislative intent to have a separate cause of action with regards to public employment practices.[58] In addition, a separate section, § 2611(4)(B) states that "[f]or purposes of . . . [§ 2611(A)(iii)], a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce."[59] The *Mitchell* court construed this statutory provision as further evidence that

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[56] *See* Mitchell v. Chapman, 343 F.3d 811, 832 (6th Cir 2003); Wascura v. Carver, 169 F.3d 683, 685-87 (11th Cir. 1999) (rejecting cause of action on a precedential reading of FLSA as not imposing liability on public agency supervisor; FLSA and FMLA are identical textually on public agency supervisor liability); Keene v. Rinaldi, 127 F. Supp. 2d 770, 775 (M.D.N.C. 2000) ("In this case, the plain words of the statute do not suggest that the supervisors of a public agency may be considered to be an employee's employer.").

[57] *Mitchell*, 343 F.3d at 830 (discussing 29 U.S.C.A. § 2611(4)(A) (West, Westlaw through P.L. 112-3).

[58] *See id.* at 828-29. *See also Keene*, 127 F. Supp. 2d at 775 (holding that the subsections of FMLA regarding public agencies are "entirely apart" from the other sections).

[59] 29 U.S.C.A. § 2611(4)(B) (West, Westlaw through P.L. 112-9).

reading a "public agency" under subsection (iii) together with subsection (i) would be superfluous.[60]

In *Wascura v. Carver*, the Eleventh Circuit determined that ascertaining whether an individual supervisor could be sued in her individual capacity had close parallels to analysis of individual liability under the FLSA.[61] The *Wascura* court relied on an earlier Eleventh Circuit case, which reasoned that a public official in a supervisory position was not an "employer" under the FLSA because the supervisor, in their individual capacity, had no control over the public employee's employment.[62] The court dismissed the plaintiff's FMLA claims on a lack of subject-matter jurisdiction.[63]

Several courts have rejected the statutory approach applied in *Mitchell* and similar cases. For example, the *Modica* court reasoned that the § 2611(4)(B) qualification of public agency under § 2611(A)(iii) simply "relieves plaintiffs of the burden of proving that a public agency is engaged in commerce."[64] According to *Mitchell*, Congress departed from the FLSA's approach in regards to public employers, even though other provisions remain the same. The *Mitchell* court cites the fact that while the FLSA makes no mention of a difference between a public and a private employer, the FMLA clearly separated "public agency" from the other sections of the statute defining an employer.[65] This deliberate change is therefore additional evidence of congressional intent to create a separate cause of action.[66]

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[60] *See Mitchell*, 343 F.3d at 830-31.

[61] *See Wascura*, 169 F.3d at 685-86.

[62] *Id.* at 686 (citing Welch v. Laney, 57 F.3d 1004 (11th Cir. 1995)).

[63] *Id.*

[64] Modica v. Taylor, 465 F.3d 174, 186 (5th Cir. 2006). *See also* Morrow v. Putnam, 142 F. Supp. 2d 1271, 1272-73 (D. Nev. 2001) ("[T]here is no reason to assume that the term 'employer' in . . . [§ 26114(A)(ii)] means anything other than what Congress defined it to mean in the various definitions of paragraph 4(A).").

[65] *See* Mitchell v. Chapman, 343 F.3d 811, 829, 831-32 (6th Cir. 2003).

[66] *Id.*

Under this more limiting view, it would make especially little sense for Congress to create separate provisions for the GAO and Library of Congress under the FMLA. For example, it would make little sense to view a "public" agency, under subsection (iii), or the GAO and Library of Congress, under subsection (iv), as being "includ[ed]" as "successor in interest" of an employer. In *Mitchell*, the court reasoned that it would be "an exercise in absurdity" to view one purpose of the FMLA to protect employees from "successors in interest" of the GAO and Library of Congress.[67] Moreover, the *Keene* court reasoned that the provisions describing a person acting "directly or indirectly, in the interest of an employer" are both separate and before the public agency ones, indicating they are meant to be read as separate.[68] The court reasoned that if Congress had intended to provide a cause of action for supervisors in the public agency context, it would have placed the "directly or indirectly" provision covering supervisors *after* the public agency provisions.[69]

Thus, although courts have been provided little guidance in textually interpreting the FMLA, the primary division seems to lie in whether or not Congress intended to provide a separate cause of action in regards to public agencies, or whether such agencies are simply subsumed within the employer definition. As discussed in the following section, the *Sadowski* court has taken the more limiting view of causes of action against individual supervisors under the FMLA. However, the fact pattern in *Sadowski* reveals why such a limiting approach is so problematic in the public agency context and why it essentially chisels away at an employee's statutory right to obtain redress.

BACKGROUND IN *SADOWSKI*

[67] *Id.* at 831. *See also* Keene v. Rinaldi, 127 F. Supp. 2d 770, 776 (M.D.N.C. 2000) (reasoning that public agencies ordinarily do not have successors in interest and that successor in interest provision should be read as applying to private entities).

[68] *See Keene*, 127 F. Supp. 2d at 776.

[69] *Id.*

In *Sadowski*, the plaintiff alleged that his employer-supervisor, defendant Walls, impermissibly modified his FMLA leave to AWOL.[70] The plaintiff claimed that he had been properly advised to obtain leave for high blood pressure from his doctor, and that following this recommendation he properly filed paperwork for medical leave according to the FMLA.[71] Sadowski alleged that he complied with a request from Sadowski's supervisor, Walls, to file additional paperwork just after FMLA leave was granted.[72] Subsequent to the apparent filing of this additional paperwork, Sadowski was called to a pre-disciplinary interview.[73] It was after this interview that Sadowski claimed he was terminated by way of notice signed by defendant Walls.[74]

Sadowski's action was removed to federal district court under 28 U.S.C.A. § 1441 and § 1442.[75] The District Court of Maryland dismissed the claim against Sadowski's supervisors under Rule 12(b)(6) of Federal Rules of Civil Procedure, on grounds that the FMLA provides no cause of action against a public employer acting in an individual capacity.[76] In its reasoning, the district court acknowledged the circuit and intra-district court split on the issue of individual liability for public employees under FMLA and the failure of Supreme Court of the United States to weigh in on the issue.[77]

The district court rejected its earlier *Knussman* approach and did not apply the FLSA standard to the FMLA, which would have permitted individual employer liability.[78] Instead, the

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[70] Sadowski v. U.S. Postal Serv., 643 F. Supp. 2d 749,750-51 (D. Md. 2009)

[71] *Id.* at 750.

[72] *Id.* at 750-51.

[73] *Id.* at 751.

[74] *Id.*

[75] *Id.* at 750.

[76] Sadowski v. U.S. Postal Serv., 643 F. Supp. 2d 749, 750, 757 (D. Md. 2009).

[77] *Id.* at 753.

[78] *Id.* at 754.

court positively cited *Mitchell* and *Keene* for the proposition that the subsections of FMLA are "distinct and independent from each other".[79] Echoing *Mitchell,* the court reasoned that permitting individual liability for public employees would render § 2611(4)(B) superfluous given (4)(A).[80] The separate qualification of public agency under (4)(B) would be redundant with qualification of (4)(A)(iii) by (4)(A)(i).[81] Furthermore, the successor in interest (4)(A)(II) provision would not make sense if it were to qualify the public agency, (iii), or Government Accountability Office and Library of Congress, (iv), provisions.[82]

The *Sadowski* court reasoned that the FLSA and FMLA, while similar, contain textually distinct provisions.[83] Under the FLSA, the term "public agency" is in the same section as individual liability.[84] By contrast, the FMLA "disconnected" public agency from private employer.[85] The FMLA, the court reasoned, "corrected the ambiguity of the FLSA," indicating that the FLSA should not guide FLMA.[86] As a result, the court held that since a textual reading of the FMLA indicates that private liability is separate from public agency liability, the FMLA does not permit public employees to be individually liable.[87] By this reasoning, the *Sadowski* court adopted the *Mitchell* and *Keene* approach.[88]

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[79] *Id.*

[80] *Id.* at 755.

[81] *Id.* at 755-56.

[82] Sadowski v. U.S. Postal Serv., 643 F. Supp. 2d 749, 756 (D. Md. 2009).

[83] *Id.* at 756-57 (reasoning that placement of "public agency" within the same clause as the individual liability provision under the FLSA materially differed from the FMLA, where "public agency" was "extracted" from the public agency provision).

[84] *Id.* at 756.

[85] *Id.*

[86] *Id.* at 757.

[87] *Id.*

[88] Sadowski v. U.S. Postal Serv., 643 F. Supp. 2d 749, 754 (D. Md. 2009).

ANALYSIS AND POLICY IMPLICATIONS

The *Sadowski* court's reasoning relied heavily upon both a textual reading of the FMLA, and a comparison to its close cousin, the FLSA.[89] Although this approach is useful, it overemphasizes textual analogy while undermining the scope and purposes of the FMLA itself. While both the FLSA and the FMLA deal with workplace employee rights, the FMLA sets out to accomplish additional employee rights in the context of family and medical leave.[90] As such, the FMLA may be viewed as a separate legislative enactment that, while similar on its face to the FLSA, is also quite different. The FLSA, for example, was passed by Congress in 1938, over a half century before the FMLA, as a means to ensure that workers enjoyed certain minimum wages, as determined by Congress, for both regular and overtime pay.[91] Although the FLSA has been amended a number of times since its passage in order to expand worker rights, Congress never modified the original definition of "employer" under the Act.[92]

By contrast, the FMLA was intended to accomplish broader social goals: to permit individuals to take unpaid time off from work while protecting against workplace gender-based discrimination.[93] Although the Act was not intended to apply

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[89] *Id.* at 756-57.

[90] For example, the FMLA may be construed as an anti-discrimination statute. *See* Rogers, *supra* note 18, at 1307.

[91] *See* Sperino, *supra* note 32, at 182.

[92] This might suggest that the textual differences between the FLSA and the FMLA, as the *Sadowski* court and others have reasoned, was deliberate. *See* Sadowski v. U.S. Postal Serv., 643 F. Supp. 2d 749, 757 (D. Md. 2009). But even if deliberate, this difference need not imply that Congress somehow set out to "correct" the FLSA's failure to separate public from private entities, as the *Sadowski* court reasoned. *Id.* at 756-57.

[93] *See* Rogers, *supra* note 18, at 1306 (noting that the FMLA sought both to create minimum labor standards, as the FLSA had, but also to prohibit discrimination on the basis of gender, in particular discrimination against working women.). *See also* 29 U.S.C.A. § 2601(b) (West, Westlaw through P.L. 112-3) (noting purpose of the Act is to balance the demands of the workplace with those of families, and also to promote the goal of equal employment opportunity for men and women).

singularly just to mothers of small children,[94] legislators initially pointed out the fact that one major goal was to address the fact that women had traditionally borne an especially heavy burden in caring for newborn children while undertaking job responsibilities.[95] Legislators likewise recognized the importance of parental participation early on, when newborns and young children were especially likely to need medical care.[96]

In addition, the Supreme Court in *Hibbs*, discussed *infra*, recognized that one legislative goal of the FMLA was to protect the right of workers to be free of gender-based discrimination in the workplace.[97] Writing for the majority in *Hibbs*, Chief Justice Rehnquist noted that state laws had historically limited women's employment opportunities.[98] Furthermore, fathers had been traditionally given very limited parental leave.[99] Chief Justice Rehnquist construed workplace discrimination against both women and men as being based on the same gender stereotype- "that women's family duties trump those of the workplace."[100] The enactment of the FMLA thus served as a "prophylactic" against states' use of gender-based stereotypes in their administration of leave benefits.[101]

Although the FMLA ostensibly was intended to facilitate allowing parents, and in particular women, to take unpaid maternity leave, the Act applies equally to other individuals who

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94 In fact, the FMLA is otherwise gender-neutral. *See* § 2601(b)(4) (accomplishing purposes "consistent with the Equal Protection Clause of the Fourteenth Amendment, . . . on a gender-neutral basis.").

95 *See* Rogers, 8note 19, at 1307.

96 *See id.* at 1305.

97 Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003).

98 *Id.* at 729 ("The history of the many state laws limiting women's employment opportunities is chronicled in—and, until relatively recently, was sanctioned by—this Court's opinions").

99 *Id.* at 731.

100 *Id.* at 731 n.5.

101 *Id.* at 735.

need to take time off from work for either close relatives or themselves.[102] For example, one goal of the FMLA was to address the increasing number of older individuals in need of elder care.[103] The FMLA thus also sought to balance the need to care for family members with the demands of the workplace.[104]

One may envision the FMLA as having several important functions. First, it encourages unencumbered maternity leave for women as well as men who might have either been prevented from taking time off from work or who might have suffered some form of sexually-based stigmatization when doing so. In this sense, the FMLA partly touches upon Constitutional issues, specifically 14th Amendment Equal Protection issues. Second, and more generally, it protects all employees, without regard to gender, by allowing individual employees to take time off from work to care for close family members or even themselves. By sharp contrast, the FLSA has long been viewed as a more strictly economic and labor-oriented statute, although it is not exclusively an economic or labor statute.[105]

Thus, although the FMLA may be viewed as a textual outgrowth of the FLSA legislatively, it also contains important differences and concerns policies that go beyond workplace conditions alone. While a close reading of the FLSA might offer some guidance to courts attempting to apply the FMLA,

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[102] *See* Sperino, note 32, at 180 (discussing the FMLA's provisions for taking workplace leave for: newborn care; caring for an adopted or foster child; caring for a close family member with a serious health condition; caring for the employee's own health condition if such condition renders employee unable to perform functions of position). *See also* 29 U.S.C.A. § 2612(a)(1) (West, Westlaw through P.L. 112-9).

[103] *See* Rogers, *supra* note 18, at 1305 (noting Congress' awareness of the aging American population and the need for care-giving for older relatives.).

[104] *Id.*

[105] For example, support from the labor sector for the FMLA was slow, possibly owing to the fact that the FMLA's provisions were more oriented towards antidiscrimination and social concerns rather than economic ones. *Id.* at 1308. However, the FLSA does touch upon social conditions as well in prohibiting oppressive child labor conditions and having as its intended goal protections that are "necessary for the health, efficiency, and general well-being of workers . . . ." *Id.* at 1331 (quoting 29 U.S.C.A. § 202(a) (West, Westlaw through P.L. 112-3) (internal quotations omitted)).

overreliance might also be stifling and counter-productive to its scope and purpose. Those courts that have sought to differentiate between the FMLA and the FLSA are correct in pointing to both textual and policy differences.[106] Unfortunately, the advantage reaped in taking a more nuanced approach to the FMLA—as it is indeed its own separate entity apart from the FLSA—has likewise had negative consequences for FMLA plaintiffs.

One primary consequence is that a number of courts no longer simply assume that individual liability exists under the FMLA because it exists under the FLSA. As discussed further below, while the *Sadowski* court's reasoning is correct that the FMLA and FLSA should not be read in tandem, it is incorrect to assume that textual differences necessarily imply that Congress no longer was interested in providing employees a right to sue individual employees. In order to ascertain the flaws in such an approach, a comparison of the FMLA and FLSA is appropriate.

COMPARING THE FMLA WITH THE FLSA: LIMITED GUIDANCE FROM PREVIOUS APPLICATION OF THE FLSA

Courts have frequently sought guidance in interpreting the right-to-sue provisions of the FMLA by looking at similar provisions under the FLSA.[107] While both statutes contain similar language and even cross-reference certain provisions,

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[106] In *Sadowski*, for example, the district court defended its departure from *Knussman*, where it had found that a supervisor may be held individually liable, by pointing to the fact that while the FMLA and FLSA had similar language, the text of the FMLA indicated that Congress intended to separate the agency provision from the FLSA's all-encompassing definition of an employer. Sadowski v. U.S. Postal Serv., 643 F. Supp. 2d 749, 754 (D. Md. 2009).

In a sense, the *Sadowski* court "gets it right" in that the FMLA and FLSA, while seemingly identical, differ. However, the *Sadowski* court got it wrong in failing to delve even deeper into the scope and purpose of the FMLA as a means to address greater social policy concerns.

[107] Modica v. Taylor, 465 F.3d 174, 185-86 (5th Cir. 2006) (suggesting that because the definition of employer under the FMLA was materially identical to that under the FLSA, the two should be read together when applying the liability provisions).

there are also distinct differences between them.[108] First, the FLSA does not textually separate public agencies from (ostensibly) private employers. Instead, coverage extends to public and private employers equally.[109] In fact, the FLSA explicitly stipulates that FLSA violations subject the employer to both criminal and civil liabilities, with individual employers being liable for up to a $10,000 fine and/or imprisonment.[110] However, under the FLSA, certain entities are explicitly excluded from liability.[111] Some courts have interpreted the absence of specific immunity clauses from the FMLA, as contrasted to the FLSA, as evidence of a desire by Congress *not* to exclude public agency supervisors from individual liability.[112] Under both the FLSA and the FMLA, an employer includes a

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[108] One commentator has suggested that overreliance on the FLSA in interpreting the FMLA has expanded the contours of the FMLA and has permitted liability to permeate even to low level supervisors with little functional control. *See* Sperino, *supra* note 32 at 178-79.

[109] *See Sadowski*, 643 F. Supp. 2d at 756 (noting that the FLSA definition of "employer" explicitly includes both a supervisor and a public agency within the same provision). *See also* 29 U.S.C.A. 203(d) (West, Westlaw through P.L. 112-3) ("'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency . . . .").

[110] *See* Rogers, *supra* note 18, at 1332. Rogers suggests that the relatively much harsher criminal penalties attached to the FLSA not only indicates that the FLSA and FMLA serve different purposes, but that Congress deemed the FLSA to be "much more important to American workers than the FMLA." *Id.* at 1333. While Rogers' assessment is correct insofar as it views the two statutes as serving different purposes, a simplistic comparison such as this might underestimate the importance of the FMLA.

[111] For example, under the FLSA, "any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization" is excluded from the definition of an "employer." 29 U.S.C.A. 203(d) (West, Westlaw through P.L. 112-3).

[112] *See* Hewett v. Willingboro Bd. of Educ., 421 F. Supp. 2d 814, 821 (D.N.J. 2006).

(reasoning that if Congress had intended to shield public officials from individual liability under the FMLA, it would have done so explicitly as under provisions of the FLSA).

person who acts, either directly or indirectly, in the interest of an employer.[113]

Under the FLSA, an employee may sue a supervisor in an individual capacity if that individual exercises some degree of control over the employee, and generally also if the supervisor holds a position of authority within the company ranks, regardless of the degree of control she exercises over the employee.[114] A number of circuit courts have adopted one of several variants of this "economic realities" test.[115] The key focus for courts here has been a common sense, totality of circumstances analysis of how the individual supervisor maintains control over the employee and whether she is merely a low-level supervisor or one with significant authority.[116] While the required degree of control exercised by supervisors over employees has varied, the general consensus among federal courts is that all individuals are potentially liable under the FLSA; the same has not been true for suits under the FMLA.[117]

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[113] The applicable provisions of the FMLA and FLSA are nearly identical. *Compare* 29 U.S.C.A. § 2611(4)(A)(ii)(I) (West, Westlaw through P.L. 112-3) (stating that an employer includes "any person who acts, directly or indirectly, in the interest of an employer") *with* 29 U.S.C.A. § 203(d) ("[An] [e]mployer includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . .").

[114] *See* Sperino, *supra* note at 32 at 184-85. *See also* Rogers, *supra* note 18, at 1319-26 (discussing court approaches employing FLSA "control test" analogues).

[115] *See*, *e.g.*, Reich v. Japan Enters. Corp., 91 F.3d 154 (9th Cir. 1996) (unpublished table decision) (applying the economic realities test in the FLSA context). *See also* Sperino, *supra* note 32, at 186-92 (discussing circuit court approaches to the economic realities test).

[116] "[I]ndividual liability arises under the FMLA when the supervisor exercises sufficient control over the employee's leave and employment status." Mueller v. J.P. Morgan Chase & Co., 2007 U.S. Dist. LEXIS 20828, at *68 (N.D. Ohio March 23, 2007) (citing Phillips v. Leroy-Somer N. Am., 2003 U.S. Dist. LEXIS 5334 (E.D. Tenn. Mar. 31, 2003) (internal quotations omitted)). In *Mueller* the court ascertained that plaintiff's supervisor was liable because he could "singlehandedly initiate or delay the FMLA paperwork process" and further more had authority over performance reviews. *Id.* at *70-*71.

[117] *See generally* Sperino, *supra* note 32.

SADOWSKI'S HOLDING WOULD LEAVE FMLA PLAINTIFFS A LIMITED SET OF OPTIONS IN THE PUBLIC AGENCY CONTEXT

Some commentators have urged that a broader application of the FMLA permitting adversely affected employees to sue their supervisors in an individual capacity would undermine the scope and purposes of the FMLA.[118] For example, one commentator has suggested that individual supervisors generally are the "small fry" in the sea of private-sector or government agency players, and thus not only have small pockets, but also are generally irrelevant in practice under a joint and several liability scheme.[119] Under this reasoning, even if it were true that a supervisor might have violated the FMLA by retaliating against an employee who took time off to take care of an ailing loved one, redressing such harm would require placing the adversely affected employee in her previous position and compensating her for lost wages. None of this would seemingly be accomplished directly by the employee's supervisor. Thus, it would seem at first blush that permitting an employee to sue a supervisor individually would not amount to much of a remedy for an adversely affected employee in practice.

A further critique is that negative consequences might arise when the focus is more narrowly upon employee-supervisor dynamics, as opposed to the employing entity itself. For example, Sperino suggests that an employee might engage in her own retaliatory behavior against an employer under the pretext of FMLA protections.[120] Furthermore, the supervisor might himself be presented with a Scylla and Charybdis-type dilemma, where he would fear both potential reprisal from his own employer for not following the company's (otherwise FMLA-violating) policy in regards to the FMLA (however flawed

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[118] *See, e.g.*, Sperino, *supra* note 32, at 227 (noting that expanding the concept of "employer" to cover individual supervisors may prevent those supervisors, in turn, from successfully seeking FMLA protections). *See also* Rogers, *supra* note 18, at 1301 (arguing that limiting the meaning of "employer" to corporate entities would encourage corporate policymakers to faithfully implement the "family-friendly policies of the FMLA).

[119] *See* Sperino, *supra* note 32, at 232.

[120] *See id.*

it might be) and the potential for finding himself the subject of litigation if he were to follow it. In this sense, the supervisor would be viewed as merely a pawn or conduit for what actually is an agency's flawed employment policies. The supervisor would essentially become the "loser" in a tug of war match between employee and employer.

However, such fears are largely unwarranted and misconstrue the scope and purpose of the FMLA. First, while supervisors may not have the "deep pockets" of large employers, complaints that name both supervisors and their employers may end up resulting in the lion's share of liability being assumed by the deep-pocketed defendant. It is common, for example, for plaintiffs to sue a number of individuals under a joint and several liability scheme, but to end up collecting primarily only from the defendants with the greatest amount of economic resources—in this case, likely the public agency. Although, as discussed further below, some public agencies, as agents of states, might be immune from liability, the FMLA language generally applies to all public agencies, federal and state. Thus, in most cases an adversely affected employee has recourse in being able to sue her employer under the FMLA.

In addition, the language of the FMLA directly prohibits punitive or emotional distress damages.[121] Thus, an employee who is prohibited from taking time off from work to take care of a loved one, and who has a mental breakdown because he is prohibited or limited by his employer, cannot collect emotional damages.[122]

While the possibility of some form of employee-originated retaliation under the FMLA is possible, it seems no more—and is probably less—likely than retaliation by a

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[121] Sheaffer v. Cnty. of Chatham, 337 F. Supp. 2d 709, 729 (M.D.N.C. 2004).

[122] For example, in Knussman v. Maryland, 935 F. Supp. 659 (D. Md. 1996), a plaintiff police officer who had taken time off from work but was later on adversely treated by his employer could not claim additional emotional damages, even though at one point the officer had even contemplated suicide. Although the *Knussman* decision was later overturned by *Sadowski*, it reveals that even under a more permissive rubric, individual liability under the FMLA need not represent a veritable floodgate leading to outrageous high damage awards.

supervisor against his employee.[123] On the other hand, a supervisor who feels compelled to accept workplace policies would have recourse to various whistleblower statutes that would insulate her from liability if she were to complain and subsequently be terminated by her employer.[124]

In fact, permitting an adversely affected employee to sue her supervisor might have several important advantages that directly serve to bolster one of the primary purposes of the FMLA in providing workplace guarantees to working individuals with ailing family members.[125] As discussed further below, an individual who works for a public agency might not be able to directly sue a public state employer under certain conditions, especially when state immunity attaches. On the other hand, suing one's supervisor in an individual capacity would not immediately raise immunity concerns.[126] Moreover, attaching liability to one's direct supervisor serves to encourage compliance with the FMLA where it matters most—at the local and individual level. This is especially true where the day-to-day supervisor has significant de facto authority over employees and is in a better position to enforce—or to trample upon—the FMLA's provisions.

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[123] In fact, one might argue that it is much less likely that an employee would use the right-to-sue provision of the FMLA to extract employer concessions—a costly endeavor for an individual facing prohibitive legal fees—than it would be for an employer simply to illegally discriminate against an employee while letting the deep-pocketed employer foot the potential legal bill.

[124] For example, the supervisor might have recourse to actions under 42 U.S.C.A. § 1983 (West, Westlaw through P.L. 112-3); a supervisor's complaints against her employer, in violating the FMLA, would be regarded as protected speech.

[125] *See* Knussman v. Maryland, 935 F. Supp. 659, 666-67 (D. Md. 1996) (discussing the purpose of the FMLA in creating workplace standards that assist workers in taking care of ailing family members). *See also* Sperino, *supra* note 32, at 180 ("The FMLA . . . is intended to 'balance the demands of the workplace with the needs of families.'").

[126] "As a general rule the Eleventh Amendment does not bar suits against officers [acting] in their individual capacities." Modica v. Taylor, 465 F.3d 174, 183 (5th Cir. 2006). On the other hand, Eleventh Amendment concerns do arise where the state is the "real and substantial party in interest . . . ." *Id.*

Although it is true that in practice an individual supervisor may not have the financial means and deep-pockets of her employer, the possibility of expensive legal fees might serve as a financial disincentive to cause FMLA violations. Bringing forward a successful FMLA case against a supervisor who has failed to provide her employee the protections afforded by the Act might serve as an important signal to others that one cannot simply insulate herself by hiding behind the coat-tails of her employer. This is especially true if the employer refuses to pay the supervisor's legal costs.[127]

A narrowly restrictive reading of an employee's right to sue her supervisor under the FMLA would also have significant negative consequences where an employee is attempting to sue a state agency. Because state agencies are potentially immune from liability arising from civil suits,[128] the elimination of individual employer liability would serve to significantly curtail the nature, and amount of, damages that public sector employees adversely affected by employer retaliation can obtain.

Under the Eleventh Amendment, private citizens may not sue a state, and by logical extension a state agency, without its consent to the suit unless two conditions are met.[129]

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[127] Certainly, an argument can be made from the other side as well: that it would be patently unfair to expose a supervisor to potentially enormous legal expenses while the employer is in a much better position to expend the necessary legal and related fees. This argument, however, would seem to raise fairness concerns more appropriately in a context where the supervisor herself has little, if any, direct control over the employee and her FMLA claims. More likely, this problem would be remedied by courts simply finding that the supervisor in this case has no control, such that FMLA would apply to her. If the supervisor exerts sufficient control over the employee such that she is responsible for meeting the FMLA's requirements, then there is no reason not to view the supervisor as responsible and thusly potentially legally liable.

[128] The Supreme Court held, in Seminole Tribe of Florida v. Florida, 517 U.S. 44, 47 (1996), that federal statutes under Article I powers do not abrogate states' sovereign immunity.

[129] "Congress may, however, abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment." Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726 (2003). *See also* Knussman v. Maryland, 935 F. Supp. 659, 663 (D. Md. 1996); Lisa Joyce, Comment & Note: *The FMLA is a Great Benefit for Everyone but State Employees: Economic Nature of Federally Mandated Leave Fails to Defeat the*

Even if an employee were permitted—ostensibly by law or by the state's direct consent—to sue her state employer, her damages would be limited under the Eleventh Amendment to prospective injunctive relief.[130] The Supreme Court directly addressed this issue in the context of the FMLA in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

In *Hibbs*, the Court concluded that Congress, in enacting the FMLA, had acted according to both Article I commerce power and the enforcement provision of § 5 of the Fourteenth Amendment.[131] Although rejecting the possibility of abrogating Eleventh Amendment sovereign immunity solely under the Commerce Clause, the Court held that Congress could abrogate Eleventh Amendment state immunity through the Fourteenth Amendment's enforcement clause.[132] The Court reasoned that Congress could enact "appropriate legislation" to enforce substantive equal protection under the Fourteenth Amendment.[133] The Court further elaborated that the FMLA

State's Sovereign Immunity in Federal Court, 68 UMKC L. REV. 291, 297 (1999) (citing *Seminole Tribe*).

[130] *See* Edelman v. Jordan, 415 U.S. 651, 677 (1974). In *Edelman*, a class action suit was filed against the State of Illinois on the grounds that the State had failed to promptly and properly process forms for Assistance to the Aged, Blind and Disabled (AABD). *Id.* at 653. Although the Court agreed that under AABD federal regulations Illinois could be sued, it held that the relief available was only limited to prospective injunctive relief, and not to retroactive monetary damages. *See id.* at 677-78. *See also* Graham v. Richardson, 403 U.S. 365 (1971) (prohibiting Arizona and Pennsylvania state officials, by injunction, from denying welfare benefits for aliens).

[131] *See Hibbs*, 538 U.S. at 726-27.

[132] *Id. at* 727.

[133] *Id.* (quoting U.S. CONST. amend. XIV, § 5) (internal quotation omitted). The *Hibbs* Court noted a number of numerical disparities and inconsistencies in the granting of family leave, in particular maternity leave, by individual states. For example, the court cited a 1990 Bureau of Labor Statistics estimate that 37% of surveyed private-sector employees were covered by maternity leave policies, with only 18% being covered by paternity leave policies. *Id.* at 730 (further citation omitted). The Court further described the "rare" availability of parental leave for fathers as also the product of "the pervasive sex-role stereotype that caring for family members is women's work." *Id. a*t 731.

aims to protect one's right to be free from gender-based discrimination at the workplace.[134] Notably, the *Hibbs* majority construed Congress as having validly abrogated states' immunity under the "family-care" provisions of the FMLA.[135] The majority reasoned that the "family-leave" provision was "proportional" to targeted gender-based discrimination in the workplace.[136] Notably, however, the Court did not hold that states' Eleventh Amendment immunity was abrogated by the "self-care" provision of the FMLA.[137]

In general, state agencies would be considered "arms" of the state, such that when an FMLA plaintiff sues her public employer, the real party in interest would be the state.[138] Thus, if courts determine that individuals may not sue their supervisors directly under the FMLA, in effect an employee who has suffered adverse action under its provisions would have to sue her public employer.

An additional complicating factor is that supervisors and other individuals of public agencies may themselves be considered arms of the state. If, for example, the supervisor is acting in a governmental capacity and not an individual capacity, the supervisor would conceivably have the same Eleventh Amendment immunity as the state entity for which she works.

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134 Id. at 728.

135 *Id.* at 725 ("[E]mployees of the State of Nevada "may recover money damages in the event of the State's failure to comply with the family-care provision of the Act."). The "family leave" provisions cover the major categories under which employees may take leave for other family members. *See* 29 U.S.C.A. § 2612(a)(1) (West, Westlaw through P.L. 112-9).

136 Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 726, 737 (2003).

137 *See* Wilson v. Exec. Office of Health & Human Servs., 606 F. Supp. 2d 160, 164 (D. Mass. 2009) (reasoning that states' Eleventh Amendment immunity was not abrogated by *Hibbs* for the self-care provision of the FMLA). *See also* 29 U.S.C.A. § 2612(a)(1)(D) (West, Westlaw through P.L. 112-9).

138 *See* FED. R. CIV. P. 17(a) (requiring every action to be prosecuted "in the name of the real party in interest").

Although the FMLA was passed under Congress's Commerce Clause power,[139] and no federal court has challenged the legitimacy of the statute as a whole, a number of courts have sustained Eleventh Amendment challenges from FMLA plaintiffs against state agencies on Constitutional grounds.[140] These challenges have succeeded along the lines of the second prong, above. For example, one court determined that certain provisions of the FMLA were not valid exercises of Congressional power under Amendment XIV, Section 5.[141] Under this provision, the federal government is authorized to enforce specific provisions of the Fourteenth Amendment, including those dealing with equal protection rights.[142] Generally, redress of injury caused by public agencies is limited only to injunctive relief.[143] As construed by *Hibbs*, the FMLA's "family-care" provision abrogated state sovereign immunity under the Eleventh Amendment.[144] Yet, by implication, the

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[139] Note that the Supreme Court in *Hibbs* construed the FMLA as one involving Equal Protection issues under the Fourteenth Amendment, thus coming under valid Constitutional authority. *See Hibbs*, 538 U.S. at 727. One author had already foreshadowed such an expensive interpretation of the FMLA under the Fourteenth Amendment. *See* Gregg A. Rubenstein, Note, *The Eleventh Amendment, Federal Employment Laws, and State Employees: Rights Without Remedies?*, 78 B.U. L. REV. 621, 655 (1998).

[140] *See* Rubenstein, *supra* note 139, at 633-34.

[141] *See* Wilson v. Exec. Office of Health & Human Servs., 606 F. Supp. 2d 160, 163-64 (D. Mass. 2009).

[142] For example, in *Wilson*, the district court determined that a provision of the FMLA dealing with caring for family members touched upon Fourteenth Amendment protections, and was thus a valid exercise of power under the Constitution. *Id.* at 164-65. As such, individuals could sue a state agency because Congress had validly abrogated the state's Eleventh Amendment immunity. On the other hand, the self-care provision of the FMLA (allowing one to take unpaid leave to take care of oneself) was not a valid exercise of Congressional authority and thus the district court determined that the state's immunity still applied. *Id.* at 164.

[143] *See* Edelman v. Jordan, 415 U.S. 651, 663 (1974) ("[A] suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.").

[144] Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 726, 725 (2003).

Supreme Court did not hold that state sovereign immunity is abrogated for the "self-care" provision of the FMLA.[145]

While the *Sadowski* case did not involve a state agency, an employee suing a state employer under the FMLA would essentially be limited to injunctive relief under its holding, as the agency itself and the employee's state supervisor would be immune from liability while at the same time the individual supervisor would likewise be immune.[146] This essentially could leave the FMLA plaintiff with few options when attempting to obtain compensatory monetary relief, fundamentally undermining the purpose of the FMLA in providing monetary compensation for adversely affected employees.

Such an outcome would seem to be starkly at odds with the legislative purposes of the FMLA. In discussing the purpose of allowing individuals unpaid medical leave, legislators mentioned "the crucial unpaid caretaking services . . . [that have] become increasingly difficult for families to fulfill."[147] Providing individuals with an enforceable right to take medical leave for themselves or for family members was viewed as a means to "achieve . . . [the] goal of balancing family and work obligations . . . ."[148] It would seem odd, then, that an individual suing for redress under the FMLA would not be able to obtain monetary compensation for lost wages. One commentator has further suggested that stricter enforcement of the FMLA might also help dispel stereotypes about the roles of men and women in child rearing, and encourage greater participation by men in this practice without fear of adverse consequences.[149]

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[145] *See Wilson*, 606 F. Supp. 2d at 163-64.

[146] In *Sadowski*, the plaintiff had taken leave under the FMLA for himself, under the "self-care" provisions. *See* Sadowski v. U.S. Postal Serv., 643 F. Supp. 2d 749, 750 (D. Md. 2009). Because *Hibbs* abrogated Eleventh Amendment immunity only under the "family care" provisions of the FMLA, a plaintiff suing a state under circumstances like in *Sadowski* might have only recourse to an individual suit. *See supra* note 135 and accompanying text.

[147] *See* Knussman v. Maryland, 935 F. Supp. 659, 666 (D. Md. 1996) (further citation and internal quotations omitted).

[148] *Id. at* 667.

[149] *See* Robin R. Cockey & Deborah A. Jeon, *The Family and Medical Leave Act at Work: Getting Employers to Value Families*, 4 VA. J. SOC. POL'Y & L. 225, 233-34 (1996).

Because individual employer-supervisors are immune from liability under *Sadowski's* narrow holding, employers who retaliate against employees are essentially provided little incentive to avoid retaliatory conduct. In *Sadowski*, for example, the supervisor was alleged to have employed pre-textual grounds to investigate and eventually fire the plaintiff after he had allegedly properly obtained leave of absence.[150] The court's narrow reading would essentially immunize the wrongdoing party and remove incentives for abiding by the FMLA at the source of the problem. Plaintiffs would not only be limited monetarily, but they would have to contend with having to file a claim directly against the employer agency.

Sperino has reasoned that limiting individual supervisor liability might be necessary to prevent opening the floodgates to litigation in the public agency context.[151] But holding public agency supervisors potentially liable under the FMLA, a doctrine most courts follow already in the private sector context,[152] would not result in such an onerous outcome, no more so than making an individual liable for wrongdoings under other legal doctrines and precedents. Moreover, many courts have interpreted a FLSA claim against an individual employer to be one limited to an employer who has "supervisory authority over the complaining employee and [is] responsible in whole or part for the alleged violation."[153] This approach would serve to further limit the potential liability of supervisors to only those who have

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[150] *Sadowski*, 643 F. Supp. 2d at 750-51.

[151] *See, e.g.,* Sandra Sperino, *Under Construction: Questioning Whether Statutory Construction Principles Justify Individual Liability Under the Family and Medical Leave Act,* 71 MO. L. REV. 71, 85 (2006) ("[E]very individual who worked for a company and who was involved in making decisions relating to whether employees can take off work or arrive late to work would be potentially liable . . . .").

[152] *See* Carpenter v. Refrigeration Sales Corp., 49 F. Supp. 2d 1028, 1030-31 (N.D. Ohio 1999) (finding that in most courts individual liability does exist under the FMLA). *See also* Bryant v. Delbar Prods., Inc., 18 F. Supp. 2d 799, 807 (M.D. Tenn. 1998).

[153] Freemon v. Foley, 911 F. Supp. 326, 330-31 (N.D. Ill. 1995) (quoting Riordan v. Kempiners, 831 F.2d 690, 694 (7th Cir. 1987) (internal quotations omitted)).

an active role in fostering wrongdoing.[154] A supervisor who has little or no direct influence on an employee's ability to take unpaid leave under the FMLA would generally not be liable, and so supervisors who essentially have their hands "clean" should not fear open-ended liability. While the possibility does exist for abuse on the part of an employee–such as the potential for reverse retaliation against a supervisor–courts are likely more than adequately equipped to address potentially frivolous claims. Most importantly, courts would be addressing workplace policies that are largely the result of the discretionary and discriminatory provisions of family leave on the part of supervisors.[155] As with other remedial statutes that protect individuals' workplace rights, a plaintiff would have to show more than presumptive claims of FMLA retaliation.[156] This, in turn, would filter out potentially frivolous FMLA lawsuits that would subject supervisors to unwarranted liability.

CONCLUSION AND POLICY SUGGESTIONS

Currently, a majority of courts apply the broader reading of FMLA that allows for individual liability in the public sector

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[154] However, some courts have interpreted liability as attaching even to an official acting in private capacity, separate from one's employer. *See* Darby v. Bratch, 287 F.3d 673, 681 (8th Cir. 2002) ("We see no reason to distinguish employers in the public sector from those in the private sector.") (citing Morrow v. Putnam, 142 F. Supp. 2d 1271 (D. Nev. 2001)). *But see* Wascura v. Carver, 169 F.3d 683, 685-86 (11th Cir. 1999) (holding that although FLSA is used as guidance in interpreting FMLA, neither statute allows a claim against a public official acting in individual capacity).

[155] Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 732 (2003). The *Hibbs* Court discussed the fact that "the authority to grant leave and to arrange the length of that leave rests with individual supervisors" and thus it leaves "employees open to discretionary and possibly unequal treatment." *Id.* (further citation and internal quotation omitted).

[156] *See, e.g.*, Lambert v. Ackerley, 180 F.3d 997 (9th Cir. 1999). *See also* Darby v. Bratch, 287 F.3d 673, 679 (8th Cir. 2001) (discussing a three-part test to establish a prima facie case of FMLA retalitation); Carpenter v. Refrigeration Sales Corp., 49 F. Supp. 2d 1028, 1030 (N.D. Ohio 1999) (stating that under the FMLA an employee must first assert her rights and provide her employer proper notice, whereupon the burden then shifts to the employer to determine whether leave should be granted under the FMLA).

context.[157] Such a reading is consistent with prior Supreme Court precedent in liberally construing other statutes, such as the FLSA, that have a remedial component protecting employee rights.[158] However, absent statutory revision by Congress to clarify the exact meaning of an employer or the granting of certiorari by the Supreme Court, divergent FMLA standards will continue to plague courts at both district and circuit levels, resulting in divergent standards for supervisors and divergent outcomes for negatively affected employees. A possible result of this will be continued uncertainty for employees wishing to take advantage of the benefits of FMLA leave without worrying that an employer may terminate or demote her upon her return to work in retaliation for FMLA leave. Although some courts have approached the statutory language of the FMLA in a rather narrow sense, refusing to construe seeming textual ambiguities in favor of a cause of action against individual supervisors in the public context, most courts have adopted a "plain meaning" approach that allows such a cause of action.[159]

Sadowski's narrow reading of individual liability in essence trades away effective policing of the FMLA in exchange for the apparent certainty that a blanket prohibition against individual liability provides. Yet this approach shies away completely from the legislative purpose of the FMLA in remedying workplace discrimination and fostering unencumbered access to family and medical leave.[160] A

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[157] *See* Sheaffer v. Cnty. of Chatham, 337 F. Supp. 2d 709, 727 (M.D.N.C. 2004). *See also* Cantley v. Simmons, 179 F. Supp. 2d 654, 656-57 (S.D. W. Va. 2002).

[158] *See, e.g.*, *Lambert*, 180 F.3d at 1003 (citing Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 292-93 (1960); Tennessee Coal, Iron, & R. Co. v. Muscoda Local No. 123, 312 U.S. 590, 597 (1944), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947, ch. 42, § 4, 61 Stat. 86 (1947) (codified as amended at 29 U.S.C.A. § 254 (West, Westlaw through P.L. 112-3))).

[159] *See*, *e.g.*, Kilvitis v. Cnty. of Luzerne, 52 F. Supp. 2d 403, 412 (M.D. Pa. 1999) (employing a "plain meaning" approach in finding individual liability under the FMLA).

[160] Interestingly, one criticism of a broader reading of the FMLA is that it would be based largely upon a strict textual reading of the language of the FMLA to the detriment of its original purposes. *See* Sperino, *supra* note 32, at 225. While Sperino is correct in pointing out that many courts thus far have relied significantly upon textual constructions of the FMLA, it does not

possible solution might be not to exclude individual liability from FMLA claims, but rather to ensure that FMLA claims are appropriately targeted to the biggest offenders: those individuals who have the greatest direct authority in the hiring, firing, or demoting of employees. In the following section, I offer a possible solution in this regard.

POSSIBLE REMEDIES TO THE CURRENT SPLIT INVOLVING INDIVIDUAL LIABILITY UNDER THE FMLA

Although the FMLA received widespread support from both Democrats and Republicans, and was supported by such divergent groups as the National Organization for Women (NOW) and conservative evangelical Christian groups,[161] a broad-based consensus for the passage of the Act is difficult to assess.[162] In fact, one prominent criticism of the FMLA during the 1996 Presidential campaign was that broad application of the FMLA might stifle business enterprises through mandated family leave under penalty of legal action.[163] Fortunately, such a fear has not been realized by those circuits that recognize a right to sue one's supervisor in an individual capacity.[164]

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necessarily imply that such an approach provides the wrong normative outcome. Sperino, for example, notes that to allow individual liability would be an "absurd" result. *Id.* at 227-28 (internal quotation and internal citation omitted). However, Sperino fails to note that if the FMLA was intended to remedy workplace violations for individuals taking unpaid leave, then a broader, not a more narrow, construction of the FMLA would comport with its purposes. This is exactly what those courts applying the flexible textual approach have accomplished, albeit perhaps not always intentionally so.

[161] *See* Rogers, *supra* note 18, at 1308-09 (noting the "broad patchwork" of support for the FMLA from different groups holding narrower self-interests).

[162] *See id.*

[163] *See id.* at 1300.

[164] Indeed, most courts have interpreted the FMLA as permitting individual liability in the private sector context. *See*, *e.g.*, Brewer v. Jefferson-Pilot Standard Life Ins. Co., 333 F. Supp. 2d 433, 437 (M.D.N.C. 2004) (finding that, under a plain reading of the FMLA, supervisors may be individually liable for those acts taken in the interest of the employer).

While the ideal solution here would be an amendment to the provisions of the FMLA that more concretely defines "employer," or perhaps the Supreme Court's own interpretation of the FMLA language on granting certiorari, a possible near-term solution might be to create a stronger test that differentially classifies supervisors to the degree to which they exercise operational control over employees. Such a test would focus only upon those supervisors with practical control over hiring and firing decisions, and would be similar to tests already be employed by courts today in the context of the FLSA.[165]

For example, on one end of the spectrum might be a supervisor with a small degree of control over the employee, who might otherwise technically be acting in the interests of his employer–as per the language of the FMLA – but in practice might have little de facto control over employees. It would not only seem unfair to hold such an individual responsible for the adverse treatment of employees, but it would also be counterproductive in punishing the innocent supervisor who merely has nominal but not de facto authority. On the other hand, those individuals who have a significant amount of control over their employees–and who ultimately make employment decisions that lead to FMLA violations–should bear their share of fault and not be otherwise immunized under, for example, a respondeat superior rubric. Such an approach would prevent potential excesses by ensuring that the degree of a supervisor's potential exposure to liability is directly correlated to her degree of control over employees.[166]

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[165] A number of courts analogize from FLSA cases in applying some form of supervisor control test. For example, one district court has reasoned that individuals with day-to-day operational control over a company would be held liable under the provisions of the FMLA. *See* Richardson v. CVS Corp., 207 F. Supp. 2d 733, 744 (E.D. Tenn. 2001). *See also* Freemon v. Foley, 911 F. Supp. 326, 332 (N.D. Ill. 1995) ("[B]ecause of the expansive interpretation given to the term 'employer' in the FLSA, we believe the FMLA extends to all those who controlled 'in whole or in part' [the plaintiff's] ability to take a leave of absence and return to her position."). While a type of "economic realities" test might require too much control–over the entire company–a similar test should be applied in the context of supervisory control over employees, especially in regards to FMLA actions.

[166] For example, a supervisor with little direct control over an employee seeking FMLA remedies would likely not face individual liability. On the other hand, one who does have significant day-to-day authority over the employee is

As with all rules that leave discretion to courts, there is a possible downside to this approach that courts might have to delve deeper into the allegations and specific fact patterns in FMLA cases. Rather than outright dismissing claims against individual defendants under a narrow textual reading of the meaning of "employer," courts might have to endeavor to address claims on a case-by-case basis. While this approach might be less procedurally efficient, it would serve to focus the greatest attention upon individual employers who clearly are at fault. Supervisors, knowing that they are potentially liable for their discriminatory actions, would (ideally) anticipatorily alter their behavior and endeavor to comply with the FMLA's employee protections.

There would potentially be drawbacks to divergent application of some form of a "control test" analogous to the one employed in the FLSA context. Although in most cases a key component in establishing supervisor liability would be the degree of influence over an employee's ability to take FMLA leave, courts would still be free to employ a variety of similar tests that serve essentially the same purpose. At least one commentator has suggested that the wide array of already existing approaches in determining individual liability under the FMLA has actually created *disarray* in the sense that approaches have been applied in oftentimes contradictory circumstances.[167] The wide latitude that courts have employed may arguably result in low-level individuals being potentially liable under the FMLA.[168]

However, even though such criticisms validly indicate the pitfalls of applying oftentimes inconsistent standards in regards to employer authority over permissible FMLA activity, the solution would not be to entirely undo the individual liability rubric. Instead, clearer guidance from courts that takes into

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likely also to be in a position to prevent possible FMLA violations, and thus should be exposed to liability where violations occur. A number of courts have followed a "plain reading" of the FMLA and have analogized from the FLSA that control over the employee's ability to take FMLA leave is the key consideration of supervisorial "control." *See Richardson,* 207 F. Supp. 2d at 744.

[167] *See* Sperino, *supra* note 32, at 208-09.

[168] *See id.* at 209.

account fairness considerations would help filter out the innocent, unoffending supervisor with little de facto authority from the truly offending one who has day-to-day authority over her employees including whether or not they may obtain unencumbered FMLA leave.