

12-1-1997

Individual Liability Under the Family and Medical Leave Act of 1993: A Senseless Detour on the Road to a Flexible Workplace

Boyd Rogers

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Boyd Rogers, *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 (1997).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol63/iss4/7>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

NOTES

INDIVIDUAL LIABILITY UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993: A SENSELESS DETOUR ON THE ROAD TO A FLEXIBLE WORKPLACE

INTRODUCTION

The 1996 presidential election presented the American people with their first clear view of the politics of gender.¹ The reelection of President William J. Clinton, who campaigned on the strength of his domestic record, reflected a gender gap of historic proportion:² men as a class preferred former Senator Robert Dole, Clinton's opponent, forty-four to forty-three percent, while women preferred Clinton fifty-four to thirty-seven percent.³ The vast difference between the votes of men and women was attributed to the focus of the Democratic party on women's issues.⁴

¹ See Ellen Goodman, *Victory at the Gender Gap*, WASH. POST, Nov. 16, 1996, at A25.

² See Lynn Sweet, *Women Use Clout at Voting Booth*, CHI. SUN-TIMES, Nov. 7, 1996, at 4.

³ *Id.* See also Goodman, *supra* note 1, at A25.

⁴ See Linda Feldman, *GOP Spoke of Soccer Moms, Democrats Spoke to Them*, CHRISTIAN SCI. MONITOR, Nov. 13, 1996, at 3. In 1995, President Clinton had organized the White House's first-ever office on women's issues. *Id.*

Among Clinton's most potent campaign issues⁵ was his proposal to expand the Family and Medical Leave Act of 1993 ("FMLA").⁶ Clinton reinforced his support of the FMLA with his advocacy of other traditional "women's issues," such as education and extended hospital stays for new mothers.⁷ The FMLA became an issue that clearly separated Clinton from his Republican opponent in the minds of the electorate. During the campaign, Dole criticized the Act, claiming that it had hurt small businesses.⁸ A strident opponent of the legislation while he was a senator,⁹ Dole promised on the campaign trail that if elected he would work to repeal the FMLA.¹⁰

However, even now, nearly two years after Clinton's election victory, talk of expanding the FMLA¹¹ seems premature considering the myriad of FMLA issues that are still being settled in the courts.¹² One issue of particular importance for businesses and their employees is whether an individual, such

⁵ Hilary Stout, *Clinton to Seek Wider Family-Leave Law*, WALL ST. J., June 25, 1996, at A2. According to the New York Times, while on the campaign trail Clinton spoke daily about the FMLA. See Francis X. Clines, *Goodbye, and Mostly Good Riddance*, N.Y. TIMES, Nov. 15, 1996, at A28.

⁶ 29 U.S.C. §§ 2601-2654 (1994).

⁷ See Goodman, *supra* note 1; Sweet, *supra* note 2.

⁸ George E. Condon Jr. & Mark Z. Barabak, *Dole's Long Campaign Rarely Connected; Strikeouts Came More Often than Hits, Aide Admits*, SAN DIEGO UNION-TRIBUNE, Nov. 9, 1996, at A21. As of February 1, 1997, the Labor Department had reported that it had received only 6,346 FMLA complaints during the past four years. The agency said almost all the complaints had been resolved, and officials have only had to take legal action in 16 cases. See Meisler, *infra*, note 10.

⁹ 139 CONG. REC. S1254, 1254-55 (daily ed. Feb. 4, 1993) (statement of Sen. Dole).

¹⁰ See Feldman, *supra* note 4, at 3. One moderate Republican expressed frustration at Dole's attacks on the FMLA, which polls showed was very popular with voters. Feldman, *supra* note 4, at 3. "Dole was out there ridiculing the [FMLA], calling it the 'long arm of the government.'" Dick Polman, *Women Won It for Clinton; GOP Loss Blamed on Biggest Gender Gap*, FLORIDA TIMES-UNION, Nov. 10, 1996, at A1. See also Stanley Meisler, *Clinton Wants Wider Leave Act, He Plans to Tell More of Benefits*, CINCINNATI ENQUIRER, Feb. 2, 1997, at A14.

¹¹ See Meisler, *supra* note 10.

¹² Areas of conflict with which courts have grappled include questions of what constitutes a serious illness under the FMLA (*George v. Associated Stationers*, 932 F. Supp. 1012 (N.D. Ohio June 3, 1996), *Oswalt v. Sara Lee Corp.*, 889 F. Supp. 253 (N.D. Miss. 1995)); whether an employee must expressly invoke FMLA protection when requesting leave (*Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 763 (5th Cir. 1995)); and various questions surrounding the proper methods of calculation to determine the eligibility of employees to take FMLA-protected leave and the applicability of the statute to employers (*McKiernan v. Smith-Edwards-Dunlap Co.*, No. Civ.A. 95-1175, 1995 WL 311393 (E.D. Pa. May 17, 1995)).

as a supervisor, may be held personally liable for violations of the Family and Medical Leave Act. To those who opposed the FMLA because of the enormity of its potential costs, such as former Senator Dole, the notion of individual liability for FMLA violations is alarming. Similarly, even for the Act's supporters, who initially conceived of the Act as a way to fight discrimination against women in the workplace,¹³ the notion likely seems strange.

To date, the issue of individual liability¹⁴ versus business entity liability¹⁵ has not been addressed by any circuit court of appeals. The question of individual liability hinges on the definition of the word "employer" in the statute, the meaning of which, as interpreted by district courts in several jurisdictions and the Department of Labor, is still unclear. This Note will recommend that the meaning of the term "employer," and hence liability under the FMLA, be limited to the corporate entity. Restricting liability to the corporate entity will protect managers and supervisors from considerable exposure for their mere compliance with corporate policies, while encouraging corporate policymakers to faithfully implement and comply with the family-friendly policies of the FMLA. Such a restriction will also lead to greater social and economic efficiency in the administration of the FMLA.

Part I of this Note will provide a brief overview of the history, provisions and purpose of the FMLA and, to the extent that it is discernible, will examine the intent of Congress regarding individual versus business liability. Part II discusses the definitional problems surrounding the term "employer" in

¹³ See *infra* Part I.B.

¹⁴ The term "individual liability" or "supervisory liability" in this Note refers to the liability of persons who do not otherwise meet the statutory definition of "employer" under 29 U.S.C. § 2611(4)(A)(i) (1994), which defines the term to mean "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." This definition includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer . . ." 29 U.S.C. § 2611(4)(a)(ii) (1994). In other words, individual liability does not refer to the liability of a sole proprietor who otherwise fits the statutory definition of "employer."

¹⁵ The term "business entity liability" or "business liability" refers to the liability of a company which meets the statutory definition of "employer" in 29 U.S.C. § 2611(4)(a)(i) (1994).

the FMLA. This Part also analyzes the Department of Labor's FMLA implementing regulations, and evaluates case law interpreting the statute's liability provisions. This Part concludes that district courts interpreting the FMLA have failed to conduct a thorough, independent examination of the statute, and have been too quick to rely upon the Fair Labor Standards Act ("FLSA"), to decide the liability issue of the FMLA. In order to fully distinguish the FMLA from the FLSA, Part III provides a brief history of the FLSA, its provisions, and its status regarding supervisory liability. Finally, Part IV recommends that courts refuse to hold individual supervisors personally liable for FMLA violations and instead restrict liability to the corporate entity.

I. THE FAMILY AND MEDICAL LEAVE ACT OF 1993

A. *Provisions and Protections*

The Family and Medical Leave Act guarantees up to twelve weeks of unpaid leave to an eligible employee¹⁶ of a qualified employer¹⁷ for the birth or adoption of a child or to care for one's own serious medical condition, or that of one's child, spouse or parent.¹⁸ During FMLA protected leave, the employee is entitled to have his or her health benefits maintained.¹⁹ When the employee returns to work, he or she is to be restored to the same position, or given an equivalent position within the business, with salary and benefits equal to

¹⁶ An eligible employee is one who has been employed by his or her employer for at least twelve months and has worked for at least 1250 hours during the twelve-month period which immediately precedes the leave. 29 U.S.C. § 2611(2)(A) (1994). See also 29 C.F.R. § 825.110(a) (1997).

¹⁷ A qualified employer is "any person engaged in commerce or in any industry affecting commerce, who employs fifty or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. § 2611(4)(A) (1994). See also 29 C.F.R. § 825.104(a) (1997). The Act also covers public agencies and public and private elementary and secondary schools, regardless of the number of employees. 29 C.F.R. § 825.104(a) (1997).

¹⁸ 29 U.S.C. § 2601(b)(2) (1994); 29 C.F.R. § 825.100(a) (1997).

¹⁹ 29 U.S.C. § 2614(c) (1994); 29 C.F.R. § 825.100(b) (1997). However, if the employee fails to return to work following FMLA leave, the employer may recover the premium that was paid on behalf of the employee to maintain the employee's health insurance coverage during the unpaid leave. 29 U.S.C. § 2614(c)(2) (1994).

those enjoyed in the previous position.²⁰ These protections form the essence of the FMLA.

Employers have an affirmative duty under the FMLA to avoid discriminating against employees with family responsibilities.²¹ Employers also are prohibited from retaliating or discriminating against any employee who "oppose[s] any practice made unlawful by this [statute]."²² The Act thus provides an employee with a present entitlement to family and/or medical leave, and prohibits subsequent retaliatory discrimination against an employee who becomes involved in an FMLA suit. This two-tiered structure of the Act—imposing an affirmative duty on an employer to allow an employee to take leave, and imposing a duty not to discriminate—has produced a two-tiered formula for making out a *prima facie* case under the FMLA. For example, if an employer breaches its affirmative duty under section 2615(a) of the FMLA, in order to demonstrate a *prima facie* case an employee must "establish (1) entitlement to leave as defined by 29 U.S.C. § 2612(a)(1), and (2) that such entitlement to leave was interfered with by the employer in violation of 29 U.S.C. § 2615."²³ However, if an employee takes FMLA protected leave and subsequently faces workplace discrimination, the employee must show that:

he or she is protected by the FMLA, that he or she suffered an adverse employment decision, and either that the plaintiff was treated less favorably than an employee who had not requested leave under the FMLA or that the adverse decision was made because of the plaintiff's request for leave.²⁴

The difference between what plaintiffs must demonstrate in order to make out a *prima facie* case under the FMLA, for

²⁰ 29 U.S.C. § 2614(a) (1994); 28 C.F.R. § 825.100(c) (1997).

²¹ 29 U.S.C. § 2615(a)(1) (1994) ("It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.").

²² 29 U.S.C. § 2615(a)(2) (1994). It is also unlawful for an employer to discriminate against an employee who brings suit under the Act, or otherwise participates in a proceeding brought against the employer under the Act. 29 U.S.C. § 2615(b) (1994).

²³ *McClain v. Southwest Steel Co.*, 940 F. Supp. 295 (N.D. Okla. June 25, 1996).

²⁴ *Oswalt v. Sara Lee Corp.*, 889 F. Supp. 253 (N.D. Miss. 1995).

interference with the right to FMLA leave on the one hand and discrimination on the other, reflects the dual nature of the antidiscrimination policy of the FMLA.²⁵

B. *The History and Purpose²⁶ Behind the FMLA*

After a long and torturous journey, including over eight years of debate²⁷ and two presidential vetoes,²⁸ the Family and Medical Leave Act of 1993 was the first piece of legislation signed into law by President Bill Clinton.²⁹ The FMLA was lauded as an overdue governmental recognition that women³⁰ who work outside the home need and deserve flexibility from their employers.³¹ Opponents of the FMLA decried the legislation as another governmental regulation of business, destined to slow the economy and hurt expanding small businesses.³²

Congress enacted the FMLA in response to the increase in

²⁵ See *infra* Part I.B.

²⁶ According to one scholar, "[w]hereas the concept of 'legislative intent' is in disfavor with many legal writers, that of 'legislative purpose' enjoys not only favor but preeminence. For most, it is the touchstone of statutory interpretation." REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 87 (1975) (footnote omitted).

²⁷ The forerunner of the FMLA, the Parental and Disability Leave Act, was introduced in 1985. The bill provided eighteen weeks of unpaid leave for every two-year period for the birth or adoption or serious illness of a child, and twenty-six weeks of unpaid leave over a twelve-month period for an employee's own serious health condition. The proposed law would have applied to employers with five or more employees. H.R. 2020, 99th Cong. (1985).

²⁸ President George Bush vetoed the proposed Family and Medical Leave Act passed by the 101st Congress, H.R. 770, 101st Cong. (1990), as well as that passed by the 102d Congress. S. 5, 102d Cong. (1992). By the time of the president's second veto, the Act had been altered substantially, providing that employers with fifty or more employees grant twelve weeks of unpaid family and medical leave to qualifying employees. *Id.*

²⁹ See Jane Rigler, *Analysis and Understanding of the Family and Medical Leave Act of 1993*, 45 CASE W. RES. L. REV. 457, 459 (1995); G. John Tysse & Kimberly L. Japinga, *The Federal Family and Medical Leave Act: Easily Conceived, Difficult Birth, Enigmatic Child*, 27 CREIGHTON L. REV. 361 (1994); Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & L. 39 (1994).

³⁰ The FMLA applies to employees without regard to gender. See 29 U.S.C. § 2601(a)(6), (b)(4-5) (1994).

³¹ See Lenhoff & Withers, *supra* note 29, at 48; Cristina Duarte, *The Family and Medical Leave Act of 1993: Paying the Price for an Imperfect Solution*, 32 U. LOUISVILLE J. FAM. L. 833, 833-36 (1994).

³² See 139 CONG. REC. S1254, 1342-44 (daily ed. Feb. 4, 1993) (statement of Sen. Gorton); *id.* at 1254-55 (statement of Sen. Dole).

the number of single-parent households, and the number of two-parent households where both parents work outside the home.³³ By passing the FMLA, Congress sought to address the "demographic revolution in the composition of the workforce" during the past forty years.³⁴ Among the findings summarized in the Senate Report that accompanied the FMLA was the fact that since 1950 there had been an increase of more than two-hundred percent in the number of females working outside the home.³⁵ Additionally, in 1988, "single parents accounted for 27 percent of all family groups with children under 18 years old," which was double that of the 1970 proportion.³⁶ Congress also was concerned with the aging American population, and an estimate from the National Council of Aging which stated that out of 100 million American workers, 20 to 25 million "have some caregiving responsibility for an older relative."³⁷ Recognizing the importance of parental participation in early childrearing and the pressures on working men and women who must care for family members with serious health conditions, Congress sought to balance the needs of American families with the demands of the workplace by prohibiting discrimination against employees with family responsibilities.³⁸ This effort is illustrated in the Act's legislative history.

The legislative history³⁹ is not so much ambiguous as it is reflective of an attempt to accomplish two not altogether harmonious goals⁴⁰ with one piece of legislation. Additionally, years of compromise and concession among the bill's support-

³³ 29 U.S.C. § 2601(a)(1) (1994).

³⁴ See S. REP. No. 103-3, 5 (1993).

³⁵ *Id.*

³⁶ *Id.* at 6.

³⁷ *Id.* at 7.

³⁸ 29 U.S.C. § 2601(a)(2) (1994); 29 U.S.C. § 2601(b)(1) (1994).

³⁹ "Legislative history . . . refers to the relevant events comprising the enactment process." DICKERSON, *supra* note 26, at 137. Professor Dickerson, while recognizing that American judges frequently and avidly look to legislative histories for the purposes of statutory interpretation, cautions that "[a]n explanatory tale should not wag a statutory dog." DICKERSON, *supra* note 26, at 137.

⁴⁰ The statute reveals its dual design in the first section: "It is the purpose of this Act . . . to entitle employees to take reasonable leave for medical [and family] reasons, . . . [and] to promote the goal of equal opportunity employment for women and men" 29 U.S.C. § 2601(b) (1994). The entitlement to leave is the tool through which the anti-discriminatory intent of the FMLA is realized.

ers and opponents produced a law that is remarkable for its lack of similarity to the first bill proposed.⁴¹ Though some members of Congress saw the statute as a new minimum labor standard,⁴² granting employees job protections similar to those found in the Fair Labor Standards Act,⁴³ the statute was grounded in the same soil as other federal antidiscrimination statutes.⁴⁴ Similar to the federal prohibitions against employment discrimination based on race, gender, religion, disability and national origin, the new statute was conceived and designed to protect working women from losing their jobs, benefits and career advancements when family duties called.⁴⁵ The language of the FMLA, while representing that both goals were contemplated, favors the antidiscrimination viewpoint of the FMLA's early proponents.

⁴¹ See generally RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW 42 (1995). The seeds of the FMLA were sown in reaction to a decision of a federal district court in Southern California which held that a 1978 California statute mandating that employers provide four months of pregnancy leave to their workers was unconstitutional because it was pre-empted by Title VII and because it discriminated against men. *California Fed. Sav. and Loan Ass'n v. Guerra*, 34 Fair Empl. Prac. Cas. (BNA) 562 (March 21, 1984); see also ELVING, *supra* at 18-19. The district court's opinion was later reversed by the Ninth Circuit Court of Appeals because it "defie[d] common sense, misinterpret[ed] case law, and flout[ed] Title VII and the PDA [Pregnancy Discrimination Act]." 758 F.2d 390, 393 (9th Cir. 1985). The Ninth Circuit's decision was upheld by the Supreme Court. *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987). The original members of the family leave coalition, disheartened and galvanized by the decision of the district court, focused on building support for the enactment of a federal antidiscrimination law that would guarantee that women who temporarily left the workforce to care for newborn children would not be discriminated against in the workplace. Creating a new federal minimum labor standard was not the coalition's primary goal. ELVING, *supra* at 19, 285.

⁴² See 139 CONG. REC. S1254, 1344-45 (daily ed. Feb. 4, 1993) (statement of Sen. McCain); *id.* at 1345 (statement of Sen. Rockefeller).

⁴³ 29 U.S.C. §§ 201-219 (1994). The Fair Labor Standards Act, enacted in 1938, contains, *inter alia*, provisions restricting child labor, setting the maximum number of hours an employee may lawfully work, and fixing a minimum wage. See *infra* Part III.

⁴⁴ This relationship is significant to the issue of individual liability because courts interpreting other federal antidiscrimination statutes, such as Title VII, have avoided imposing individual liability on supervisors or other co-workers. See *infra* Part IV.B.

⁴⁵ See 139 CONG. REC. S1254, 1355 (daily ed. Feb. 4, 1993) (statement of Sen. Mitchell) ("[t]his legislation is as much about giving women an equal economic opportunity as it is about providing a national policy to protect jobs during times of family crises.").

For example, the language and tone of the FMLA reflect the statute's antidiscrimination foundation.⁴⁶ For example, Congress found that "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men."⁴⁷ Further, "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender."⁴⁸ Also, Congress sought to "accomplish the purposes [of the Act] in a manner that . . . minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available . . . on a gender-neutral basis; and [] to promote the goal of equal employment opportunity for women and men"⁴⁹ The concern for working women, particularly those women who choose to rear families, is apparent from the language of the Act. The history of the FMLA also indicates that the primary goal of the statute was to end discrimination against women who temporary left the workforce in order to bear children.⁵⁰ Congress recognized the disparate impact of traditional family care arrangements on women.

The FMLA had its genesis in the proposed Parental and Disability Leave Act of 1985 ("PDLA").⁵¹ The PDLA would have provided up to eighteen weeks of unpaid leave for mothers and fathers of newborn or newly adopted children, and up to twenty-six weeks of unpaid leave for employees' non-work-related disabilities and for employees with sick children. The PDLA would have applied to all businesses with five or more

⁴⁶ Though a comprehensive analysis of statutory interpretation is beyond the scope of this Note, Supreme Court commentators seem to agree that the majority of the current Court favors a textualist approach. See, e.g., Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 355 (1994); Richard J. Pierce Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750 (1995).

⁴⁷ 29 U.S.C. § 2601(a)(5) (1994).

⁴⁸ 29 U.S.C. § 2601(a)(6) (1994).

⁴⁹ 29 U.S.C. § 2601(b)(4-5) (1994).

⁵⁰ See ELVING, *supra* note 41, at 17-19.

⁵¹ ELVING, *supra* note 41, at 42. The PDLA was introduced in the House of Representatives by Representative Pat Schroeder as H.R. 2020 on April 4, 1985.

employees.⁵² Yet, the proposed law metamorphosed many more times after 1985, often in response to pressures from members of Congress and lobbyists who conditioned their support upon modifications to the bill. For example, some advocates of the disabled objected to the term "disabled" in the title of the proposed law. As a result, the bill was renamed the Parental and Medical Leave Act. Along with the new name came a broader base of support.⁵³ Later compromises saw a drastic shortening of the length of mandated leave, an exemption for businesses with fewer than fifty employees, and a provision that would allow an employee to take protected leave to care for a seriously ill spouse or elderly parent.⁵⁴ To reflect this new array of protections, the bill's sponsors eventually changed the name of the bill to the Family and Medical Leave Act.⁵⁵

Perhaps one of the most surprising aspects of the history of the FMLA is the fact that organized labor was slow to support the bill.⁵⁶ This delay emphasizes that the bill was not conceived as a minimum labor standard, which presumably would have had organized labor's support from the beginning. Rather, the FMLA was perceived as an antidiscrimination statute.⁵⁷ During the four years following the introduction of the bill, the AFL-CIO regarded family leave as "a perk for affluent female professionals"⁵⁸—a group that is hardly per-

⁵² See Lenhoff & Withers, *supra* note 29, at 58.

⁵³ See ELVING, *supra* note 41, at 58.

⁵⁴ ELVING, *supra* note 41, at 66. Each of these modifications added more interest groups and more members of Congress to the FMLA support coalition. The move to allow protected leave to care for an elderly parent caused the American Association of Retired Persons—one of the most powerful interest groups in the U.S.—to become one of the bill's most ardent supporters. ELVING, *supra* note 41, at 66.

⁵⁵ ELVING, *supra* note 41, at 66.

⁵⁶ ELVING, *supra* note 41, at 153.

⁵⁷ During a very short period of time in the late 1980s and early 1990s Congress enacted at least two other antidiscrimination statutes that directly affected American businesses. The Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994), passed both houses of Congress in 1989. See ELVING, *supra* note 41, at 195. In 1991, Congress amended Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-2000e-5 (1994). ELVING, *supra* note 41, at 195. Following passage of these two statutes, there was little incentive for members of Congress and President George Bush to support yet another anti-discrimination statute that would further burden American business. See ELVING, *supra* note 41, at 195-96, 292.

⁵⁸ ELVING, *supra* note 41, at 153.

ceived as the backbone of organized labor. The support coalition, consisting mostly of feminist lawyers and liberal politicians,⁵⁹ fought this perception by arguing that affluent workers already enjoyed generous leave policies, and that the protections afforded by the FMLA would accrue mostly to working class hourly wage earners.⁶⁰ Over time, however, unions became family leave proponents and activists, but they were not easily persuaded.⁶¹

Other interest groups also supported the family leave legislation for their own narrow purposes. The United States Catholic Conference, and eventually Representative Henry Hyde, an influential member of the House, came aboard because of the prevailing feeling that legislation designed to assist pregnant women would encourage birth and discourage abortions.⁶² Interest groups such as the American Association of University Women, the National Organization for Women, the national Parent Teacher Association, the American Civil Liberties Union, and the United Methodist Church also championed the legislation.⁶³

Considering the broad patchwork of support and the years of compromise behind the FMLA, the congressional intent⁶⁴ behind the Act is difficult to assess. If Congress in fact intended to create a new minimum labor standard, then it may be logical to look to interpretations of other federal labor statutes for guidance on the issue of individual versus business entity liability.⁶⁵ On the other hand, if the FMLA is more closely

⁵⁹ ELVING, *supra* note 41, at 19-31.

⁶⁰ ELVING, *supra* note 41, at 154.

⁶¹ ELVING, *supra* note 41, at 154. The support of the union leaders was so slow that it was measured in terms of "each successive Congress." ELVING, *supra* note 41, at 154. Today, however, the AFL-CIO is at the forefront of the lobbying effort to expand the FMLA. See Laura M. Litvan, *What Labor Got for Its Money*, INVESTOR'S BUSINESS DAILY, Nov. 12, 1996, at A1.

⁶² ELVING, *supra* note 41, at 57, 156, 290.

⁶³ ELVING, *supra* note 41, at 32, 175-176.

⁶⁴ For an excellent discussion about legislative intent, its judicial usage, and its pros and cons, see DICKERSON, *supra* note 26, at 67-86. *But see* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29 (1989) ("It is our task, as I see it, not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but to give fair and reasonable meaning to the text of the United States Code . . .") (Scalia, J., concurring in part and dissenting in part).

⁶⁵ See generally Dickerson, *supra* note 26, at 238-61.

aligned with other federal antidiscrimination statutes, it makes sense to look to interpretations of those statutes for guidance. Complicating an already complex situation,⁶⁶ there is virtually no mention made in the legislative history of the FMLA regarding the precise issue of individual versus business entity liability. Courts interpreting the FMLA therefore must look first to the statute itself,⁶⁷ then to its implementing regulations, and then, if necessary, to similar statutes to guide their decisionmaking.⁶⁸ The courts must not lose sight of the fact that the FMLA was conceived as an antidiscrimination law—not as a minimum labor standard.⁶⁹ The problem with taking such an approach is that the question of liability hinges on the definition of the word “employer” in the statute, the meaning of which, as interpreted by the Department of Labor and the courts, is still unclear. Moreover, the word “employer” has not been consistently defined in cases construing anti-discrimination statutes, such as Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act (“ADA”), nor has it been well-defined in judicial interpretations of labor laws such as the Fair Labor Standards Act.

The Family and Medical Leave Act sets up a statutory framework and authorizes the Department of Labor to prescribe regulations designed to carry out and enforce the law.⁷⁰ Though the FMLA is a comparatively short statute, the subsequent implementing regulations promulgated by the Secretary

⁶⁶ 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, 1352 (1994) (“While the Act is deceptively simple in its purposes, analysis and experience have made it clear that interpretation and execution of the Act and regulations are anything but simple.”).

⁶⁷ As Justice Oliver Wendell Holmes, Jr. stated, “[W]e do not inquire what the legislature meant; we ask only what the statute means.” Peter C. Schanck, *An Essay on the Role of Legislative Histories in Statutory Interpretation*, 80 L. LIBR. J. 391, 394 n.14 (1988) (quoting Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899)).

⁶⁸ See Dickerson, *supra* note 25, at 238-39.

⁶⁹ After the FMLA had been enacted by Congress and signed by President Clinton, Judith Lichtman, head of the Women’s Legal Defense Fund and a founding member of the family leave coalition, stated that the idea that the FMLA was a labor bill “annoyed [her] in the extreme. Because we believed that the women’s movement and feminists had really provided the leadership . . . for this bill . . . we didn’t want [others’ involvement] to obscure that.” ELVING, *supra* note 41, at 285.

⁷⁰ 29 U.S.C. § 2654 (1994).

of Labor consist of over a hundred pages of rules, regulations, questions and answers.⁷¹ These regulations have been codified in the Code of Federal Regulations, the contents of which are required to be judicially noticed.⁷²

The regulations pertaining to the FMLA are varied and all-encompassing. They run the gamut from questions as simple as "What is the Family and Medical Leave Act?"⁷³ to discussions of the effect of the FMLA on the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA").⁷⁴ These rules are designed to aid the executive branch in enforcing the laws passed by Congress, and to help employers and employees who come within the FMLA's scope.

Regarding the issue of individual versus business entity liability under the FMLA, the regulations explain that the Act's definition of "employer" is similar to the definition of "employer" in the FLSA.⁷⁵ They further specify that the term encompasses "any person acting directly or indirectly in the interest of an employer in relation to an employee."⁷⁶ The Code of Federal Regulations explains that this regulation means that "[a]s under the FLSA, individuals such as corporate officers 'acting in the interest of an employer' are individually liable for any violations of the requirements of the FMLA."⁷⁷ This explanation, by its exclusion of other classes of supervisory employees, indicates that supervisors who are not "individuals such as corporate officers" should not be held individually liable for violations of the FMLA.⁷⁸ The regulation not only suggests that the imposition of liability be restricted to corporate officers, but also indicates that there is an even higher threshold for liability: the requirement that the

⁷¹ See 29 C.F.R. § 825 (1997).

⁷² 44 U.S.C. § 1507 (1994).

⁷³ 29 C.F.R. § 825.100 (1997).

⁷⁴ 29 C.F.R. Pt. 825, App. E (1997).

⁷⁵ See 29 C.F.R. § 825.104(d) (1997); see also *infra* Part II.A.

⁷⁶ 29 C.F.R. § 825.104(d) (1997).

⁷⁷ *Id.* FLSA case law indicates that this is a high burden; it is indeed an extraordinary situation when a court finds that an individual is an "employer" under the FLSA. See *infra* note 139 and accompanying text.

⁷⁸ The phrase "such as" is defined as a term meaning "for example." THE RANDOM HOUSE DICTIONARY 870 (1980). Inserting this definition, the C.F.R. would read "individuals [for example] corporate officers 'acting in the interest of an employer' are individually liable for any violations of the . . . FMLA."

corporate officers must be "acting in the interest" of the employer in order to be held liable—"employer" here meaning, apparently, the corporate entity.⁷⁹ Furthermore, the Department of Labor's regulation warns that, normally, only the legal entity which employs the employee is the employer.⁸⁰ Given such suggestion, threshold and warning, courts should question whether individual liability under the FMLA is appropriate at all.⁸¹ Viewed objectively, the regulations are inconsistent, and thus ambiguous.

II. THE DEFINITION OF "EMPLOYER" UNDER THE FMLA

A. *Statutory Interpretation*

The Family and Medical Leave Act prohibits any employer from interfering with the exercise of any right granted by the Act,⁸² and from discriminating against an employee who has exercised his or her right to protected leave.⁸³ The Act holds the employer liable for damages arising out of the employer's violation of the FMLA.⁸⁴ Liability for violations of the Act is thus dependent upon who is an "employer," a term that must

⁷⁹ This additional restriction, though of vital importance to the liability provisions of the FMLA, is beyond the scope of this Note. However, it is essential to recognize that the Code of Federal Regulations imposes not only a positional requirement for liability—that the person be an individual such as a corporate officer—but also a behavioral requirement—that the person must have been acting in the interest of the employer. Of course, the "employer" in this sense must mean the business entity lest the regulation be rendered meaningless. This definitional difficulty could be avoided simply by holding the corporate entity solely liable for FMLA violations. *See infra* Part II.A.

⁸⁰ 29 C.F.R. § 825.104(c) (1997).

⁸¹ Judicial skepticism on this point is warranted not only because of the circular definition of "employer" in the FMLA and its regulations, but also because of the distinctions between the Fair Labor Standards Act and the FMLA. *See infra* Part III.

⁸² 29 U.S.C. § 2615(a)(1) (1994).

⁸³ 29 U.S.C. § 2615(a)(2) (1994).

⁸⁴ 29 U.S.C. § 2617(a)(1) (1994). This section is somewhat confusing, however, because section 2615(b) prohibits any *person* from discriminating against an employee who exercises his or her FMLA rights. The use of the word "person" in this section seems to indicate a natural—not corporate—person. In distinction, section 2615(a) prohibits the *employer* from taking certain actions which may violate the statute. Section 2617(a)(1), however, pins liability solely on the employer. Because of these distinctions, it seems appropriate to conclude that section 2617(a)(1) holds the employer liable—not the natural "person" referred to in section 2615(b).

be given the same meaning throughout the statute.⁸⁵

While defining a common term such as employer may seem like an easy task, the FMLA provides a rather convoluted definition. The Act defines "employer" as:

any person engaged in commerce or in any industry affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year; includ[ing] any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer⁸⁶

This definition appears to codify the common law doctrine of respondeat superior by including "person" within the scope of "employer."⁸⁷ This interpretation is logical since the granting of FMLA leave or discrimination against an employee who takes FMLA leave will always be within the scope of an individual "person's" official duties. The term "employer" logically includes people working for the employer and under its direction.

Nevertheless, because the statutory definition is subject to varying interpretations,⁸⁸ the Code of Federal Regulations at-

⁸⁵ See Dickerson, *supra* note 26, at 219, 224-24, 229, 233.

⁸⁶ 29 U.S.C. § 2611(4)(A)(i), (ii) (1994).

⁸⁷ Respondeat superior literally means "[l]et the master answer." BLACK'S LAW DICTIONARY 1311 (6th ed. 1990). According to Black's Law Dictionary, this doctrine "means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent Under this doctrine master is responsible for want of care on servant's part toward those to whom master owes duty to use care" *Id.* at 1311-12.

⁸⁸ Such definitional difficulty is not confined to the FMLA. Justice Souter commented on the difficulty of construing the meaning of the term "employee" where a statute, the Employee Retirement Income Security Act ("ERISA"), did not adequately define the term. "ERISA's nominal definition of 'employee' as 'any individual employed by an employer' . . . is completely circular and explains nothing." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992). The definition of "employer" in the FMLA is similarly circular. The word "person" in the FMLA has the same meaning as the FLSA's definition of "person" in 29 U.S.C. § 203(a): "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." The FMLA's definition of "employer" is rendered practically worthless because it uses the term it purports to define as part of the definition, and because the word "person" has at least seven different meanings. Absurdities result if the definition is taken literally. The Department of Labor's subsequent attempt to explain the term is an implicit recognition that the statute's definition is unworkable. Moreover, that the word "person" in the FMLA has the same meaning as the word "person" in the FLSA is significant because the FLSA clearly distinguishes between "persons" and "employers." See *infra* Part

tempts to simplify the definition by acknowledging that "[n]ormally the legal entity which employs the employee is the employer under FMLA."⁸⁹ However, the attempt at simplification is in vain, because the regulations further specify that

[a]n 'employer' includes any person who acts directly or indirectly in the interest of an employer to any of the employer's employees. The definition of 'employer' in section 3(d) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(d), similarly includes any person acting directly or indirectly in the interest of an employer in relation to an employee. As under the FLSA, individuals such as corporate officers, 'acting in the interest of an employer' are individually liable for any violations of the requirements of FMLA.⁹⁰

In the end, there is no easy way to analyze the definition of "employer" in the FMLA. And harmonizing the different definitions of "employer" is an even greater task.

First, the language of the statute's definition of employer is confusing.⁹¹ Instead of providing a basic definition for the term, the statute attempts to provide an explanation of the term. Moreover, the purported definition uses in its text the very term which it is supposed to define, providing a classic example of circularity.⁹² Read literally, the statute says that an employer is any individual, partnership, association, corporation, business trust, legal representative, or any organized

III.

⁸⁹ 29 C.F.R. § 825.104(c) (1997).

⁹⁰ 29 C.F.R. § 825.104(d) (1997). This is the only mention of individual liability in the FMLA and its regulations. While a court will give "considerable weight . . . to an executive department's construction of a statutory scheme it is entrusted to administer," the court is not required to absolutely accept that interpretation. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). *Chevron* set forth a two-part analysis for courts to follow when reviewing an agency's construction of a statute: first is "the question whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If Congressional intent is clear, the court must give effect to the "unambiguously expressed intent of Congress." *Id.* at 842-43. However, if Congress has not spoken to the precise issue in controversy, the court must determine "whether the agency's [interpretation] is based on a permissible construction of the statute." *Id.* at 843. As pointed out in Part I.B., *supra*, Congress has not directly spoken to the precise question of individual liability under the FMLA. Moreover, given the confusing statutory definition of "employer" in the FMLA, the Department of Labor's conclusion that individuals may be liable for violations of the statute cannot be a permissible construction of the FMLA. The regulations thus fail the second prong of the *Chevron* analysis.

⁹¹ See 29 U.S.C. § 2611(4)(A)(ii)(I) (1994).

⁹² See *id.* and *supra* note 86.

group of persons, who acts directly or indirectly in the interest of any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons who acts directly or indirectly in the interest of any individual, partnership . . . and so forth in a vicious circle of definitional dementia.⁹³ Had Congress really intended for individuals other than sole proprietors to be considered statutory employers under the FMLA, the law could have accomplished this purpose through other language. For example, the statute could have stated outright that individual supervisors are liable for FMLA violations, or it could have clearly distinguished between natural and corporate persons, or it could have distinguished, as does the FLSA, between "person" and "employer."⁹⁴ Either of these options would have simplified the analysis, because Congress would have "directly spoken to the precise question at issue."⁹⁵

However, the statute and the Department of Labor's implementing regulations obfuscate what should be a simple issue.⁹⁶ The statute indicates that persons who act in the interest of an employer are to be considered employers.⁹⁷ On the other hand, the implementing regulations state that normally only the legal entity which employs an employee is an employer.⁹⁸ This latter approach seems to make the most sense. Confining liability to the legal entity which employs⁹⁹ an employ-

⁹³ This should not be interpreted to mean that a sole proprietor who otherwise meets the definition of "employer" would not be liable for FMLA violations. See *supra* note 14.

⁹⁴ See *infra* Part III.

⁹⁵ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842.

⁹⁶ Compare the simple definition of "employer" in *Black's Law Dictionary*: "[o]ne who employs the services of others; one for whom employees work and who pays their wages or salaries." BLACK'S LAW DICTIONARY 525 (6th ed. 1990). The Senate Report accompanying the FMLA states that the term "employ" means "maintain on the payroll." S. Rep. 103-3, 22 (1993), quoted in *Caterpillar, Inc. v. Local Union 786*, 107 F.3d 1052, 1065 n.9 (3d Cir. 1997).

⁹⁷ 29 U.S.C. § 2611(4)(A)(ii)(I) (1994). This definition, however, ignores the economic realities of the modern workplace. See *infra* Part IV.B.

⁹⁸ 29 C.F.R. § 825.104(c) (1997). This explanation conforms well with the term's common definition.

⁹⁹ The term "employ" in the FMLA means "to suffer or permit to work," the same definition used in the Fair Labor Standards Act. See 29 U.S.C. §§ 2611(3), 203(g) (1994). This language is derived from child labor statutes, and is broadly construed, see *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (cit-

ee assures that a remedy is available¹⁰⁰ and provides a potential plaintiff with no doubt about whom to sue.¹⁰¹ However, the regulations proceed to state that even though natural persons usually are not employers, persons such as corporate officers acting in the interest of an employer are themselves employers.¹⁰² Thus, a synthesis of the statute with its regulations may be impossible.

Another major reason for the difficulty of such an analysis is the internal inconsistency of the statute itself. A quick look at other sections of the statute shows that the confusion extends beyond the definitional conundrum previously described. For example, the FMLA requires that employers maintain an employee's health benefits during any period of FMLA leave,¹⁰³ and that should an employee fail to return from leave, the employer may recover the premium which was paid to continue the employee's coverage during the leave.¹⁰⁴ In this section of the statute, the employer is obviously the entity which employs the employee. It is difficult to believe that an individual supervisor, or even a corporate officer, is personally responsible for maintaining and paying the premium for an employee's health benefits during the employee's leave. It is just as unbelievable that a supervisor would sue—or have standing to sue—an employee to recover the premium paid on the employee's behalf should the employee fail to return to work following FMLA leave. Such a suit would certainly be brought by the legal entity that employs the employee. It simply is not logical to assume that in this section of the Act Congress intended "employer" to mean an individual supervisor.

ing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947)).

¹⁰⁰ Remedies for violation of the FMLA are limited to the dollar amount actually lost or any actual monetary loss suffered by the employee as a direct result of the violation, plus liquidated damages equal to the amount lost if the violation was willful. 29 U.S.C. § 2617(a)(1)(A) (1994). Equitable remedies such as reinstatement or promotion are also available. 29 U.S.C. § 2617(a)(1)(B) (1994).

¹⁰¹ But for the employment relationship, there can be no violation of the Family and Medical Leave Act. The legal employing entity logically should answer for violations of the Act. See *infra* Part IV.A.

¹⁰² 29 C.F.R. § 825.104(d) (1997).

¹⁰³ 29 U.S.C. § 2614(c)(1) (1994).

¹⁰⁴ 29 U.S.C. § 2614(c)(2) (1994).

Two other examples support the proposition that because the use of the term "employer" is not internally consistent, an individual supervisor cannot be considered an employer. In one of its more simple sections, the FMLA mandates that employers post and maintain a notice in the workplace informing employees of their rights under the FMLA.¹⁰⁵ A willful violation of this section subjects the employer to a fine of up to one hundred dollars.¹⁰⁶ Just as in the previous example, the duty to post the FMLA notice surely falls upon the legal entity that employs the employee, and not upon an individual supervisor. Finally, the FMLA provides that an employee wishing to take FMLA leave in order to attend to a serious medical condition provide a satisfactory medical certification to the employer.¹⁰⁷ If the employer has any reason to doubt the veracity of the employee's medical certification, the employer may, at its own expense, request a second opinion, and if necessary, a third.¹⁰⁸ In such a situation, it is implausible to expect that Congress intended a supervisor to pay the costs of obtaining a second and third opinion regarding an employee's medical certification. Certainly the costs are to be borne by the legal entity which employs the employee. In sum, the use of the term "employer" in the FMLA is consistent with only one interpretation: that the employer under the Act is the legal entity that employs the employee—the entity for whom employees work and who pays their wages and salaries.¹⁰⁹

Adding to the difficulty of defining employer is the fact that several of the district courts which have analyzed the FMLA have relied exclusively on the Fair Labor Standards Act¹¹⁰ for guidance in interpreting the FMLA.¹¹¹ Because

¹⁰⁵ 29 U.S.C. § 2619(a) (1994).

¹⁰⁶ 29 U.S.C. § 2619(b) (1994).

¹⁰⁷ 29 U.S.C. § 2613(a) (1994).

¹⁰⁸ 29 U.S.C. § 2613(c-d) (1994).

¹⁰⁹ See *supra* note 89 and accompanying text.

¹¹⁰ Under the FLSA, 29 U.S.C. §§ 201-219 (1994), " '[e]mployer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee" 29 U.S.C. § 203(d) (1994). The FLSA's federal regulations note that the term "employer" includes "any person acting directly or indirectly as an employer or as an agent of an employer in relation to an employee" 29 C.F.R. § 401.5 (1997). This regulation's explanation of the term "employer" is very similar to the definition of employer found in Title VII, which defines "employer" in relevant part as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person." 42 U.S.C.

the definition of "employer" in the FMLA parallels the definition found in the FLSA, the district courts that have addressed the issue of individual liability under the FMLA have interpreted the statute by hijacking and haphazardly applying the reasoning from cases construing the FLSA.¹¹² While a comparison with the FLSA is understandable due to the fact that both Acts protect employees in the workplace, the FMLA's history and provisions set it apart from the FLSA. This distinction should be taken into account when interpreting the statute. Moreover, the fact that the two statutes use similar language to define "employer" would not come as a surprise to any statutory scholar; the courts, however, upon recognizing this similar language, purport to finish the statutory analysis before it ever actually begins. The courts have improperly perceived the FMLA as a minimum labor standard instead of its more appropriate characterization as an antidiscrimination statute.¹¹³ In doing so, the courts have ignored the FMLA's history and purpose,¹¹⁴ and have interpreted the statute piecemeal rather than as a whole.

§ 2000e-(b) (1994). At least four circuit courts of appeals have held that this definition precludes a finding of individual liability under Title VII. *See Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993); *Grant v. Lone Star Co.*, 21 F.3d 649, 651-53 (5th Cir. 1994); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991).

¹¹¹ While the language of the FMLA itself does not suggest that courts look to the Fair Labor Standards Act to provide any guidance as to its interpretation, the regulations promulgated by the Secretary of Labor pursuant to 29 U.S.C. § 2654 are replete with comparisons of the FMLA to the FLSA and other federal labor statutes such as the Labor Management Relations Act. *See, e.g.*, 29 C.F.R. §§ 825.104-105; 825.108 & 110 (1997). Such comparisons admittedly are difficult for a court to resist when interpreting the FMLA.

¹¹² *See, e.g.*, *McKiernan v. Smith-Edwards-Dunlap Co.*, Civ.A.No. 95-1175, 1995 WL 311393, at *3 (E.D. Pa. May 17, 1995); *Freemon v. Foley*, 911 F. Supp. 326, 330-31 (N.D. Ill. 1995); *Knussman v. Maryland*, 935 F. Supp. 659, 663-64 (D. Md. 1996).

¹¹³ *See infra* Part IV.A.

¹¹⁴ *See McKiernan*, 1995 WL 311393, at *3; *Freemon v. Foley*, 911 F. Supp. 326, at 330-31; *Knussman v. Maryland*, 935 F. Supp. at 663-64.

B. Case Law

1. *Freemon v. Foley*

One of the first cases that confronted the issue of individual versus corporate entity liability under the Family and Medical Leave Act was *Freemon v. Foley*,¹¹⁵ where the district court considered the issue as one of first impression in the Seventh Circuit.¹¹⁶ Jimmye Freemon was employed as a nutritionist at Mount Sinai Hospital in Chicago.¹¹⁷ One morning before work Freemon discovered that her five-year old son had chicken pox.¹¹⁸ She notified her supervisor, Gilda Ivy, of her son's ailment on the next business day.¹¹⁹ Two days later, Freemon learned that her three-year old son had a contagious fungal infection.¹²⁰ The doctor ordered Freemon to keep both children at home until they recovered.¹²¹ Freemon reported the new development to Ivy, and asked for time off work to care for her kids.¹²² Ivy told Freemon that her vacation time would cover a two-week leave of absence, but that she must return to work when her vacation time depleted.¹²³

However, by the time her youngest son had recovered from his fungal infection, he had caught his older brother's chicken pox.¹²⁴ Three days after her vacation time had expired, Freemon informed Ivy and Steve Foley, Ivy's supervisor, of the new developments, and that she would be back at work after another week at home.¹²⁵ After returning to work, Freemon allegedly failed to document her lengthy absence¹²⁵ to the sat-

¹¹⁵ 911 F. Supp. 326 (1995).

¹¹⁶ *Id.* at 330.

¹¹⁷ *Id.* at 328. Freemon was on probation during the events leading up to her dismissal. *Id.*

¹¹⁸ *Id.* at 328.

¹¹⁹ *Id.*

¹²⁰ *Freemon*, 911 F.Supp. at 328.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Freemon*, 911 F.Supp. at 328.

¹²⁶ *Id.* at 328-29. The FMLA allows employers to require employees taking leave to submit a medical certification issued by the health care provider, documenting the condition of the sick individual, whether it be the employee or the employee's spouse, child, or parent. 29 U.S.C. § 2613(a) (1994). Medical certification is not

isfaction of Steven Huish, the Vice-President of Human Resources.¹²⁷ Three weeks after Freemon returned to work, Foley contacted her at home and notified her that she had been discharged for failing to document her absences.¹²⁸ Freemon brought her cause of action against Mount Sinai, Ivy, Foley, and Huish.¹²⁹

Ivy, Foley and Huish moved for summary judgment on the grounds that they were not "employers" under the FMLA, and thus could not be held personally liable for a violation of the FMLA.¹³⁰ The individual defendants argued that they did not employ fifty or more people during the previous twenty weeks,¹³¹ they were not officers or directors of Mount Sinai, and they each lacked unilateral authority to hire, fire or grant a leave of absence to any employee.¹³²

The *Freemon* court quoted the statutory definition of "employer," but did not conduct an independent inquiry into the term's meaning. Instead, the court chose to conduct the analysis by looking to other federal statutes.¹³³ The court noted that the definition of "employer" in the FMLA¹³⁴ differed from that in Title VII, the ADA, and the Age Discrimination in Employment Act ("ADEA").¹³⁵ For that reason, the court de-

needed if the employee is taking FMLA leave because of the birth, adoption, or foster care placement of a child. *Id.*

¹²⁷ *Freemon*, 911 F. Supp. at 326, 329.

¹²⁸ *Id.*

¹²⁹ *Id.* at 328. The suit also named Juan Corbin, who had been Freemon's temporary acting supervisor the day Freemon returned to work, as a defendant. *Id.*

¹³⁰ *Id.* at 330.

¹³¹ See 29 U.S.C. § 2611(4)(A)(i) (1994).

¹³² *Freemon*, 911 F. Supp. at 330.

¹³³ *Id.* This fact is significant because Freemon was clearly alleging retaliatory discrimination: that she had been terminated because she took FMLA protected leave. The court noted that the issue of individual liability under Title VII of the Civil Rights Act of 1964 ("Title VII") (42 U.S.C. §§ 2000e-2000e-17 (1994)), the Americans with Disabilities Act ("ADA") (42 U.S.C. §§ 12101-12213 (1994)) and the Age Discrimination in Employment Act ("ADEA") (29 U.S.C. §§ 621-634 (1994)) had been litigated frequently in the district, and that the Seventh Circuit had recently rejected individual liability under the ADA. 911 F. Supp. 326, 330 (citing *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1279-82 (7th Cir. 1995)).

¹³⁴ See *supra* note 86 and accompanying text.

¹³⁵ These anti-discrimination statutes define "employer" as a person engaged in an industry affecting commerce "and any agent of such person. 42 U.S.C. § 12111(5)(A) (1994) [ADA]; § 2000e(b) (1994) [Title VII]; 29 U.S.C. § 630(b) (1994) [ADEA]. The inclusion of the word "agent" in these definitions has caused several courts to find that individuals may not be held personally liable for statutory

clined to extend the reasoning of the cases interpreting these anti-discrimination statutes to the FMLA claims.¹³⁵ Then, in lieu of conducting an inquiry into what the term "employer" means in the FMLA, the court simply took notice of the "parallel" between the definitional language in the FLSA and the FMLA, and decided to rely upon the FLSA line of cases to "enlighten [its] interpretation" of the issue of individual liability.¹³⁷

Remarkably, the court pointed out that the Code of Federal Regulations indicated that the definitions of "employer" in the FMLA and FLSA were the same, but failed to analyze the regulations.¹³⁸ Instead, the court proceeded to examine a line of cases interpreting the FLSA.¹³⁹

violations. Instead, the acts of supervisors are imputed to the employer under common law agency principles. See *Tomka v. The Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993); see also *supra* note 98 and accompanying text. Significantly, the procedures and remedies provided by Congress under the ADEA were originally the same as those under the FLSA. MARK A. ROTHSTEIN, ET AL., *EMPLOYMENT LAW* § 3.37, at 297 (1994). However, the Civil Rights Act of 1991 changed the procedures of the ADEA so that they are now almost identical to those under Title VII. *Id.* at 298.

¹³⁵ *Freemon*, 911 F. Supp. at 330.

¹³⁷ *Freemon*, 911 F. Supp. 326, 330-32. The court also cited to two FMLA cases from other jurisdictions in which the courts had addressed the issue of individual liability, *Reich v. Midwest Plastic Eng'g, Inc.*, No. 1:94-CV-525, 1995 WL 478884, at *5-6 (W.D. Mich. June 6, 1995), and *McKiernan*, 1995 WL 311393, at *3. In *Midwest Plastic*, the district court addressed the question whether an individual who is an owner, officer and director of a company was an "employer" under the FMLA. *Midwest Plastic*, 1995 WL 478884, at *6. The court looked to cases interpreting the FLSA for guidance and purported to apply an "economic reality" test in determining whether the individual defendant could be personally liable for violation of the Act. *Id.* While the court explained that the individual defendant oversaw the day to day operation of the company, it did not offer any justification for its holding; there was nothing to indicate that the individual defendant had affected the plaintiff's ability to take FMLA-protected leave and nothing to show that he had participated at all in the events that led to the filing of a lawsuit. In other words, the court found that the individual was an "employer" simply because of his position in the company—not for any act (overt or covert) that harmed the employee/plaintiff. *Id.* The individual did not actually do anything; he merely occupied a position of authority. See also *supra* note 70 and accompanying text. It should also be noted that when the case proceeded to trial the court found that the defendants did not violate the FMLA, and the plaintiff took nothing. The individual defendant, whom the court had earlier found to be an "employer" under the FMLA, was not even identified in the court's opinion. *Reich v. Midwest Plastic Eng'g, Inc.*, 1995 WL 514851, at *3 (W.D. Mich. July 26, 1995).

¹³⁸ See *supra* notes 70-81 and accompanying text.

¹³⁹ Among the FLSA cases cited by the court were *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991) (for the proposition that the FLSA

contemplates simultaneous employers); *Riordan v. Kempiners*, 831 F.2d 690, 695 (7th Cir. 1987) (stating in dicta that an individual may be liable for FLSA violations if that person has supervisory authority over the complainant and was responsible in whole or in part for the alleged violation). The *Freemon* court also cited a Fifth Circuit case for the principle that FLSA liability "extend[s] to those 'who, though lacking a possessory interest in the 'employer' corporation, effectively dominate[] its administration or otherwise act[], or ha[ve] the power to act, on behalf of the corporation vis-a-vis its employees.'" *Freemon*, 911 F. Supp. at 331, citing *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 329 (5th Cir. 1993) (quotations omitted).

However, none of these cases support the *Freemon* court's decision that the individual defendants were "employers" under the FMLA. First, all of these cases dealt with the Fair Labor Standards Act, not the FMLA. See *infra* Part III. The court in *Elliott Travel & Tours* found that an individual who was the president and joint owner of Elliott Travel was an "employer" under the FLSA and could be held personally liable for violations of the statute's overtime wages and recordkeeping requirements. *Elliott Travel & Tours*, 942 F.2d at 964. The court noted that the "FLSA contemplates there being several simultaneous employers who may be responsible for compliance with the FLSA." *Id.* at 965 (citing *Falk v. Brennan*, 414 U.S. 190, 195 (1973)). *Falk*, however, offers little strength for that claim. Instead, *Falk* held that an apartment complex management partnership consisting of two people was an "employer" under the FLSA because it had "substantial control of the terms and conditions of the work" of the employees who maintained the apartments. *Falk*, 414 U.S. at 195. Only one of the partners was sued in his individual capacity. *Id.* at 190. The Court held "that D & F is, . . . an 'employer' " under the FLSA. *Id.* at 195. The Court used the singular "is" and referred only to the partnership entity itself in its holding. *Id.* There is no indication at all that the Court held that Drucker and Falk *individually* were employers under the FLSA, and thus individually liable for D & F's violations. *Falk* neither approved nor suggested the proposition that the individual petitioners were "employers" and thus potentially liable for violations of the FLSA. But even if the Court had, in fact, held that the two partners individually were statutory "employers," it is axiomatic that a partner in a general partnership is individually liable for the obligations of the partnership. Courts uniformly have misstated and misinterpreted the Court's holding in *Falk*, with the result that courts importing FLSA case law into FMLA cases have erroneously assumed that the Supreme Court has held that individuals can be deemed "employers" and thus be personally liable for FLSA violations.

Elliott Travel & Tours also relied upon *Donovan v. Agnew*, 712 F.2d 1509 (1st Cir. 1983), to support its assertion that an individual may be personally liable for violations of the FLSA. However, the *Agnew* test is inapposite to the defendants both in *Elliott Travel* and in *Freemon*. The multi-factor test states that corporate officers with a significant ownership interest who had operational control of significant aspects of the corporation's day to day functions, including compensation of employees, and who personally made decisions to continue operations despite financial adversity during the period of non-payment of wages were employers under the FLSA. *Agnew*, 712 F.2d at 1514. Under such a strict test, the only individual who could possibly meet the requirements would be a person who is an owner, officer, general manager and main decisionmaker in a company. None of the individual defendants in *Freemon* met these requirements. In short, *Elliott Travel & Tours* provides no foundation for a finding that the individual defendants

The court noted that "[s]tatus as an employer under the FLSA is a question of law."¹⁴⁰ The court conducted a factual inquiry of the circumstances under which an individual could be considered an "employer,"¹⁴¹ using a "control test." Following the reasoning of the FLSA cases that it examined, the court found that "because of the expansive interpretation given to the term 'employer' in the FLSA," liability under the FMLA would extend "to all those who controlled 'in whole or in part' Freemon's ability to take a leave of absence and return to her

in *Freemon* were "employers" under the Family and Medical Leave Act.

Further, *Riordan v. Kempiners*, an action brought under the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1994), an amendment to the FLSA, was essentially a sex discrimination case with the E.P.A. claim tacked on. *Riordan v. Kempiners*, 831 F.2d 690, 693 (7th Cir. 1987). At oral argument, the plaintiff asserted that she was suing Kempiners in his official—not individual—capacity. *Id.* at 694-95. Because there was no assertion of personal liability, *Riordan* has nothing to do with individual liability under the FLSA nor the FMLA.

Finally, the Fifth Circuit in *Circle C Investments* merely relied upon two of its own previous decisions to support its holding that Charles Cranford, a "consultant" to a company which operated a group of nightclubs, was an "employer" under the FLSA. *Reich v. Circle C Invs., Inc.*, 998 F.2d 324, 329 (1993). *Circle C* was a company which was owned by Cranford's wife. *Id.* at 326. Moreover, the court found that the employees of the company (topless dancers) thought that Charles Cranford owned the nightclubs. *Id.* at 329 n.4. Cranford hired the dancers, instructed the employees, signed paychecks, removed money from the company's safes, and forced dancers to dance to his favorite songs. *Id.* at 329. There is little question that there really was no separate identity between the company and its "consultant." *Circle C Investments* should be read simply as holding that in an insular situation, where there is no separate identity between the individual and the company, the person who exercises such unbridled power may be considered an "employer" under the FLSA. In a situation such as *Circle C Investments*, it makes little practical difference that both the individual and the company were deemed "employers," because they are one and the same.

¹⁴⁰ *Freemon*, 911 F. Supp. at 331 (citing *Karr v. Strong Detective Agency, Inc.*, 787 F.2d 1205, 1206 (7th Cir. 1985)). Other courts have treated this issue as a question of fact. *See, e.g., Keenan v. Allan*, 889 F. Supp. 1320 (E.D. Wash. 1995), *aff'd* 91 F.3d 1275 (9th Cir. 1996); *Donovan v. American Leader Newspapers, Inc.*, 524 F. Supp. 1144 (M.D. Fla. 1981); *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668 (5th Cir. 1968).

¹⁴¹ *Freemon*, 911 F. Supp. at 331. It is not always obvious if a court is making a legal or a factual decision regarding the definition of the term "employer." *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986) (holding that the definition of the term "seaman" in the Fair Labor Standards Act was a factual—not a legal—finding). *Icicle Seafoods* may not only be important in determining the standard of appellate review of a decision involving the definition of "employer" under the FMLA, but also in determining whether the question ultimately should be decided by a jury.

position."¹⁴²

The court concluded that Ivy, Huish and Foley "exercised sufficient control over [Freemon's] ability to take protected leave to qualify as employers under the FMLA."¹⁴³ In so holding, the court not only refused to interpret the FMLA on its own terms, but also failed to consider the FMLA's implementing regulations. The court denied the motions of the individual defendants with the exception of Corbin.¹⁴⁴

The *Freemon* decision highlights both the inadequacy of the statutory definition of "employer," and the tendency of the FMLA's implementing regulations to divert a court's analysis of the statute from independent investigation to an oversimplified examination of FLSA case law.

2. *McKiernan v. Smith-Edwards-Dunlap Co.*

A similar error was made by the court in *McKiernan v. Smith-Edwards-Dunlap Co.*¹⁴⁵ And again, the unsound result could have been avoided had the court simply conducted an independent analysis of the FMLA, or merely taken into account the entire language of the Code of Federal Regulations.¹⁴⁶

After working for Smith-Edwards-Dunlap for more than five years as a driver/messenger, McKiernan requested a ninety-day unpaid leave of absence to care for his wife and family.¹⁴⁷ McKiernan's wife was pregnant and undergoing serious pregnancy-related health problems.¹⁴⁸ After ninety days, McKiernan requested and was granted an extension of his unpaid leave of absence.¹⁴⁹ The company's personnel director allegedly told McKiernan to do whatever he needed to do in order to care for his wife and family.¹⁵⁰ McKiernan and his

¹⁴² *Id.* at 332.

¹⁴³ *Id.* at 331.

¹⁴⁴ *Freemon*, 911 F. Supp. at 332. Corbin could not be held individually liable because his involvement in the events was limited to delivering Freemon's medical documentation to Ivy after she returned to work. *Id.* The line-drawing around the decision regarding Corbin was not explained in detail by the court.

¹⁴⁵ No. Civ.A.95-1175, 1995 WL 311393 (E.D. Pa. May 17, 1995).

¹⁴⁶ See *supra* notes 70-81 and accompanying text.

¹⁴⁷ *McKiernan*, 1995 WL 311393, at *2.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *McKiernan v. Smith-Edwards-Dunlap Co.*, No. Civ.A.95-1175, 1995 WL

employer also agreed that the company would stop paying for his medical insurance.¹⁵¹

Later, McKiernan's wife gave birth but remained in intensive care for two and a half months.¹⁵² Smith-Edwards eventually tried to contact McKiernan about his job.¹⁵³ Two weeks after McKiernan was supposed to return to work, he was terminated by a letter from Robert Jardel, his production manager.¹⁵⁴ McKiernan's lawsuit followed, naming both Smith-Edwards and Jardel as defendants.¹⁵⁵

Jardel moved for summary judgment on the basis that he was not an "employer" under the FMLA.¹⁵⁶ The court took notice that under the Code of Federal Regulations, "individuals . . . 'acting in the interest of an employer' are individually liable for any violations of the requirements of the statute."¹⁵⁷ However, while quoting the very regulation which suggests that FMLA liability be limited to corporate officers who act in the interest of an employer, the court inserted ellipses into the opinion in place of the words "such as corporate officers."¹⁵⁸ After this omission,¹⁵⁹ the court went on to hold that persons

311393 (E.D. Pa. May 17, 1995).

¹⁵¹ *Id.* Under the provisions of the FMLA, the employer is required to continue an employee's medical insurance coverage during the period of the unpaid leave. 29 U.S.C. § 2614(c) (1994).

¹⁵² *McKiernan*, 1995 WL 311393, at *2.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ McKiernan, like the plaintiff in *Freemon* clearly alleged retaliatory discrimination: that he had been terminated because he took family and medical leave. See *supra* note 128 and accompanying text.

¹⁵⁶ *McKiernan*, 1995 WL 311393, at *3.

¹⁵⁷ *Id.* (quoting 29 C.F.R. § 825.104(d)).

¹⁵⁸ *McKiernan*, 1995 WL 311393, at *3.

¹⁵⁹ The court's oversight is startling. In addition to omitting a vital part of the regulation, the court also failed to follow commonly accepted rules of statutory interpretation and application. "If the language of the statute is plain and free from ambiguity, and expresses a single, definite, and sensible meaning, that meaning is conclusively presumed to be the meaning which the legislature intended to convey." HENRY CAMPBELL BLACK, *HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS*, 35-6 (1896). It matters not that this language is found in the Code of Federal Regulations and not in the statute itself, because Congress expressly mandated that the Secretary of Labor promulgate a series of regulations in order to implement the FMLA. 29 U.S.C. § 2654 (1994). Moreover, even if the court were to have found the language of the C.F.R. ambiguous, "the court is not at liberty, merely because it had a choice between two constructions, to substitute for the will of the legislature its own ideas as to the justice, expediency, or policy of the law." BLACK, *supra*, at 36.

who have the ability to hire and fire may be considered employers—a slight modification of the *Freemon* court's "control test."¹⁶⁰ As a result, the court's reasoning was based solely on past interpretations of the definition¹⁶¹ of "employer" in the FLSA.¹⁶² Thus, the court refused to grant summary judgment to Jardel, preferring instead to "await further development of the facts" before determining whether Jardel was an employer under the FMLA.¹⁶³

In reality, the *McKiernan* court had no need to postpone the question of Jardel's status as an employer under the FMLA. Under neither the statute nor the Code of Federal Regulations did Jardel qualify as McKiernan's employer, despite Jardel's position as McKiernan's immediate manager,¹⁶⁴ and his signature on the letter discharging McKiernan.¹⁶⁵ Had the court independently analyzed the term "employer" as used in the FMLA, or even simply applied the Department of Labor's implementing regulations in their entirety, it would have been better able to analyze Jardel's supervisory status.¹⁶⁶ Despite the circular and contradictory language in the FMLA, there is still little room for a finding that Jardel was a statutory "employer," nor an individual "such as a corporate officer who 'act[ed] in the interest of an employer.'"¹⁶⁷ *McKiernan* is another example of the confusion surrounding the question of supervisory liability.

¹⁶⁰ *McKiernan*, 1995 WL 311393, at *3.

¹⁶¹ 29 U.S.C. § 203(d) (1994).

¹⁶² *McKiernan*, 1995 WL 311393, at *3.

¹⁶³ *Id.* The court offered no indication about what further facts it would need to determine whether Jardel could be considered McKiernan's "employer." Further, by choosing to await further discovery before deciding whether Jardel was an "employer" under the FMLA, the court treated the issue as a question of fact, not as a question of law. See *supra* note 129 and accompanying text.

¹⁶⁴ *McKiernan*, 1995 WL 311393, at *1. That Jardel was a low-level supervisory employee is apparent from the fact that Smith-Edwards' human resources manager submitted an affidavit to the court on behalf of the company, which supported the defendants' summary judgment motion. *Id.* at *2. The affidavit also detailed the history of its communications with McKiernan. *Id.*

¹⁶⁵ *Id.* at * 3. It is not clear from the court's opinion if Jardel was ordered by the human resources manager to write the letter.

¹⁶⁶ See 29 C.F.R. § 825.104(d) (1997).

¹⁶⁷ *Id.* Even under the other tests available for a determination of status as an "employer" under the FLSA, Jardel does not qualify as McKiernan's employer. See *supra* notes 125-27 and accompanying text.

3. *Knussman v. Maryland*

Similar confusion regarding status as an "employer" under the FMLA was encountered by the court in *Knussman v. Maryland*.¹⁶⁸ The plaintiff, Howard Knussman, was an officer with the Maryland State Police.¹⁶⁹ Knussman's suit claimed that he was "deprived of his right to parental leave immediately following the birth of his daughter expressly because of his gender."¹⁷⁰ Knussman named the State of Maryland, the Maryland State Police, Colonel David B. Mitchell, Captain David Czorapinski, First Sergeant Ronnie P. Creel, and Jill D. Mullineaux as defendants.¹⁷¹ The individual defendants moved to dismiss Knussman's FMLA claims against them, arguing that "by definition it is an official act that subjects individuals to liability; therefore, suits against individuals in their individual capacities are inappropriate."¹⁷² The individual defendants made a persuasive respondeat superior argument—that they were merely agents of the real employer, the State of Maryland, and that liability should flow through them to their principal.¹⁷³ They argued that but for the existence of their employer, the State of Maryland, there was no relationship at all between Knussman and the individual defendants.¹⁷⁴

In response, the court quoted the FMLA's definition of employer,¹⁷⁵ and then looked to *Freemon*¹⁷⁶ and *McKiernan*¹⁷⁷ for guidance.¹⁷⁸ Finding the "rationale of the Freemon court persuasive," the court held that "liability under the FMLA is essentially the same as liability under the

¹⁶⁸ 935 F. Supp. 659 (D. Md. 1996).

¹⁶⁹ *Id.* at 662.

¹⁷⁰ *Id.* In addition to his FMLA claim, Knussman alleged violations of the 14th Amendment and 42 U.S.C. § 1983, and the Maryland Equal Rights Amendment. *Id.* Similar to the plaintiffs in *Freemon v. Foley* and *McKiernan v. Smith-Edwards-Dunlap*, Knussman was alleging discrimination.

¹⁷¹ *Id.* at 661.

¹⁷² *Id.* at 664.

¹⁷³ See *infra* Part IV.B.

¹⁷⁴ See *infra* Part IV.B.

¹⁷⁵ See 29 U.S.C. § 2611(4)(A)(ii)(I) (1994). See also *supra* Part II.A.

¹⁷⁶ See *supra* notes 115-39, and accompanying text.

¹⁷⁷ See *supra* notes 140-62 and accompanying text.

¹⁷⁸ *Knussman*, 935 F. Supp. at 664.

FLSA.¹⁷⁹ The next portion of the court's analysis is troubling. Turning to the FMLA's implementing regulations, the court quoted the Code of Federal Regulations in the exact manner as it was quoted in the *McKiernan* decision, leaving out the phrase "such as corporate officers."¹⁸⁰ Again, the court placed ellipses in the opinion in place of perhaps the most relevant words in the entire regulation.¹⁸¹ One wonders whether the court even looked at the regulation, or if it merely copied it verbatim from *McKiernan*. One also wonders which scenario is worse.

With this "hard step" now out of the way, the court was free to appropriate the reasoning of cases interpreting the FLSA and apply it haphazardly to the case before it.¹⁸² The court then held that the "liability of individual defendants in their individual capacities is not foreclosed under the FMLA."¹⁸³ Like *Freemon* and *McKiernan* before, the *Knussman* court failed to read the FMLA as a whole, glanced too quickly at the Department of Labor's regulations, and did not consider the significant analytical problems inherent in importing FLSA case law into FMLA interpretation.

The *Knussman* court's analysis highlights the ease with which courts rely upon imprecise analyses promulgated by other courts that have been confronted with similar issues. After the first decision is made, little if any attention is paid to the steps taken by the first court. While the facts of *Freemon*, *McKiernan* and *Knussman* are admittedly similar, the parallel reasoning behind the courts' decisions is open to debate. At the very least, the courts could have discussed the confusing statutory definition of "employer," and admitted the difficulty of the analysis. Moreover, overlooking the definition and elaboration of the term "employer" in the Code of Federal Regulations, when the court is required to take judicial notice of the regulations,¹⁸⁴ constitutes a serious lapse of judgment. That it was committed by three separate district courts makes the issue

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ That the identical error was committed by two separate district courts should raise an eyebrow.

¹⁸² *Knussman*, 935 F. Supp. 659.

¹⁸³ *Id.* at 664.

¹⁸⁴ See 44 U.S.C. § 1507 (1994).

more distressing. Finally, the three courts' careless importation of FLSA case law into FMLA terrain does not do justice to the authors of the statute, to the businesses and employees affected by the statute, nor to the helpless supervisors caught in a web of litigation for simply following corporate policy.

The reality is that the statute and its implementing regulations provide little support for the proposition that an individual supervisor can be considered an employer under the Family and Medical Leave Act.¹⁸⁵ Without this needed support, individuals such as the defendants in *Freemon*, *McKiernan* and *Knussman* should not be deemed "employers" under the FMLA, and should not be held personally liable for its violation.

4. Summary

The fact that three federal district courts sitting in different jurisdictions followed almost identical paths in deciding the question of individual liability under the Family and Medical Leave Act admittedly may be a simple case of mistaken reliance on the decision of another court. While reliance on another court's decision may simplify the job of the jurist, a previously decided case has inherent limitations.¹⁸⁶ "The decided case . . . establish[es] a principle, and it is indeed a . . . beginning. . . . [but a] principle is a fundamental assumption that does not foreclose further inquiry."¹⁸⁷ Additionally, the principles set forth in the cases constituted mere persuasive authority for other courts faced with similar questions. Thus, because previous decisions of these district courts are not binding on any other court, judges who address the question of individual liability under the FMLA in the future have a duty to independently analyze the question.¹⁸⁸ The definition of "employer" in

¹⁸⁵ See *supra* Part II.A.

¹⁸⁶ Honorable Edward D. Re, *Stare Decisis, Address Before Federal Appellate Judges* (May 13-16, 1975), in *EDUCATION AND TRAINING SERIES 3* (Federal Judicial Center).

¹⁸⁷ *Id.*

¹⁸⁸ "[W]here it can be shown that the law has been misunderstood or misapplied, or where the former determination is . . . contrary to reason[,] [t]he authorities are abundant to show that in such cases it is the duty of the courts to reexamine the question." *Rumsey v. New York & New England R.R. Co.*, 133 N.Y. 79, 85 (1892).

the FMLA must be given uniform meaning throughout the statute.¹⁸⁹ A court may not pick and choose when "employer" means the business entity and when it means individual supervisors. When read as a whole, it is clear that though the term "employer" "includ[es] any person . . . act[ing] . . . in the interest of an employer," this definition plainly incorporates the common law doctrine of respondeat superior.¹⁹⁰ Because the employer only acts through its employees, the liability flows through those employees back to the business entity.

Moreover, the federal regulations promulgated by the Secretary of Labor do not adequately support the imposition of such individual liability. Simply put, the Department of Labor's regulations are not a permissible construction of the ambiguous term of the statute, thus running afoul of the second prong of the *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* analysis. As a result, courts are under no obligation to defer to the Department's interpretation. However, even if individual supervisors are considered "employers" under the FMLA, and individual liability were appropriate in a given case,¹⁹¹ liability still would be limited to persons meeting the high threshold set by the regulations: that the individuals be persons "such as" corporate officers acting in the interest of the employer.¹⁹²

Finally, the crux of the problem with these decisions is that the courts, prodded by language in the regulations, thoughtlessly looked to case law interpreting the Fair Labor Standards Act for interpretational guidance when deciding the issue of individual liability under the FMLA. The Fair Labor Standards Act is not the proper prism through which to interpret the Family and Medical Leave Act. Moreover, the entire premise for individual liability under the FLSA is based upon a single case that does not stand for the proposition for which it is asserted.

¹⁸⁹ See *supra* note 85.

¹⁹⁰ See *supra* note 87 and accompanying text.

¹⁹¹ For a discussion of the Fair Labor Standards Act cases, see *supra* note 139 and accompanying text. But see *infra* Part IV.A.

¹⁹² See 29 C.F.R. § 825.104(d) (1997).

III. FUNDAMENTAL DISTINCTIONS BETWEEN THE FLSA AND THE FMLA

The differences between the FLSA and the FMLA are numerous, and are too great to permit wholesale importation of the reasoning from FLSA case law to decide FMLA questions. Courts should be cautious of applying the results or reasoning of cases interpreting the Fair Labor Standards Act to issues arising under the Family and Medical Leave Act. Moreover, there is considerable tension between the FLSA's position as a labor standard and the FMLA's anti-discriminatory function,¹⁹³ tension that should further discourage use of the FLSA when deciding FMLA issues.

First, the FMLA and the FLSA are philosophically very distinct. Fundamentally, the FLSA and the FMLA are intended to accomplish different purposes and provide for different rights. Congress enacted the FLSA in 1938 due to a dramatically changing workforce and a decline in working conditions in the late 1930s.¹⁹⁴ This act was designed to govern and protect the basic rights of American workers.¹⁹⁵ The essential features of the FLSA are its prohibition of oppressive child labor,¹⁹⁶ its establishment of a minimum wage,¹⁹⁷ and its restrictions on maximum work hours.¹⁹⁸ These basic protections and prohibitions are "necessary for [the] health, efficiency, and general well-being of workers"¹⁹⁹ As a result, the FLSA imposes both duties and prohibitions on employers, in addition to creating an employee entitlement to a minimum wage. The FLSA also prohibits employers from retaliating against employees for their involvement in reporting violations of the

¹⁹³ The FMLA was originally conceived as an anti-discrimination statute. Even though some members of Congress considered it a new minimum labor standard comparable to the FLSA, the language of the FMLA repudiates that contention. Unfortunately, many courts also have the mistaken view that the FMLA is a minimum labor standard, when it is more accurately characterized as an anti-discrimination statute. See *supra* Part II.B.

¹⁹⁴ 29 U.S.C. §§ 201-219 (1994).

¹⁹⁵ ROTHSTEIN, *supra* note 135, at 195.

¹⁹⁶ 29 U.S.C. §§ 212, 203(l) (1994).

¹⁹⁷ *Id.* § 206.

¹⁹⁸ *Id.* § 207.

¹⁹⁹ *Id.* § 202(a).

statute or for seeking the statute's protections.²⁰⁰ The FLSA also provides for both criminal and civil penalties to be assessed against employers who violate its provisions.²⁰¹

The Family and Medical Leave Act, on the other hand, deals with just one issue. Simply, the FMLA prohibits discrimination and retaliation against employees who have family responsibilities that may occasionally interfere with their jobs.²⁰² The FMLA bars such discrimination by creating an entitlement to leave under exceptional circumstances, and by prohibiting employers from infringing on the employee's right to enjoy that entitlement. Unlike the FLSA, there is no statutory recognition that family and medical leave was "necessary for the health, efficiency, and general well-being of workers."²⁰³ Moreover, the FMLA explicitly recognizes that it is an anti-discrimination statute,²⁰⁴ and not a labor statute such as the FLSA.

The second area of substantive difference between the FLSA and the FMLA is the fact that the statutes do not provide for similar remedies and enforcement mechanisms. The FLSA distinguishes between a violator who is a *person* and a violating *employer*.²⁰⁵ The Fair Labor Standards Act subjects a person to a fine of up to \$10,000 and/or to imprisonment of up to six months.²⁰⁶ In contrast, an employer that violates the FLSA is liable for the amount of money which the employee would have received had there been no violation of the statute.²⁰⁷

²⁰⁰ 29 U.S.C. § 215(a)(3) (1994).

²⁰¹ *Id.* § 216(a)-(b). The criminal penalties are significant: an employer found to have violated the FLSA faces a fine of up to \$10,000 and/or imprisonment for up to six months. *Id.* §216(a).

²⁰² See 29 U.S.C. § 2615 (1994).

²⁰³ See *supra* note 199 and accompanying text.

²⁰⁴ See, e.g., 29 U.S.C. §§ 2601(a)(6); 2601(b)(4)-(5); 2615(a)(2) (1994). Courts interpreting the FMLA have also recognized the statute's anti-discriminatory nature. See, e.g., *Frizzell v. Southwest Motor Freight, Inc.*, 906 F. Supp. 441 (E.D. Tenn. 1995).

²⁰⁵ See 29 U.S.C. § 216(a)-(b) (1994).

²⁰⁶ *Id.* § 216(a).

²⁰⁷ *Id.* §216(b). For example, if the employer violated the overtime or minimum wage provisions of the FLSA, it would be liable for the amount of the unpaid wages or overtime compensation. Equitable relief, such as reinstatement or promotion, is also available under section 216(b).

The Family and Medical Leave Act, in contrast, provides only for civil remedies,²⁰⁸ and holds only the *employer* liable for violations of the Act. Unlike the FLSA, there is nothing in the enforcement section of the FMLA which purports to hold a *person* individually liable for a violation of the Act. There are no criminal penalties for violation of the FMLA, and imprisonment is not available as a punishment.²⁰⁹ The FMLA's remedies are reinstatement, backpay and benefits, and liquidated damages in instances of wilfull violations of the statute.²¹⁰ These comprehensive differences between the statutory remedies available under the FLSA and the FMLA highlight the comparative regard in which Congress holds the two statutes. Because Congress has imposed criminal sanctions for FLSA violations, it is apparent that Congress deemed imprisonment a necessary deterrent to ensure the welfare and safety of American workers. In stark contrast, Congress imposed no correlative punishment for FMLA violations. If Congress had really intended the FMLA to create a new minimum labor standard similar in nature and kind to the FLSA, it would have ensured that criminal penalties were available. In short, the harsh penalties that may be levied for FLSA violations make it clear that Congress deems the FLSA much more important to American workers than the FMLA. Otherwise, FMLA penalties would have been closer in kind and degree to those of the FLSA.

This analysis of the statutory penalties under the FLSA and the FMLA serves to point out another compelling reason why the FLSA is not an appropriate guide for interpreting the FMLA. The FLSA—within its statutory structure—provides for penalizing *persons* and *employers*. The statute takes pains to distinguish the two.²¹¹ The FMLA, however, provides only that the *employer* be penalized for violating the Act. Even though the Code of Federal Regulations purports to point out similarities between the FLSA and the FMLA regarding the issue of individual liability, the structure of the statute directly

²⁰⁸ 29 U.S.C. § 2617 (1994).

²⁰⁹ *Id.* This difference alone is sufficient to distinguish the FLSA from the FMLA, since only a person may be imprisoned, not an employer.

²¹⁰ 29 U.S.C. § 2617(a) (1994).

²¹¹ See *supra* note 201 and accompanying text.

contradicts this proposition.²¹² If Congress had intended persons to be individually liable for FMLA violations, it logically would have patterned the FMLA more closely to the structure of the FLSA by distinguishing between persons and employers.

Finally, and perhaps most importantly, the statutes do not cover the same constituencies. The FLSA, while providing for limited exemptions,²¹³ applies across the board to any industry affecting commerce.²¹⁴ Virtually all American workers are protected in one way or another by the FLSA. The FMLA, however, applies only to businesses which employ fifty or more employees.²¹⁵ Because of this selective application, it is estimated that "approximately ninety-five percent of all businesses and from forty to fifty percent of all United States employees" are excluded from the coverage of the FMLA.²¹⁶ It is difficult to see how Congress could rationally assert that the FMLA is a minimum labor standard when it affects such a comparatively small percentage of workers, and so few businesses.²¹⁷ Moreover, because FMLA leave is unpaid, only those employees who can afford to take it are likely to invoke the statute's protections.²¹⁸ On the other hand, the protections of the FLSA are available regardless of whether employees can afford to take advantage of them.

²¹² See *supra* notes 103-09 and accompanying text.

²¹³ 29 U.S.C. § 213 (1994).

²¹⁴ The FLSA's coverage originally was dependent on an employee's job duties, not on the nature or type of the employer's business. ROTHSTEIN, *supra* note 135, at 197. The FLSA was amended in 1961 to extend its reach on the basis of an employer's business. ROTHSTEIN, *supra* note 130, at 197. Congress intended the FLSA "to extend to the limits of the commerce clause." ROTHSTEIN, *supra* note 135, at 197. In contrast, the FMLA does not define its coverage by the nature of the employee's job duties, but by the nature of the employer's business, exempting businesses with fewer than fifty employees. 29 U.S.C. § 2611(4)(A)(i) (1994).

²¹⁵ 29 U.S.C. § 2611(4)(A)(i) (1994). This exemption was a long-time obstacle to the Act's eventual passage. See ELVING, *supra* note 41, at 96. The small business exemption, as originally estimated by the General Accounting Officer, would exclude from coverage all but the largest five percent of the nation's businesses. ELVING, *supra* note 41, at 96.

²¹⁶ Tysse, *supra* note 29, at 361-62. Another source estimates that the FMLA affects 44% of all workers and a scant five percent of the nation's employers. Lynne Curry-Swann, *We Can Fire Her—Can't We?*, ANCHORAGE DAILY NEWS, Nov. 11, 1996, at 1D.

²¹⁷ Instead, the FMLA's coverage makes the statute look even more like other anti-discrimination statutes, which also exclude small businesses from its coverage.

²¹⁸ Lenhoff & Withers, *supra* note 29, at 48-51.

These great disparities between the purposes, protections, provisions, remedies and coverage of the FLSA and the FMLA severely weaken the ability of a court to rationally rely on reasoning from FLSA cases when deciding issues arising under the FMLA. The FLSA and the FMLA are too dissimilar to allow undifferentiated analyses, especially when courts are considering a basic, threshold issue such as individual versus business entity liability.

IV. MODEST PROPOSALS FOR THE AVOIDANCE OF SUPERVISORY LIABILITY UNDER THE FMLA

A. *The FMLA as an Anti-Discrimination Statute*

The antidiscrimination aspect²¹⁹ of the Family and Medical Leave Act is directly related to the issue of individual liability. In *Frizzell v. Southwest Motor Freight, Inc.*,²²⁰ the court held that the term "employer" in the FMLA should be construed the same as the term is construed under Title VII.²²¹ The *Frizzell* court's analysis of Title VII thoroughly examined the question of individual liability and provides a framework through which to view the FMLA as an anti-discrimination statute.²²² After examining case law from across the nation,²²³ the court held that individuals who are not otherwise employers²²⁴ may not be held liable for violations of the FMLA.²²⁵ Though the court gave scant attention to the

²¹⁹ See *supra* notes 46-55 and accompanying text.

²²⁰ 906 F. Supp. 441 (E.D. Tenn. 1995).

²²¹ 42 U.S.C. §§ 2000e-2000e-17 (1994). Title VII defines "employer" in relevant part as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person." 42 U.S.C. § 2000e(b).

²²² See *supra* Part I.B.

²²³ The court pointed out that of the eight circuits which had clearly addressed the issue under Title VII, all had concluded that individuals may not be held liable under the statute. *Id.* at 447. See *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995); *Greenlaw v. Garrett*, 59 F.3d 994, 1001 (9th Cir. 1995) *cert denied*, 117 S.Ct. 110 (1996); *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1280-81 (7th Cir. 1995); *Lenhardt v. Basic Inst.*, 55 F.3d 377, 381 (8th Cir. 1995); *Smith v. Lomax*, 45 F.3d 402, 403-04 & n.4 (11th Cir. 1995); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510-11 (4th Cir. 1994); *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451 (5th Cir. 1994); *Lankford v. City of Hobart*, 27 F.3d 477, 480 (10th Cir. 1994).

²²⁴ See *supra* Part I.B.

²²⁵ *Frizzell*, 906 F. Supp. at 449.

differences between the statutory definitions of "employer" in the FMLA and Title VII,²²⁶ the analysis is still sound.

The *Frizzell* court stated that Congress intended to "incorporate respondeat superior principles under Title VII, the remedies under Title VII are remedies an employer, not an individual would provide, and individual liability under Title VII is inconsistent with the limitation of its reach to employers with fifteen or more employees"²²⁷ The court applied a similar rationale to the FMLA.²²⁸ The fact that the FMLA applies only to businesses with fifty or more employees is prima facie evidence that Congress did not desire to burden small businesses with the expense of providing family leave and the costs of litigating FMLA claims.²²⁹ If Congress was so concerned with protecting small businesses, as former Senator Dole was,²³⁰ then it is illogical to assume that Congress intended that individuals would bear the costs and burdens of compliance and litigation that it had refused to place on small businesses.

In fact, holding individuals liable for violations of the Family and Medical Leave Act runs contrary to the intent of Congress. If individuals are personally liable under the Act, then the entire rationale for the exemption for businesses with fewer than fifty employees is lost, leading to unequal treatment of supervisory employees. If individuals who work for a company with more than fifty employers are liable for FMLA violations, there is little fairness in not holding liable an individual who

²²⁶ Compare 29 U.S.C. § 2611(4) (1994), with 42 U.S.C. § 2000e(b) (1994).

²²⁷ 906 F. Supp. at 449. See also John P. Furfaro & Maury B. Josephson, *Liability of Supervisors*, 210 N.Y.L.J., 46 at 3 (Sept. 3, 1993); Christopher Greer, Note, *'Who, Me?': A Supervisor's Individual Liability for Discrimination in the Workplace*, 62 FORDHAM L. REV. 1835 (1994).

²²⁸ *Id.*

²²⁹ See, e.g., *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (holding that it was "inconceivable" that a Congress concerned with protecting small businesses would allow civil liability to run against individual employees); accord *Tomka*, 66 F.3d at 1314; See also *Grant v. Lone Star Co.*, 21 F.3d 649, 651-53 (5th Cir. 1994); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991); *Coraggio v. Time, Inc.*, No. 94-5429, 1995 U.S. Dist. LEXIS 5399, at *22-27 (S.D.N.Y. Apr. 25, 1995). Cf. *AIC Security Investigations, Ltd.*, 55 F.3d at 1280-81 (holding that there is no individual liability under the Americans with Disabilities Act because of the statute's exclusion of businesses with fewer than fifteen employees).

²³⁰ See *supra* note 8 and accompanying text.

is employed by a business with fewer than fifty employees. There is no statutory support for classifying supervisory employees on this basis, holding some liable and exempting others. It is clear that Congress exempted small businesses from FMLA coverage because it intended for liability to run against the business-entity employer, not against an individual. The liability exemption affects a class of businesses—not a class of individuals. Congress' exclusion of small businesses reveals that individual liability was not its goal. Therefore, only businesses should be liable for violations of the FMLA.

Additionally, the text of the statute, the incorporation of respondeat superior principles in the definition of "employer,"²³¹ and the nature of the remedies²³² all indicate that the FMLA imposes liability solely on the corporate entity and not on individuals in supervisory positions.²³³

B. *The Argument for Corporate Liability*

The best supporting argument for limiting FMLA liability to the employing entity is based on economic efficiencies. Given the complexities of the Family and Medical Leave Act, the ambiguity of the legislative intent, and the equivocation of its implementing regulations, it makes eminent sense for a court to look at the underlying rationale of the FMLA. At its core, the purpose behind the FMLA is straightforward.²³⁴ It prevents discrimination against workers by providing unpaid leave for employees who need to take care of personal or family obligations. The burden of the congressional mandate falls upon businesses—not upon individuals.²³⁵

²³¹ See Tomka, 66 F.3d at 1313-14; *infra* Part IV.B.

²³² *Id.* at 1314-15. See also *infra* Part IV.B.

²³³ See *supra* Part IV.A.

²³⁴ See *supra* Part I.B.

²³⁵ The main contention of the Act's opponents is that it hurts business, smaller businesses in particular. This argument has been the opposition's central thesis for twelve years. There exists no evidence to suggest that a single opponent of the Act argued that the FMLA would adversely affect supervisory employees, nor that a single proponent of the Act intended that individuals would bear the burdens of non-compliance. Such a proposition did not exist. See ELVING, *supra* note 41, at 289-90, describing the extensive, and ultimately unfruitful, efforts of the National Federation of Independent Business ("NFIB") to derail the FMLA. The leaders of the NFIB "saw family leave as the first part of 'a new wave of quasi-social business legislation where business is asked to take on more and more of the social

The corporate entity is in the best position to implement the family-friendly policies of the FMLA. The business entity has the resources, the skills, the staff and the experience to ensure that its leave policy is carried out in a manner consistent with the FMLA. Moreover, because the business will bear the burden of litigating any employee claims under the Act, it has a strong incentive to comply with the FMLA. Such compliance contemplates adequate training of supervisory employees to ensure that they are familiar with the requirements of the FMLA, and that they are equipped to handle employee leave requests. The incentive for strict compliance is the avoidance of litigation costs, employee dissatisfaction, and supervisor uncertainty. The employer-entity stands in the best position to ensure that the actions of its employees do not subject the company to FMLA liability.²³⁶

The realities of the modern workplace also lean strongly in favor of confining Family and Medical Leave Act liability to the employer-entity. The FMLA's definitions fail to take into account the fact that there may be many levels of corporate governance. For example, a bank teller, in coordinating his or her benefits with the employer, may have dealings with the head teller at the branch, the branch manager, the corporate human resources manager, and on up the chain of corporate command—a chain which includes support personnel such as administrative assistants, secretaries and receptionists. If the employer fails to enact leave policies that abide by the mandates of the FMLA, who is really responsible for the violation? What happens if the faulty family and medical leave policy was written by an outside human resources consulting firm and the individuals responsible for its administration just went "by the book?" Given the fact that remedies under the FMLA are limited,²³⁷ it seems logical that the employer entity is in the best situation to answer for potential suits over FMLA

costs." ELVING, *supra* note 41, at 289.

²³⁶ This is, of course, the classic common law argument for the application of respondeat superior. See *supra* note 221 and accompanying text.

²³⁷ 29 U.S.C. § 2617 (1994). Monetary damages may be levied up to the amount denied to or lost by an employee as a result of the violation, and may be doubled for a willful violation of the Act. Equitable relief, in the form of reinstatement or promotion is also available. See *supra* Part III. The employer entity is, of course, in the best position to supply these remedies.

violations. A recognition of these everyday issues leads to the conclusion that the policies behind family and medical leave, and its enforcement, are best enacted and enforced by the legal entity which employs an employee. It is the legal employing entity—the real employer in the dictionary sense of the word²³⁸—that should answer for FMLA violations.

Moreover, the statutory remedies for FMLA violations are best provided by the corporate entity. This argument is best supported by considering the equitable remedies provided by the FMLA. While a corporate entity may easily make the decision to hire, promote, or reinstate a prevailing employee, individual supervisors likely lack the ability to unilaterally take such action.

Fairness is also a consideration that leads to the conclusion that individual liability under the FMLA makes little sense. Given the complexities of the modern workplace, many supervisors oversee the work of employees who earn salaries equal to or greater than the supervisor. A supervisor who violates the FMLA may find him- or herself liable for damages in an amount up to twice the aggrieved employee's lost salary. While such a situation could bankrupt an individual supervisor, the corporate entity would be better situated financially to absorb such costs. Moreover, the business entity should be encouraged to take the responsibility to implement lawful leave policies, and train its supervisors to ensure compliance. This type of encouragement will make the FMLA more socially, as well as economically, efficient. If a mistake is made, the business—not the supervisor—should answer for the violation.

This principle is really nothing more than a variation of common law liability theory. The doctrine of respondeat superior holds that an employer must answer for the wrongful acts of its employees when those acts are taken in the course of employment.²³⁹ Under the FMLA, any action regarding leave that a supervisor might take in relation to a subordinate employee is taken in the course of employment. But for the employment relationship, there can be no FMLA protection. Therefore, the alleged violation of the Act will always be an "official" act, and liability for such wrongful acts should flow

²³⁸ See *supra* note 96 and accompanying text.

²³⁹ See *supra* note 96 and accompanying text.

through the employee to the employer. Adoption of this common law employment doctrine will streamline FMLA litigation by assuring that the aggrieved employee names the proper entity in a lawsuit. Doing so will lessen litigation costs because there will be no question that the pleading is adequate, cutting down on expensive and time-consuming "motion practice." The aggrieved employee will have greater assurance of a remedy because of the greater likelihood that the employee will have access to a corporation's "deep pockets."²⁴⁰ There is no such guarantee of recovery in a suit against an individual supervisor.

CONCLUSION

Individual liability under the Family and Medical Leave Act is not supported by the language and structure of the Act, its implementing regulations, nor its underlying purpose. Moreover, the FMLA's similarity to other anti-discrimination statutes and the fact that the business entity is better situated to comply with and absorb the costs of the FMLA, demonstrates the senselessness of holding supervisors personally liable for FMLA violations. The Fair Labor Standards Act, because of its many incongruities with the FMLA, lends no support for individual liability under the FMLA. Faced with the confusion resulting from a statute that was transmogrified over the space of eight years in order to placate myriad constituencies, courts should not look for easy answers to guide their interpretation of the statute. There is no support for imposing individual liability under the FMLA. Restricting liability to the business entity is not only the most economically and socially efficient solution to the problem, but also the wisest for the administration of a flexible, family-conscious workplace.

Boyd Rogers

²⁴⁰ See *Tomka*, 66 F.3d at 1315 (noting that a plaintiff will rarely file a suit against the supervisor alone because the chance for recovery from the employer entity is much greater).