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Ninth Circuit Rules That "If You Want FMLA Leave, You Had Better Request It"

The Family and Medical Leave Act ("FMLA") entitles eligible employees to take time off to care for ailing family members. To secure their right to FMLA leave, employees need not expressly mention the FMLA. Rather, the employer must obtain the information necessary to determine whether an FMLA leave is being sought by the employee. The same is true under the California Family Rights Act ("CFRA"). But what if an employee eligible for FMLA leave expressly declines to request it? Does the FMLA still protect her ensuing absence from work? On February 25, 2014, in *Escriba v. Foster Poultry Farms, Inc.,* the United States Court of Appeals for the Ninth Circuit held that an employee can decline to use FLMA leave, even if she qualified for it.

The Facts

The plaintiff, Maria Escriba, worked in a processing plant at Foster Poultry Farms, Inc. ("Foster Farms"). In November 2007, Escriba's supervisor approved a two-week paid vacation to allow Escriba to visit her sick father in Guatemala. Escriba then requested an additional one to two weeks of unpaid time off. This request was denied. Escriba's supervisor asked Escriba twice if she needed additional time off to care for her father, to which she answered "no."

Because Escirba's supervisor had denied her additional time off, she tried her luck with the superintendent. But he understood that she was requesting additional vacation time, and denied the request. Even though she lacked the approval for additional leave, Escriba remained off work and did not return until sixteen days after her approved vacation had ended. During this absence, Escriba made no effort to contact Foster Farms to seek more time off.

Foster Farms discharged Escriba under its "three day no-show, no-call rule," which dictates an automatic termination for employees who are absent for three work days without notifying the company or seeking time off. Escriba sued Foster Farms under the FMLA and the CFRA.

After the jury found for Foster Farms, Escriba appealed.

The Appellate Court Decision

Escriba argued that the underlying reason for her leave—caring for her ailing father—triggered FMLA protection, so Foster Farms was required to designate her leave as such, and to provide her with appropriate notices regardless of whether she had declined such a designation. The Ninth Circuit disagreed.

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The Ninth Circuit concluded that an employee can affirmatively decline to use FMLA leave, even if she would have qualified for it. The Ninth Circuit reasoned that under certain circumstances an employee might seek time off but still decline to invoke FMLA leave, in order to preserve her FMLA rights for future use. For example, an employee may opt to preserve FMLA leave when the employer's policy, as in this case, requires the FMLA leave to run concurrently against accrued vacation time. By simply exhausting paid vacation first, the employee could save the FMLA leave for future use.

Escriba, of course, also argued that, as a matter of fact, she did not expressly decline to take FMLA leave. But the jury had found otherwise, and the Ninth Circuit also concluded that the following evidence substantially supported this verdict: (1) Escriba twice answered "no" when asked if she needed more time in Guatemala, (2) the superintendent testified that Escriba asked only for "vacation time," not "family leave," (3) Escriba knew that only human resources—not her supervisor or the superintendent—handled all FMLA requests, as she successfully requested similar leaves on many prior occasions, and (4) the company policy required FMLA leave to run concurrently with accrued vacation, so Escriba had an incentive to decline her FMLA leave in order to save it for future use.

What *Escriba* Means For Employers

Although the employer here obtained a hard-fought victory, the case serves as a reminder that employers should ascertain and record whether an employee *intends* to take FMLA leave when the employee is eligible to take it. By ensuring that employees declare in writing their intent to take, or decline, FMLA or CFRA leave, employers will significantly reduce the likelihood of factual disputes and improve their chances to obtain a summary judgment.

Escriba's statement that employees have the right to decline FMLA leave should not be taken out of context. *Escriba* involved a leave to care for a family member; it did not involve a leave for the employee's own serious health condition. Thus, *Escriba* did *not* address whether an employee could decline FMLA entitlement—thereby saving it for future use—while demanding a leave to accommodate the employee's own disability, under the federal Americans with Disabilities Act or the California Fair Employment and Housing Act.

The *Escriba* decision should not be read to mean that an employee can decline FMLA or CFRA leave while seeking leave as a reasonable accommodation for the employee's own disability. An employer faced with that situation could argue that it is entitled to designate and count the leave against the employee's FMLA and CFRA entitlement, because a leave to accommodate the employee's disability that did not also exhaust any available FMLA and CFRA leave would *not* be a *reasonable* accommodation. Note, though, that we are aware of no authority precisely on point and that employers should consult their counsel if such a scenario arises.

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