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The FMLA Helps Those Who Help Themselves: Employees May Decline the FMLA's Protection

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When employees take leave to care for their own or a family member's serious medical condition, they are often entitled to the protection of the Family and Medical Leave Act ("FMLA" or "Act"). But what if an FMLA-eligible employee expressly declines to use FMLA leave? The Ninth Circuit recently answered that question in *Escriba v. Foster Farms Poultry, Inc.*, 743 F.3d 1236 (9th Cir. 2014) and held that employees are free to decline FMLA leave, but if they do so they are not entitled to the protections of the Act.

Background

Escriba asked her supervisor for two weeks of vacation to care for her sick father in Guatemala. After her supervisor granted her leave request, Escriba asked for an additional one to two weeks of unpaid leave, but her supervisor initially denied Escriba's additional request. Later, the supervisor asked Escriba whether she needed more time in Guatemala to care for her father. Escriba said she did not, and her supervisor told her to speak with the HR department if she later changed her mind. Escriba then spoke with the facility superintendent and asked him for an additional two weeks of vacation to care for her father, whom she described as "very ill." The superintendent said that he could not grant her request but instructed her to send a doctor's note or other documentation to the HR office. He did not inform Escriba about her FMLA rights.

Shortly after arriving in Guatemala, Escriba decided that she could not return to work within two weeks. But she did not contact Foster Farms to extend her leave. Sixteen days after her approved leave had expired, Escriba contacted her union representative, who informed her that she had likely already been terminated under the company's "three day no-show, no-call rule." Foster Farms indeed had terminated Escriba's employment for her violation of that rule.

Jury Reaches Verdict for Foster Farms

Escriba sued Foster Farms alleging violations of the FMLA and the California Family Rights Act, which applies the same standards as the FMLA. After completing discovery, both sides moved for summary judgment. The district court denied both parties' motions and ruled that there were genuine issues of material fact about whether Escriba's notice was sufficient to trigger the FMLA or whether she had declined FMLA protections. After a six-day trial, the jury returned a verdict for Foster Farms, finding that Escriba had expressly declined to use FMLA leave. The district court then denied Escriba's motion for judgment as a matter of law.

Court of Appeals Upholds Jury's Verdict

The Ninth Circuit Court of Appeals affirmed the district court's decision, holding that "an employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection." Because the jury found that Escriba expressly declined to use FMLA leave, she was not entitled to the return to work protections afforded by the Act.

The court acknowledged that the FMLA does not explicitly address whether employees may defer taking FMLA leave, but it found sufficient guidance in the Department of Labor's regulations, which require employers to determine "whether FMLA leave is being sought by the employee." The court reasoned that the DOL's language implied that employees could decline to seek FMLA leave. The court pointed out that a contrary rule would put employers in a difficult position because other courts have held that forcing an employee to take FMLA leave involuntarily might give rise to "a type of interference claim." *See e.g., Wysong v. Dow Chem. Co.*, 503 F.3d 441, 449 (6th Cir. 2007) (noting that "an involuntary-leave claim," which alleges that an employer forces an employee to take FMLA leave for a non-FMLA-qualifying reason, is "really a type of interference claim").

What It Means

Perhaps the most important take away from the court's decision in Escriba is the importance of documentation when making decisions regarding FMLA leave. Despite the district court's ruling in Foster Farms' favor—that employees may decline to take FMLA leave in certain circumstances—Foster Farms was still forced to defend itself in a jury trial. If it had required Escriba to decline FMLA leave in writing, it would have likely prevailed long before trial and at considerably less expense.

Businesses should also be aware that, under *Escriba*, employees have the right to decline FMLA leave. Many businesses have FMLA policies requiring employees to exhaust paid leave banks concurrently with FMLA leave. The Department of Labor expressly allows these policies under 29 CFR § 825.207. But under *Escriba*, the converse is not allowed. Employers may not require employees to exhaust FMLA leave concurrently with paid leave if the employees decline to use FMLA leave. Although declining FMLA leave means an employee will not be entitled to the Act's protections, some employees may choose to defer FMLA leave until they exhaust their paid leave banks, thus leaving a cushion of leave, albeit unpaid, for future needs. In those situations, employers should be careful not to unreasonably deny employees' paid-time-off requests because it is unclear whether denying paid time off for the purpose of forcing employees to use FMLA leave instead might constitute a new cause of action under the Act. What is clear is that *Escriba* does give employees the right to decline to exercise their FMLA rights, and employers should examine each situation individually while carefully documenting their decision-making process.