

Workers Can Choose Not To Use FMLA Leave, 9th Circ. Says

By **Abigail Rubenstein**

Law360, New York (February 25, 2014, 7:23 PM ET) -- The Ninth Circuit ruled Tuesday that an employee can affirmatively decline to use Family & Medical Leave Act leave, even if the worker's underlying reason for seeking time off would have invoked the law's protection, upholding a win for Foster Poultry Farms Inc.

The appeals court affirmed a California federal court's judgment that Foster Poultry Farms had not run afoul of the FMLA when it fired Maria Escriba for failing to show up for work or call within three days of her expected return date following a two-week trip to Guatemala to care for her ill father.

The company prevailed in the lower court, arguing that it was within its rights to fire her because Escriba had indicated that she wished to take vacation and not FMLA leave, but in her appeal Escriba contended that Foster Poultry Farms was required to designate her leave as FMLA-protected and to provide her with a notice of her rights under the FMLA regardless of whether she expressly declined such a designation.

The Ninth Circuit sided with the company, saying that the Department of Labor's requirement that an employer must ascertain whether FMLA leave is being sought strongly suggests that there are circumstances in which an employee might seek time off but intend not to exercise her rights under the FMLA. The court therefore concluded that employees may decline to use FMLA leave when they seek time off, even if it is for a legally protected reason.

"We are very gratified that the Ninth Circuit agreed that by preserving an employee's right to determine the status and type of their leave requests, both the employee and the employer benefit," Mayer Brown LLP's Carmine Zarlenga, who represents Foster Poultry Farms, said. "Otherwise, the burden placed on employers would have been disproportionate, if not extreme."

Explaining that the plaintiff was pushing for a bright-line rule that any time an employee requests leave for an FMLA-qualifying reason the employer would have to count it as FMLA leave, Zarlenga said "I think that would be a trap for a lot of employers and would be a 'gotcha' kind of rule and not very practical."

Escriba, a former employee in Foster Poultry Farm's Turlock, Calif., turkey plant, filed suit in 2009 after she was discharged for violating the company's "three day no-show, no-call rule" for union workers at the plant.

Following a jury trial that ended with a verdict in the employer's favor, the district court rejected

Escriba's motion for a judgment as a matter of law.

Escriba appealed not only the denial of that motion, but also an earlier decision to deny her bid for summary judgment.

But the appeals court concluded that the lower court got it right, stating that the company had presented substantial evidence that Escriba had intended to take vacation rather than FMLA leave and explained that in doing so she was preserving her ability to take more leave time under company policy.

Noting that the FMLA does not expressly state whether an employee may defer the exercise of FMLA rights under the statute, the appeals court nonetheless determined that it would not make sense to require employers to make workers use FMLA leave even when they do not wish to do so.

“Holding that simply referencing an FMLA-qualifying reason triggers FMLA protections would place employers like Foster Farms in an untenable situation if the employee’s stated desire is not to take FMLA leave,” the court's opinion said. “The employer could find itself open to liability for forcing FMLA leave on the unwilling employee.”

The Ninth Circuit also determined that the lower court had not erred in allowing evidence to be presented concerning Escriba's prior use of FMLA leave.

However, the Ninth Circuit also rebuffed Foster Poultry Farm's cross-appeal of the district court's decision not to award the company its costs associated with the suit, finding that the district court did not abuse its discretion in declining to tax costs.

“We’re disappointed in the court’s ruling on the FMLA issue,” Elizabeth Kristen of the Legal Aid Society - Employment Law Center, who represented Escriba, told Law360. “But we’re pleased that the court rejected the attempt by Foster Farms, a multi-billion dollar company, to recover thousands of dollars in costs from an indigent client.”

“The court affirmed that this was a close case involving an important legal question, and that imposition of costs on a low-wage worker like Ms. Escriba could chill enforcement of civil rights laws,” she said.

Escriba is represented by Robert Borton, Elizabeth Kristen and Sharon Terman of The Legal Aid Society - Employment Law Center.

Foster Poultry Farms is represented by Carmine R. Zarlenga and Michael B. Kimberly of Mayer Brown LLP and by Julia A. Follansbee of Follansbee & Associates.

The case is Maria Escriba v. Foster Poultry Farms Inc., case number 11-17608, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Emily Kokoll.