

How They Won It: Mayer Brown Forges FMLA Opt-Out Path

By Alex Lawson

Law360, New York (March 19, 2014, 2:27 PM ET) -- In securing clarification that employees may affirmatively decline coverage under the Family and Medical Leave Act even if departing work for an FMLA-covered reason, attorneys for Mayer Brown LLP kept the factual record at the fore even in the face of a vigorous interest group on the plaintiffs bar to seal a win for Foster Poultry Farms Inc.

Mayer Brown trial specialist Carmine R. Zarlenga and his team on Feb. 25 successfully convinced the Ninth Circuit that Foster Farms had not violated the FMLA when it fired Maria Escriba from its Turlock, Calif., turkey plant 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 had prevailed in the lower court, arguing it was within its rights to fire Escriba because she 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.

For Zarlenga, the victory at the Ninth Circuit served as a microcosm of the ongoing conflict in the dispute dating back to the 2011 trial against Escriba, backed by the Legal Aid Society - Employment Law Center. Zarlenga said that while the plaintiff's counsel was seeking to craft new law on the triggering of FMLA coverage, Mayer Brown sought to highlight factual inconsistencies in her story.

"I felt it was really important on appeal to demonstrate that this was a factual case, and we spent a lot more time than we would normally spend on the factual statement in the brief," Zarlenga told Law360. "I think the way we built our factual statement really had an impact, because the judge who wrote the opinion really focused on the facts as well and then drew the inferences and conclusions from those facts."

Zarlenga noted that some could view that strategy as risky in the generally plaintiff-friendly Ninth Circuit, since appeals courts are more often concerned with questions of law than questions of fact. But the seeds for the strategy Mayer Brown unfurled on appeal were planted three years earlier, when the firm joined the dispute ahead of a jury trial.

Upon taking over for the Foster Poultry Farms' local counsel after the company came up short in a summary judgment motion, Zarlenga immediately began pouring over the discovery that already taken place and began to notice various inconsistencies in Escriba's description for her departure and her

attempts to contact her employer while she was away, Zarlenga said.

The precise nature of Escriba's efforts to contact the company was critical, as the decision to terminate her was based on the violation of the company's "three day no-show, no-call rule" for union workers at the plant.

Despite Escriba's claims that she had attempted to contact the plant, Zarlenga said he and his team had unearthed testimony Escriba gave during an unemployment hearing in which she said under oath that she had failed to contact the company during her time in Guatemala because she forgot to do so.

The jury found in favor of Foster Poultry Farms, and Escriba shortly thereafter renewed her motion for judgment as a matter of law, which the court rejected, setting the scene for the battle at the Ninth Circuit.

At the trial court level, Zarlenga had worked closely with Mayer Brown employment attorney Maritoni D. Kane. Once the case ascended to the Ninth Circuit, Zarlenga called on the expertise of Mayer Brown attorney Michael Kimberly, an appeals court specialist.

At the outset of the proceedings, Escriba's feud with Foster Poultry Farms did not appear to be poised for appellate-level litigation, as such cases often end with settlements. But Zarlenga said that the case was doggedly argued by Escriba's lawyers at the Legal Aid Society, pushing the matter to a new level.

Kane noted that when Mayer Brown came into the case ahead of trial, its attorneys were inundated with a hefty record of discovery as opposed to the handful of depositions that usually accompanies a case brought by a single employee against a company.

"They had deposed several different levels of managers and several different people from human resources," Kane told Law360. "The resources they were throwing at this case were significant when compared to run-of-the-mill cases."

In convincing the trial court and the Ninth Circuit that Foster Poultry Farms had submitted substantial evidence to show that Escriba intended to take a vacation instead of FMLA leave, Zarlenga said that he and his team had prevented the establishment of a potentially costly precedent for employers, which would have been forced to manage employee leave requests at a much more granular level and risk a flood of additional litigation.

From a strategic standpoint, Kimberly explained that even though it would have been much easier for the company to settle Escriba's claims, which he called "meritless," it was important to take a firm stance on halting such suits.

"If Foster Farms had settled, they would have sent the message that even when plaintiffs file facially meritless cases, the company will settle and give them a big chunk of money," Kimberly said. "It would encourage plaintiffs with equally meritless in the future to file claims and the company would find itself being sued far more frequently than it is."

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.

--Additional reporting by Abigail Rubenstein.

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