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# Recent Case Notes

## EMPLOYMENT/ FMLA RIGHTS

### *Ninth Circuit affirms that an employee may affirmatively decline to exercise leave rights under FLMA*

In *Escriba v. Foster Poultry Farms, Inc.*, 2014 WL 715547 (9th Cir 2014), the Ninth Circuit affirmed the district court's judgment, after a jury trial, that an employee can affirmatively decline to exercise leave rights under the Family and Medical Leave Act (FMLA), even when the underlying reason for seeking leave would have invoked FMLA protection.

In *Escriba*, the plaintiff requested and received two weeks off to care for her ailing father. She did not return to work on her scheduled date and was terminated in accordance with the employer's "no call/no-show rules." At trial, the employer introduced evidence that plaintiff, a long-time employee, specifically asked for "vacation" from her supervisor; that the plaintiff declined to request FMLA leave from the company's human resources department; that the plaintiff had taken numerous prior FMLA leaves; and, therefore, that she knew how to arrange such a leave with the human resources department.

Plaintiff argued that her employer should have designated her leave as FMLA-protected regardless of whether she expressly declined such a designation. The Ninth Circuit disagreed, concluding that it is not tenable to place employers in a situation where they "force" FMLA leave on an unwilling employee. The court held that an employee can affirmatively decline to use FMLA leave, noting that an employee may be motivated to initially decline FMLA leave and then request it at a later date, thereby preserving future leave time.

The *Escriba* case is fact-specific but raises interesting issues. Currently, many employers automatically designate leave as FMLA whenever there is a qualifying reason. That practice may need review, given the potential for a claim that such automatic designation may actually interfere with an employee's FMLA rights. See, e.g., *Wyson v. Dow Chem. Co.*, 503 F3d 441 (6th Cir 2007) (cited in *Scribe* for the proposition that an involuntary leave claim is really a type of FMLA interference claim). ☛

— Submitted by Kate A. Wilkinson,  
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