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Declining FMLA Leave Includes Your FMLA Lawsuit, Court Says

March 23, 2014 | | Employee Health Issues,Labor And Employment

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At least one court has held that an employee who declined FMLA leave and chose to use vacation leave instead cannot later invoke the protections of the law. This comes from the Ninth Circuit Court of Appeals, the federal appeals court for California and other far western states, so employers in other states should not rely on this decision but it is instructive. (And of course it is almost always advisable to consult with counsel before terminating an employee who is absent for her own or a family member's health condition.) *Escriba v Foster Family Poultry Farms* is, among other things, a testament to a very persistent plaintiff and/or her lawyers. Ms. Escriba had to leave the country to care for an ill family member. While it sounds from the court's decision that her English was limited, the record indicated that HR asked her about using FMLA and she declined. She took vacation but did not return when she said she would, and failed to communicate about that. The court that she contradicted herself on her explanation of this fact, but ultimately acknowledged she simply forgot. Her husband also worked at the company, and she had a union. The company fired Ms. Escriba for failing to follow its absence reporting policy, and Ms. Escriba filed a lawsuit saying the company interfered with her rights under the FMLA and that, even if she chose to use vacation rather than FMLA leave, she was entitled to those protections. The company of course said that she declined FMLA leave and therefore was not entitled to invoke the statute after termination. Ms. Escriba actually filed a motion for summary judgment – not unheard of but not common for plaintiffs in employment cases – which was denied. She had her day in court, six of them actually in a six-day jury trial, and the jury quickly returned a verdict for the company. She appealed to the Ninth Circuit, normally one of the less employer-friendly courts of appeal, and the three-judge panel unanimously denied her appeal. In some ways, Ms. Escriba seems sympathetic – she had an ill family member, was a low wage worker, and arguably might not have fully understood the various options. (Certainly employers can understood being confused by the FMLA!) But it appears she had credibility issues (at least with the appeals court), and even assuming a language barrier, certainly an employer can expect basic communication about when you are going to be at work. If nothing else, the case stands for one of the few things an employer can count on under the leave laws – employers can expect reasonable communication from employees. As noted above, employers should use caution in relying on this decision for the more general principle of employees opting out of FMLA leave and consult with counsel if faced with such an issue.

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