Employer's Due Diligence Curtails FMLA Liability

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Is an employer exposed to liability when an employee purposely chooses not to take leave provided for by the Family & Medical Leave Act ("FMLA"), despite qualifying for FMLA leave, and the employee is subsequently terminated while out of work?

Recently, the United States Court of Appeals for the Ninth Circuit issued an "employer friendly" opinion, holding that it was legally possible for an employee to refuse FMLA protection. Although this opinion is not binding on courts in our federal circuit, there are lessons to be learned from this case about ascertaining whether an employee is attempting to take FMLA leave.

In *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236 (9th Cir. 2014), the Plaintiff, a long term employee of Foster, requested time off to care for her ailing father in Guatemala, which could have been a qualifying event triggering FMLA job-protected leave. Testimony revealed conflicting accounts of the type of leave requested by Escriba, and to complicate matters, Escriba's second language was English. The evidence at trial revealed that Escriba's direct supervisor, a native English speaker, spoke with Escriba on multiple occasions concerning the type of leave requested. The supervisor testified that Escriba requested vacation leave (as opposed to FMLA leave) when she said "Linda, please for me, Linda, for me, vacation." The supervisor spoke with the plaintiff on subsequent occasions and even involved a Spanish-speaking supervisor to interpret the leave requests. From the employer's perspective, Escriba declined FMLA leave after repeated discussions. Paperwork was completed for the Plaintiff's two-week "vacation" leave, and she was told to contact Human Resources if she needed additional time off.

Escriba did not report back to work after the two weeks of vacation elapsed, and she was terminated for violating the company's 3-day no show/no call attendance rule. Escriba subsequently filed a lawsuit against the company alleging interference with her FMLA rights. A jury returned a verdict in favor of the company and assessed costs against Escriba.

On appeal, Escriba argued that because she notified two supervisors of an FMLA-qualifying event, FMLA's protections were activated, regardless of whether she declined FMLA leave. Thus, she argued, she should not have been terminated during the absence from work. Moreover, she argued that it was "legally impossible" to refuse FMLA job–protected leave, as such would be an impermissible "waiver" of rights.

The 9th Circuit looked to Department of Labor ("DOL") regulations for guidance on whether an employee can defer FMLA rights, as the text of the law is not explicit on that point. The regulations state that an "employer will be expected to obtain any additional required information through informal means" from an employee after discovering a potential FMLA-triggering event. 29 C.F.R. § 825.303(b). The employee is expected to "provide more information" during this "informal" process. *Id.* As part of this process, the employer should inquire further about whether FMLA leave is being sought by the employee and obtain the necessary details of the requested leave. 29 C.F.R. § 825.302(c),

The court in Escriba held that the employer's obligation to ascertain whether FMLA was being "sought" suggests an employee might seek leave, but intend not to exercise FMLA rights. Accordingly, the court concluded that an employee can decline to use FMLA leave, even if the reason for seeking leave would qualify for FMLA protection. Moreover, the Court noted that by simply declining FMLA there is no "waiver" of rights. To the contrary, declining the present exercise of FMLA leave in order to preserve it for a later date is not a "waiver," rather, it is a deferral. In fact, it was within the company's policy that unpaid FMLA leave was to run concurrently with paid vacation leave, unless the worker expressly declined FMLA to preserve it for a later date.

This case is a good reminder for all employers that they should be cautious and exercise due diligence when faced with a potential FMLA-triggering event. If in doubt, the employer should provide the applicable FMLA Notice of Eligibility (Form 381) and applicable certification form to the employee, and document the file as having done so. By providing the FMLA paperwork to the employee, the employer thus transfers the responsibility to the employee to timely complete and submit the paperwork should the employee want to pursue FMLA leave. If the employee fails to timely submit the forms, it will be near impossible for the employee to later claim that the employer interfered with FMLA rights. This is all the more important in situations involving a language barrier.

For questions or more information, please contact one of MGC's employment law attorneys.

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