FMLA INSIGHTS: The GOOD, The BAD, & The UGLY

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The Family and Medical Leave Act ("FMLA") requires covered employers to provide unpaid leave for qualified medical and family reasons. Two recent opinions—one from the Sixth Circuit and one from a Sixth Circuit judge sitting by designation in the Ninth Circuit—could have strong implications for employers covered by the FMLA.

The first opinion, *Srouder, et al v. Dana Light Axle Manufacturing,* 725 F.3d 608 (6th Cir. 2013), involved the extent to which an employer can implement notice and procedural requirements for employees seeking leave under the FMLA. The employer in *Srouder,* Dana Light, had a policy requiring a medical certification to support a request for FMLA leave because of a serious health condition. Dana Light also had a two-day, no-call-no-show policy. In other words, if for two consecutive shifts an employee failed to call in to work to report that he or she would be absent, then Dana Light considered that employee to have voluntarily quit.

In September 2009, White, the employee who filed the appeal, notified Dana Light that he was having surgery for a hernia in October. At the time of his notification, White did not provide a medical certification that complied with Dana Light's FMLA policy. On October 1, 2, 5, & 6, White neither reported to work nor called in to report that he would be absent. The reason(s) for White's absences were not made clear in the opinion. On October 6, Dana Light sent White a letter informing him that he had been terminated under Dana Light's two-day, no-call-no-show policy. On October 7, the day of White's hernia surgery, White finally provided Dana Light with a medical certification that complied with Dana Light's FMLA policy. On October 8, White received the termination letter.

Following his termination, White file a lawsuit stating a claim for FMLA interference. The district court ultimately granted Dana Light's motion for summary judgment, *Srouder,* 2012 WL 1080411 (E.D. Ky. Mar. 30, 2012), and White perfected his appeal. The Sixth Circuit identified the question before it as: "whether an employer may impose and enforce its own internal notice requirements, even if those requirements go beyond the bare minimum that would generally be sufficient under the FMLA to constitute proper notice." The Sixth Circuit plainly decided that yes, an employer may impose and enforce its own internal notice requirements. "[A]n employer may enforce its usual and customary notice and procedural requirements against an employee claiming FMLA-protected leave," explained the Sixth Circuit, "unless unusual circumstances justify the employee's failure to comply with the employer's requirements." The Sixth Circuit based its ruling in part on the 2009 revisions to the FMLA regulations, specifically the revisions to Section 825.302(d). The revised Section 825.302 explicitly permits employers to condition FMLA-protected leave upon an employee's compliance with the employer's usual notice and procedural requirements, absent unusual circumstances. *See* 29 C.F.R. § 825.302(d). Neither the regulations nor the *Srouder* court addressed what circumstances may otherwise be considered "unusual."

The second opinion, *Escriba v. Foster Poultry Farms, Inc.,* 2014 WL 715547 (9th Cir. Feb. 25, 2014) (Gilman, J.), decided whether an employee can affirmatively decline to use FMLA leave. A three-judge panel that included Sixth Circuit Judge Ronald Lee Gilman, who sat by designation, decided *Escriba.* The *Escriba* court held that "an employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeing the leave would have invoked FMLA protection."

In November 2007, Escriba, who speaks English as a second language, met with her supervisor to discuss taking time off to care for her ailing grandfather in Guatemala. Escriba told her supervisor: "please for me . . . vacation . . . father is no good . . . and is in hospital in Guatemala." Escriba's supervisor told her that she (Escriba) could take vacation. Escriba's supervisor later used a translator to confirm with Escriba that Escriba wanted only to take two weeks of vacation to go visit her sick grandfather. Escriba was never instructed regarding her rights and obligations under the FMLA nor did any Foster Farm employee take any steps to designate Escriba's time off as FMLA leave. Escriba took her approved vacation, but spent longer than two weeks in Guatemala. As a result, Foster Farms terminated Escriba under its three-day, no-call-no-show policy, which was similar in substance to the policy used above by Dana Light.

After her return from Guatemala, Escriba sued Foster Farms for interference and retaliation under the FMLA, along with a number of other claims. Following a jury verdict for Foster Farms, the district court entered judgment in its favor, *Escriba,* 2011 WL 4565857 (E.D. Cal. Sept. 29, 2011). *Escriba* appealed the district court's ruling. As it relates to Escriba's FMLA claim, the Ninth Circuit identified the issue before it as whether "Foster Farms was required to designate [Escriba's] leave as FMLA-protected and to provide her with notice of her rights under the FMLA regardless of whether she expressly declined such a designation." The Ninth Circuit held that Foster Farms was not required to do so. Although the FMLA does not expressly state whether an employee may defer the exercise of FMLA rights under the statute, explained the Ninth Circuit, an employer's obligation to 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 his or her rights under the FMLA, for example, in order to preserve leave for future use. Notably, the Ninth Circuit made clear that affirmatively declining FMLA leave is "fundamentally different" from permanently relinquishing one's FMLA rights. The latter, permanently relinquishing one's FMLA rights, for example, under an employer's collective bargaining agreement, would be unlawful. How *Escriba* will be adopted or distinguished by the Circuits remains to be seen; however, the *Escriba* court (i.e., Judge Gilman of the Sixth Circuit) used previous decisions from both the Sixth and Seventh Circuits to justify the holding in *Escriba.*

The *Srouder* opinion is a great case for employers. It provides employers with good defenses against certain FMLA claims where a plaintiff does not comply with an employer's call-in procedures and notice requirements. It is important now for employers to review their policies and change them if necessary to better take advantage of the new regulation and court decision. *Escriba,* on the other hand, presents employers with a troubling dilemma. Its holding runs contrary to what is thought to be the FMLA mandate that if an employee gives notice of an FMLA qualifying reason for leave, then the leave must be designated as FMLA leave. To deviate from this standard by allowing employees to choose when to take FMLA leave will only add to the confusion of whether to designate leave as FMLA leave, and in many cases will result in a he-said, she-said dispute for a jury to determine (as in *Escriba*). But for the fact that a Sixth Circuit judge decided *Escriba,* it would be easy for employers in this Circuit to disregard this Ninth Circuit decision.

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