The Ninth Circuit's Decision in Escriba v. Foster Poultry Farms, Inc. May Limit the Use of Involuntary Leave and Why That Is Okay

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I. INTRODUCTION

Once upon a time, America’s social landscape was dominated by the archetypical traditional family: a two-parent, one-income household where the husband worked and the wife stayed at home to raise the children. In 2013 however, only nine percent of all U.S. households consisted of married couples with children where the husband was the sole breadwinner.1 In response to this decrease in traditional families, Congress enacted the Family and Medical Leave Act (FMLA or the Act)2 in 1993.3 The FMLA was intended to help families balance the demands of the workplace with the needs of their changing family dynamics.4 The Act permits employees to take unpaid leave from the workplace for qualified medical and family reasons without fear of termination.5

In the years since its passage, the FMLA has served as an important tool for protecting employee rights in the workplace. However, as employers struggled with compliance and employees began to abuse their statutory leave, case law interpreting the Act provided a unique method of empowering employers as well. Specifically, most federal courts have recognized an employer’s independent right to designate a leave of absence as FMLA leave, even if an employee explicitly states a desire not to use such leave.6 Known as placing an employee on “involuntary leave,” this practice offers employers greater control when complying with FMLA regulations while simultaneously allowing them

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4. Id. § 2601.
5. Id. §§ 2601–2654.
to combat abuse. In particular, this method has provided some protection against employee "leave hoarding," a type of abuse where employees exploit the FMLA to stockpile more leave than they are eligible to receive.\(^7\)

However, a recent court of appeals decision in the Ninth Circuit declared that an employer may no longer place an employee on FMLA leave involuntarily,\(^8\) thus creating a split on the issue with other circuits, including the Sixth Circuit. If the Ninth Circuit's reasoning is adopted by other circuits, it may open the door to increased abuse of the Act in the future.

This Casenote ultimately will argue that, despite the concerns about leave hoarding, the Sixth Circuit should adopt the Ninth Circuit's reasoning in *Escriba v. Foster Poultry Farms, Inc.*,\(^9\) as it is more consistent with the legislative intent of the FMLA and provides additional freedom for employees to designate when they take time off work. Part II of this Casenote will lay the foundation for this argument by discussing the history of the FMLA and providing an overview of the language of the statute. Part III is dedicated to the facts, procedure, and rationale of two cases: *Wysong v. Dow Chemical Company*\(^10\) and *Escriba v. Foster Poultry Farms, Inc.*\(^11\) *Wysong*, a Sixth Circuit decision, was one of the first authorities on the subject of involuntary leave and has served as a guide for other districts.\(^12\) *Escriba* is the recent Ninth Circuit decision that shakes the foundations of the reasoning in *Wysong*. Part IV analyzes these decisions and their implication on current and future employees and employers. Finally, Part V will conclude that the Sixth Circuit should adopt the rule set forth in *Escriba*.

II. BACKGROUND

The FMLA is a surprisingly concise statute and provides employees with certain rights that cannot be waived by an employer. The statute also regulates the manner in which qualified employees request and take leave under the Act. While FMLA leave is limited, the legislative history suggests the FMLA was meant to be interpreted liberally and construed to provide broad protection for employees, including greater

\(^7\) *Id.*

\(^8\) *Escriba* v. Foster Poultry Farms, Inc., 743 F.3d 1236 (9th Cir. 2014).

\(^9\) *Id.*

\(^10\) *Wysong* v. Dow Chem. Co., 503 F.3d 441 (6th Cir. 2007).

\(^11\) *Escriba*, 743 F.3d 1236.

\(^12\) See e.g., Pagel v. Tin Inc., 695 F.3d 622, 630 (7th Cir. 2012); Smothers v. Solvay Chemicals Inc., 740 F.3d 530 (10th Cir. 2014).
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flexibility when requesting time off from work.

A. The Family and Medical Leave Act

The Family and Medical Leave Act of 1993 allows eligible employees to take a maximum of twelve weeks of unpaid leave per year without fear of termination. In the Act, Congress provided the Secretary of Labor with the authority to administer the FMLA. Thus, the Department of Labor (DOL) has issued a series of regulations that aid in the interpretation of the statute. Therefore, both the statute and the ensuing DOL regulations have limited FMLA leave in a number of ways.

First, the FMLA applies only to employers with fifty or more employees. Second, the Act applies only to leaves of absence for specified reasons. These reasons include: (a) the birth of a child, (b) the adoption of a child or placement of a foster child, (c) the care of a spouse or immediate family member who has a serious health condition, or (d) the recovery from a serious health condition that makes employees unable to perform the functions required by their job. A “serious health condition” is defined by the statute as a physical or mental condition that involves: (a) inpatient care in a hospital, hospice, or residential medical care facility; or (b) continuing treatment by a health care provider. Third, leave is available only to “eligible employees.” An eligible employee is a person who has been an employee of the company for at least twelve months and has worked at least 1,250 hours during the twelve month period immediately preceding the request for leave. Finally, an employer may require certification.


15. These regulations are codified in 29 C.F.R § 825 (2013).


17. 29 U.S.C. § 2611(4)(A)(i). The Act also applies to work sites that have less than fifty employees when there are a total of fifty or more employees within seventy five miles of the worksite in question. Id. § 2611(2)(b)(ii).

18. Id. § 2612(a)(1)(A)-(D). These are known colloquially as “FMLA qualifying events.”

19. Id. § 2612(a)(1)(A)-(D). The Act also allows extended leave to military members and their families. However, the rules governing military leave often differ from ordinary FMLA leave. Accordingly, military leave will not be discussed in this article for the sake of brevity.

20. Id. § 2611(11).

21. Id. § 2611(2).

22. 29 U.S.C. § 2611(2)(a)(i)-(ii). The 12-month period may be consecutive or non-consecutive. See Thomas v. Pearle Vision, Inc., 251 F.3d 1132 (7th Cir. 2001). 1,250 hours is approximately twenty
by a health care provider for a leave based on a serious health condition and has the power to request a second medical opinion related to the illness from a different health care provider.\textsuperscript{23}

1. Protections Provided by the Act

If an employee qualifies for leave under the FMLA, he or she immediately is afforded a number of protections. For example, the Act requires employers to allow the leave of absence and to restore employees to their former positions or an equivalent position upon their return.\textsuperscript{24} Furthermore, the Act requires employers to maintain health insurance coverage for employees taking FMLA leave.\textsuperscript{25} The FMLA also prohibits employers subject to the Act from interfering with, restraining, or denying the exercise of any right provided under the Act.\textsuperscript{26}

2. Unpaid Leave

While FMLA leave generally is unpaid,\textsuperscript{27} the Act and Code of Federal Regulations (Code) allows employees to use accrued paid leave at the same time as their FMLA leave.\textsuperscript{28} This allows the employee to receive pay while still benefitting from the protections of the FMLA. However, a paid leave counts against both the employee’s accrued time off and their twelve week FMLA leave, effectively depleting the two leaves concurrently.\textsuperscript{29}

The Code also dictates that an employee’s ability to use paid leave and FMLA leave concurrently is governed by the terms and conditions of the employer’s standard leave policy.\textsuperscript{30} Accordingly, the employee must comply with any additional requirements imposed by the employer to receive the benefit of the FMLA protections.\textsuperscript{31} In certain circumstances, the Code also permits employers to require employees to

\begin{itemize}
\item five hours per week. This threshold often means part-time employees do not qualify for FMLA leave.
\item See 29 U.S.C. § 2611(2)(a)(i)-(ii).
\item id. § 2614(a)(1)(A)-(B).
\item id. § 2614(c).
\item id. § 2615(a)(1); see also Wysong v. Dow Chem. Co., 503 F.3d 441, 447 (6th Cir. 2007).
\item 29 U.S.C. § 2612 (c).
\item 29 C.F.R. § 825.207(a). Technically, an employee is allowed to “substitute” accrued paid leave for FMLA leave. However, the definition of substitute provides that “the paid leave provided by the employer and accrued pursuant to established policies of the employer will run concurrently with the unpaid FMLA leave.” Id. An employee potentially could use accrued leave for the full twelve weeks.
\item id.
\item id.
\item id.
\end{itemize}
take paid leave concurrently with FMLA, even if the employee otherwise would decline to do so.\textsuperscript{32} Conversely, non-FMLA leave, either unpaid or paid, does not affect an employee’s entitlement to twelve weeks of FMLA leave.\textsuperscript{33} For example, paid sick leave due to a medical condition that is not a “serious health condition” does not count against the twelve week FMLA allotment.

3. Notice Requirements

The FMLA also requires that an employee notify his employer if he intends to utilize the FMLA leave.\textsuperscript{34} When the need for leave is foreseeable, employees must provide employers with at least thirty days of advance notice before the leave begins.\textsuperscript{35} If the reason for leave is not foreseeable, an employee must notify the employer as soon as is practicable.\textsuperscript{36} As soon as is practicable generally means that an employee must notify the employer on either the same day or next business day of the need for leave.\textsuperscript{37} Employees generally are expected to follow the employer’s established procedures for requesting leave.\textsuperscript{38}

4. Remedies Under the Act

Should a FMLA violation occur, any eligible employee may bring a civil action against his employer.\textsuperscript{39} Penalties for a violation are harsh and include employer liability for lost wages, out-of-pocket expenses, double damages, equitable relief, and attorneys’ fees.\textsuperscript{40} Typically, an employee alleges a violation by using one of two recovery theories: the interference theory or the retaliation theory.\textsuperscript{41} Under the interference theory, an employee claims the employer has interfered with or denied a right provided by the FMLA.\textsuperscript{42} To succeed on this claim, the employee must prove that: (1) the employee is an eligible employee, (2) the defendant is an employer, (3) the employee was entitled to leave under the FMLA, (4) the employee gave the employer notice of his or her

\textsuperscript{32} Id.
\textsuperscript{33} 29 C.F.R. § 825.207(a).
\textsuperscript{34} Id. §§ 825.302-303; see also MAYER, supra note 13.
\textsuperscript{35} 29 C.F.R. §§ 825.302-303.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} 29 U.S.C. § 2617(a).
\textsuperscript{40} Id.
\textsuperscript{41} 29 U.S.C. § 2615(a)(1) and 29 U.S.C. §2615(a)(2), respectively. For the sake of simplicity, this Casenote will only address the interference theory.
\textsuperscript{42} See 29 U.S.C. § 2615(a)(1).
intention to take leave, and (5) the employer denied the employee the FMLA benefits to which he or she was entitled.\textsuperscript{43} The retaliation theory states that an employer is prohibited from retaliating against an employee for having exercised any FMLA right.\textsuperscript{44}

5. Involuntary Leave

The Sixth Circuit recognizes that an employee’s FMLA rights may be interfered with when the employee is placed on involuntary leave in violation of the FMLA.\textsuperscript{45} Accordingly, an employee may have a cause of action against his or her employer when placed on FMLA leave involuntarily.\textsuperscript{46} As in any civil suit, the employee also must have standing to sue. In the Sixth Circuit, an employee has standing only if the employee seeks FMLA leave and that leave is not available because the employee was wrongfully forced to use FMLA leave in the past.\textsuperscript{47}

Interestingly, the FMLA and the DOL Regulations do not address whether an employer has the ability to place an employee on FMLA leave involuntarily. Thus, an employer’s ability to place an employee on FMLA leave involuntarily is governed by case law. However, most federal courts recognize an employer’s independent right to designate a leave of absence as FMLA leave for FMLA-qualifying events, even if an employee explicitly declines to designate it as such.\textsuperscript{48} To exercise this right, the employer must show reasonable verification that the leave indeed was taken for a FMLA-qualifying event and must provide notice to the employee.\textsuperscript{49}

Typically, involuntary leave suits arise from one of two scenarios. The first scenario occurs when an employee takes time off from work for a non-FMLA-qualifying event and the employer wrongfully places the employee on FMLA leave, thus depriving the individual of the benefit of FMLA protection in the future.\textsuperscript{50} The second scenario occurs when an employee takes non-FMLA leave for a FMLA-qualifying event and subsequently is terminated.

\textsuperscript{43} Wysong v. Dow Chem. Co., 503 F.3d 441, 447 (6th Cir. 2007).
\textsuperscript{44} 29 U.S.C. § 2615 and 29 CFR § 825.220(c).
\textsuperscript{45} See generally id.
\textsuperscript{46} Id. at 448-49.
\textsuperscript{47} Id. at 449.
\textsuperscript{48} Asbrock, supra note 6.
\textsuperscript{49} Id.
6. Relationship to State Law

Because the FMLA is federal law, both the Supremacy Clause of the Constitution and the language of the FMLA itself mandate that the Act preempts any state law related to leave of absence.\textsuperscript{51} This preemption is consistent with Congress's intent to create a unified national standard for medical leave.\textsuperscript{52} However, this declaration is subject to one very large caveat—nothing in the FMLA supersedes any state law that provides more benefits to employees for family or medical leave.\textsuperscript{53} Therefore, individual states are free to pass modified statutes pertaining to leave so long as they do not restrict the rights provided by the FMLA. While Ohio has not passed its own comprehensive state Medical Leave Act, the legislature has passed additional statutes relating to parental leave (Ohio Act).\textsuperscript{54} However, the Ohio Act only applies to individuals who are employed by the state government and does not affect private employers.\textsuperscript{55}

In Ohio, public employees who work for thirty or more hours per week are entitled to six weeks of leave for the birth or adoption of a child under the Ohio Act. In contrast to the FMLA, the Ohio Act provides that four of the six weeks are paid, at seventy percent of the employee's base pay. The statute mandates the first two weeks of the leave are a "waiting period" and thus are unpaid.\textsuperscript{56} Finally, if an employee is eligible to receive FMLA leave, he or she has the option to use either FMLA leave or leave under the Ohio Act, whichever is more generous.\textsuperscript{57} If the employee chooses to take leave under the Ohio Act, such leave also will count against the twelve week FMLA entitlement if the leave otherwise would have been available under the FMLA.\textsuperscript{58}

The resulting interplay of these statutes means that public employees may have access to more leave than the FMLA provides. For example, an employee who has used her entire twelve weeks of FMLA leave to

\textsuperscript{51} 29 U.S.C. § 2651.
\textsuperscript{52} S. REP. NO. 103-3, at 3 (1993).
\textsuperscript{53} 29 U.S.C. § 2651(b). Examples provided by the senate include, among others, an Oregon law the provides twelve weeks of parental leave for eligible employees who work for employers of twenty-five or more persons, rather than the fifty required by the FMLA, and a California law that provides up to sixteen weeks of leave over two years for the birth or adoption of a child. S. REP. NO. 103-3, at 13.
\textsuperscript{54} OHIO REV. CODE ANN. § 124.136 (West). Nor has any other state in the Sixth Circuit passed its own comprehensive state FMLA laws.
\textsuperscript{55} Id.
\textsuperscript{56} Id. However, the employee may use his accrued paid time off during this waiting period. If he chooses to do so, such use will diminish leave under both the Ohio Act and the employee's accrued paid leave.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
care for a serious medical condition at the beginning of the year can take an additional six weeks off work if she has a child later in the year. Alternatively, a public employee can use leave provided by the FMLA and the Ohio Act to receive four weeks of paid time off without using accrued personal leave, thus allowing that employee to save personal leave for use at a future date.

B. Legislative History

In the forty years before the Act was passed, Congress observed a dramatic change in the landscape of the American workforce. In that time period, the number of women in the workforce increased by 200%, the number of single-income households decreased, and employees faced increasing demands in the workplace. After finding a lack of employment policies designed to accommodate working parents, Congress introduced the first family leave legislation in 1985. Some eight years later, the final form of the FMLA was signed into law, guaranteeing employees a minimum amount of annual leave to balance the demands of their personal and professional lives. The Act was based on the same principles as child labor laws, minimum wage laws, Social Security laws, safety and health laws, pension and welfare benefit laws, and other labor laws that establish minimum standards for employment.

While extensive, the legislative history of the FMLA demonstrates a consistent purpose throughout: to provide both beneficial rights and greater job security to employees. For example, it was Congress’s desire for the FMLA to protect an abundant and wide range of employees, rather than a particular class of individuals. This is most noticeable in Congress’s decision to extend FMLA leave to fathers, in addition to mothers, for the birth of a child. Furthermore, Congress sought to protect a wide range of benefits for these employees, including the maintenance of health benefits, the restoration to a same or equivalent position upon the employees’ return from leave, and protection against termination. It also believed the Act would lead to

61. Id.
63. See generally S. REP. NO. 103-3 (1993). The Senate Report discusses changing economic and familial situations for, inter alia, women, men, the elderly and low-wage workers. The adopted version of the Act provides protections to low-wage workers, employees of all ages, males and females, and those with serious health conditions or whose family members suffer from such a condition.
64. Id. at 12-13.
cost savings for employers by reducing hiring and training costs, turnover, and absenteeism.\textsuperscript{65}

Some of the legislators who opposed the FMLA argued that it was too favorable to employees.\textsuperscript{66} The legislative history contains references to comments by legislators noting that the Act "allows employees almost unrestrained discretion as to when to take leave"\textsuperscript{67} and "gants the employee a unilateral right to schedule and take the leave."\textsuperscript{68} Others have argued that the FMLA does not provide enough protection to employees and that it has "serious limitations" that "disproportionately affect women, especially middle- and low-income women" because it does not guarantee paid time off.\textsuperscript{69} However, the final version of the FMLA was not modified to accommodate either of these critics' concerns. It is worth noting that the final language of the Act encourages employers to adopt leave policies that are more generous than those provided by the FMLA, but does not guarantee paid time off.\textsuperscript{70}

\section*{III. RECENT DECISIONS}

\textit{Wysong v. Dow Chemical Co.},\textsuperscript{71} decided by the Sixth Circuit, was one of the first cases to address involuntary leave. It allows employers to place employees on FMLA leave unilaterally and is the standard analysis for involuntary leave claims in the Sixth Circuit. However, its reasoning has not been accepted by all circuits. Most notably, the Ninth Circuit recently decided \textit{Escriba v. Foster Poultry Farms, Inc.},\textsuperscript{72} which, while not explicitly overruling the Sixth Circuit, seems to suggest federal courts are ready for a departure from \textit{Wysong}'s holding.

\subsection*{A. Wysong v. Dow Chemical Co.}

Kimberly Wysong worked for the Dow Chemical Company (Dow) as an Operating Technician.\textsuperscript{73} Wysong had an unfortunate medical history that often required her to miss work.\textsuperscript{74} In February of 2003, her boss,
Dwight Miller, issued Wysong a “Letter of Concern” notifying her that she had exhausted all of her paid medical leave. The letter informed Wysong that if she required additional leave, such leave would be without pay.\textsuperscript{75} Approximately ten days later, Wysong reported to work late and was issued a “last chance letter,” informing her that she would be terminated for any future performance failures.\textsuperscript{76}

Roughly two months passed without incident. However, in May of 2003, Wysong contacted the plant nurse to report a neck problem.\textsuperscript{77} She did not request any time off to deal with this health issue.\textsuperscript{78} However, her supervisor learned of the report and contacted Dr. Teter, Dow’s Regional Medical Director.\textsuperscript{79} Dr. Teter placed Wysong on work restrictions that prohibited her from lifting more than five pounds.\textsuperscript{80} Her supervisor ultimately determined that he could not find a job at the plant that would comply with the doctor’s restrictions and informed Wysong not to come into work.\textsuperscript{81}

Two days later, Wysong received a letter from Dow informing her that her “request” for FMLA leave was approved.\textsuperscript{82} The letter further stated that Wysong previously had exhausted the majority of her FMLA leave and she was eligible for only three additional days of FMLA leave.\textsuperscript{83} Because Wysong had not requested FMLA leave, she sought clarification of the letter from Dow’s Human Resources Department (HR Department).\textsuperscript{84}

In response, the HR Department removed the language about her request, but explained that she had been placed on FMLA leave nonetheless.\textsuperscript{85} In the interim, Dow’s medical board met to review her case.\textsuperscript{86} It determined that Wysong would need to pass a Functional Capacity Exam (FCE) prior to returning to work.\textsuperscript{87} A FCE is a series of tasks that an employee must complete to demonstrate that he or she is nearly doubled that number in 2002 when she took 783.5 hours (roughly 97 days). Reasons she provided included: chronic neck and groin pain, a hernia operation, mononucleosis, a hysterectomy, and caring for an ill child. \textit{Id.}

\textsuperscript{75.} \textit{Id.} She also could have used her paid vacation time.
\textsuperscript{76.} \textit{Id.}
\textsuperscript{77.} \textit{Id.}
\textsuperscript{78.} \textit{Id.}
\textsuperscript{79.} \textit{Id.}
\textsuperscript{80.} \textit{Id.}
\textsuperscript{81.} \textit{Id.}
\textsuperscript{82.} \textit{Id.}
\textsuperscript{83.} \textit{Id.}
\textsuperscript{84.} \textit{Id.}
\textsuperscript{85.} \textit{Id.}
\textsuperscript{86.} \textit{Id. at 445.}
\textsuperscript{87.} \textit{Id.}
physically capable of performing the necessary job duties.\textsuperscript{88} Prior to administering the FCE, Dr. Teter requested that Wysong stop taking all pain medications for two weeks.\textsuperscript{89} On the advice of her doctors, she refused to do so.\textsuperscript{90} As a result, she was placed on unpaid leave until she received a release to work without restrictions.\textsuperscript{91} Six months later, Dow terminated Wysong pursuant to a company policy that allowed the company to terminate employees on medical leave for six months or more.\textsuperscript{92}

Wysong brought suit in the Southern District of Ohio and alleged a violation of the FMLA.\textsuperscript{93} Wysong alleged Dow was liable under the FMLA when it forced her to take her last three days of FMLA leave when she did not elect to do so and that this involuntary leave interfered with her FMLA rights. The district court granted summary judgment to Dow, and Wysong appealed.\textsuperscript{94}

The Sixth Circuit found that a plaintiff may only succeed under this cause of action when an employer forces him or her to take FMLA leave and he or she does not have a serious health condition or other FMLA-qualifying event.\textsuperscript{95} More importantly, the court stated that an employee may only bring a claim of involuntary leave when he or she seeks FMLA leave at a later date and the leave is unavailable because he or she was wrongfully forced to use FMLA leave in the past.\textsuperscript{96} The Sixth Circuit ultimately dismissed Wysong’s involuntary leave claim on this ground, holding that “she cannot show that she was denied FMLA leave to which she was entitled as a result of Dow forcing her to take earlier leave when she did not have a ‘serious health condition’ that precluded her from working.”\textsuperscript{97}

\textit{B. Escriba v. Foster Poultry Farms Inc.}

Maria Escriba worked in a Foster Poultry Farms (Foster Farms)
processing plant for eighteen years.\textsuperscript{98} A native of Guatemala, Escriba spoke fluent Spanish but limited English.\textsuperscript{99} In 2007, Escriba met with her supervisor, Linda Mendoza, to request two weeks off from work to care for her sick father in Guatemala.\textsuperscript{100} In response to this request, and in compliance with Foster Farms' employee leave policy, Mendoza provided paperwork that documented the details of a two-week vacation request, during which Escriba would use her paid vacation time rather than FMLA leave.\textsuperscript{101}

After this initial exchange, Mendoza requested the service of an interpreter. When the interpreter asked Escriba if she needed more than two weeks paid vacation in Guatemala, Escriba responded "no."\textsuperscript{102} The interpreter again asked if she "needed more time in Guatemala[,]" and Escriba again responded "no."\textsuperscript{103} After finalizing her two weeks of leave, Escriba traveled to Guatemala to care for her father.\textsuperscript{104} She testified that shortly after arriving in Guatemala, she decided that returning to work after two weeks would be impractical.\textsuperscript{105} Sixteen days after she was scheduled to return to work, Escriba contacted a union representative.\textsuperscript{106} The union representative informed Escriba that she likely would be fired under Foster Farms' "three day no-show, no-call rule".\textsuperscript{107} This rule, included in the Foster Farms employee handbook, allowed Foster Farms to terminate any employee who, without giving notice to the company, was absent from work for three consecutive days.\textsuperscript{108} Under this policy, Escriba was fired.\textsuperscript{109}

Escriba filed suit, alleging violations of the FMLA.\textsuperscript{110} At trial, Escriba argued that her employer knew she was taking time off for an FMLA-qualifying event—to care for her ailing father—therefore, she was entitled to FMLA leave even though she did not formally request its protection.\textsuperscript{111} Foster Farms argued that even though Escriba provided

\textsuperscript{98. Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236, 1239 (9th Cir. 2014). The reader should note that the facts in this case were heavily contested and this statement of facts largely represents Escriba's position.}
\textsuperscript{99. Id. at 1240.}
\textsuperscript{100. Id.}
\textsuperscript{101. Id.}
\textsuperscript{102. Id.}
\textsuperscript{103. Escriba, 743 F.3d at 1240.}
\textsuperscript{104. Id. at 1241.}
\textsuperscript{105. Id.}
\textsuperscript{106. Id.}
\textsuperscript{107. Id.}
\textsuperscript{108. Escriba, 743 F.3d at 1241.}
\textsuperscript{109. Id. at 1239.}
\textsuperscript{110. Id. at 1242. Escriba also claimed violation of the California Family Rights Act (CFRA), CAL. GOV'T CODE § 12945.2, and California public policy. Id.}
\textsuperscript{111. Id. at 1242-43.
an FMLA-qualifying reason for taking leave, she declined to have her
time off qualify as FMLA leave and, therefore, was not afforded its
protection against termination. The jury delivered a verdict in favor
of Foster Farms. Escriba filed a renewed motion for judgment as a
matter of law (JMOL), which the judge denied, stating “Escriba . . .
was given the option and prompted to exercise her right to take FMLA-
leave, but . . . unequivocally refused to exercise that right.” Escrita
appealed the judgment against her to the Ninth Circuit.

The Ninth Circuit ultimately agreed with the lower court, and held
that Foster Farms legally could terminate Escriba. It began its analysis
by finding that Escriba’s suit was based on an FMLA interference
claim. To make out a prima facie case of FMLA interference in the
Ninth Circuit, an employee must establish that, inter alia, she provided
sufficient notice of her intent to take leave. The court found the
FMLA does not expressly state whether employees may choose to delay
the use of their FMLA rights under the law. However, it reasoned
that the FMLA regulations provided guidance in this situation. The
regulations state that the employer has the responsibility to determine
whether “FMLA leave is being sought by the employee.”

The court concluded that “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 not intend
to exercise his or her rights under the FMLA.” As a result, the court
reached the conclusion that an employee can affirmatively decline to use
FMLA leave, even if the underlying reason for seeking the leave would
have warranted FMLA protection. The court held that Ms. Escriba
elected not to use her FMLA leave and, therefore, could be fired without
violating the FMLA.

112. Id. at 1242.
113. JMOL is a motion made by a party during trial claiming the opposing party has insufficient
evidence to reasonably support its case. It is similar to summary judgment but occurs during the trial,
whereas a motion for summary judgment happens after discovery and before trial. JMOL also is known
as a directed verdict.
114. Escriba, 743 F.3d at 1242.
115. See generally id.
116. Id.
117. Id.
118. Id.
119. Escriba, 743 F.3d at 1243.
120. Id. (“The employee need not expressly assert rights under the FMLA or even mention the
FMLA, but the employer should inquire further of the employee if it is necessary to have more
information about whether FMLA leave is being sought by the employee. . . .”) (emphasis in original).
121. Id. at 1244.
122. Id.
123. Id.
IV. DISCUSSION

The Sixth Circuit has relied on the *Wysong* decision to stand for a number of legal principles. Most relevantly, the *Wysong* opinion reiterates the idea that an employer may place an employee on FMLA leave involuntarily so long as the leave is for an FMLA-qualifying event.\(^\text{124}\) While *Wysong* did not prevail on her involuntary leave claim, the court appears to recognize the validity of such a cause of action.

The Ninth Circuit’s decision in *Escriba*, however, is a departure from the principle in *Wysong* that an employer may place an employee on FMLA leave without the employee’s consent. Rather, the holding suggests that employees have the ability to choose when they take FMLA leave, including the ability to delay use of FMLA leave until it is most beneficial to them. While this proposition could lead to increased abuse of FMLA leave, the *Escriba* decision is more consistent with the legislative intent of the FMLA, and any potential increase in abuse is outweighed by the additional benefits provided to employees who do not abuse the system. As a result, the Sixth Circuit should adopt the rule espoused by the *Escriba* court.

A. Practical Effect of *Wysong*

The practical effect of *Wysong* is that employers have been able to place employees on FMLA leave against their wishes, thus minimizing abuse, so long as that employee has an FMLA qualifying event. In other words, employees have not been able to save FMLA leave for later use if their employer would prefer the “FMLA clock” to start ticking after an FMLA-qualifying event occurs. For example, assume an employee has accrued four weeks of vacation time and wishes to take a leave of absence to care for his ailing mother. Under *Wysong*, the employee would not be able to take four weeks off from work using his vacation time and then receive an additional twelve weeks of unpaid FMLA protection at a later date, leading to a total of sixteen weeks off of work.\(^\text{125}\) Rather, under *Wysong*’s interpretation of FMLA, the employer

\(^{124}\) *Wysong* v. Dow Chemical Co., 503 F.3d 441, 448-49 (6th Cir. 2007).

\(^{125}\) This also is supported by 29 C.F.R § 825.207(a) and case law in other circuits. See e.g., *Strickland* v. Waterworks and Sewer Board of the City of Birmingham, 239 F.3d 1199, 1205-06 (11th Cir. 2001). The employer may only do so in accordance with the employer’s normal leave policy and upon notice to the employee. 29 C.F.R § 825.207(a). And, in the words of the Eleventh Circuit:

The logical purpose underlying the substitution language in the FMLA and accompanying regulations is to protect employers who offer paid sick leave benefits to their employees from having to provide both the statutory 12 weeks of leave required by the FMLA and the paid leave benefit separately. If employers could not require a sick employee to use accrued paid sick leave and FMLA leave concurrently when the employee’s condition qualifies for both,
could place the employee on involuntary FMLA leave immediately and substitute the paid leave for FMLA leave. This would entitle the employee to four weeks of paid leave plus an additional eight weeks of unpaid FMLA leave for a total of twelve weeks of FMLA leave.\textsuperscript{126}

The rationale in \textit{Wysong} also seems to suggest that employees have immediate protection from termination any time they take leave for a FMLA-qualifying event, even if they do not request FMLA leave.\textsuperscript{127} In essence, this allows employees to raise a claim of FMLA interference any time they take leave for a FMLA-qualifying event and argue that they were automatically entitled to FMLA protection, even though they were not actually placed on FMLA leave.\textsuperscript{128} This creates an added level of protection for employees.

This standard has encouraged employers to draft leave policies very carefully, as employers prefer an employee's FMLA leave to begin as soon as possible. Usually, this is done in an effort to guard against employees who abuse leaves of absence—particularly, when the language of the Act allows employees to utilize other, more favorable types of leave that offer additional time off. An extreme example of this situation is provided in the case of Ms. Wysong. Wysong used 464 hours of paid medical leave (roughly 58 days) in 2001, and nearly doubled that number in 2002 when she took 783.5 hours (roughly 97 days) off of work. Despite missing nearly one-third of the year (which is 37 days more than is allowed by the FMLA), she remained entitled to three additional days of FMLA leave before her termination. This case demonstrates that the FMLA can provide the employee with significantly more time off than the twelve weeks envisioned by the drafters of the FMLA, and employers prefer to place employees on FMLA leave as soon as possible. While extended leave may benefit the employee, clearly, it is not desirable for employers as it reduces productivity, increases costs, and adds bureaucratic headaches to the administration of employee leave policies.

then the employee could choose to use his paid leave benefit and his 12 weeks of FMLA leave sequentially. That would unduly and unfairly burden employers. To balance the needs of employers and sick employees, Congress intended that the FMLA provide employees with a minimum entitlement of 12 weeks of leave, while protecting employers against employees tacking their FMLA entitlement on to any paid leave benefit offered by the employer.

\textit{Strickland v Waterworks and Sewer Bd. of the City of Birmingham}, 239 F.3d 1199, 1205-06 (11th Cir. 2001).

126. Again, the same additional requirements of notice, proper documentation, and a written employee leave policy are applicable. 29 C.F.R § 825.207.

127. See \textit{e.g.}, \textit{Escriba v. Foster Poultry Farms, Inc.}, 743 F.3d 1236, 1243 (9th Cir. 2014).

128. \textit{Id.}
B. Differences Between Escriba and Wysong

The Ninth Circuit’s decision in Escriba departs from the principle that an employer unilaterally may place an employee on FMLA leave for FMLA-qualifying events.\(^{129}\) This decision creates interesting ramifications for both employees and employers in the Ninth Circuit. Notably, the Escriba court agreed with the employer, accepting the premise that the plaintiff could, and in fact did, decline to use her available FMLA leave to preserve future FMLA leave.\(^{130}\) Accordingly, the employer could then lawfully terminate the plaintiff for failing to comply with the attendance policy when she took leave for a FMLA-qualifying purpose but specifically declined to invoke FMLA leave.\(^{131}\) Thus, the Escriba decision is a win for the employer in that scenario.

Even though the result of the case was favorable for the employer, the reasoning in the opinion may be used against employers in future litigation. For example, if an employee has the power to decline use of FMLA leave, that power also may preclude employers from designating FMLA leave against an employee’s wishes. Consequently, employees who are aware of this power may be able to hoard their FMLA leave by preventing an employer from placing them on FMLA leave involuntarily. In other words, the Ninth Circuit has allowed employees to postpone use of their FMLA rights until the use is most favorable for the employee. Under Escriba, an employee who has accrued four weeks of paid vacation time is now able to use all four weeks of vacation time prior to claiming twelve additional weeks of FMLA leave. On its face, this would appear to be a deviation from current law in the Sixth Circuit and inconsistent with the interpretation of the FMLA provided by other circuits.\(^{132}\) While this ruling was detrimental to the plaintiff in Escriba, the court’s reasoning is a foundational shift in the way employees are placed on FMLA leave, and opens the door for employer liability suits if employers involuntarily place employees on FMLA leave in the future. As a result, employers must be careful when placing an employee on FMLA leave without his or her consent—even if the employee potentially is abusing his or her right to FMLA leave.

129. See generally id.
130. Id. at 1244.
131. Id. at 1244-45.
132. Notably, the Eleventh Circuit stated in Strickland that the purpose of the “FMLA and accompanying regulations is to protect employers who offer paid sick leave benefits to their employees from having to provide both the statutory 12 weeks of leave required by the FMLA and the paid leave benefit separately.” 239 F.3d 1199, 1205 (11th Cir. 2001).
C. The Sixth Circuit Should Adopt the Ruling in Escriba

Although *Escriba* was decided in the Ninth Circuit, it has real implications on future jurisprudence in the Sixth Circuit. Interestingly, the opinion was written by Judge Ronald Lee Gilman, a Sixth Circuit judge sitting by designation.\(^{133}\) Because the authoring judge is from the Sixth Circuit, the *Escriba* decision may reflect the Sixth Circuit’s openness to a change in the law. Ultimately, the Sixth Circuit should adopt the holding of the *Escriba* court, because its reasoning is more consistent with the legislative history of the FMLA and Congress’s intent in passing the Act. Additionally, the *Escriba* rationale relies more directly on statutory interpretation and has favorable policy implications.

1. *Escriba* is More Consistent with the Congressional Intent of the FMLA

In addition to Congress’s stated intent for the FMLA to “entitle employees to take reasonable leave for [family] and medical reasons,”\(^{134}\) the FMLA includes a number of sections that encourage courts to construe the meaning of its language in favor of employees (Liberal Construction Provisions).\(^{135}\) These Liberal Construction Provisions can be understood, in combination with legislative reports relevant to the passage of the Act, to create a minimum standard for leave that courts should expand whenever possible. These sections include provisions preventing the Act from modifying any federal or state law which prohibits discrimination or state laws that provide greater medical leave rights to employees (including collective bargaining agreements and other benefit programs).\(^{136}\) The Act itself expressly states that it is designed for the “encouragement of more generous leave policies.”\(^{137}\) These clauses, when taken as a whole, indicate that Congress intended the FMLA to act as a minimum requirement. Accordingly, the FMLA should be interpreted to give employees as many rights as possible in the future. As a result, when the statute is silent, it should be interpreted in favor of employee rather than employer.

Furthermore, it is worth reiterating that some of the legislators who opposed the FMLA did so on grounds that it was too favorable to

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135. *Id.* §§ 2651-53.
136. *Id.*
137. *Id.* § 2653.
employees. Therefore, by adopting the Act without accommodating these arguments, Congress implicitly rejected these concerns. It recognized that the Act was designed to provide employees with increased flexibility for designating when they take medical and family leave.

Based on the legislative history of the Act and the inclusion of Liberal Construction Provisions, the FMLA appears to support the notion that individual employees have the right to choose when to use their FMLA leave. In other words, the Ninth Circuit’s indication that employers should not have unilateral authority to place employees on FMLA leave appears to be a correct interpretation of the FMLA based on Congress’s intent when passing the Act.

However, this conclusion is inconsistent with the Sixth Circuit’s reasoning in Wysong. The Wysong court has restricted an employee’s freedom to claim FMLA rights at times of his or her choosing, and, instead, has allowed employers to start the “FMLA clock” anytime an FMLA-qualifying event occurs, regardless of the employee’s intentions. Because this reasoning contradicts the legislative history of the FMLA and Congress’s intent in passing the Act, the Wysong decision should be overruled as inconsistent with the spirit of the Act.

2. Policy Concerns

The recent holding in Escriba seems to suggest that employees have the ability to choose when they take FMLA leave—including the ability to delay use of FMLA leave until it is most beneficial to them. While this proposition could lead to increased abuse of FMLA leave, any potential increase in abuse is outweighed by the additional benefits provided to employees who do not abuse the system. As a result, the Sixth Circuit should adopt the holding of the Ninth Circuit’s decision in Escriba.

First and foremost, most employees that use FMLA leave have an excess of FMLA leave available to them. Therefore, there is little incentive for an employee to game the system to receive more leave, as time off is already freely available. Specifically, the DOL indicates that 13% of employees used FMLA leave in the past year. Of those 13%, the average leave was 27.8 days, leaving an average of 32.3 days of

140. Id.
141. Id.
unused leave.\textsuperscript{142} This means that, on average, employees who use FMLA still have more than four weeks of FMLA leave available to them at any one time. Because most employees are leaving large amounts of FMLA leave unused, they have no reason to attempt to acquire more leave time. This factor minimizes any potential abuse by reducing the incentive to leave horde, as additional time off already is available to most employees.

Even though there is little incentive for an individual employee to seek additional time off, an employee nonetheless may attempt to abuse the system by manipulating the timing of the FMLA leave. However, direct evidence supports the notion that this type of abuse occurs very infrequently and would not lead to serious consequences for an employer on a large scale. For example, a survey conducted by the DOL found FMLA was abused in only 2.5% of leaves.\textsuperscript{143} Since a majority of workers do not even use FMLA leave, this translates to a problem that affects less than .000325% of employees in the United States.\textsuperscript{144}

IV. CONCLUSION

After many years of revisions and compromises, Congress enacted the FMLA in 1993, guaranteeing employees a minimum amount of annual leave.\textsuperscript{145} While Congress recognized the need to protect an employer’s legitimate interest in maximizing efficiency, the Sixth Circuit has overextended this protection by restricting employees’ freedom to claim their FMLA rights at the time of their choosing.

The decision in \textit{Wysong} allows employers to start the “FMLA clock” anytime an FMLA-qualifying event occurs, regardless of the employee’s wishes. Practically, this allows employers to use the FMLA offensively against its employees—a practice that seems inconsistent with Congress’s intent to “balance the demands of the workplace with the needs of families and to allow employees reasonable leave for the treatment of medical issues.”\textsuperscript{146}

\textsuperscript{142} (60 days of allowed leave under the FMLA) – (27.8 days used) = 32.3 days remaining on average.


\textsuperscript{144} This number was calculated assuming 13% of employees used FMLA and employers estimated there was abuse in 2.5% of FMLA leaves. To reach this summation, the author multiplied 2.5% x 13% = .000325. This works out to roughly 50,790 employees total in the United States based on an average of 156,278,000 people in the work force in October of 2014. See R.I. DEP’T OF LABOR & TRAINING, U.S. BUREAU LABOR STATISTICS, supra note 143.

\textsuperscript{145} 29 U.S.C. § 2601(b).

\textsuperscript{146} See generally id.
Fortunately, the recent decision in *Escriba* appears to be the first step in a judicial departure from this misguided legal principal. The *Escriba* decision is more consistent with the language of the Act, the legislative history, and Congress's attempt to create a powerful tool for employee protection. *Escriba* finally may be the first step in returning the power and protections of the FMLA back into the hands of employees.