

# FMLA: Employer's Leave of Absence Form Defeats Former Employee's FMLA Claim

## Labor & Employment Law Update

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Under the Family Medical Leave Act ("FMLA") employees do not have to expressly say they need "FMLA" or otherwise invoke any of its provisions when requesting leave that would qualify under the FMLA. As such, employers have to be vigilant and question whether an employee's request or need for leave qualifies for FMLA leave.

However, employers should know that an employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection. *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1244 (9th Cir. 2014), citing *Ridings v. Riverside Med. Ctr.*, 537 F.3d 755, 769 n. 3 (7th Cir.2008) states that, "If an employee does not wish to take FMLA leave but continues to be absent from work, then the employee must have a reason for the absence that is acceptable under the employer's policies, otherwise termination is justified."

In the recent case *Amstutz v. Liberty Ctr. Bd. of Educ.*, No. 3:13CV2385, 2015 WL 5254988, (N.D. Ohio Sept. 9, 2015), the District Court for the Northern District of Ohio held that the employee affirmatively declined FMLA leave and thus was not able to pursue any of her FMLA claims against the employer. In *Amstutz*, the employee requested a week of sick leave for her grandson's birth. The employee was advised that under the CBA she could only use one sick day and would have to use personal days for the rest of the week. When the week arrived the employee called in sick and said she would be bedridden for the rest of the week. When the employee returned to work she filled out a leave of absence form and provided a doctor's note. The employer's leave of absence form included a section that explained FMLA leave and included a checkbox where the employee could request FMLA leave. Instead of selecting unpaid FMLA leave, the employee requested regular paid sick leave.

The Court in *Amstutz* held that the employee understood FMLA leave as she had taken it before and thus when filling out the leave of absence form she expressly declined FMLA leave by choosing paid sick leave and not checking the box for FMLA leave. The Court further held that since the employee declined FMLA leave,

the employer could not have known that she wanted FMLA leave. Therefore, the employer was not obligated to provide her FMLA leave and could not have interfered with or retaliated against her in violation of the FMLA.

The takeaway for employers from these cases is that there are actions that you can take to limit your exposure to FMLA claims through your policies and forms. First and foremost, it is important to have an FMLA leave policy that is understandable and that identifies who employees should talk to in the event of an absence. Next, as demonstrated by these cases, leave of absence forms and other reporting techniques can be used to help in defending against FMLA claims by showing that the employee affirmatively declined FMLA leave.

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