

## MISCONDUCT LINKED TO MEDICAL CONDITION UNDER FMLA

CAPTION: In *Byrne v. Avon Products, Inc.*, 328 F.3d 379 (1st Cir. 2003), the First Circuit Court of Appeals went beyond the district court's analysis that an employee's odd behavior at work was simply misconduct and justified termination with no ADA or FMLA recourse available. Instead, the appeals court considered the possibility that the odd behavior resulted from a serious medical condition and was covered under the FMLA.

John Byrne began working for Avon Products as a night shift, stationary engineer in 1994. For four years, Avon Products considered him an excellent employee; however, in early November 1998, a co-worker found Byrne asleep in the carpenter's shop (frequently used by night employees as a break room) and reported this to management. After receiving the report, Avon reviewed its security logs and found that Byrne had begun to frequent the carpenter's shop on a regular basis (access to the carpenter's shop required use of a coded card). Avon took the next logical step in today's hi-tech society and installed a camera in the carpenter's shop. Upon its maiden recording, the camera revealed Byrne in the carpenter's shop for approximately 3 hours of his shift either reading or sleeping. On Byrne's next shift, the camera recorded him there for approximately six hours; the majority of that time, Byrne spent sleeping with the lights off.

Managers attempted to catch Byrne on his next shift (November 16-17) in order to discuss the matter but could not as Byrne had left work early that day after reporting feeling ill to a co-worker and that he would be out the rest of the week. Avon followed with telephone calls to his residence that were answered by one of Byrne's sisters who reported that Byrne was "very sick."

James Sparks, Avon's facilities engineer, did make contact with Byrne on November 17 by telephone. Byrne muttered some strange utterances but did agree to meet with management later that day. Byrne did not attend the meeting, and Avon subsequently terminated him for this absence and for sleeping while on the job.

It was later determined that at this time, Byrne was suffering from depression. His relatives were only able to take him to the hospital after they convinced him to come out of a room in which he had barricaded

himself. After evaluating Byrne, a psychiatrist determined that by November 16 Byrne had begun to hallucinate. On November 17, Byrne had to tried to commit suicide and during another panic attack had tried to flush his head down a toilet.

Two months of psychiatric treatment were necessary before he was fit to return to working; however, Avon would not rehire him. Byrne subsequently filed suit under the American with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA). After a period for discovery, Avon moved for summary judgment which the district granted concluding that neither statute excuses misconduct on the job.

The First Circuit Court of Appeals began its analysis by evaluating whether Byrne was a qualified individual with a disability under the ADA. "A qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 USC §12111(8). The appeals court that because of his depression (which lasted approximately two and a half months), Byrne was unable to stay awake and had become too suspicious of his co-workers to tolerate them. Thus, Byrne could not perform the essential functions of his position because his condition rendered him incapable of working. Despite conceding this, Byrne maintained that Avon should have accommodated him by permitting him not to work.

The appeals court recognized the inconsistency of such an accommodation and the purpose of the ADA: to provide reasonable accommodations so that an individual with a disability can perform the essential functions of the job or work: "Not working is not a means to perform the job's essential functions. An inability to do the job's essential tasks means that one is not "qualified"; it does not mean that the employer must excuse the inability.

The First Circuit did acknowledge that time off from work may be an appropriate accommodation for intermittent conditions such as arthritis, lupus, or recovering from a medical condition; however, an accommodation of not working for an extended time is unreasonable under the Act and renders the individual not qualified: "Inability to work for a multi-month period removes a person from the class protected by the ADA.

Having disposed of the ADA claim the appeals court turned its attention to

Byrne's claim under the FMLA. That turn seemed promising as the FMLA does, unlike the ADA, afford protection to individuals who cannot work as a result of a "serious health condition." In this case, Byrne did have a serious health condition and was able to return to work prior to 12 weeks after his medical condition forced him to leave work. The validity of an FMLA case turns on notice to the employer of a qualifying condition.

Byrne contended that his sister's statement on November 17 that he was "very sick" plus the notice of his hospitalization received by Avon on November 18 were sufficient notice of his condition. The district court found that the November 17 notice was too late and that Byrne had been sleeping on the job for the previous 10 days which justified his termination.

The court of appeals considered whether Byrne's unusual behavior was notice in itself of a serious medical condition and whether notice was excused in this case. In considering the former, the court cited examples of a worker collapsing on the job as providing notice to the employer of a serious medical condition such as a stroke, heart attack or insulin deficiency and of an employee who broke an arm on the job and thus obviously requiring leave from work. Notice to the employer was not as easily communicated by outward signs of a problem in Byrne's situation as in these examples except that Byrne had been a model employee for four years who now had suddenly been acting like a very poor one.

The court questioned whether Byrne's condition prevented him from giving notice as one who is unable to give notice is excused from doing so: "When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved."

29 C.F.R. §825.303(a) (emphasis added).

From this the court reasoned that if a person with "major depression" could

not have informed his employer about his problem and request leave, then notice was not feasible and unnecessary even if Byrne's change in behavior was insufficient to inform Avon of his need for medical leave.

In this case, the appeals court ruled that summary judgment was inappropriate because a trier of fact could find from the evidence presented (a) that the change in behavior was enough to notify a reasonable employer that Byrne suffered from a serious health condition, or (b) that Byrne was mentally unable either to work or give notice early in November 1998, then he would be entitled to FMLA leave covering the period that Avon treats as misconduct.

The court of appeals also instructed that the lower court "require the employee to agree, as a condition of pursuing relief under the FMLA, that unproductive time preceding the discharge be reclassified as unpaid leave (with restitution of wages received) or taken as vacation or medical leave if any is available." In doing so the court indirectly addressed the lower court's concern that Byrne's behavior prior to leaving work justified termination as the lower court had considered that behavior separately from Byrne's medical condition.

The First Circuit's recognition that on-the-job erratic behavior should not be automatically assumed as intentional misconduct on the part of the employer but may be linked to and/or precipitated by a medical condition is a large step towards a less draconian view of wrongful termination claims. Many times, judges seem more than willing to side with the employer if an easy out exists such as the behavior in this case. In *Byrne v. Avon Products, Inc.*, the FMLA provided the context in which this determination was made. Courts making such determinations in the context of the ADA will be another step towards considering the role of the employee's disability in bringing about conduct which would, at first glance, justify termination.