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LABOR UPDATE

Recent Developments in Labor and Employment Law

IS EMPLOYER REQUIRED TO PLACE SLEEPING EMPLOYEE ON FMLA LEAVE?

John Byrne, a highly regarded employee, had worked at Avon Products for over four years when he suddenly began exhibiting odd behavior. After a co-worker reported having found Byrne asleep during work hours, Avon installed cameras to investigate. Avon recorded Byrne reading and sleeping during work hours for periods of three to six hours at a time. Managers planned to discuss this conduct with Byrne on his next work shift, but were unable to do so because Byrne left work early, telling a co-worker that he did not feel well and intended to take off the rest of the week. Avon representatives tried to call Byrne at home, but a family member always answered the phone and said that Byrne was “very sick.” Avon finally reached Byrne, and he agreed to attend a meeting at the office. Nonetheless, Byrne failed to appear. Avon then fired Byrne for not attending the meeting and sleeping on the job.

Unbeknownst to Avon, Byrne was suffering from severe depression. After Byrne had engaged in repeated bizarre behavior, such as trying to flush his head down a toilet and attempting suicide, Byrne’s family hospitalized him. For two months Byrne received treatment for depression, and his health improved. Byrne asked for his job back, but Avon declined. Byrne then sued Avon under the Americans with Disabilities Act (ADA) and the Family Medical Leave Act (FMLA).

The United States District Court for the Northern District of Illinois granted summary judgment in favor of Avon, finding that neither the ADA nor the FMLA excused misconduct on the job. Byrne appealed.

The United States Court of Appeals for the Seventh Circuit found little difficulty in affirming the district court’s ruling on the ADA claim. Byrne’s argument that Avon should have accommodated his disability (depression) by allowing him *not to work* failed to impress the Seventh Circuit. The Court observed that while permitting employees to take time off for intermittent health conditions may be an apt accommodation under the ADA, employees must show that the accommodation sought will allow them to “perform the essential functions of the employment position.” The Court noted that *not working* is not a means to perform a job’s essential functions.

Nonetheless, the Court wrestled with the question of whether the FMLA provided relief to Byrne. The FMLA provides for up to 12 weeks of unpaid leave for eligible employees (generally, those employed full-time for more than one year by an employer with 50+ employees) who have a serious health condition. The Court observed that a company's duty to provide FMLA leave depends on the company's *knowledge* of the employee's health condition. In most cases, the employee discloses that condition to the employer when requesting a leave. In some cases, such as when an employee has a heart attack at work, the employee need not request FMLA leave specifically since the employee's need for time off is obvious.

In *Byrne's* case, the Court found that the sharp change in the behavior of a good employee *may* be sufficient notice of a medical problem. However, the Court could not determine whether Byrne's sleeping at work was simple malingering or a reasonable sign of a person with depression, and concluded that a jury should decide that issue. The Court noted that if a jury determined either that Avon should have known of Byrne's serious medical condition because of his changed behavior, or that Byrne's depression prevented him from working or giving notice, then he would be entitled to FMLA leave covering the period that Avon treated as misconduct. In either case, the Court noted, Byrne would have been entitled to reinstatement when his serious health condition abated in less than 12 weeks. The Court remanded the case to the district court to determine whether Byrne's last weeks at Avon should be reclassified as FMLA leave.

Although the facts of the case are unusual, *Byrne* raises an important issue for employers. There may be circumstances under which an employee need not make a formal leave request to trigger employee rights and employer duties under the FMLA. Employers therefore are wise to review carefully sudden employee absences and changes in behavior to determine whether FMLA leave may be appropriate. *Byrne v. Avon Products, Inc.*, 328 F.3d 379 (7th Cir. 2003).

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RECYCLING -- GOOD FOR NEWSPAPERS, BOTTLES AND CANS--- DANGEROUS FOR EMPLOYMENT RELEASES

Lehigh Valley Health Network terminated its 57-year-old administrator, John Wastak, after eight years of service. Lehigh offered Wastak, among other things, thirty-six weeks of severance pay and outplacement services, in exchange for signing a release. Wastak agreed to Lehigh's terms, and signed the release. Nine months after Wastak's termination, Leigh hired a 44-year-old woman to fill Wastak's former position. After learning that Lehigh had replaced him with a younger individual, Wastak filed an age discrimination charge with the Equal Employment Opportunity Commission (EEOC). Wastak filed his charge 195 days after the EEOC's deadline for filing such claims. The EEOC dismissed Wastak's charge, and ultimately, he filed suit

In trying to avoid judgment in Lehigh's favor, Wastak first claimed that he was excused from timely filing his age discrimination action because he did not know that the claim existed until he learned that Lehigh had hired a younger individual to replace him. The United States Court of Appeals in Philadelphia brushed this argument aside, finding that a federal cause of

action (i.e., age discrimination) accrues when the employee knows of the actual injury (e.g., termination), and not when the employee learns that the injury constitutes a legal wrong. Thus, according to the court, Wastak needed to act within the prescribed filing period after his termination, and not when he discovered that Lehigh had hired a younger replacement.

A thornier issue for the court was some problematic language the employer had included in its release. The release included Wastak's release of all claims related to his employment and a promise not to sue. However, the release also prohibited Wastak from filing a charge with the EEOC, or participating in an EEOC investigation of a charge. An amendment to the federal age discrimination statute prohibits such provisions.

The court concluded that although the employer had included a void and unenforceable provision in its release, the entire severance agreement would not fall. Citing to one of its earlier opinions, the court observed, "You don't cut down the trunk of a tree because some of its branches are sickly."

While the employer ultimately prevailed, it came at the price of litigation costs. To lessen the likelihood of burdensome court costs, an employer should avoid recycling severance agreements it has used in previous terminations, and ensure that any release it asks an employee to sign reflects the current state of the law. *Wastak v. Lehigh Valley Health Network*, 2003 WL 21350230 (3rd Cir. June 10, 2003).

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REFUSAL TO PERMIT WORK AT HOME DOES NOT VIOLATE ADA

A U.S. District Court in Chicago recently held that an employer did not violate the Americans with Disabilities Act (ADA) when it denied a request by an employee afflicted with severe migraine headaches to work at home three days per week. The Court held that the employee's proposed arrangement did not constitute a reasonable accommodation under the ADA, and thus the employer was within its rights to reject it.

Maria Cruz's employment with the government's General Services Administration (GSA) was plagued by chronic poor attendance, purportedly due to intermittent, unpredictable, and debilitating migraines caused by stress. Cruz claimed that these headaches prevented her from driving to work and also inhibited her ability to work productively.

Consequently, on three separate occasions within a four-year period, Cruz asked to participate in the GSA's "Flexiplace Program," which allowed certain employees to work at home. To be eligible for this program, employees had to hold a job conducive to home work and obtain their supervisor's consent.

The GSA denied all three of Cruz's requests. These denials were based on Cruz's pattern of absenteeism and tardiness, as well as the GSA's opinion that that the majority of her duties had to be performed on site. After the third denial, Cruz sued the GSA, claiming it had a duty to allow her to work at home pursuant to the ADA's reasonable accommodation mandate.

The GSA defended this claim with undisputed evidence establishing that each time it denied Cruz's work at home requests, it also offered her several alternative accommodations. For example, it explained her rights under the Family and Medical Leave Act and the GSA's employee assistance program; offered to let her work part time and/or at different hours; and discussed transfers to a less stressful environment and to a different field office, where greater work at home opportunities might exist.

Finding that each of these alternative accommodations was appropriately designed to reduce Cruz's stress level (and resulting migraines), the Court held that by proposing these options, the GSA had fulfilled its obligation to reasonably accommodate Cruz. Citing ADA precedent, the court stated that, "the ADA does not require the employer to give the employee precisely the accommodation she requests. It requires only that the employer offer a *reasonable* accommodation." [Emphasis supplied].

In granting summary judgment for the GSA, the court also observed that Cruz had failed to establish that her desired accommodation—working at home three days a week—would have had any effect on the problems caused by her migraines. Given Cruz's claims that her headaches were intermittent, unpredictable, and rendered her incapable of working efficiently, her migraines would have rendered her equally ineffective regardless of where they occurred. Although the court noted that an employer's failure to sanction work at home could support an ADA claim in certain "extraordinary cases," it decisively ruled that Cruz's did not qualify. *Cruz v. Perry*, 2003 WL 1719995 (N.D. Ill. Mar. 28, 2003).

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BITS & PIECES

Senate Bill 101, which would amend the Illinois Human Rights Act by adding sexual orientation and gender identity as protected categories, has been placed on the Senate calendar and awaits a floor vote. Although to date Illinois law does not prohibit discrimination in employment based on sexual orientation or gender identity, Chicago and Cook County ordinances recognize both as protected categories. The deadline for the third reading of this bill has been extended to December 31, 2003.

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A recent American Bar Association study concluded that employers defending disability actions prevailed in 78% of EEOC charges brought under the Americans with Disabilities Act. For ADA cases brought in federal court, employers were successful in 94.5% of cases decided last year.

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QUOTABLE

"Advice is what we ask for when we already know the answer but wish we didn't." - Erica Jong

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