

Employment Law Notes

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CAN GOLDBRICKING BE A PROTECTED ACTIVITY?

You would probably want to terminate an employee who sleeps for several hours on every shift. However, that behavior might be notice of the need for FMLA leave, or the leave itself, according to Byrne v. Avon Products, Inc., decided by the 7th Circuit Court of Appeals, available at www.dehnlaw.com.

Legal Background

The FMLA requires employees to notify employers 30 days in advance of taking leave when the need is foreseeable. When it is unforeseeable, the employee need only inform the employer "as soon as practicable." Notice can be written or verbal, and the employee does not need to mention the FMLA. Once the employee makes it known that leave is needed, it is up to the employer to determine if the FMLA applies and it has a duty to inquire if it is not sure.

The Case

After four years of exemplary service as an employee of Avon Products, John Byrne was discovered sleeping on the job. Afterward, Avon checked its security logs and cameras and learned that he had been sleeping and reading on the job for hours at a time for at least ten days. When his supervisor tried to talk to him about it, he said he was going home because he did not feel well and would be out the rest of the week. Calls to him were screened by his sister, who would only say he was very sick. Eventually Mr. Byrne agreed to come to a meeting. He did not attend the meeting, and Avon fired him for missing the meeting and sleeping on the job.

Byrne missed the meeting because he was hospitalized for major depression, which Avon learned a few days later. After two months of treatment, Byrne

was ready to return to work but Avon would not rehire him. Byrne sued under the FMLA. The trial court dismissed his case.

The appellate court ruled in Byrne's favor. Depression can qualify as a "serious health condition" under the FMLA, and Byrne was gone less than the 12-week leave period provided by the act. The difficult questions concerned notice. Arguably Byrne's statement that he didn't feel well, his sister's statement that he was "very sick," and Avon's knowledge of Byrne's hospitalization might serve as notice, except that what Avon fired Byrne for was sleeping on the job before any of those things happened.

The appeals court ruled that Byrne could satisfy the notice requirement in two ways. First, an employee need not give any notice if he is unable to, and arguably Byrne's depression rendered him incapable of giving notice – much like an employee who collapses and becomes unconscious due to a stroke. Second, because his job performance had been exemplary in the four years that preceded this episode, his sudden change in behavior could itself constitute notice. Under either scenario, his "leave" really started when he began sleeping on the job, and although Avon didn't have to pay him for time he didn't work, it had to respect his FMLA rights.

Conclusion

Mental health issues present some of the most challenging situations under the FMLA and the ADA. The same behavior might be malingering or evidence of depression. Whenever an employee is missing work or performing badly and circumstances suggest either a physical or a mental problem, the Employer should keep the FMLA and ADA in mind. ✍

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