

CHANGE IN BEHAVIOR MAY CONSTITUTE REQUEST FOR FMLA LEAVE

By: Gregory P. Kult*

August 11, 2003

In *Byrne v. Avon Products, Inc.*, 328 F.3d 379 (7th Cir. 2003), the U.S. Court of Appeals for the Seventh Circuit (Indiana, Illinois, Wisconsin) cautions employers that: (1) a dramatic change in the behavior of a model employee can serve as notice of a need for FMLA leave; and (2) an employee's inability to request leave due to a medical condition may excuse the FMLA's notice requirement.

The FMLA provides eligible employees with up to 12 weeks of unpaid, job-protected leave during a designated 12-month period when they are not able to work because of, among other reasons, a serious health condition. In most cases, the employee must provide the employer with advance notice of the need for leave.

According to the *Byrne* case, after more than four years of reputable service, employee Byrne began reading and sleeping on the job, sometimes for hours. One day, employer Avon planned to talk to him, but Byrne left early that day because he was not feeling well. He told his co-workers that he would be out the rest of the week. Byrne's sister told Avon that Byrne was "very sick." Avon subsequently reached Byrne by telephone. Byrne "mumbled several odd phrases" but agreed to come in for a meeting later that day. When he failed to show up for that meeting, he was terminated.

It turned out that Byrne was in no shape to attend the scheduled meeting. He was suffering from depression, barricaded himself in a room, had to go to the hospital, began to hallucinate, and attempted to commit suicide and flush his head down a toilet. After two months of treatment, he was able to return to work. He asked for his job back, but Avon refused. He sued under the ADA and FMLA.

The Court of Appeals upheld the District Court's judgment for Avon on Byrne's ADA claim, recognizing that Byrne's inability to work at all for an extended period of time meant that he was not "qualified" to do the job (and therefore was not protected by the ADA).

The Court of Appeals acknowledged that Avon did not receive verbal or written notice of Byrne's condition (or need for FMLA leave) until after it decided to terminate him. However, the Court of Appeals decided Byrne's FMLA claim could continue, noting:

- a dramatic change in behavior of a model employee can itself be notice of a medical problem necessitating FMLA leave; and
- Byrne's medical problem may have prevented him from giving notice of his need for FMLA leave, and a person who is unable to give notice of a need for FMLA leave is excused from doing so.

The Court found that either of these theories could have triggered Byrne's rights under the FMLA and, therefore, it is possible that Avon had to take him back when he requested to be reinstated.

Managers are often taught to enforce standards without speculating about a possible employee medical condition out of fear of ADA liability. However, in *Byrne*, the Court of Appeals

cautions employers that they cannot always disregard the possibility of a medical explanation for a change in behavior, particularly a drastic change. This case illustrates the importance of training managers and supervisors to work with Human Resources or legal counsel when faced with situations of ADA and FMLA overlap.

*Current contact information:

Wooden & McLaughlin, LLP
One Indiana Square, Suite 1800
Indianapolis, IN 26204
(317) 639-6151 ext. 341
gkult@woodmclaw.com

This article does not constitute legal advice, nor is it a substitute for familiarity with the most current statutes, regulations, ordinances and case law on this topic. Slight differences in factual context can result in significant differences in legal obligations. Consider seeking legal advice with respect to any particular situation.