

No. 02-2629

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHN BYRNE,

Plaintiff-Appellant,

v.

AVON PRODUCTS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division, No. 00 C 5378
The Honorable **Milton I. Shadur**, Judge Presiding.

BRIEF OF APPELLEE
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Appellate Court No. 02-2629

Short Caption: *Byrne v. Avon Products, Inc.*

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Avon Products, Inc.

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Vedder, Price, Kaufman & Kammholz

- (3) If the party or amicus is a corporation:

- i) Identify all its parent corporations, if any; and

None

- ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

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III. JURISDICTIONAL STATEMENT

The jurisdictional statement submitted by Plaintiff, John Byrne (“Byrne”), is not complete and correct. Defendant, Avon Products, Inc. (“Avon”), submits the following complete and correct jurisdictional statement.

A. District Court Jurisdiction

The District Court had jurisdiction over Count I (violation of the Family and Medical Leave Act, 29 U.S.C. § 2601, et seq. (“FMLA”)), and Count II (violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (“ADA”)) of the Complaint (R.1)¹ pursuant to 29 U.S.C. § 2617(a)(2) and 42 U.S.C. § 12117 (incorporating by reference 42 U.S.C. § 2000e-5(f)(3)), respectively.

B. Appellate Court Jurisdiction

On May 22, 2002, the District Court granted Avon’s motion for summary judgment on both Counts of the Complaint (R.32). The Clerk of the District Court entered final judgment in accordance with Fed. R. Civ. P. 54 on May 24, 2002 (R.32). Byrne filed a Notice of Appeal 27 days later on June 20, 2002 (R.33). Byrne’s appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A) because it was filed within 30 days of the entry of final judgment and this Court otherwise has jurisdiction pursuant to 28 U.S.C. § 1291.

IV. STATEMENT OF ISSUES

1. Whether the District Court properly granted summary judgment to Avon on Byrne’s FMLA entitlement claim?

2. Whether the District Court properly granted summary judgment to Avon on Byrne’s failure to accommodate claim under the ADA?

¹ References to “R. ___” are to the pages and exhibits contained in the Record on Appeal. References to “Brief at ___” and “A. ___” are to the pages of the Plaintiff’s Brief and attached Appendix, respectively.

V. STATEMENT OF THE CASE

Byrne's Statement of the Case (Brief at 1-2) is complete and correct.

VI. STATEMENT OF FACTS

The record shows that most of the facts are undisputed.

A. The Parties

Avon is a global manufacturer and distributor of beauty products with a production and distribution facility in Morton Grove, Illinois (R.15 ¶ 1; R.22 ¶ 1). It employs approximately 700 employees there on three shifts (R.15 ¶ 1; R.22 ¶ 1). Byrne was hired at the Morton Grove facility on July 1, 1994 and until the events which gave rise to his discharge, was generally a satisfactory employee (R.15 ¶ 2; R.22 ¶ 2).

B. Plaintiff's Employment

Throughout his five-year employment, Byrne worked as the sole stationary engineer on the third shift, the hours of which are 10:00 p.m. to 6:00 a.m. (R.15 ¶ 3; R.22 ¶ 3). In that job, Byrne was responsible for monitoring and maintaining the operation of Morton Grove's steam system, including its boilers, air compressors and related equipment (R.15 ¶ 4; R.22 ¶ 4). The job is critical to Morton Grove operations because steam is integral to the running of other plant equipment and machinery (R.15 ¶ 5; R.22 ¶ 5).

Byrne reported to Facilities Engineer James Sparks, who, in turn, reported to Engineering Unit Leader Gregory Korak (R.15 ¶ 4; R.22 ¶ 5). Korak reported to William Baronti, Morton Grove's General Manager (R.15 ¶ 7; R.22 ¶ 7).

1. Byrne Found Sleeping

On Saturday, November 7, 1998, Byrne began work at 2:00 p.m. to work the second shift (2:00 p.m. to 10:00 p.m.) (R.16, Ex. A, p. 85). However, at approximately 5:30 p.m. (17:30 military time used in the Company's computer), Rick Anderson, a Maintenance Advisor, found

Byrne asleep or apparently asleep in the carpenter's shop (R.15 ¶ 8; R.16, Ex. H, p. 28). Byrne was lying back in a chair with his feet propped up on another with his eyes closed (R.15 ¶ 9; R.22 ¶ 9). Anderson woke Byrne, but did not reprimand him because he did not know if Byrne was taking one of his two authorized daily breaks of 10 and 20 minutes, respectively, in the first and second half of each shift (R.15 ¶ 10; R.16, Ex. H, pp. 28-30).

Byrne's job as stationary engineer rarely required him to go to the carpenter's shop, a restricted area located approximately 300 feet away from the boiler room (R.15 ¶ 6; R.22 ¶ 6; R.28 ¶ 6). Indeed, access to the carpenter's shop is gained only by using a security card keyed to an employee's identification number (R.15 ¶ 6; R.22 ¶ 6). Although the carpenter's shop was used by some employees for breaks (R.23 ¶ 107), Byrne was not expected to because he was required to maintain ready availability to the boiler room and an employee lounge and a refrigerator were nearby for break purposes (R.16, Ex. E, pp. 48-49).

a. Sparks and Korak Investigate

The following Monday, November 9, 1998, Anderson reported Byrne's sleeping to Facilities Engineer Sparks, who told Unit Leader Korak (R.15 ¶¶ 11-12; R.22 ¶¶ 11-12).

Korak decided to investigate what Byrne was doing in the carpenter's shop (R.16, Ex. D, p. 61). He first obtained a printout for the preceding three weeks showing the date and time Byrne and other employees entered the carpenter's shop, information automatically recorded and obtained from the security cards used by employees when gaining access (R.15 ¶ 13; R. 26, Ex. B, p. 49). A log prepared from the printout showed that Byrne had already been in the carpenter's shop for approximately 52 minutes when Supervisor Anderson found him sleeping on November 7 (R.15 ¶ 15; R.22 ¶ 15).² It also showed that Byrne had entered the carpenter's

² At his deposition, Byrne confirmed that he had been there for approximately 52 minutes (R.15 ¶ 16; R.22 ¶ 16).

shop every scheduled work day from October 26, 1998 until November 11, 1998, including the afternoon he was found sleeping, and that he often went there two or three times a night (R. 15 ¶ 14; R.22 ¶ 14). Further, the entry times failed to correspond to routine employee break periods (R.15 ¶ 14; R.22 ¶ 14).

Concerned that Byrne was misusing Company time in a remote area for reasons unconnected with his work, Korak and Sparks had a video camera installed in the carpenter's shop on November 11, 1998 (R.15 ¶ 17; R.22 ¶ 17; R.26, Ex. B, pp. 60-61; R.26, Ex. C, pp. 50-51). The next two mornings – November 12 and 13 – Sparks and Korak each reviewed the videotape from Byrne's just concluded third shift (R.15 ¶¶ 18, 20; R.22 ¶¶ 18, 20). As summarized in a log prepared by Korak and as can be seen in the video, Byrne was asleep, reading or engaged in other non-work related "activities" for approximately three hours during the third shift commencing November 11 (R.15 ¶ 19; R.22 ¶ 19). The breakdown of his behavior during that period is as follows:

- a. from 12:30 a.m. until 2:43 a.m., Byrne read and slept while sitting in a chair in the carpenter's shop;
- b. from 2:44 a.m. until 3:05 a.m., Byrne read while sitting in a chair in the carpenter's shop;
- c. from 4:25 a.m. until 4:51 a.m., Byrne read while sitting in a chair in the carpenter's shop.

(R.15 ¶ 19; R.22 ¶ 19).

The tape from Byrne's third shift commencing November 12 similarly showed Byrne engaging in non-work activity for nearly five hours in the carpenter's shop. Thus:

- a. from 10:19 p.m. until 10:52 p.m., Byrne read while sitting there;
- b. from 11:53 p.m. until 1:46 a.m., Byrne read and slept there;

c. from 1:59 a.m. until 4:20 a.m., Byrne slept with the lights off.

(R.15 ¶ 22; R.22 ¶ 22).³

As the Byrne investigation proceeded, Korak spoke either with Brenda LeMire or Mary Ellen Spedale, Morton Grove's Human Resources Managers, and generally informed them what the video showed Byrne doing (R.15 ¶ 25; R.16, Ex. D, p. 89).

b. Supervision's Futile Attempt To Meet Or Talk With Byrne

On Monday, November 16, 1998, Human Resources Manager LeMire advised Korak to meet with Byrne to discuss what Avon knew about his carpenter shop conduct and recommended to him that Byrne be discharged for misuse of Company time (R.15 ¶ 26; R.16, Ex. F, pp. 48-49).

Shortly thereafter, Korak and Sparks agreed that they would to try to speak with Byrne sometime during the third shift beginning that day and ending at 6:00 a.m. on November 17, at which time Sparks planned to terminate Byrne (R.15 ¶¶ 27-28; R.16, Ex E, pp. 82-83). However, the meeting never took place. Byrne left the plant at 1:17 a.m. on November 17 without the knowledge or consent of anyone and without Byrne having sought to cover the balance of his shift with another stationary engineer or supervisor (R.15 ¶ 29; R.22 ¶ 29). Nor at any time did Byrne call Sparks at home to tell him that he was leaving (R.15 ¶ 30; R.22 ¶ 30). Instead, at 1:17 a.m., Byrne left Sparks a message on the latter's work voicemail stating he was

³ At his deposition, Byrne denied sleeping during either shift, but admitted he was in the carpenter's shop for approximately three hours on November 11-12 and five hours on November 12-13 without doing anything related to his maintenance job (R.15 ¶¶ 20, 23; R.22 ¶¶ 20, 23). He also admitted that he did not have permission from management or supervision, including Sparks or Korak, to be there or take up to five-hour breaks or that he needed them for any medical or other reason (R.15 ¶¶ 21, 24; R.22 ¶¶ 21, 24).

“sick” or “not feeling good” and would not be at work for the rest of the week (R.15 ¶ 30; R.16, Ex. A, p. 135; R.22 ¶ 30).⁴

Not knowing that Byrne had left, Sparks, as previously agreed, came to the plant at 3:00 a.m. to meet Korak for the purpose of discussing Byrne’s conduct with him (R.15 ¶ 32; R.22 ¶ 32). When they were unable to locate Byrne, Sparks spoke to security personnel who told him that Byrne had left the plant and left him a voicemail (R.15 ¶ 33; R.22 ¶ 33).

Then at about 4:00 a.m., after listening to Byrne’s message, Sparks called Byrne at his home (R.15 ¶ 34; R.22 ¶ 34). His sister, Sheila Byrne, answered and told Sparks that Byrne was at work (R.15 ¶ 34; R.22 ¶ 34). When Sparks told Ms. Byrne that Byrne was not there, she responded that Byrne probably was at his other sister’s – Madge Rodgers’ – house (R.15 ¶ 34; R.22 ¶ 34). When Sparks asked Ms. Byrne for Rodgers’ telephone number, she refused to give it to him, but told Sparks that she would call Rodgers to find out if Byrne was there (R.15 ¶ 34; R.22 ¶ 34). She did, and fifteen minutes later Ms. Byrne called Sparks back and confirmed that Byrne was at Rodgers’ house (R.15 ¶ 35; R.22 ¶ 35). During one of their two conversations, Sparks asked Ms. Byrne if she noticed her brother “being strange,” and she said “no” (R.15 ¶ 36; R.22 ¶ 36). Sparks also denied observing Byrne acting strangely (R.15 ¶ 36; R.22 ¶ 36).

Beginning at approximately 8:00 a.m. on November 17, Sparks called the Rodgers household several times, asking to speak to Byrne (R.15 ¶ 37; R.22 ¶ 37). At her deposition, Madge Rodgers did not have a clear recollection of how many times she spoke to Sparks that day or what was said in each conversation (R.15 ¶ 37; R.22 ¶ 37). But she estimated that there were three to five such conversations and that in them:

⁴ Although at his deposition Byrne said he felt nauseous, nervous and had hallucinations when he left, he admitted that he did not tell anyone at Avon, by voicemail or otherwise, of these symptoms (R.15 ¶ 31; R.22 ¶ 31).

- Rodgers told Sparks that Byrne was vomiting and too ill to speak on the phone;
- Sparks asked if Byrne was so ill why was he not in a hospital; and
- Rodgers told Sparks that Byrne had locked himself in a room and that she was trying to get Byrne to his personal physician, Dr. Poulus.

(R.15 ¶ 37; R.22 ¶ 37; R.16, Ex. B, p. 44; R.23 ¶¶ 176, 178-79; R.26, Ex. H, ¶ 5).

At some point during these conversations, according to Rodgers, Sparks asked whether she noticed Byrne acting “strange” or “noticed anything wrong with [him]?” and Rodgers replied “no” (R.15 ¶ 37; R.22 ¶ 37; R.16, Ex. B, pp. 44, 46, 56). However, Byrne evidently had grabbed a pair of scissors and tried to cut his wrists, which prompted Rodgers to get her son, Neil, and husband to restrain him (R.23 ¶ 97; R.26, Ex. A, pp. 145-46). Byrne then locked himself in the family room until about 2:00 p.m. on November 17 (R.23 ¶ 98). Despite the apparent gravity of Byrne’s actions, Rodgers never told Sparks or anyone at Avon about them.

Later the same morning and again in the afternoon, Sparks spoke twice to Neil Rodgers, (R.26, Ex. H, ¶¶ 3, 6, 7). Neil Rodgers also said nothing about Byrne’s earlier possibly suicidal behavior (R. 26, Ex. H), but told Sparks that “John is not well,” and that “his well-being is really more important than meeting with you” (R.26, Ex. H, ¶¶ 6, 7). He also said that efforts were being made to take Byrne to the hospital (R.26, Ex. H, ¶¶ 6, 7).

In a final telephone call to the Rodgers household at approximately 2:00 p.m. on November 17, 1998, Sparks spoke directly with Byrne (R.15 ¶ 39; R.22 ¶ 39; R.23. ¶ 98). During this conversation, Sparks asked Byrne what was wrong but was unable to understand his answer because Byrne was somewhat incoherent (R.16, Ex. E, pp. 113-16). Sparks eventually asked Byrne whether he had a fever, and Byrne responded “fever, fever” (R.15 ¶ 39; R.22 ¶ 39; R.16, Ex. E, pp. 113-16). Nevertheless, Sparks told Byrne to come to a meeting at 3:30 p.m. at the Morton Grove facility, stressing that it was important (R.15 ¶ 40; R.22 ¶ 40). At first, Byrne

resisted, saying he had a doctor's appointment, but ultimately agreed to appear as requested (R.23 ¶ 219; R.15 ¶ 41; R.22 ¶ 41).⁵

Korak and Sparks appeared for the 3:30 p.m. meeting as agreed and waited for Byrne for approximately 90 minutes (R.26, Ex. B, pp. 117-18). Byrne, however, did not appear or cancel the meeting (R.15 ¶ 41; R.22 ¶ 41). Byrne could not meet because at approximately 2:30 p.m., his sister took him to Lutheran General Hospital's emergency room where Byrne was examined but not diagnosed (R.15 ¶ 42; R.16, Ex. B, pp. 52-53, 59). Rodgers remained with Byrne that afternoon and evening until approximately midnight, when Byrne was admitted for further evaluation (R.16, Ex. B, pp. 52-53). During that time, Rodgers had no contact with Sparks or anyone else at Avon (R.16, Ex. B, pp. 52-53), and Avon managers had no knowledge of his hospitalization.

c. Avon's November 17, 1998 Discharge Decision

After Byrne failed to appear for his 3:30 p.m. meeting, both Sparks and Korak immediately recommended to Human Resources and simultaneously to Morton Grove's General Manager Bill Baronti that Byrne be terminated (R.15 ¶ 43; R.22 ¶ 43). All managers concurred, and as a result Korak next prepared a standard discharge letter and a "discussion form" to effect it (R.15 ¶ 43; R.22 ¶ 43). The next day, November 18, the letter terminating Byrne's employment for misuse of Company time was mailed (R.15 ¶ 44; R.22 ¶ 44).

C. Avon's Continuing Ignorance Of Byrne's Medical Condition

On the morning of November 18, the same day as Byrne's discharge letter was mailed, Madge Rodgers called Sparks, Mary Ellen Spedale and a Human Resources assistant and told each that Byrne was hospitalized (R.15 ¶¶ 46-47; R.22 ¶ 47; R.28 ¶¶ 42, 46; R.29 ¶¶ 235-36,

⁵ Byrne testified that he never told Sparks or anyone else at Avon that he was depressed or suicidal or had any psychiatric or other medical or psychological problems (R.15 ¶ 49;

239).⁶ In these conversations, Rodgers failed to tell anyone at Avon that Byrne was diagnosed with depression or any other physical or mental condition (R.15 ¶ 48; R.22 ¶ 48). Indeed, Avon first learned what was wrong with him approximately three weeks later, when his treating psychiatrist, Dr. Ok Ro Hong, notified Avon by letter dated December 11, 1998 that Byrne had severe depression (R.15 ¶ 50; R.22 ¶ 50).

D. Byrne's Depression And Treatment

According to Dr. Hong's belated report, Byrne began to suffer from symptoms associated with depression, particularly, sleep disturbance, after returning from a trip to Ireland in October 1998 (R.16, Ex. M). His depression and resulting sleeplessness, stated the doctor, became progressively worse until approximately November 7, 1998, when it began to affect his work performance (R.16, Ex. M).

Byrne's medical records show that, when Byrne was hospitalized for the first and only time on November 17, 1998, Dr. Hong prescribed three medications for him: (1) an antipsychotic for hallucinations and paranoid delusions (Risperdal); (2) a sleep aid (Trazedone); and (3) an antidepressant (Effexor) (R.26, Ex. M, p. 4). However, after two days of treatment, Byrne showed significant improvement, becoming more "sociable" and participating in group sessions and recreational activities (R.26, Ex. M, p. 4). On November 25, 1998, Byrne's psychiatrist re-evaluated him and concluded that Byrne no longer had suicidal or paranoid ideations and no delusions (R.26, Ex. M, p. 4). His antipsychotic and sleeping medications were discontinued, and Byrne was discharged later that day in stable condition with a prescription for an

R.22 ¶ 49).

⁶ In his deposition, Sparks initially testified that Madge Rodgers called him on November 17 and informed him of Byrne's hospitalization (R.29 ¶¶ 235-36, 239). Sparks later corrected himself and testified consistently with Madge Rodgers that the conversation occurred on November 18 (R.15 ¶ 47; R.16, Ex. B, pp. 52-53, 72-75; R.29 ¶¶ 235-36, 239).

antidepressant only and directions to attend a day program for further counseling (R.26, Ex. M, p. 4).

Dr. Hong released Byrne to return to work on January 12, 1999 (R.1 ¶ 21).

E. Comparatives

In addition to Byrne, Avon supervisors have discharged two other Morton Grove employees sleeping on the job – forklift operator Tommie Powell, Jr., and machine operator Teresa Kinel (R.23 ¶¶ 260, 262-63, 265, 270-71).

VII. SUMMARY OF THE ARGUMENT

Avon violated neither Byrne's rights under the FMLA or the ADA by denying him medical leave.⁷ Although Byrne was ill in November 1998, neither Byrne nor his family told Avon how ill. Nor did Avon have enough information to reasonably infer it before he was effectively and actually fired. Therefore, Avon did not and could not have known that Byrne suffered from an FMLA-qualifying health condition or what could have been an ADA-covered disability. Accordingly, neither Act imposed obligations on Avon to grant Byrne a medical leave.

Moreover, as the District Court recognized and ruled, the FMLA and its implementing regulations do not insulate employees from the consequences of their own poor performance, even if those performance problems are caused by the condition for which FMLA leave is requested or taken. Here, it cannot be seriously disputed that Byrne would have been discharged in the early morning meeting of November 17, 1998, which never occurred, for blatantly and repeatedly misusing Company time.

⁷ Byrne abandons on appeal his ADA disparate treatment claim that he was fired on account of his depression.

Byrne's claim to protection under the ADA's reasonable accommodation requirements is groundless. Avon had no notice that Byrne had a disability. And Byrne was not disabled as a matter of law. His severe depression was an isolated and apparently non-recurring bout. Under the ADA, isolated bouts of depression, severe or not, are not covered disabilities.

Byrne also was unprotected by the ADA because no record evidence shows that Byrne was a "qualified individual" within the meaning of the Act. Neither Byrne nor anyone else had any idea at the time of Byrne's discharge whether Byrne, who indisputably was unqualified to do his job without accommodation, would ever become qualified again, what accommodation was necessary or how long it would be required. All these are requisite under the law and Byrne met none.

For all these reasons, the District Court properly granted Avon's summary judgment motion, and its decision should be affirmed.

VIII. ARGUMENT

A. Standard Of Review

The District Court's grant of summary judgment is reviewed *de novo*. Basith v. Cook County, 241 F.3d 919, 926 (7th Cir. 2001).

B. The District Court Correctly Ruled That Byrne Was Not Entitled To FMLA Leave.

As properly held by the District Court (A. 19), the undisputed record facts establish that Byrne could never prevail before a rational fact finder on his FMLA entitlement claim.⁸ The Company had no actual or constructive knowledge of his qualifying medical condition when it

⁸ Byrne proceeds under only the FMLA's prescriptive rights – specifically, the right to take leave in the first instance and the right to be reinstated when leave expires. See 29 U.S.C. §§ 2612(a)(1), 2614(a), 2615(a)(1). Byrne's Brief and his submission to the District Court (R.22, pp. 14-15) make no reference to either the FMLA's anti-retaliation provision (29 U.S.C. § 2615(a)(2)) or the McDonnell-Douglas framework governing FMLA retaliation claims. See King v. Preferred Technical Group, 166 F.3d 887, 892 (7th Cir. 1999).

decided to discharge him or take steps preparatory to doing so. Even if it had, Byrne was properly discharged for repeated wrongdoing that he acknowledged in his deposition. He was AWOL from his assigned work station, the boiler room, and sleeping or reading for hours on end in another plant location where he had no business. The FMLA does not protect employees from the consequences of their own misconduct even when a medical condition may give rise to it. For both of these reasons, the District Court decision is correct and should be affirmed.

1. Avon Had No Notice Of A Serious Health Condition.

Byrne's FMLA entitlement claim fails first because the undisputed record evidence shows that neither he nor his family timely complied with the FMLA's notice requirements by advising Avon he had a health condition serious enough to require extended time away from work. See 29 C.F.R. § 825.303.

The FMLA requires health-related leave only for employees who suffer from a "serious health condition." 29 U.S.C. § 2612(a)(1)(D); see Collins v. NTN-Bower Corp., 272 F.3d 1006, 1008 (7th Cir. 2001); Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 713 (7th Cir. 1997). But the employee must also let his employer know about that condition as soon as reasonably practical. See Collins, 272 F.3d at 1006 (citing 29 C.F.R. § 825.303); see also Horwitz v. Bd. of Educ. of Avoca Sch. Dist. No. 37, 260 F.3d 602, 609, 616 (7th Cir. 2001) (doubting the adequacy of notice where employee failed to disclose her depression, stating only that she had a "medical condition" and could not work for nearly a month).

Here, neither Byrne nor members of his family who spoke with Avon management or supervision provided adequate notice until after he was terminated. Prior to his discharge, Avon knew only that Byrne had left work feeling ill. It also knew from Byrne's sister, Madge Rodgers, and his nephew, Neil, that Byrne was "sick" or "not well" and vomiting, that he was not coherently expressing himself, that he might have a fever, and that he planned to see a

doctor. What Avon did not know, because neither one of the Rodgers told Avon, was that Byrne had sought to cut his wrists and was evidently suicidal. Whether Byrne's family members were trying to protect him from embarrassment or were acting from some other altruistic motive is immaterial. What is material and controlling is Avon's ignorance, at the critical juncture in its own decision-making, of Byrne's more serious mental problems. What Avon knew is insufficient to put it on notice that Byrne had a serious health condition. Not every sickness qualifies. See Collins, 272 F.3d at 1008 ("sick" does not imply a "serious health condition").

Although, Byrne asserts that Avon, in fact, knew more – specifically, that it had been told that his family planned to take him to the hospital (Brief at 18) – that too is insufficient notice.⁹ Even if Avon had been unambiguously notified that Byrne was going to or was at the hospital, which it was not, a single visit to the hospital does not imply a "serious health condition" within the meaning of the Act. Inpatient care or *continuing* treatment by a health care provider is the standard. See 29 C.F.R. § 825.114. Madge Rodgers, however, testified that she did not even advise Avon until the morning of November 18 that Byrne had been hospitalized and that was the day *after* Avon made its discharge decision, and the day it dispatched Byrne's discharge letter reflecting that earlier decision (supra at 8-9).

Byrne argues that had Avon granted him leave, it then would have discovered that he did indeed have a serious medical condition (Brief at 22) (*citing* 29 C.F.R. §825.303(b)).¹⁰ But this

⁹ It is far from clear from the record that Avon even knew that much. Byrne's sister, Madge Rodgers, testified in her deposition that she told Sparks only that she was taking Byrne to his family physician, Dr. Poulus (R.16, Ex. B, p. 44), a statement her son, Neil Rodgers, confirmed (R.26, Ex. H, ¶ 5). Byrne, himself, also told Sparks that he had a doctor's appointment (R.23 ¶ 219). Only one line in Neil Rodgers' affidavit suggests that Avon had been told about the Byrne family's plan to take Byrne to the hospital (R.26, Ex. H, ¶ 7), a thin factual reed.

¹⁰ That regulation, inapposite to Byrne's argument, provides that employees need not expressly assert their FMLA rights in order to be offered protection. But, as just discussed, Byrne did not

is not the way the law is intended to operate. The right to a medical leave only comes into existence when the employer knows that the obligation is owed. Employers are not required to divine that need or to rearrange its business operations to find out. See Johnson v. Primerica, 94 CV 4689, 1996 WL 34148, at *5 (S.D.N.Y. Jan. 30, 1996).

Accordingly, the District Court properly granted Avon summary judgment on Byrne's FMLA claim for this reason.

2. Even With Adequate Notice, Byrne Was Lawfully Discharged.

Had Byrne (or his family) properly informed Avon of his need for an FMLA leave, Avon still was under no obligation to grant it because Byrne's discharge for poor performance already was an accomplished fact or virtually so and Avon's reasons were perfectly legitimate.

It is beyond serious dispute that sleeping on the job and otherwise ignoring job responsibilities warrants discharge. Here, Byrne did both. He slept or read or otherwise wiled away his time in the carpenter's shop while the boiler room – the literal heart of the plant – went completely unattended.

Accordingly, even if Byrne had had a right to a leave,¹¹ it was forfeit by his acknowledged serious and repeated wrongdoing in the workplace. As recognized and held in Kohls v. Beverly Enterprises Wisconsin, Inc., 259 F.3d 799 (7th Cir. 2001), Section 2614(a)(3) of the Act excludes from its substantive rights “any right, benefit or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.” Id. at 804 (quoting 29 U.S.C. § 2614(a)(3)(B)); see 29 C.F.R.

provide enough information for a reasonable employer to conclude even inferentially that he had a serious medical condition.

¹¹ Byrne torturously asserts without record support that he was entitled to a pre-discharge meeting (originally scheduled for November 17 at 3:30 p.m.), that had it been deferred as it

§ 825.216(a) (“An employee has no greater right to reinstatement or other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period.”); see also Rice v. Sunrise Express, Inc., 209 F.3d 1008, 1017-18 (7th Cir.), reh’g en banc denied, 217 F.3d 492 (7th Cir.), cert. denied, 531 U.S. 1012 (2000).

As applied to the facts here, Byrne was not protected by the FMLA by virtue of any inchoate right to a leave anymore than if he had been on a leave when his wrongdoing was discovered. The statute was not intended as a guarantor of employment greater than that accorded to other employees whether or not on leave. As this Court said:

As indicated by the statute, an employer can refuse to restore an employee to their former position when restoration would confer a “right, benefit, or position of employment” that the employee would not have been entitled to if the employee had never left the workplace. 29 U.S.C. §2614(a)(3)(B). For example, if an employee was hired only for a discrete project, and that project was completed while the employee was on leave, then the employer has no obligation to restore the employee. See 29 C.F.R. §825.216(b). The regulations also state that an employee who is laid off during the course of her leave has no right to reinstatement. See *id.* at (a)(1). With no absolute right to reinstatement, whether an employer violates the FMLA turns on why the employee was not reinstated. Clearly, an employee may not be fired because she took leave – that would be in direct violation of the statute. See 29 U.S.C. §2615(a)(2). However, an employee may be fired for poor performance when she would have been fired for such performance even absent her leave. See *Clay v. City of Chi. Dep’t. of Health*, 143 F.3d 1092, 1094 (7th Cir. 1998).

Kohls, 259 F.3d at 805; accord Ogborn v. United Food and Commercial Workers Union, Local No. 881, 305 F.3d 763, 768 (7th Cir. 2002).

Although Kohls dealt specifically with the right to reinstatement under FMLA Section 2614(a)(1)(A) once FMLA leave expires, its analysis applies equally to employees not on leave like Byrne. Thus, in Serio v. Jojo’s Bakery Restaurant, 102 F. Supp.2d 1044 (S.D. Ind. 2000), plaintiff advised his supervisors that he was “sick” and “not feeling” well. *Id.* at 1048-49. He

should have been, Avon would then have been on notice concerning his depression and, hence, he would have been entitled to an FMLA leave (Brief at 22-24).

also advised one of them that he had just visited the hospital and needed medical leave. Id. at 1048-49 & n.3. Despite plaintiff's notice, plaintiff's supervisors, who had already planned to discharge him, requested that plaintiff meet with them to discuss his poor work performance. Id. When plaintiff did not appear because he believed that his condition excused him, defendant terminated him. Id. at 1049. Nevertheless, the district court upheld the discharge against plaintiff's FMLA entitlement claim, concluding: "ignoring [plaintiff's] poor performance and deferring his termination simply because he requested medical leave would vest [plaintiff] with greater rights and benefits than he would have enjoyed had he continued working without requesting such leave." Id. at 1052. The same reasoning applies here on facts worse for Byrne. His performance would have resulted in discharge irrespective of his medical condition.

Further, no evidence supports Byrne's corollary argument (supra at 14, n.11) that had Avon delayed his November 17 meeting until he returned from a medical leave, Avon would not have fired him.¹² The record is uncontradicted that both Sparks and Human Resources Manager LeMire had already concluded that Byrne should be terminated *before* the meeting was scheduled (supra at 5). And although Korak testified he would not have conclusively determined Byrne's fate until after they had met (Brief at 23), no record evidence shows that anything Byrne could have said ultimately could have made a difference in light of the overwhelming proof of his serious misconduct. Byrne only speculates that the meeting might have made a difference (Brief at 23-24). However, speculation is not enough to stave off summary judgment on these undisputed facts concerning his poor performance. See Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 931-32 (7th Cir. 1995).

¹² Although Avon was perhaps harsh in scheduling the meeting knowing that Byrne was ill, that fact is immaterial as a matter of law. Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1034 (7th Cir. 1999) (court does not sit as a super-personnel department that re-examines an employer's personnel decision).

Finally, and contrary to Byrne, Avon would have been within its rights to discharge Byrne for sleeping on the job even if Byrne's misconduct was the product of his underlying medical condition. "While it may be true that [plaintiff's] problems were a result of [her] illness, the FMLA does not protect an employee from performance problems caused by the condition for which FMLA leave is taken, nor does it require that an employee be given an opportunity to show improved job performance when not ill." McBride v. Citgo Petroleum Corp., 281 F.3d 1099, 1108 (10th Cir. 2002); cf. Waggoner v. Olin Corp., 169 F.3d 481, 484 (7th Cir. 1999) ("[T]he ADA does not protect persons who have erratic, unexplained absences, even when those absences are the result of a disability").

Because Avon properly discharged Byrne for poor performance before he sought a leave and could lawfully have done so had a leave been granted, Byrne had no FMLA rights whatsoever. Therefore, the District Court properly granted Avon summary judgment for this reason as well.

C. The District Court Correctly Ruled That Byrne Was Entitled To No Accommodation Under The ADA.

To prevail on the only ADA issue that Byrne raises on appeal¹³ – that Avon failed to accommodate his disability – Byrne is required to show that: (1) he was disabled; (2) his employer was aware of his disability; and (3) he was a qualified individual who, with or without reasonable accommodation, could perform the essential functions of the position. See Basith,

¹³ In the District Court, Byrne argued both that Avon had discriminated against him on the basis of a disability (depression) and failed to accommodate that disability. On appeal, however, Byrne abandons the former, disparate treatment claim, and pursues only the latter, failure to accommodate, claim (Brief at 28) ("Byrne's claims under the ADA are premised on the fact that he did not receive a reasonable accommodation for his disability"). Byrne's failure to accommodate claim, however, is meritless and the District Court properly so found.

241 F.3d at 927; Contreras v. Suncoast Corp., 237 F.3d 756, 762 (7th Cir.), cert. denied, _____ U.S. _____, 122 S.Ct. 62 (2001).

Byrne satisfies none of these elements and, accordingly, the District Court properly granted Avon summary judgment on his ADA claim.

1. Byrne Was Not Disabled.

Byrne first argues that he is “disabled” within the meaning of the ADA because he suffers from depression, an ADA-recognized impairment, which substantially limits his major life activities of sleeping, thinking and interacting with others (Brief at 27). However, Byrne’s “disability” is without record support. Although the record shows that Byrne was diagnosed with, and hospitalized once (and briefly) for, depression in November 1998 and that Byrne still receives some treatment for it today (Brief at 14), the record also shows that Byrne’s major life activities were significantly limited for less than six weeks. Accordingly, Byrne is not “disabled” within the meaning of the ADA and Avon had no obligation to accommodate him.

As repeatedly recognized by the United States Supreme Court and this Court, the ADA protects a finite universe of people. See Sutton v. United Air Lines, Inc., 527 U.S. 471, 487 (1999); Waggoner v. Olin Corp., 169 F.3d 481, 484 (7th Cir. 1999). It does not, for example, protect everyone with an impairment. Waggoner, 169 F.3d at 484. Only those individuals with disabilities, that is, individuals with impairments that substantially limit one or more major life activities, are covered. See id. “The Act is not a general protection of medically afflicted persons. . . . [I]f the employer discriminates against them on account of their being (or being perceived by him to be) ill, even permanently ill, but not disabled, there is no violation.” Christian v. St. Anthony Med. Ctr., Inc., 117 F.3d 1051, 1053 (7th Cir. 1997), cert. denied, 523 U.S. 1022 (1998); see Waggoner, 169 F.3d at 484.

Although, as Byrne correctly points out, major depression can constitute a disability under the ADA, see Ogborn v. United Food & Commercial Workers Union, Local No. 881, 305 F.3d 763, 768 (7th Cir. 2002); Krocka v. City of Chicago, 203 F.3d 507, 512 (7th Cir. 2000), depression is not necessarily disabling for everybody. See Ogborn, 305 F.3d at 767; Schneiker v. Fortis Ins. Co., 200 F.3d 1055, 1061 (7th Cir. 2000). Moreover, as this Court recently observed, “intermittent, episodic impairments such as broken limbs and appendicitis are not disabilities, . . . *nor are isolated bouts of depression.*” Ogborn, 305 F.3d at 767 (emphasis added) (citations omitted); see Waggoner, 169 F.3d at 484 (disability does not include temporary medical conditions).¹⁴

Here, the facts establish that Byrne’s depression was “an isolated bout,” not a disability. Its effect on his major life activities was, at best, transient. Thus, according to Byrne’s psychiatrist, Byrne began suffering from the effects of depression, specifically, sleeplessness, in October 1998 after he returned from a trip to Ireland. As Byrne’s insomnia persisted and his mental condition degenerated, Byrne’s work suffered, he became delusional, attempted suicide, and required hospitalization from November 17 through November 25, 1998 (supra at 8-9).

However, no record evidence exists that Byrne’s major life activities were substantially limited after his hospitalization. Byrne’s medical records show that Byrne improved dramatically during his eight-day hospital stay. His sleeplessness improved to the point where he no longer required medication, and his antipsychotic medication was discontinued. Byrne’s psychiatrist also noted that Byrne began participating in recreational activities and group

¹⁴ Below, the District Court focused only on the severity of Byrne’s symptoms and concluded that Byrne had raised a genuine issue of fact regarding his disability (A. 13). However, the District Court did not then have the benefit of this Court’s decision in Ogborn, which clarified that isolated bouts of depression are not disabilities, even if severe when they occur. See Ogborn, 305 F.3d at 766 (plaintiff’s ex-wife called police, stating that plaintiff was “crazy and suicidal”).

meetings. On November 25, 1998, Byrne was discharged with only a prescription for an antidepressant and instructions to attend a day program for further therapy. And by January 12, 1999, Byrne's doctor certified Byrne to return to work (supra at 8-9). The record reveals no relapse or ongoing medical irregularities of the kind that precipitated Byrne's hospitalization or required time away from work to convalesce.

In short, Byrne had an isolated bout of depression, not a disability, and Avon was under no obligation to accommodate him.

2. Avon Was Unaware Of Byrne's Alleged Disability.

But even if Byrne did have a disability, Avon's obligation to accommodate was not triggered because the record shows that Avon could not reasonably have known of it before his discharge.

"An employee has the initial duty to inform the employer of a disability before ADA liability may be triggered for failure to provide accommodations – a duty dictated by common sense lest a disabled employee keep his disability a secret and sue later for failure to accommodate." Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1134 (7th Cir. 1996); see also Hedberg v. Indiana Bell Telephone Co., 47 F.3d 928, 934 (7th Cir. 1995) ("The ADA does not require clairvoyance."). Thus, the Act requires only reasonable accommodations "to the *known* physical or mental limitations" of an employee. Id. (quoting 42 U.S.C. § 12112(b)(5)(A)) (emphasis in original). An employer that has no knowledge of an employee's disability cannot be held liable for not accommodating him. Id. Similarly, an employee cannot wait until after dismissal to inform an employer of his disability and request an accommodation for the first time. See Amadio v. Ford Motor Co., 238 F.3d 919, 929 n.3 (7th Cir. 2001).

Beck and Amadio doom Byrne's claim. Contrary to Byrne's argument on appeal that "Avon was presented with evidence of a mental disability" thereby triggering its obligation to accommodate (Brief at 30), the record is to the contrary. As discussed above (supra at 12-13), and as is shown indisputably in this factual record (supra at 6-8), Avon would have had to be all-seeing and all-knowing to perceive that Byrne was depressive or otherwise disabled when it discharged him. All Avon knew at that time was that Byrne had left work feeling ill, that he was vomiting, that he was not coherently expressing himself, that he might have a fever, and that he had plans to see a doctor – a plainly inadequate showing that Avon knew Byrne was disabled.

Moreover, no request for accommodation was ever made to Avon until mid-December 1998, weeks after Byrne's discharge, when Byrne's psychiatrist wrote to Avon, advising it for the first time of Byrne's depression and requesting Avon to "take reconsideration regarding his employment status" (R. 16, Ex. M). That request came too late to require Avon to take action. Amadio, 238 F.3d at 929 n.3.

Because this record shows that Byrne's illness was all Avon knew about his condition, Avon had no obligation to provide Byrne an accommodation.

3. Byrne Submits No Evidence Of Qualification With Reasonable Accommodation.

Finally, Byrne's reasonable accommodation claim fails because the record contains insufficient evidence to show that Byrne can establish that he is a "qualified individual with a disability" who, with or without reasonable accommodation, could perform the essential functions of the position. See Basith, 241 F.3d at 927.

It is undisputed that prior to his discharge, Byrne was not qualified *without* an accommodation. For weeks Byrne spent between three and five hours per shift away from his post, reading, sleeping and basically ignoring his duties, in an area where he was not supposed to

be and behind a locked door to which only a few employees had security access (supra at 3-5). Byrne's conduct was tantamount to not showing up for work at all. This Court has repeatedly held that, "attendance is usually an essential function in most every employment setting; if one is not present, he is usually unable to perform his job." Jovanovic v. In-Sink-Erator Division of Emerson Electric Co., 201 F.3d 894, 898-99 (7th Cir. 2000). "This is especially true in factory positions, such as [plaintiff's], where the work must be done on the employer's premises; maintenance and production functions cannot be performed if the employee is not at work." Id.

Because Byrne indisputably was not performing the essential functions of his job without accommodation, he can prevail on a failure to accommodate claim only if he shows that he could perform *with* reasonable accommodation. See Amadio, 238 F.3d at 928. Byrne, however, submitted no relevant evidence on this point. Although Byrne argues that a "short" medical leave for hospitalization and therapy would have been a reasonable accommodation, Byrne's contention is based solely on his post-discharge success in treatment (Brief at 28-29). But the facts relevant to a determination of whether a medical leave is a reasonable accommodation are the facts available to the decision-maker *at the time of the employment decision*. Amadio, 238 F.3d at 928. Thus, the ultimate future success of Byrne's treatment is immaterial.

As to the facts that are material, the District Court properly concluded that none relating to the appropriateness of accommodation was available to Avon when Byrne was discharged. The District Court found "no medical or other relevant evidence to demonstrate what was needed, how long it would take, how it would affect his future ability to function as a stationary engineer and why the accommodation would be reasonable for his employer" (A. 14). The District Court also found that few additional facts emerged in the weeks *after* Byrne had been discharged. Although Avon subsequently received a one-page letter dated December 11 from

Byrne's psychiatrist regarding Byrne's depression, the District Court properly concluded it was inadequate and uninformative because it advised Avon only that Byrne had been in "treatment" since November 17 and requested that Avon "[p]lease take reconsideration regarding his employment status" (A. 14) (quoting R.16, Ex. M).

Clearly, Avon had no information about Byrne's prospects for recovery at, or near, the time of Byrne's discharge, and the District Court properly so found. Thus, it committed no error in granting Avon's motion for summary judgment on Byrne's failure to accommodate claim, when Byrne submitted nothing to Avon showing that he was, or would at some point become, "qualified" to work with reasonable accommodation.

IX. STATEMENT CONCERNING ORAL ARGUMENT

In accordance with Fed. R. App. P. 34(a)(1) and Circuit Rule 34(f), Avon states that oral argument is not appropriate and need not be permitted because: (1) the dispositive issues have been authoritatively decided; and (2) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. See Fed. R. App. P. 34(a)(2)(B), (C).

X. CONCLUSION

For the foregoing reasons, Defendant, AVON PRODUCTS, INC., respectfully requests that the decision of the District Court granting it summary judgment be affirmed.

Respectfully submitted,

AVON PRODUCTS, INC.

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CERTIFICATE OF SERVICE

I, James E. Bayles, Jr., an attorney, certify that I served the foregoing Brief of Appellee Avon Products, Inc. by causing three true and correct copies of the same – two in hard copy format and one on floppy disk -- to be mailed, by United States mail, with proper postage prepaid, to:

Elizabeth Hubbard
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on this ____ day of January, 2003.

James E. Bayles, Jr.