Credit Union Attorney Law Letter

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Employee Reading and Sleeping on Job Not Entitled to Extended Leave Under Americans with Disabilities Act, But May Be Entitled to Reclassification of That Time as Leave Time under Family Medical Leave Act

In ***Byrne v. Avon Products, Inc.***, 02-2629 (7th Cir. May 9, 2003), the Seventh Circuit Appeals Court held that an employee who was reading and sleeping on the job allegedly because of major depression was not entitled, under the Americans with Disabilities Act, 42 U.S.C. §§ 12111 *et seq.* ("ADA"), to receive extended leave as an accommodation for his disability; but, the Family Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.* ("FMLA"), may have required his employer to reclassify the two weeks during which he had been documented reading and sleeping on the job as medical leave and count it against the 12 weeks of annual leave to which he was entitled under the FMLA, rather than firing him.

Facts

For four years, John Byrne worked, in an exemplary manner, as a stationary engineer on the night shift at Avon Products. In November 1998, one of Byrne's co-workers reported finding Byrne asleep in the carpenter's shop, which night employees used as a break room. Avon checked security logs and found that Byrne had been frequenting the carpenter's shop recently. Avon installed a camera there. Its first night of operation revealed that Byrne spent three hours reading or sleeping in the shop. The next shift, Byrne was in the shop six hours and spent most of that time asleep.

During Byrne's next shift, an Avon manager requested a meeting with him, but Byrne left early, telling co-workers that he wasn't feeling well and would be out the rest of the week. An Avon manager called Byrne at home. His sister answered the call and said Byrne was "very sick." The next day, an Avon manager spoke to Byrne. Byrne mumbled some strange things but agreed to a meeting on November 17. Byrne did not show for the meeting. Avon fired Byrne for not showing up and for reading and sleeping on the job. The same day, Byrne attempted suicide. His relatives took him to a hospital, where a psychiatrist concluded that he had been suffering from major depression and hallucinations.

After two months of treatment for his mental condition, Byrne asked Avon to rehire him. When Avon declined, Byrne sued alleging that Avon's conduct violated the ADA and the FMLA.

Suit Alleging ADA & FMLA Violations

For his ADA claim, Byrne argued that his mental

condition was a disability that Avon should accommodate by giving him extended leave. Avon objected that a person in need of extended leave was not "qualified" to perform the job. The ADA covers only a "qualified individual with a disability," who is defined as one "who with or without reasonable accommodation can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

The district court agreed with Avon that Byrne's need for extended leave because of his mental condition was an admission that he was unable to perform the essential functions of his position; therefore, he was not a qualified individual with a disability within the meaning of the ADA. The district court therefore granted a judgment for Avon on Byrne's ADA claim.

For his FMLA claim Byrne argued that he was entitled to have the time he had spent reading and sleeping on the job reclassified as leave time and counted against the 12 weeks of unpaid leave that the FMLA granted him for a serious health condition. Avon argued that Byrne was required to give notice of his need for leave and that, by the time it had learned of Byrne's hospitalization, he had already been fired and the conduct for which he was fired, reading and sleeping on the job and not showing up for a meeting justified his discharge. The trial court agreed with Avon and granted it a judgment on Byrne's FMLA claim. Byrne appealed.

Appeals Court Agrees No ADA Claim

On appeal, the Seventh Circuit affirmed the judgment for Avon on Byrne's ADA claim, stating:

> "Byrne did not want a few days off or a part-time position; his only proposed accommodation is not working for an extended time, which as far as the ADA is concerned confesses that he was not a 'qualified individual.' .... Inability to work for a multi-month period removes a person from the class protected by the ADA."

Appeals Court Reverses Judgment for Employer on FMLA Claim

The Seventh Circuit disagreed with the district court's decision to grant a judgment for Avon on the FMLA claim. The court pointed out that, under the FMLA an employee is not required to give notice of a need for leave if the employer knows of the need or if it is not feasible for the employee to give the notice. Here, the appeals court concluded, a jury could find either that Avon knew of Byrne's need for leave from the sudden change in his work behavior, or that it was not feasible for Byrne, as a person suffering from "major depression," to notify his employer about his problem and request leave. The court explained:

> "These are independent possibilities. Either one would entitle Byrne to reinstatement ... when the 'serious health condition' had abated. Instead of treating Byrne's final two weeks as goldbricking, Avon should have classified this period as medical leave -- if Byrne indeed was unable to give verbal or written notice, or if the sudden change in his behavior was itself notice of his mental condition."

The appeals court remanded for a jury trial on Byrne's FMLA claim.

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Judgment Lien Arising from Deficiency After Foreclosure of Mortgage Is Avoidable Under 11 U.S.C. § 522(f) of the Bankruptcy Code

In ***In re Hart (Hart v. BankNorth, N.A.)***, no.02-9005 (1st Cir. May 8, 2003), the First Circuit held that a lien obtained by a bank because the sale of a mortgaged property generated insufficient proceeds to cover the debt was not a "judgment arising out of a mortgage foreclosure" within the meaning of Bankruptcy Code provision 11 U.S.C. § 522(f)(2)(C) and, therefore, bankruptcy debtors could avoid the judgment under 11 U.S.C. § 522(f)(1).

Loan, Default, Foreclosure & Bankruptcy

David and Lynn Hart, residents of Massachusetts, owned a house in Bridgton, Maine, mortgaged to secure a debt owed to People's Heritage Bank ("the Bank"). The Harts defaulted on their debt. The Bank foreclosed on the house and sold it. The proceeds were insufficient

to cover the Harts' debt. After the sale, the Bank obtained a deficiency judgment in a Maine superior court. The Bank then filed an action in a Massachusetts court to enforce its Maine deficiency judgment.

While the Bank's Massachusetts action was pending, Mr. Hart filed a Chapter 7 bankruptcy petition.

In July 1997, the Massachusetts court entered a deficiency judgment against the Harts for $12,900. On July 29, 1997, the Bank properly recorded the judgment, thereby creating a lien against the Harts' real property in Massachusetts.

Six months after the Bank perfected its judgment lien, Mrs. Hart filed a Chapter 7 bankruptcy petition.

Motion to Avoid Judgment Lien

In March 2001, the Harts both filed motions to avoid the Bank's lien arising from the deficiency judgment in Massachusetts. They argued that the Bank's lien was avoidable under 11 U.S.C. § 522(f)(1) because it impaired an exemption to which they were entitled under 11 U.S.C. § 522(d)(1) and (5).

The Bank objected to avoidance, arguing that the nature of the lien--having arisen from a deficiency judgment after foreclosure of a mortgage in Maine--made it unavoidable under § 522(f)(2)(C), which does not allow a debtor to avoid a "judgment arising out of a mortgage foreclosure."

The bankruptcy court rejected the Bank's argument, concluding that the Massachusetts judgment was not a "judgment arising out of a mortgage foreclosure."

The Bank appealed and a bankruptcy appellate panel affirmed. The Bank then appealed to the First Circuit Court of Appeals.

Judgment Lien from Deficiency Judgment Is Avoidable Under 11 U.S.C. § 522(f)

The First Circuit agreed with the lower courts that a lien based on judgment arising out of a mortgage deficiency was not exempt from avoidance by virtue of § 522(f)(2)(C).

Specifically, the court reasoned, in writing § 522(f)(2)(C), Congress was not creating an exception for judgments arising out of mortgage foreclosures but was contrasting "mortgage foreclosure judgments from liens which are avoidable under § 522(f)," thereby "clarifying that the entry of a foreclosure judgment does not convert the underlying consensual mortgage into a judicial lien which may be avoided." Quoting a case from a federal court in the Northern District of Illinois, the court stated: "'[A] deficiency judgment--whether it arises in a foreclosure action as in Maine or in a separate action as in Massachusetts--is a non-consensual judicial lien like any other which is subject to avoidance under § 522(f).'"

Accordingly, the Harts were able to avoid the Bank's deficiency judgment to the extent it impaired an exemption to which they were entitled under 11 U.S.C. § 522(d)(1) and (5).

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Bank Unwittingly Relinquished Security Interest in Dishonored Checks and Failed to Obtain a Security Interest in Proceeds Deposited to Cover Dishonored Checks

In ***GMAC v. Union Bank & Trust Co.,*** nos. 01-2147, 02-1045, & 02-1491 (8th Cir. May 19, 2003), the Eighth Circuit held that a bank' right to proceeds from a dealership's sale of cars were subordinate to another creditor, even though the dealership made the deposit to prevent an overdraft of its checking account after several checks that the dealership had deposited were dishonored.

Facts

An automobile dealership in Warren, Arkansas ("the Dealership"), had a wholesale security agreement with GMAC, pursuant to which GMAC provided floor- plan financing for the Dealership. The security agreement granted GMAC a security interest in the vehicles owned by the Dealership and in the proceeds from the sale of vehicles. GMAC perfected its security interest.

The Dealership had a commercial checking account with Union Bank & Trust Co. ("Union"). On July 2 and

3, 1998, the Dealership deposited 15 checks drawn on another bank into its Union account. Union provided immediate credit to the Dealership for those deposits and allowed the Dealership to withdraw the uncollected funds. A few days later, the drawee bank notified Union that the drawer had stopped payment on 12 of the 15 checks, which totaled over $335,000. The drawee bank marked "stopped payment" on the dishonored checks and returned them to Union.

When Union received the dishonored checks, the Dealership had insufficient funds to cover a charge back. Instead of creating an overdraft, Union entered the amount of the dishonored checks as a debit to its own general ledger cash items account and asked the Dealership to deposit $335,000 that day, to cover the provisional credit extended by Union. To meet Union's demand for funds, the dealership sold several cars and deposited $321,000 in its account on July 10. Of that amount, $246,500 represented proceeds from the sale of GMAC's collateral.

Union recorded the Dealership's $321,000 deposit as a credit to Union's general ledger cash items account. Union charged back the $14,000 deficit to the Dealership's account, which had sufficient funds to cover the charge back. A few days later, GMAC made a demand on Union for GMAC's collateral proceeds, $246,500. Union refused the demand. The next day, at the Dealership's request, Union returned the dishonored checks to the Dealership and the Dealership closed its checking account.

Conversion Action

GMAC filed suit against Union alleging that, when it credited the Dealership's $321,000 deposit to its own general ledger cash items account, it had converted proceeds from the sale of GMAC's collateral to Union's own use and benefit.

Union responded that Article 4 of Arkansas's Commercial Code granted it a security interest in both the 15 checks that the Dealership deposited on July 2 and 3 and in the checks totaling $321,000 that the Dealership deposited to cover its negative collected funds balance. Union further argued that its security interest was superior to GMAC's security interest.

GMAC agreed that Article 4 of Arkansas's Commercial Code had granted Union a security interest in the 15 checks that the Dealership had deposited on July 2 and 3. But, GMAC maintained, the security interest expired on three of those checks when they were paid and on the other 12 dishonored checks when Union relinquished those checks to the Dealership.

GMAC disagreed that Union had any security interest in the checks totaling $321,000 that the Dealership deposited on July 10 because Union did not exchange the 12 dishonored checks for the July 10 deposit.

The district court rejected GMAC's arguments and held that Union had a security interest in the $246,500 of collateral proceeds that was superior to GMAC's security interest. GMAC appealed.

Appeal

On appeal, the Eighth Circuit reversed. The appeals court agreed with GMAC that Union lost its security interest in the 12 dishonored checks when it simply gave them back to the Dealership days after the Dealership made the$321,000 deposit. The appeals court also agreed with GMAC that Union obtained no security interest in the $321,000 that the Dealership deposited on July 10, because Union did not give the Dealership anything of value in exchange for the deposit. The court explained:

> "Union could only satisfy its security interest by exchanging the dishonored checks with the Dealership or the drawer for money or other value. Union could also exercise its right to charge back the dishonored checks to the Dealership's account. Union opted to do neither."

Thus, Union's rights to the $246,500 were

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subordinate to GMAC's and, by not paying those proceeds to GMAC upon its demand, Union had converted them.

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