Employees Who Quit In Anticipation Of Business Closure Count As "Employment Losses" Under The WARN Act

On January 21, 2011, in *Collins v. Gee West Seattle*, the Ninth Circuit Court of Appeals held that the Worker Adjustment and Retraining Notification ("WARN") Act's 60-day plant closing notice requirement could be triggered despite the fact the employer terminated fewer than 50 employees on the day it closed its doors. The court held that employees who decided to quit after learning the plant was closing should be included in calculating the number of employees who suffered an "employment loss" under WARN.

In doing so, the Court rejected the employer's argument that the total number of employees to be counted towards the 50-employee threshold under the statute should be reduced by those who decided to leave on their own accord after receiving notice of the closure. Instead, the court concluded that an employee departing a business because that business was closing has not "voluntarily departed" within the meaning of WARN. It further held that the number of "employment losses" should be determined prospectively at the time notice is given for purposes of determining whether a plant closing has occurred.

The Facts

On September 27, 2007, Seattle automobile franchise Gee West Seattle LLC ("Gee West") sent written notices to 150 of its employees advising them that, unless a buyer could be found, it would "close[e] its doors at the end of business on Sunday, October 7, 2007." Within 10 days, 120 Gee West employees left Gee West to pursue other employment opportunities. The 30 employees who remained were laid off on the company's last day of business.

The WARN Act

The WARN Act provides that "[a]n employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order . . . to each affected employee." The 60-days' notice requirement applies only "if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees . . . ." Under WARN, an "affected employee" is defined as one who "may reasonably be expected to experience an employment loss as a consequence of a plant closing," and "employment loss" means "an employment termination, other than a discharge for cause, voluntary departure, or retirement."

The District Court Proceedings

Following Gee West's closure, former employees filed suit claiming that Gee West's 10-day notice violated the WARN Act's 60-day notice requirement. Gee West moved for summary judgment, arguing that the WARN Act's 60-day notice requirement was not triggered because 120 employees "voluntarily" left after it provided notice of the potential closure, and therefore, fewer than 30 employees actually suffered an "employment loss."

The district court granted Gee West's motion for summary judgment, holding that "an employee who leaves of their own free will prior to the closure of a business [has] 'voluntarily departed' for purposes of the WARN Act and has not suffered an 'employment loss' …" Consequently, because fewer than 50 employees suffered an "employment loss" as a result of the business closure, the court concluded that Gee West's closing did not qualify as a "plant closing" and 60-days' notice was not required.

The Ninth Circuit's Decision

The Ninth Circuit Court of Appeals reversed the district court's decision, holding that where employees leave because a business is closing, their departure "is generally not voluntary, but a consequence of the shutdown and must be considered a loss of employment when determining whether a plant closure has occurred."

The court noted that the WARN Act defines an "affected employee" as one who "*may reasonably be expected to experience* an employment loss as a consequence of a plant closing." Based on this language, the court concluded that the number of "affected employees" must be determined *prospectively, i.e.*, Gee West was required to give 60-days notice to every employee that "reasonably expected" to be terminated at the time the notice was given.

Next, to determine whether 50 employees would be "affected," the court adopted the Department of Labor's position that the "actual or reasonably expected employment loss" should be determined by counting the number of "*positions* [to] be eliminated by the closing," minus anticipated departures such as retiring employees. This methodology was supported by the court's assumption that unless there is "some evidence of imminent departure for reasons other than the shutdown, it is unreasonable to conclude that employees voluntarily departed after receiving notice of the upcoming closure." Accordingly, the Court found that after Gee West notified its employees of the potential closure, "all" 120 of the departing employees "left as a consequence of the business closing."

Finally, the court concluded that its interpretation was consistent with the WARN Act's purpose as a "workers' equivalent of business interruption insurance," as well as Congress' intent to require 60-days notice except when a "faltering business" is actively seeking capital or business to avoid or postpone a shut down. In this light, the Court viewed Gee West's argument that 120 of its 150 employees had "voluntarily" departed as an end-run around the 60-day notice provision, which was designed to alleviate the very pressures caused by Gee West's 10-day actual notice.

What *Gee West* Means For Employers

After *Gee West*, employers considering a mass layoff or plant closing should be aware that employees who "voluntarily" quit after the employer issues a notice of layoff or plant closing may still be counted for purposes of determining whether the WARN notice "employment loss" thresholds have been met. Failure to provide adequate notice subjects employers to costly claims for back pay, back benefits, attorney's fees, and penalties.

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