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Ninth Circuit Creates New Bright Line Rule: Employees Who Abandon Their Jobs Because of a Business Closing Have Not Voluntarily Departed per WARN

February 1, 2011

Anna Nesterova- New York

In a groundbreaking decision of first impression, the Ninth U.S. Circuit Appeals recently held that employees who stopped returning to work notice that their employer intended to shut down operations suffere loss” within the meaning of the Worker Adjustment and Retraining Program ("WARN Act," "WARN," or the "Act"), 29 U.S.C. 2101 et seq. The rule where an employee has left a business “because the business is closed” employee has not "voluntarily departed" within the meaning of the WARN Act and is thus entitled to the full statutorily required 60-days’ notice, where a damages in lieu thereof. Collins v. Gee West Seattle, No. 09-36110, 2011 WL 182447 (9th Cir. Jan. 21, 2011).

The Facts

In September 2010, Gee West, the owner of several automobile franchises written memo to its 150 employees stating that while it had been at the sale of the business, absent finding a purchaser within the next intended to close its doors and terminate all but certain specifically designated employees. The memo explained that Gee West had not given notice sooner because it had been "concerned that potential purchasers would not have made a purchase, had its workforce been seeking alternate employment." Within several days following the announcement, employees stopped reporting to work, such that nine days later only 30 employees remained. Because too few employees remained operations, Gee West was forced to shut down two days prior to its date. Although it reopened for one day to show its facilities, it did not find a purchaser. Documents created by Gee West’s human resources director all employees who abandoned their jobs after receiving the memo regarding the expected closing did so because the "business closed."

WARN Act Requirements

The WARN Act requires that: "An employer shall not order a plant closing, layoff until the end of a 60-day period after the employer serves a notice that its employer intended to shut down operations sufficient to result in an employment loss” within the meaning of the Worker Adjustment and Retraining Program ("WARN Act," "WARN," or the "Act"), 29 U.S.C. 2101 et seq. An “affected employee” is one who "may reasonably be expected to experience an employment loss as a consequence of a plant closing..." 29 U.S.C. § 2102(5). The 60-days’ notice requirement, however, applies only in an employment loss... for 50 or more employees..." 29 U.S.C. § 2102(2) (emphasis added). "[T]he term ‘employment loss’ means (A) an termination, other than a discharge for cause, voluntary departure,
29 U.S.C. § 2101(a)(6) (emphasis added). In short, WARN requires employer expects 50 or more of its employees to incur an employment loss as a result of closing its plant or business, it must provide 60 days’ notice to those who are reasonably expected to experience the employment loss, or those who it expects to or terminates for cause, or those who “voluntarily depart retire.”

The District Court Decision

After Gee West closed its facilities, the former employees brought an action alleging the company had violated WARN by failing to give them the full 60 days’ notice. Granting Gee West’s motions for summary judgment, the court determined that the approximately 120 employees who stopped working after notice was provided “voluntarily departed” and therefore did not suffer an “employment loss” within the meaning of WARN. Thus, since only 30 employees, fewer than the statutorily required 50, actually incurred the “employment loss,” WARN liability was not triggered. The employees appealed, claiming that the court erred in determining that those who departed after learning the plant would close did so voluntarily.

The Court of Appeals Decision

The Ninth Circuit rejected the district court’s conclusion that employees who chose to quit after learning of the plant closing satisfied WARN’s “voluntary departure” exception to employment loss. Instead, the circuit court focused on the Act’s definition of “affected employee” as one who “may reasonably be expected to experience an employment loss as a consequence of a plant closing.” These individuals were still employees at the time Gee West should have given the required WARN notice, and as of that date they were “reasonably expected to suffer an employment loss” as a result of the plant closing. Thus, more than 30 employees were covered by WARN, and Gee West violated WARN by failing to provide the required notice of the plant closing. The court then concluded that as a policy matter, it will presume that the departure of an employee after an employer says it will close a plant is not voluntary unless the employer demonstrates a concrete, specific reason for the employee’s departure that is unrelated to the business closing, such as pregnancy, health reasons, or a better job opportunity. The decision goes on to reject Gee West’s argument that WARN was not intended to provide double income to employees who secure alternate employment prior to the end of the notice period.

Finally, the Ninth Circuit noted that employers in Gee West’s position may avoid liability for failing to give a full 60-day WARN notice under the Act’s company exception. Under this exception, an employer may provide notice of a plant closing, if at the time that notice would have been required, it was actively seeking financing or business, that if obtained, could have postponed or prevented a shutdown, and that it reasonably believed that providing the notice, potential customers or sources of financing would have actually provided the funding. Thus, the court concluded that the district court erred in its interpretation of “voluntary departure” and instead held that where an employee leaves a business “because the business is closing,” even if he or she does so before the closing, that employee has not voluntarily departed within the meaning of WARN.

The Dissent

In a strong dissent, Chief Judge Richard F. Cebull argued that the decision creates a bright line rule, unintended by the Act’s drafters, that every employee who abandons their job because their employer is closing has not voluntarily departed and thus suffers an employment loss within the meaning of WARN. Such a rule, he objected, directly contradicts the Department of Labor commentary accompanying the Act’s passage providing that an employee who leaves early after announcement of a business closing has not necessarily been constructively discharged involuntarily. (A constructive discharge occurs when an employer creates conditions so adverse that a reasonable employee would feel compelled to quit.) Judge Cebull further expressed concern that the new presumption of departure shifts the burden of proving a WARN Act violation from the employer.

Practical Implications

http://www.hklaw.com/id24660/PublicationId3056/ReturnId31/contentid55353 02/02/2011
The Ninth Circuit’s decision in Gee West calls into question both court of appeals precedent holding that employees who resign after a plant closing is announced but before it actually occurs depart voluntarily and thus do not suffer an employment loss under WARN. In addition, this decision is at odds with prior court of appeals precedent concluding that employees’ resignations after notice of intention to close a plant or business is given do not on their face imply constructive If followed by other circuits, this decision will place a burden on employers by providing employees with an incentive to abandon their jobs immediately upon receiving 60 days’ notice of a possible layoff or closing, in order to secure other employment while still being qualified to receive full wages and benefits for the entire notice period. Thus, the decision will decontextualize employers from providing notice in borderline situations in cases where they may be hoping to obtain outside funding and do not want to prematurely place the nail on the coffin of their operation by risking an early shut-down because the employees, as in Gee West, walk off their jobs.

Finally, this decision is a reminder that employers should keep accurate records detailing the reasons for their employees’ departures so the employee’s decision was voluntary, even given the Gee West decision.

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