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# Ninth Circuit Rules That An Employee Who Quits Because The Business Is Closing Has Not "Voluntarily Departed" Under the WARN Act

On January 21, 2011, the Ninth Circuit Court of Appeals in Collins v. Gee West Seattle LLC held that when an employee voluntarily leaves because the company is closing, the employee has not "voluntarily departed," but has instead suffered an "employment loss" under the Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. § 2101 *et seq*.

The WARN Act requires an employer to provide 60-days' notice before a mass-layoff or plant closure to its "affected employees," but 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 . . . ." 29 U.S.C. § 2101(a)(5). The WARN Act defines "affected employee" as one who "may reasonably be expected to experience an employment loss as a consequence of a plant closing . . . ." 29 U.S.C. § 2101(a)(5). "Employment loss" includes "an employment termination, other than a discharge for cause, voluntary departure, or retirement." 29 U.S.C. § 2101(a)(6).

Gee West Seattle LLC ("Gee West") had suffered financial losses and was attempting to sell itself. Unable to find a buyer, Gee West then gave its approximately 150 employees only nine days' notice before ending operations. After receiving notice, many employees departed. By the time Gee West closed, it had only thirty employees remaining.

Employees subsequently sued Gee West for failing to provide them with the 60-days' notice required under the WARN Act. Gee West countered that it had not violated the WARN act because only thirty employees had suffered an "employment loss," while the rest had voluntarily departed before the closure. The district court agreed and granted summary judgment in Gee West's favor.

The Ninth Circuit reversed, holding 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." A plant closure or mass-layoff creates an "unexpected and urgent need to find new employment." The court reasoned that an employee who leaves under this pressure is generally not doing so voluntarily. The court found support in Gee West's own records, which provided that all employees who left after notice had done so "as a consequence of the business closing."

Although the court reversed summary judgment, it explained that Gee West's liability under the WARN Act was not a foregone conclusion. Employers such as Gee West, who are "trying to keep a business afloat and whose futures are uncertain," may find safe harbor under the WARN Act's "faltering business" exception. The "faltering business exception," provides that such employers do not have to provide 60 days' notice if doing so would prevent them from obtaining the "capital or business" necessary to survive. 29 U.S.C. §§ 2102(b)(1) & (3). Instead they must only provide as much notice "as is practicable" under the circumstances.

This case is a reminder to employers facing financial challenges and potential layoffs to ensure that they fully comply with WARN and analogous state laws to avoid further liabilities.

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