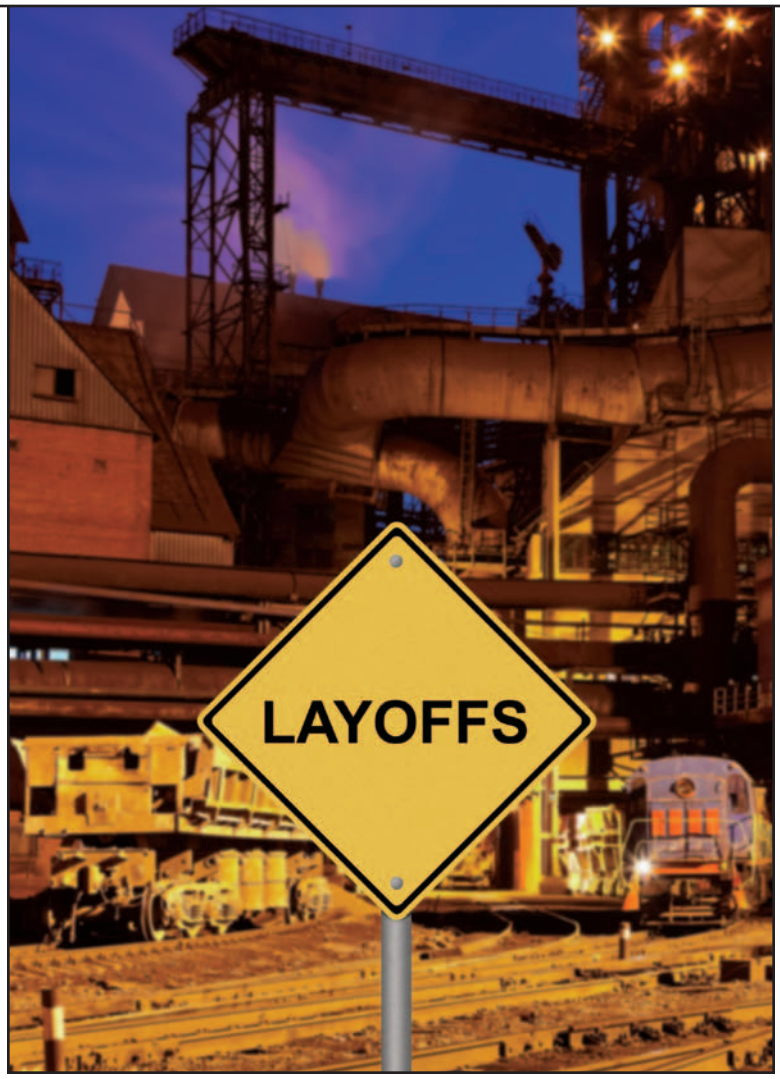
Employment Law Briefing



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You have been WARNed

Recent case addresses notice requirement for mass layoffs

The Worker Adjustment and Retraining Notification (WARN) Act has been an important part of the employment law landscape since the late 1980s. Under this law, employers that order plant closings or mass layoffs generally must provide 60 days' written notice to the affected employees, their union representatives and the state government.

The notice requirement applies to employers with 100 or more full-time employees. A mass layoff is defined as any 30-day period during which either 500 or more employees or 33% of the full-time workforce is laid off.

In *United Steel Workers of America Local 2660 v. United States Steel Corporation*, the U.S. Court of Appeals for the Eighth Circuit decided whether the employer, U.S. Steel, had failed to provide adequate notice pursuant to the WARN Act.

Facilities idled

U.S. Steel operated an iron ore plant that produced 97% of the iron pellets used by two particular company facilities — one in Illinois, the other in Michigan. During the first three quarters of 2008, U.S. Steel reported some of the highest sales and net income in its history and operated at near full capacity. But, in late 2008, the national economic crisis hit the steel business hard.

In response to the recession, the company completely idled work at the two facilities mentioned. Considering that nearly all of the iron ore plant's output went to these facilities, operations were idled there as well. Between Dec. 7 and Dec. 21, more than 300 union workers were laid off at the plant.

The unforeseeable business circumstances exception applies if the layoffs are caused by business circumstances that weren't reasonably foreseeable as of the time that notice would have been required.

U.S. Steel sent notice to Local 2660 on Dec. 3, 2008, and the union representing its employees filed a lawsuit against U.S. Steel in August 2009, alleging that the company had failed to provide the required 60 days' notice of the mass layoff. U.S. Steel moved for summary judgment, arguing that it was entitled to the "unforeseeable business circumstances" exception. The district court granted the company's motion, and the union appealed.

Crisis cited

True to its name, the unforeseeable business circumstances exception applies if the layoffs are caused by business circumstances that weren't reasonably foreseeable as of the time that notice would have been required. With the first layoffs coming on Dec. 7, 2008, notice would have been required by Oct. 8, 2008.

The union argued that the economic crisis was well known before Oct. 8, and that U.S. Steel failed to identify any relevant event that occurred after that date. The Eighth Circuit disagreed, finding that, while the crisis may have been well known more than 60 days before the layoffs, its

full impact on U.S. Steel wasn't truly understood until late November 2008. The court noted that "no momentous event needs to occur in order for the exception to apply."

In 2008, U.S. Steel went from near-record profits to an unprecedented and unforeseeable drop in demand during the year's final quarter. The union argued that U.S. Steel should have made the decision to lay off the workers in early October, but the company instead decided to try and weather the storm.

The Eighth Circuit concluded that the WARN Act wasn't intended to deter companies from "fighting to stay afloat." Nor was it created to punish employers that provided "insufficient" notice to laid off workers as a result of efforts to save those jobs.

Diligence needed

In planning the closing of a facility or mass layoffs, employers must be diligent about taking into account the WARN Act's provisions of providing notice. Failure to comply can result in an award of back pay to each aggrieved employee for every day of violation, medical expenses incurred that would have been covered by a benefits plan but for the employment loss, and attorneys' fees. ♦

Same-sex discrimination cases pose added challenges

Even under the most clear-cut circumstances, dealing with sexual harassment allegations poses challenges for employers. When *same-sex* discrimination is involved, however, the challenges are often compounded. A good example of this can be found in *Wasek v. Arrow Energy Services, Inc.*

The co-worker

The male plaintiff began working at Arrow Energy Services in April 2008, assigned to the Pennsylvania region. Early on, he saved money by sharing a hotel room with a male co-worker. This co-worker, however, made the plaintiff feel increasingly uncomfortable with sexually explicit stories. A day after the co-worker bragged about having an affair with his wife's sister, the plaintiff moved out.

Yet the co-worker's conduct wasn't confined to the hotel room. He repeatedly touched the plaintiff in inappropriate ways, told him explicit jokes and directed sexual comments toward him. The plaintiff's boss would often laugh when he witnessed or heard these incidents.

In September, the plaintiff complained to two directors of operations about the touching and comments. When neither provided assistance, he quit in frustration. While the plaintiff was on his way home, the co-worker left the

plaintiff a voicemail stating, "I miss holding you. I miss spooning with you. I love you. Please call me back."

A few days later, an Arrow HR representative contacted the plaintiff and set up a meeting between the plaintiff, one of the directors he'd contacted and the regional supervisor. During this meeting, it was agreed that Arrow would help the plaintiff find a new job but that he couldn't return to the Pennsylvania region because his former crew, believing the plaintiff had abandoned them, refused to work with him.

The plaintiff filed a lawsuit against Arrow, making hostile work environment and retaliation claims under Title VII. The district court granted Arrow's motion for summary judgment, and the plaintiff appealed.

3 inferences of harassment

Sexual harassment is a form of discriminatory treatment whether it involves members of the same or different genders. But an inference of discrimination is "easier" to draw with male-female sexual harassment than it is in same-sex matters.

In the 1998 decision *Oncale v. Sundowner Offshore Services, Inc.*, the U.S. Supreme Court adopted a test to be used in same-sex cases. Under this test, an inference of sexual harassment occurs when the plaintiff can show:

1. Credible evidence that the harasser was homosexual,
2. Evidence making it clear that the harasser was motivated by general hostility to members of the same gender, *or*
3. Evidence regarding how the harasser treated members of both sexes in a mixed-sex workplace.

Considering that the plaintiff worked in an all-male workplace and there was no evidence produced showing that the co-worker was hostile toward men, only the first option was available to the plaintiff.

No causation shown

In affirming the district court's grant of summary judgment, the U.S. Court of Appeals for the Sixth Circuit stressed the requirement of credible evidence. All that the plaintiff produced was conjecture that the co-worker was "possibly bisexual," speculation which fell short of the *Oncale* standard. Accordingly, the court ruled in Arrow's favor regarding the hostile work environment claim.

To establish his retaliation claim, the plaintiff needed to show, among other things, that he'd suffered an adverse employment action that was causally related to some protected conduct.

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Applying the *Oncale* standard

As the U.S. Court of Appeals for the Sixth Circuit explained in *Wasek v. Arrow Energy Services, Inc.* (see main article), plaintiffs alleging same-sex harassment must show that the discriminatory treatment was because of their gender. And the U.S. Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.* clarified that one way a plaintiff may make this showing is by presenting credible evidence that the alleged harasser was homosexual.

One example of applying this standard can be found in *Redd v. New York State Division of Parole,* a decision handed down in May of last year by the U.S. Court of Appeals for the Second Circuit. Here the female plaintiff had worked as a parole officer since 1990 and was assigned to the Queens office in 2005. In February, the plaintiff was assigned a new, female boss, who the plaintiff later claimed in a lawsuit had touched her breasts on three separate occasions between April and September.

On appeal, the Second Circuit reversed a district court's finding for summary judgment in the defendant's favor. The appellate court found that, given the repeated touching of such a gender-specific body part, a reasonable fact-finder could infer that such contact could be considered homosexual advances.

The court also rejected the district court's conclusion that the plaintiff's claim must fail because she didn't assert that her boss made suggestive or sexual remarks. The Second Circuit noted that fact-finders are instructed to use common sense and are able to draw inferences as to intent and motivation from conduct as well as words. Accordingly, the grant of summary judgment was reversed.

complaint constituted protected conduct, and 2) Arrow's banishment of him from the Pennsylvania region was an adverse employment action.

The Sixth Circuit, however, found that the plaintiff failed to show causation because the Pennsylvania ban was a direct result of his abandoning the job site and angering his co-workers — it wasn't causally related to his complaints. Without causation, the retaliation claim failed as well.

Provide and protect

Although this case went in Arrow's favor, the company clearly could have responded more quickly and clearly to the plaintiff's complaints. As a general rule, employers shouldn't try to differentiate same-sex from opposite-sex harassment. Provide equal protection to employees from both types of discrimination. ♦

In treatment (or not): An FMLA case

Whether or not a given employee is receiving treatment for a stated medical condition might seem a relatively easy thing to determine. But, when leave authorized under the Family and Medical Leave Act (FMLA) is in dispute, all bets are off. Specifying a legal definition of "treatment" can be tricky. The recent decision by the U.S. Court of Appeals for the Seventh Circuit in *Jones v. C&D Technologies, Inc.* provides some instructive perspective for employers.

Failed to show

The plaintiff began working at C&D Technologies in 2000. Both before and during his tenure there, he experienced periodic bouts of anxiety as well as leg and back pain. These issues required the plaintiff to periodically see his treating physician throughout the year.

In 2003, C&D implemented a new attendance policy that assessed employees with points for violations. Any worker who accrued three points in a four-month period would be terminated. Employees weren't assessed points for preapproved FMLA absences.

On Sept. 30, 2009, the plaintiff requested FMLA leave for a 1:00 p.m. procedure he had the following day. But, instead of missing just the afternoon, he failed to work any of his shift on Oct. 1, and it was later learned that he'd spent that morning visiting his treating physician's office to refill a prescription and verify that his paperwork was in order for the procedure.

The procedure itself wasn't scheduled to be performed at the clinic of the plaintiff's treating physician. Rather, it was scheduled to take place at a different clinic about 25 miles away. The plaintiff never saw his treating physician that morning; in fact, he never left the office's lobby.

Terminated for absence

According to C&D, the plaintiff had requested leave only for the afternoon. When it learned of his morning absence, the company suspended the plaintiff pending a further investigation.

The plaintiff and a union official met with C&D management several days later. At this meeting, the plaintiff was unable to provide any documentation showing that he'd received "treatment" during the morning of Oct. 1.

Concluding that his absence that morning was for personal reasons, C&D assessed the plaintiff a half point. By Oct. 1, he'd already accrued 2.5 points. Thus, because he'd earned three points within a four-month period, the plaintiff was terminated on Oct. 7.

Appeal filed

Alleging that C&D had interfered with his use of FMLA leave, the plaintiff filed a federal lawsuit against his former employer. To prevail in an FMLA interference claim, the plaintiff must show, among other things, that he was "entitled to take leave" under the act.

One way to show this entitlement is to prove that the plaintiff "suffers from a serious health condition that makes [him] unable to perform the functions of [his] position." Because it was undisputed that the plaintiff suffered from a serious health condition, the question became whether his condition had prevented him from performing his job duties the morning of Oct. 1. The district court found that it hadn't, and the plaintiff appealed to the Seventh Circuit.

Activities, not treatment

Following the Department of Labor's regulations, the appellate court noted that the definition of an employee who's unable to perform his job duties is one "who must be absent from work to receive medical treatment for a serious health condition," and that use of the word "must" clearly indicates that the employee's absence is necessary for his or her treatment.

Therefore, an employee who received treatment is automatically considered to have been unable to perform the functions of his position. Thus, the issue here was whether the plaintiff had received treatment *that morning*.

The court again looked to the FMLA's regulations for definitions of "treatment" and found that, while "treatment" includes examination and evaluations of a serious health condition, it excludes "routine physical examinations." Moreover, while the regulations do define a "regimen of continuing treatment" as including "a course of prescription medication," this definition applies only to the question of whether or not a serious health condition exists — not whether an individual with a serious health condition is receiving treatment.

The Seventh Circuit then reviewed the actions taken by the plaintiff on the morning of Oct. 1, and it found that none of the activities he'd undertaken could be considered "treatment." Accordingly, the court affirmed the district court's decision, granting the employer's motion for summary judgment.

No surprise

It should come as no surprise to any employer that the FMLA's requirements are detailed and that close attention to them is necessary to stay in compliance. When granting an employee FMLA leave of any duration, and certainly before challenging a worker's rights under that leave, closely review the definitions and regulations set forth in the act before reaching any conclusions. Your employment law attorney can be a critically helpful advisor in this regard. ♦

All joking aside

Tenth Circuit addresses hostile work environment

A little joking around in the workplace can be a good thing — it can help build a sense of camaraderie among co-workers and strengthen morale. But, when the joking in question is offensive to an employee, it can instead be a very bad thing, potentially creating a hostile work environment. Case in point: *Hernandez v. Valley View Hospital,* a decision handed down this past summer by the U.S. Court of Appeals for the Tenth Circuit.

Frequent comments

The plaintiff, a Latina of Mexican origin, began working at Valley View Hospital's food services department in 2001. She alleged that her supervisors frequently made racially derogatory jokes and comments about Latinos despite the plaintiff's constant complaints about such talk. She also alleged that her supervisors critiqued and chastised Latino workers, while saying nothing to non-Latino employees who engaged in the same or similar conduct.

In July 2007, during an argument in which her supervisor screamed at her, the plaintiff stated, "Well, maybe I'm not white enough." That afternoon, Valley View's HR Coordinator suspended the plaintiff for making the comment, and then e-mailed the HR department's Administrative

Director, informing him that several of the plaintiff's supervisors wanted her terminated.

Ten days later, the plaintiff met with the Administrative Director and one of her supervisors, and she requested a transfer to any position outside of food services. This request was denied, but the plaintiff was offered leave pursuant to the Family and Medical Leave Act until Oct. 15. She accepted this leave but was summoned to another meeting with the Administrative Director on Oct. 12 to discuss "performance concerns raised … but never formally documented."

Conduct that might appear to be neutral may, in fact, be related to some racial animus only revealed when viewed in the context of other discriminatory behavior.

The plaintiff again asked for a transfer but again it was denied. She didn't return to work on Oct. 15, and her employment was terminated on Oct. 18.

Steady barrage

The plaintiff sued, alleging that she'd been subjected to a hostile work environment and then constructively discharged in violation of Title VII of the Civil Rights Act of 1964. The district court granted Valley View's motion for summary judgment on the hostile work environment claim because it viewed the plaintiff's evidence as only "a handful of racially insensitive jokes and comments over a period of more than three years."

According to the district court, to establish a hostile work environment, a plaintiff must first present evidence "of a steady barrage of opprobrious racial comments." It held that Hernandez's "handful" of evidence was insufficient. Additionally, because a plaintiff cannot prove a constructive discharge without first establishing a hostile work environment, the district court granted Valley View's motion for summary judgment on the constructive discharge claim as well. The plaintiff appealed.

More than a handful

The Tenth Circuit disagreed with the district court's assessment. It held that, when viewed in the light most favorable to the plaintiff, a rational fact-finder could conclude that the plaintiff experienced more than a "handful" of racially derogatory jokes and comments. Indeed, by the appellate court's count, the plaintiff presented evidence of at least a dozen offensive comments in the 14-month span she was supervised by the offending managers.

The appellate court also countered Valley View's argument that several of these comments were either "facially-neutral" (meaning not racially derogatory on their face) or not directed at the plaintiff. It noted that "the comments need not be directed at or intended to be received by the victim to be evidence of a hostile work environment." Conduct that might appear to be neutral may, in fact, be related to some racial animus only revealed when viewed in the context of other discriminatory behavior.

Costly exposure

This case demonstrates the importance of training supervisors about the legal implications of making racially insensitive jokes and comments and the importance of responding properly when complaints of such behavior are raised. Failure to take either measure can lead to costly legal exposure for employers should supervisors behave inappropriately. ♦