



---

## broader rights for employees

---

*MSK Client Alert*

January 31, 2011

*By Anthony J. Amendola and Steven M. Schneider*

In the past few days, two important decisions were handed down, each of which substantially broadens employee rights under federal employment laws. Notably, in both cases, although no clear statutory language supported the claimants' positions, the Courts looked to the spirit of the statute to articulate broader rights for employees.

### **Opening the Floodgates?: Everybody and Her Fiancé Can Sue**

By Anthony J. Amendola and Jennifer A. Zimbhoff

In *Thompson v. North American Stainless, LP*, a decision that expands the scope of retaliation claims under Title VII, the U.S. Supreme Court held unanimously that "third-party" retaliation against someone "closely related to or associated with" an employee who has engaged in protected activity is actionable.

*At issue in the case was plaintiff Eric Thompson's termination from employment three weeks after his fiancée and co-worker filed a sex discrimination charge with the U.S. Equal Employment Opportunity Commission ("EEOC"). Although the employer asserted that Thompson was terminated for poor performance, Thompson alleged that his termination was motivated by his fiancée's filing of the EEOC charge and thus constituted unlawful retaliation under Title VII. After his lawsuit was dismissed and the dismissal was affirmed on appeal, Thompson brought his case to the Supreme Court.*

*Writing for the unanimous Court, Justice Scalia reversed the lower courts, holding that Thompson had stated a claim under Title VII. The Supreme Court found that the broad anti-retaliation provision of Title VII, which prohibits retaliation against any aggrieved person "because he has opposed any practice made an unlawful employment practice ... or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" was broad enough to cover retaliation against someone "closely associated" with the person who has engaged in protected activity. Noting that Title VII's anti-retaliation*

### **practice areas**

employment litigation & counseling

labor & employment

labor litigation & counseling



*provision prohibits any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," the Court stated:*

"We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."

The Court declined, however, to identify the class of persons who may be protected from third-party retaliation. As Justice Scalia noted, "We expect that firing a close family member will almost always" meet the standard for retaliation under Title VII, while "inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize ... the significance of any given act of retaliation will often depend upon the particular circumstances."

**ASK MSK - Q&A Section:**

**Q: Would Thompson's fiancée, who filed the EEOC charge, also be able to assert a retaliation claim based on Thompson's termination?**

A: Although that issue was not before the Court, it appears that the answer is "yes." While the Court noted that "injuring [Thompson] was the employer's intended means of harming" his fiancée, this issue was not before the Court. Nonetheless, as noted by concurring Justices Ginsburg and Breyer, the EEOC has long taken the position that, in these circumstances, retaliation can be asserted "by both the individual who engaged in protected activity and the relative, where both are employees."

**Q: What practical lessons can be learned from *Thompson*?**

A: Employers must carefully scrutinize all of the facts and circumstances before taking adverse action against any employee. For example, before terminating an employee, the employer should consider whether he or she is "closely related" to another employee who has recently engaged in protected activity. While a claimant cannot prevail unless a causal link can be proven between the protected activity (e.g., the fiancée's EEOC charge) and the adverse act (here, Thompson's termination), the employer should ensure that it has a well-documented reason, consistent with how it has treated similarly situated employees, before carrying out the termination.

**Employer Warning About the WARN Act**

By Steven M. Schneider and Ivan Perkins

*Until recently, an employee who quit his or her employment was not counted as an "employment loss" for the purpose of federal WARN Act liability. However, in *Collins v. Gee West Seattle LLC*, the U.S. Court of Appeals for the Ninth Circuit just held that, "if an employee leaves a job because the business is closing, that employee has not 'voluntarily departed' within the meaning of the WARN Act. Rather, that employee has suffered an 'employment loss.'*



## broader rights for employees

*In this case Gee West operated three new-car dealerships, a used-car facility, a body shop, and an auto loan department. The company had about 150 total employees, and all its operations were treated as a single "site of employment" for WARN Act purposes. On September 26, 2007, Gee West issued a "notice of possible sale" to its employees, letting them know that it was actively seeking a buyer for the business but that, if the business could not be sold by October 7, 2007, it would close. After receipt of this notice, most of the 150 employees stopped coming to work. By October 5, 2007, only eight days after this notice, only 30 employees remained at the employer's facilities. Gee West ceased operations that day and on October 7 permanently closed.*

*Its former employees brought suit under the federal WARN Act (the "Act"), which requires that employers of more than 100 employees must provide 60 days' notice in advance of a plant closure if it will result in a 30-day period of an "employment loss" for 50 or more employees. Thus, but for the voluntary quits, Gee West clearly would have been obligated to provide the 60 days' advance notice to all 150 employees who were facing the loss of their jobs. However, Gee West argued that, at the time of the closure, it employed only 30 employees and thus was not obligated to give WARN Notice.*

*While the trial court agreed with Gee West, the Ninth Circuit reversed. While acknowledging that "voluntary departures" are excluded from the term "employment loss," that Court found that a strict adherence to the "dictionary definition" of "voluntary" in this case would "flip[] the basic structure of the WARN Act on its head." To the Ninth Circuit majority in this decision, the Act requires employers to give 60 days' notice of a plant closing to employees who "may reasonably be expected to experience an employment loss," thereby adding a definition not found in the Act itself.*

*The Ninth Circuit majority held that excusing Gee West from the 60-day advance notice requirement because 120 employees decided to stop coming to work days before the business closed would frustrate the Act's basic purpose. The majority opinion noted that "[t]he unexpected and urgent need to find new employment is precisely the type of pressure that this Court held that Congress was attempting to eliminate by creating the WARN Act." "Employees' departure because of a business closing," the majority determined, "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. Gee West's argument that only 30 employees lost employment as a consequence of the plant closing is thus not credible."*

*The Ninth Circuit majority did not address the question of just how "imminent" or "probable" the job losses must be for employee departures not to count as "voluntary" for purposes of the Act. Accordingly, it is no longer certain when an employee's seemingly voluntary departure will still be counted as an "employment loss" under the Act.*

*After this decision, if an employer believes that a plant closing may occur in which 50 or more employees would lose their jobs, it might be advisable to issue the 60-day advance notice contemplated by the Act even if the plant closure is not inevitable.*

### ASK MSK - Q&A Session

**Q: What employers are covered under the federal WARN Act? What about the California version of the law, known as Cal-WARN?**



## broader rights for employees

---

A: Under the federal WARN Act, a covered employer is a business enterprise that employs 100 or more full-time employees or 100 or more employees who work a combined 4,000 hours per week, exclusive of overtime hours. Under Cal-WARN, a covered employer is any person or business entity that owns and operates any "industrial or commercial facility" that employs (or has employed within the past 12 months) at least 75 persons. There are other differences between these two statutes, with Cal-WARN usually providing more employee protection than the federal act.

**Q: What if an employer is trying to avoid a plant closing, but it is worried that sending WARN notices to employees will hamper its efforts to keep the plant open (by scaring away potential investors or business partners, for example)? Does the law provide any respite from this Catch-22 situation?**

A: *Both the federal WARN and Cal-WARN Acts provide an exception for employers who are actively seeking capital or business that would keep an operation running and who reasonably and in good faith believe that providing the notices would prevent it from obtaining that capital or business. Because of the narrowness and complexity of this exception, please consult with experienced employment counsel before relying on this or any other federal WARN or Cal-WARN exceptions.*