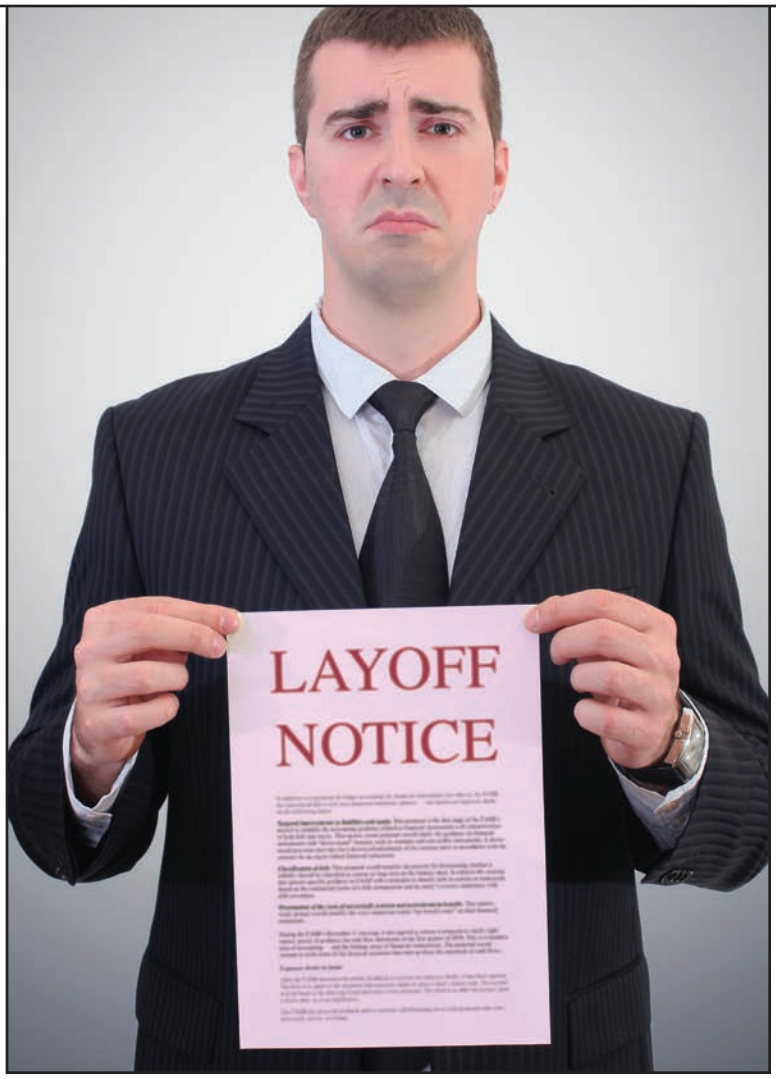
# Employment Law Briefing






**MARCH/APRIL 2016**

# Fair WARNing

## *Failure to provide layoff notice may land you in court*

The Worker Adjustment and Retraining Notification (WARN) Act requires employers to notify employees at least 60 days before a mass layoff. But as *Calloway v. Caraco Pharmaceutical Laboratories* shows, this is often easier said than done. In this case, the U.S. Court of Appeals for the Sixth Circuit had to decide whether the Food and Drug Administration's (FDA's) seizure of the employer's products — which led to layoffs — was unforeseeable.

### History of violations

The employer was a pharmaceutical manufacturer subject to FDA regulations and periodic inspections. If, after an inspection, the FDA finds that a company isn't in compliance with regulations, it can issue a Form 483 or a more serious warning letter that notifies the industry about violations of regulatory significance.

The plaintiff worked for the pharmaceutical company from 2006 until he was terminated on June 29, 2009, as part of a mass layoff. Several years before the layoff, the FDA had issued the company warning letters, one in 2000 followed by Forms 483 and another in 2002. The letters stated that, if the company failed to correct the violations, the FDA could take enforcement action without further notice.

The company further received Forms 483 in:

- 2005, for which it took corrective action,
- 2006 and 2007, at which time the company informed the FDA that it was taking corrective action, and
- 2008, when the company decided that the violations could represent broader issues and hired an independent consulting firm to conduct an audit of its facilities.

The consulting firm found that the company faced the real possibility of an FDA enforcement action and a mass seizure of its products.


The consultant also felt that, if the company were more aggressive in demonstrating that it could take significant corrective action, the FDA might give it another chance. Otherwise it would be difficult to prevent an enforcement action.

*The company argued that seizure of its pharmaceutical products by the FDA was an unforeseeable business circumstance and, therefore, it was excused from providing notice of layoffs.*

### Failed efforts

The company began taking remediation efforts. However, it received a formal warning letter from the FDA in October 2008 stating that its failure to fix the violations could result in legal action without further notice — including seizure and injunction. The company explained to the FDA the actions it was taking to correct the

## Testing for unforeseen business circumstances

**In *United Steel Workers of America Local 2660 v. U.S. Steel Corp.*, the U.S. Court of Appeals for the Eighth Circuit considered whether an employer was excused from complying with the Worker Adjustment and Retraining Notification (WARN) Act's notification requirement because of unforeseen business circumstances. (For further WARN Act details, see the main article.)**

**The employer in this case operated an iron ore plant. In early 2008, the company enjoyed its highest historical sales. However, when the economy slumped in late 2008, the company planned to temporarily stop steelmaking and reduce costs. But, as the economic crisis worsened, it announced a complete idling of its facilities and laid off 313 workers. Their union brought an action alleging violation of the WARN Act. The trial court entered summary judgment in the employer's favor, and the union appealed.**

**The appeals court applied a test to determine whether the business circumstances were reasonably foreseeable to excuse the employer from the 60-day notice requirement. Under this test, an employer must exercise the commercially reasonable business judgment of a similarly situated employer, given the demands of its particular market. The court decided that the economic downturn and subsequent plunge in steel industry orders constituted unforeseeable business circumstances — and that the company was excused from providing the 60-day notice. Although the crisis commenced at least 60 days before layoffs were made, the company's decline in utilization rates was unprecedented.**

violations. The agency responded that such actions were positive, yet it still issued another Form 483 for additional violations. In response, the company recalled some of its products.

After issuing yet another Form 483, the FDA served the company with a complaint and warrant for arrest on June 24, 2009. It also seized various products from two of the company's facilities. Two days later, the company began a mass layoff of workers at those facilities.

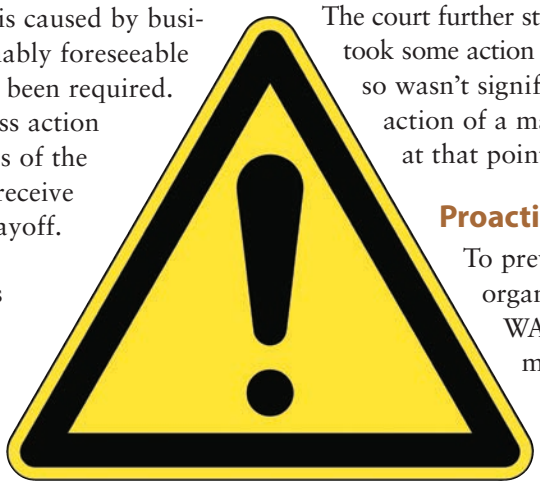
### 60 days' notice

The WARN Act requires employers to give 60 days' notice to affected employees before a mass layoff. But full notice isn't required if the closing is caused by business circumstances that weren't reasonably foreseeable at the time that the notice would have been required. The plaintiff in this case brought a class action against his employer alleging violations of the WARN Act because employees didn't receive the requisite notification of the mass layoff.

The company argued that seizure of its products by the FDA was an unforeseeable business circumstance and, therefore, it was excused from providing the notice. However, the trial court ruled in favor of the plaintiff, finding that the company had failed to comply with the act's notification provision when it closed its drug manufacturing operation.

The appeals court affirmed, concluding that the lower court didn't err in making the factual finding that the mass seizure of the company's products by the FDA wasn't unforeseeable. In the court's view, the company didn't make adequate changes to its business practices after receiving warning letters from the FDA. And, based on its failure to resolve serious issues cited in FDA warning letters and on its own consultant's warnings, the company should have known that an enforcement action was imminent.

The court further stated that, even though the company took some action — including making recalls — doing so wasn't significant enough. The FDA's enforcement action of a mass seizure was essentially inevitable at that point.



### Proactive stance

To prevent an adverse ruling against your organization, familiarize yourself with the WARN Act and its notification requirement. Even if you don't have an exact date for layoffs, give employees written notice well in advance. ♦

# Fitness-for-duty evaluation spurs ADA case

Can an employer require an employee to undergo a fitness-for-duty evaluation? Or does such a demand violate the Americans with Disabilities Act (ADA)? The appellate court in *Wright v. Illinois Dept. of Children and Family Services* considered this question — and whether the worker in question had been constructively discharged.

## Test refused

The plaintiff, a caseworker for a state agency, retired from her job after her employer ordered her to undergo a fitness-for-duty evaluation. The agency claimed that it required the evaluation because of the plaintiff's:

- History of defiance to all levels of management,
- Inability to recognize risks to children in foster care,
- Failure to report incidents of injury,
- Refusal to accept agency decisions, and
- Blatant disregard for rules.

The plaintiff refused to undergo the test and was placed on desk duty. After taking some vacation time, she retired and filed suit against her employer.

A jury found for the plaintiff on her ADA claim. Notwithstanding the jury's verdict, the trial court granted her employer's motion for summary judgment regarding her constructive discharge claim. Both parties appealed.

## Business necessity questioned

The U.S. Court of Appeals for the Seventh Circuit affirmed, holding that there were genuine issues of material fact as to whether the agency's fitness-for-duty evaluation order was consistent with a business necessity. Under the ADA, it's the employer's burden to establish that such a medical examination is necessary — meaning that it's vital to the business and not simply expedient.

The court held that a medical examination is job-related and consistent with a business necessity if the employer reasonably believes that a medical condition will either: 1) impair the employee's ability to perform essential job functions, or 2) threaten the employee's well-being. The employer's reasonable belief must be based on objective evidence that's obtained (or is reasonably available)

before it makes a disability-related inquiry or requires the employee to undergo a medical examination.

The employer's belief also requires an assessment of the employee and his or her position. It can't be based on general assumptions or rely on reasons that were acceptable in other cases.

According to the court, this employee's annoying behavior or inefficiency didn't justify a medical evaluation. She wasn't put on desk duty when she was first ordered to undergo the test and still had her own cases and had even been assigned a new one. She was only put on desk duty two months later after she had refused to undergo the test. The inconsistency of the agency's application of its evaluation procedures was objective evidence that the evaluation wasn't consistent with a business necessity. Therefore, there was a genuine issue of material fact for the jury as to the plaintiff's ADA claim.

## Constructive discharge denied

The appeals court also upheld the trial court's decision to grant the employer's motion for judgment as a matter of law on the constructive discharge claim because constructive discharge is based on an objective standard. An employee is constructively discharged when a reasonable person would believe that his or her working conditions are intolerable and that the employer had acted in a manner that communicated immediate and unavoidable

termination. The prospect of being fired at the end of an extended process isn't, by itself, the basis for finding a constructive discharge.

In this case, the appeals court found that the employer had assigned the employee to desk duty until she took the examination and the results of her fitness-for-duty evaluation could be assessed. The agency had initiated disciplinary proceedings against the employee after she'd refused to submit to the examination.

The employee chose to use her vacation time and not be in the office while the proceedings were pending. Upon her return to work, she submitted retirement paperwork effective at the end of the month. The agency hadn't terminated her employment and didn't tell her that she would be terminated or indicate that termination would be certain. Thus, she wasn't constructively discharged.

### Important lessons

*Wright* provides several tips for employers trying to avoid ADA suits. First, you must have a legitimate business necessity before requiring workers to undergo fitness-for-duty or medical exams. And you must act consistently with your claimed necessity. What's more, you need objective grounds to believe an employee's condition impairs his or her ability to perform or poses a threat.

This case also highlights the high burden on employees to prove a constructive discharge. Plaintiffs must prove that a reasonable person would believe that their working conditions were intolerable and termination was imminent and unavoidable. ♦

*Disability discrimination*

# Why employers must document termination decisions

When do legitimate reasons to terminate an employee become pretext for disability discrimination? In *Burton v. Freescale Semiconductor, Inc.*, the U.S. Court of Appeals for the Fifth Circuit considered this question, as well as whether two employers had violated the Americans with Disabilities Act (ADA).

### Temp worker is terminated

The plaintiff started working as a temporary employee at a manufacturing company in 2009. In January 2011, the plaintiff broke the manufacturer's equipment and received counseling from her staffing agency. Subsequently, she inhaled chemical fumes at work and, two months later, went to the emergency room with heart palpitations. The plaintiff believed that her health condition was caused by the fume exposure, and she filed a workers' compensation claim.

In June 2011, contrary to company rules, the plaintiff was seen using the Internet. She was terminated soon after. The employee who made the decision to terminate the plaintiff relied on reports from the plaintiff's supervisors. But it was unclear whether he made the choice before or after the Internet incident.

### Agency discourages action

At the time of termination, the staffing agency requested that the manufacturer provide it with supporting documentation. The manufacturer generated retrospective documents. The staffing agency responded by recommending that the plaintiff *not* be terminated, citing lack of documentation and the plaintiff's existing workers' compensation claim.

Nevertheless, the manufacturer insisted that the staffing agency terminate the plaintiff based on four factors:

1. Poor performance reviews,
2. Broken equipment,
3. Unauthorized use of the Internet, and
4. Continued poor performance after the termination decision was made.

The staffing agency eventually acquiesced and terminated the plaintiff. Soon after, she filed a claim with the Equal Employment Opportunity Commission (EEOC) and in court, alleging discrimination in violation of the ADA. But the trial court found in favor of the employers, holding that they had asserted legitimate reasons for termination. The plaintiff appealed.

### Court reverses decision

To succeed on an ADA discrimination claim, a plaintiff must make a prima facie showing of employment discrimination. If that showing is made, the employer then needs to articulate a legitimate nondiscriminatory reason for the adverse employment action. The burden next shifts back to the plaintiff to show, through substantial evidence, that the employer's reasons were pretextual.

The appeals court stated that, based on the evidence, there was a genuine issue of material fact as to whether the employee's termination for poor work performance was pretextual. It held that, while the employers noted poor performance, the plaintiff's performance reviews were actually positive because any negative comments were offset by statements that the plaintiff had made significant improvement.

The court also found that there was conflicting evidence about when the manufacturer learned of the plaintiff's Internet use. If it had been informed of the incident after the termination decision, the Internet use would be false and pretextual.

As for the employers' offered reason of continued poor performance after the termination decision was made, the court held that evidence of a sudden and unprecedented campaign to document the plaintiff's deficiencies to justify a decision that had already been made could raise an inference of pretext. On the other hand, the court decided that the manufacturer's second reason, breaking equipment, could indeed evidence poor performance.

However, both employers provided misleading information to the EEOC regarding the reasons for the plaintiff's termination, not to mention that the termination decision occurred shortly after she'd filed a workers' compensation claim. All of this could lead to an inference of pretext, so the appeals court reversed the trial court's decision.

### Don't delay

If you find you need to terminate an employee, take great care to document all contributory incidents and examples of poor performance as soon as they occur. Failing to do so may lead to a discrimination claim. ♦

# Don't build a border barring older employees from promotion

It's not enough for employers to make nondiscriminatory promotion decisions. They also must prevent their managers from making comments that create a perception that discrimination is in play. Recently, the U.S. Court of Appeals for the Ninth Circuit considered whether a trial court had erred in ruling against an employee who claimed that age discrimination prevented his promotion.

### Candidate calls foul

The plaintiff, a federal employee, brought a suit against his employer, the Tucson Sector of Border Patrol (an agency of the U.S. Department of Homeland Security). He alleged that, in violation of the Age Discrimination in

Employment Act, the agency decided not to promote him to a new assignment because of his age.

Twenty-four eligible candidates applied for four new border patrol assignments that came with pay increases. The applicants were between 38 and 54 years old, with the plaintiff being the oldest candidate. The agency chose 12 candidates to interview based on assessment scores. Thereafter, the interviewers, a panel of three Chief Patrol Agents, selected six candidates for final consideration. One of the agents recommended four of the six to the Chief Border Patrol Agent who, in turn, recommended the four candidates to the Deputy Commissioner. The four selected candidates were between 44 and 48 years old.

## Pretext for preference

The plaintiff wasn't selected for final consideration. The agent who interviewed and recommended the final four candidates stated that the plaintiff wasn't promoted because he lacked the leadership and judgment for the position as well as flexibility and innovation.

The plaintiff presented as evidence of pretext for age discrimination his claim that, at a staff meeting, the agent had expressed his preference for "young, dynamic agents" for the new position. This statement was confirmed by a co-worker. The plaintiff also claimed that the agent had conducted repeated retirement discussions with him — even though the plaintiff had made clear he didn't want to retire. Additionally, two co-workers testified that the Chief Border Patrol Agent showed a preference for promoting younger, less experienced agents.

The trial court granted summary judgment in favor of the defendant because the agent had only a limited role in the ultimate hiring decision. The plaintiff appealed.

## Reverse and remand

A plaintiff asserting age discrimination can demonstrate pretext indirectly by showing that the employer's proffered explanation isn't credible because it's inconsistent or otherwise unbelievable. The appeals court held that the trial court had erred because it failed to take into account the cat's paw theory.

Under the cat's paw theory, the speaker of a discriminatory statement doesn't need to be the final decision maker if the plaintiff can establish that the speaker influenced or was involved in the decision or decision-making process. The court held that, in this case, there were genuine issues of material fact as to whether the agent — who had allegedly stated a preference for promoting younger agents and had conducted retirement discussions with the plaintiff — was involved in the hiring decision for the new position.

The plaintiff had produced evidence that the agent was the person who created the new positions. Other chief patrol officers who interviewed the job candidates deferred to that agent because he would be supervising the candidates. In addition, the agent recommended four candidates to the Chief Border Patrol Agent, who then passed that recommendation to the Deputy Commissioner.

The court felt that the agent had substantial influence on the promotion decision because his superiors deferred to his recommendation. Therefore, it held that a genuine dispute existed as to the agent's influence or involvement. Accordingly, the appeals court reversed the ruling and remanded the case back to the trial court for further consideration.

## Watch your employees' words

This case should serve as a warning to employers that discriminatory statements made by employees could lead to a discrimination case — even if the speaker doesn't make final decisions that lead to an adverse action. It's enough that a speaker influences or is involved with a decision. ♦