

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RENECIA JOHNSON, LORRAINE)
KENNEDY, and LYNETTE ADDISON,)
individually and on behalf)
of all others similarly)
situated,)
)
Plaintiffs,)
)
v.) Civil Action No. 97-433-SLR
)
TELESPECTRUM WORLDWIDE, INC.,)
)
Defendant.)

O R D E R

At Wilmington, this 23rd day of March, 2001, having reviewed plaintiffs' motion for reargument and the papers submitted in connection therewith, and having heard oral argument on the same;

IT IS ORDERED that said motion (D.I. 73) is denied, for the reasons that follow:

1. The gravamen of plaintiffs' argument is that summary judgment cannot appropriately be granted in favor of the defendant where, as here, there are genuine issues of material fact. Thus, while plaintiffs concede that they have not demonstrated that at least 50 full-time employees suffered an employment loss so as to trigger the notice requirement under the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101 et seq., they assert that defendant, for its part, has not demonstrated the contrary, that less than 50 full-time employees suffered an employment loss.

2. The question as framed by the proceedings, then, is which party has the burden of proof as to this threshold issue. This court has held that plaintiffs have the burden to prove a prima facie case under WARN, which

entails demonstrating that (1) there are 50 employees, (2) at a single site of employment, (3) who suffered an employment loss. Specifically, plaintiffs must demonstrate that there are 50 employees, exclusive of those who average less than 20 hours a week, and exclusive of those who had been employed for fewer than 6 of the 12 months preceding the date on which notice was required. 29 U.S.C. § 2101(a)(8). To show that the 50 employees suffered an employment loss, plaintiff[s] must show that the employees suffered a termination, other than a discharge for cause, voluntary departure, or retirement. 29 U.S.C. § 2101 (a)(6).

(D.I. 57 at 6-7)

3. This court ultimately granted defendant's motion for summary judgment because plaintiffs had not carried their burden of proving their prima facie case as described above. Plaintiffs assert that, based upon the decision in Moore v. The Warehouse Club, Inc., 992 F.2d 27 (3d Cir. 1993), they do not have the burden of proof, at least not at this stage of the proceedings. The court (once again) disagrees with plaintiffs' analysis.

4. In Moore, plaintiffs and defendant filed cross-motions for summary judgment. Plaintiffs in that case claimed that 52 full-time employees suffered an employment loss. As described in the Moore opinion, the district court "concluded that the number

of employment losses at the North Versailles location fell short of the threshold amount and, therefore, granted Warehouse Club's cross-motion for summary judgment." On appeal, the parties once again focused on whether particular employees should be included among those full-time employees who suffered an employment loss. With appellant Moore conceding that only 51 employees were eligible for consideration, the court stated that "**appellee Warehouse Club need only establish** that two of the remaining workers be excluded from the total number of affected employees" in order to prevail. Moore, 922 F.2d at 28-29 (emphasis added).

5. As understood by the court, plaintiffs rely on the above emphasized language to argue that their only burden pretrial is to come forward with some evidence that at least 50 employees suffered an employment loss; the burden then shifts to the employer to prove the contrary. If the employer fails to so demonstrate, then plaintiffs are entitled to go to trial on the threshold issue of whether 50 full-time employees suffered an employment loss due to a plant closing.¹

6. The problem with plaintiffs' analysis is that in Moore, there were no disputed issues of fact; the parties and the court

¹A plant closing is defined as the "permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees." 29 U.S.C. § 2101(a)(2).

were only concerned with "the application of WARN's statutory provisions to the facts." Id. In other words, plaintiffs in Moore had produced sufficient evidence to prove their prima facie case and the disputed issues were ones of law. The court in Moore was not faced with the situation at bar where plaintiffs, despite access to the employees and their employment records, have failed to establish by the summary judgment stage the fundamental facts of their own putative class' employment history.

7. Under the record presented, the court concludes that plaintiffs have not carried their burden of demonstrating their prima facie case and, therefore, cannot survive defendant's motion for summary judgment. See also Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 252 (3d Cir. 1999) ("Once the moving party points to evidence demonstrating no issue of material fact exists, the nonmoving party has the duty to set forth specific facts showing that a genuine issue of material fact exists and that a reasonable factfinder could rule in its favor. . . . Speculation and conclusory allegations do not satisfy this duty.").

United States District Judge