No. 19-935

In the
Supreme Court of the United States

CARL LEEPER,
Petitioner,
v.

HAMILTON COUNTY COAL, LLC AND
ALLIANCE RESOURCE PARTNERS, L.P.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

KEVIN P. GREEN
Counsel of Record
THOMAS P. ROSENFELD
GOLDENBERG HELLER
& ANTOGNOLI, P.C.
2227 South State Route 157
Edwardsville, IL 62025
618-656-5150
kevin@ghalaw.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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REPLY BRIEF

This case involves a clear split among multiple circuits in distinguishing between a "layoff" and "termination" under the WARN Act. Respondents suggest this question is resolved exclusively by the employer's language in announcing an employment separation. The Seventh Circuit embraced Respondents' view, confining its analysis to some of the language used by Respondent Hamilton County Coal, LLC, ("HCC") in a written notice (the "Notice") delivered to 158 full-time employees at HCC's mine in Hamilton, Illinois.

The Seventh Circuit's failure to look beyond the language of the Notice conflicts with decisional authority from the Second and Sixth Circuits, under which an employer's use of terminology does not control whether an employment separation is a "layoff" or a "termination." The Seventh Circuit's analysis is also irreconcilable with the Eighth Circuit's holding that employment separations expressly announced as "permanent" are, nevertheless, not "terminations" if the employees are subsequently rehired.

The circuit split warrants this Court's intervention and reversal.

The Seventh Circuit also failed to view the summary judgment record in the light most favorable to Petitioner Carl Leeper ("Leeper"). In determining the separation at issue was a "layoff", the Seventh Circuit gave no weight to the evidence refuting employees' reasonable expectation of recall, including HCC's invocation of numerous termination policies in

the Notice, oral communications by management, and the economic crisis afflicting the coal industry. The factfinder, not the appellate court, should have determined whether the employees had "a 'reasonable expectation of recall' . . . that he/she will be recalled to the same or a similar job." 20 C.F.R. § 639.3(a).

Finally, in holding that employees who suffered a 100 percent reduction in hours during a 6-month period did not experience an "employment loss," the Seventh Circuit improperly rewrote the WARN Act's plain language, which provides that "employment loss" includes "a reduction of hours of work of more than 50 percent during each month of any 6-month period." 29 U.S.C. § 2101(a)(6)(C).

Certiorari should be granted.

I. THE CIRCUITS ARE SPLIT ON THE FIRST QUESTION PRESENTED

A. Courts Do Not Universally Hold that an Employer's Label for an Employment Action Determines Whether an Employment Loss Occurs under the WARN Act

Respondents contend that "in each case cited to this Court or below where the employer has announced a temporary layoff or closure, the court held such employment action did not constitute an 'employment termination' . . . ." Opp. 14.

Under the WARN Act, however, "[i]t is the practical effect of the employment action, not the employer's characterization of it, that controls." *Mich. Reg'l*

Council of Carpenters v. Holcroft LLC, 195 F. Supp. 2d 908, 915 (E.D. Mich. 2002). Both the Second and Sixth Circuits acknowledge this vital principal, which prevents employers from manipulating employment terminology to circumvent the WARN Act. *See Martin v. AMR Servs. Corp.*, 877 F. Supp. 108, 116 (E.D.N.Y. 1995)[1] ("Where there is a preexisting policy that mandates a 'lay off' *with clear criteria for recall*, the concern that an employer will manipulate employment terminology to circumvent federal requirements is minimized.") (emphasis added); *Kildea v. Electro-Wire Prods., Inc.*, 144 F.3d 400, 403 n.2 (6th Cir. 1998) ("Electro-Wire makes much ado about whether the plaintiffs were laid off 'temporarily' or 'indefinitely.' While the terminology does connote a difference in time, the bottom line is that the plaintiffs, because of industry practice and Electro-Wire's history of layoffs and recalls, were not considered terminated, but instead had an expectation of being recalled in the future.").[2]

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[1] *aff'd sub nom., Gonzalez v. AMR Servs. Corp.*, 68 F.3d 1529, 1531 (2d Cir. 1995) (affirming summary judgment "for the reasons stated in the district court's opinion").

[2] The Fourth Circuit's decision in *Graphic Communications Int'l Union, Local 31-N v. Quebecor Printing Corp.*, 252 F.3d 296 (4th Cir. 2001), does not address how courts are to distinguish employment terminations from layoffs. But, unlike the employees in that case, here, the Notice recipients had no recall rights, lost all meaningful benefits, had no history of being laid off and recalled by HCC, and were subjected to HCC's numerous termination policies. *Id.* at 298; Pet. 6-9. Accordingly, *Graphic Communications* does not compel the same result.

The Eighth Circuit's decision in *Rifkin v. McDonnell Douglas Corp.*, 78 F.3d 1277 (8th Cir. 1996), further refutes Respondents' suggestion that courts universally defer to the language an employer uses in announcing an employment action. There, the Eighth Circuit found a notice to employees of a "permanent" separation did not constitute a "termination" because some employees were thereafter rehired. *Id.* Under the Seventh Circuit's analysis, the word "permanent" would have led the court to conclude a termination occurred. Respondents even concede that the Eighth Circuit used a retroactive approach "rather than relying exclusively on the employer's announcement." Opp. 23.[3]

B. The Seventh Circuit's Approach to Distinguishing Terminations from Layoffs Cannot be Reconciled with Decisions from the Second, Sixth, and Eight Circuits

1. The Seventh Circuit split with the Second and Sixth Circuits by failing to consider employer's written and oral communications, the employer's policies and practices, industry standards, and other factors

Respondents argue that *Martin*, 877 F. Supp. 108, does not conflict with the Seventh Circuit's decision in this case for three reasons: (1) *Martin* involved different facts; (2) *Martin's* conclusion that employees did not suffer employment loss was "dicta;" and

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[3] *Smith v. Consolidated Coal Co.*, 948 F. Supp. 583 (W.D. Va. 1996), cited by Respondents, contains no analysis of how courts are to distinguish layoffs from terminations. *Id.* at 586.

(3) *Martin* used a practical, effects-driven approach to identify employment loss. Opp.19.

Martin, however, expressly announced and applied a test for distinguishing employment terminations from layoffs that looks beyond the language used by an employer in announcing the employment action:

> In distinguishing between lay offs and terminations for purposes of calculating employment loss under WARN in situations such as AMR and its employees faced, what is required is not a finding respecting each employee's subjective belief regarding his or her future with the company, but an objective evaluation of 1) whether any existing lay off or reduction in force regulation [i.e., company policy] was properly invoked; and 2) whether the lay off and transfer provisions of the regulations as applied offered a reasonable likelihood that employment would continue.

Martin, 877 F. Supp. at 114.

This test underpinned the *Martin* court's holding that the employees did not suffer employment termination where, among other things, the employees retained recall rights and all employee benefits. *Id.* at 115-17. Accordingly, this test was more than "dicta."

Moreover, the Seventh Circuit did not apply *Martin's* practical, effects-driven analysis. First, had the Seventh Circuit asked whether HCC invoked any pre-existing policies relating to "temporary" separations or "layoffs", the answer would have been "no" because: (1) as HCC concedes, it had no policies for

"temporary layoffs"; and (2) HCC elected not to invoke its policies for "temporary unpaid leave." *See* Pet. 9; Appellee's Br., 7th Cir. ECF No. 20, p. 10. Second, virtually all of the policies HCC did invoke applied to terminations, not layoffs, allowing a reasonable factfinder to conclude that HCC's conduct and invocation of policies offered the Notice recipients no reasonable likelihood of continued employment. *See* Pet. 6-9.

Respondents also suggest that applying the Sixth Circuit's analysis in *Kildea*, 144 F.3d 400, would not demonstrate a genuine issue of material fact. Opp. 19. *Kildea*, however, makes clear that distinguishing between layoffs and terminations under the WARN Act requires a multi-factor analysis that addresses whether separated employees possess a "reasonable expectation of recall." *See* 144 F.3d at 406 (endorsing test for determining reasonable expectation of recall which considers employer's past experience, employer's future plans, circumstances of the layoff, expected length of the layoff, and industry practice).

The record here abounds with evidence refuting a reasonable expectation of recall (and thereby supporting a finding by a factfinder that a "termination" occurred), including:

- HCC's invocation of employment policies associated with termination and HCC's failure to invoke policies associated with a temporary employment cessation, such as its policies of continuing benefits or suspending 401(k) loan repayments during times of approved unpaid leave;

- HCC's collection of over $194,000 from its employees' "final pay" to recover for advances, which, according to the "Advance Agreements," were not to be "recovered until your employment ends with Alliance by either retirement or termination of employment (voluntary or involuntary)";[4]
- HCC's immediate cessation of wages and benefits to all Notice recipients;
- HCC's payments to the Notice recipients for accrued and unused vacation days;
- HCC's own binding corporate testimony interpreting the Notice as not providing a guaranteed return to work;
- the oral communications by HCC's general manager on the day the Notice was delivered that any employees who were called back would have to reapply and interview for available positions;
- the absence of a history of layoffs and recalls by HCC;
- the decrease in demand affecting the coal industry generally and HCC specifically, and

[4] Respondents curiously argue HCC's suspension of 401(k) loan payments and the recoupment of over $194,000 in advance payments were events occurring after the Notice was delivered (Opp. 27); however, both of these policies were announced in the Notice. Pet. App. 47, ¶ 3; *id.* at 51-52, ¶ 16.

HCC's failure to secure expected business prior to February 2016; and

- the economic background at the time of the Notice—what HCC called "[t]he well-documented devastation of America's coal industry [that] has led to three of the top five American coal producers, along with dozens of smaller coal producers, filing for bankruptcy in the past year alone, and has caused literally thousands of coal miners to lose their jobs."

Pet. 6-9.[5]

In short, the record in this case gives rise to genuine issues of material fact related to the employees' reasonable expectations of recall under either *Martin* or *Kildea* and their progeny. Yet the Seventh Circuit made no attempt to reconcile its decision with *Martin* or *Kildea*, both of which were heavily briefed by the parties on appeal. Accordingly, the Seventh Circuit's decision clashes with decisional authority from both the Second and Sixth Circuits.

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[5] Respondents' argument that HCC "preserved returning employees' service credit and vesting under the retirement benefit policy" (Opp. 27) would only potentially be relevant under the Eighth Circuit's retrospective analysis that the Seventh Circuit expressly rejected.

2. The Seventh Circuit's decision cannot be reconciled with the Eight Circuit's decision in *Rifkin*

Respondents concede the "Seventh Circuit utilized different reasoning in this case from that employed by the Eighth Circuit in *Rifkin,*" but, nevertheless, deny the existence of a split between the Seventh and Eighth Circuit. Opp. 23.

Respondent's position is untenable. According to the Seventh Circuit, "the relevant distinction between a layoff and an employment termination is whether that termination was expected to be temporary or permanent." App. 11. In *Rifkin*, the employer expressly stated that the separations were expected to be "permanent," but the Eighth Circuit nonetheless held the employees had not suffered employment termination because some were rehired within 6 months. 78 F.3d at 1282. The Eighth Circuit undertook no analysis of employees' reasonable expectations at the time of the notice, instead adopting the retroactive analysis rejected by the Seventh Circuit. Had the Eighth Circuit utilized the test adopted by the Seventh Circuit, *Rifkin* would have been decided differently. Therefore, a split exists between the Circuits on the issue presented by this case.

II. THE SEVENTH CIRCUIT'S AFFIRMANCE OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS IS INCORRECT

A. The Summary Judgment Record Creates a Genuine Issue of Material Fact as to Whether the Notice Recipients Possessed a Reasonable Expectation of Recall

Respondents contend "it is not accurate to claim the Seventh Circuit considered only the written notice" because the opinion reflects "consideration of the FAQ" accompanying the cover letter delivered to employees. Opp. 25-26. Leeper, however, characterizes the "Notice" as both the written cover letter and FAQs, and both constitute the relevant written communication by the employer. Pet. 8, n.4. Respondents point to no analysis of facts outside the written Notice performed by the Seventh Circuit because there is none. *See* Pet. App. 11. Thus, the Seventh Circuit broke from the other circuits (and from Petitioners' arguments) by examining *only* the written communication. This incorrect analysis was reversible error.

If this was the correct analysis, however, the Seventh Circuit still erred because the written Notice was "fairly susceptible to different interpretations," *Life Plans, Inc. v. Sec. Life of Denver Ins. Co.*, 800 F.3d 343, 352 (7th Cir. 2015), and the Seventh Circuit improperly choose among two competing interpretations of the written Notice. *See* Pet. 30-35.[6]

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[6] Respondents refer to Petitioner's differing reasonable interpretation of the notice as a "quibble," providing different definitions for the word "may." Opp. 25. Their arguments, however,

Even under the Seventh Circuit's analysis, in addition to the ambiguities in the Notice, the Notice's announcement that HCC would discontinue benefits,[7] the oral communications by HCC management at the time of delivering the Notice, HCC's own interpretation of the Notice as not providing a guaranteed recall, and the underlying economic crisis affecting the coal industry at the time of the Notice provide material issues of fact regarding the employees' reasonable expectation of recall arising from the written Notice.[8]

The Seventh Circuit's analysis is inconsistent with the fundamental summary judgment standards requiring courts to construe the summary judgment record in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

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highlight the competing reasonable interpretations that should have been left to a factfinder to resolve.

[7] Respondents claim that HCC's benefits plan excluded continuing coverage during a "temporary layoff." Opp. 26, n.7. HCC's cramped interpretation of its benefit plan is debatable, and HCC cannot point to any evidence showing that continuation of coverage during a "temporary layoff" was prohibited by its benefits plan (or that HCC could not have treated employees pursuant to the "approved unpaid leave" policies).

[8] Whether HCC's obtaining of contact information from employees supports a reasonable expectation of recall as Respondents suggest (Opp. 26) is a fact that, if relevant, should be weighed by a factfinder.

B. The Seventh Circuit's Interpretation of 29 U.S.C. § 2101(a)(6)(C) is Incorrect

An "employment loss" includes a "reduction of hours of work of more than 50 percent during each month of any 6-month period." 29 U.S.C. § 2101(a)(6)(C). Leeper contends the months in which employees experienced a 100 percent reduction in hours should be included as part of a § 2101(a)(6)(C) "employment loss" because a 100 percent reduction in hours is more than a 50 percent reduction.

Respondents incorrectly claim Leeper cannot reconcile his interpretation of the plain language of § 2101(a)(6)(C) with 29 U.S.C. § 2102(c), which simply provides 2 additional defenses for when a previously-announced layoff lasting less than 6 months is extended beyond 6 months. Opp. 29-30. Section 2102(c) does not address when an initial employment separation of less than 6 months constitutes an employment loss under § 2101(a)(6)(C). Accordingly, § 2102(c) is simply irrelevant here, as there was no extension giving rise to the additional defenses of § 2102(c).

Respondents further argue that Leeper's interpretation renders § 2101(a)(6)(B) superfluous and *Graphic Communications*, 252 F.3d 296 (4th Cir. 2001), and *Phason v. Meridian Rail Corp.*, 479 F.3d 527 (7th Cir. 2007), do "not support Leeper's contention that the same employment action can satisfy both the 'layoff' and 'reduction in hours' categories." Opp. 29-30.

But the plain language of §2101(a)(6) provides that an employment loss occurs when (A), (B), *or* (C) occurs, and (C) includes a "reduction of hours of work of more than 50 percent during each month of any 6-month period." Congress did not say "a reduction of hours of work of more than 50 percent and less than 100 percent."

The Seventh Circuit explained in *Phason* that the Act requires employers to consider whether each prong of the "employment loss" definition is implicated by a planned employment action. *See Phason*, 479 F.3d at 529 ("Meridian supplied the district court with elaborate calculations demonstrating that § 2101(a)(6)(C) was not satisfied, given the number of people Nortrak hired. But what of that? An 'employment loss' occurs when *any one* of the subsections applies."). Employers, therefore, are not permitted to stop reading the statute if they conclude that § 2101(a)(6)(B) does not apply to a planned employment action. They must also determine whether § 2101(a)(6)(C) applies to the planned action. If it does, 60-day notice is required.

Furthermore, *Graphic Communications* explains that a change to a previously-announced plant closing or mass layoff may give rise to additional notice obligations if the change implicates any additional prongs ((A), (B), or (C)) of the "employment loss" definition. 252 F.3d at 299.

In light of the WARN Act's plain language and these cases, applying § 2101(a)(6)(C) to a 100 percent reduction in hours does not make § 2101(a)(6)(B) superfluous, as § 2101(a)(6)(B) continues in effect and

applies to reductions in hours that are subsequently extended beyond 6 months. For example, if an employee is given 60-days' notice that her hours will be reduced by 100 percent for 5.8 months under § 2101(a)(6)(C), § 2101(a)(6)(B) removes any doubt and clarifies to employers that the employee should receive additional notice if the 100 percent reduction will continue beyond 6 months. Language is not superfluous if Congress included it to remove doubt. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013).

Ultimately, Respondents' interpretation, which requires adding language to § 2101(a)(6)(C), renders § 2101(a)(6)(B) *and* (C) meaningless, as employers can simply fluctuate employees between 99 and 100 percent reductions in hours for 5-month intervals to avoid the notice provisions of the WARN Act.

Accordingly, the alleged redundancy underpinning the Seventh Circuit's construction of the WARN Act is illusory and provides no justification for the Seventh Circuit's rewriting of the WARN Act's plain language.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

KEVIN P. GREEN
Counsel of Record
THOMAS P. ROSENFELD
GOLDENBERG HELLER & ANTOGNOLI, P.C.
2227 South State Route 157
Edwardsville, IL 62025
618-656-5150
kevin@ghalaw.com

Counsel for Petitioner

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