‘Shoplifting and No Apprehension’ Policy Vulnerable to Whistleblower Claims, Illinois Court Finds

By Paul Patten

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A retail employer is liable under the Illinois Whistleblower Act (“IWA”) when it terminates an employee for violating its “shoplifting and no apprehension” policy prohibiting employees from calling law enforcement directly about suspected shoplifting, an Illinois federal court has found. *Coffey v. DSW Shoe Warehouse, Inc. a/k/a DSW, Inc.,* No. 14 C 4365 (Oct. 29, 2015).

Under the IWA, employers are prohibited from retaliating against employees who report unlawful activity — committed by anyone — which they have reasonable cause to believe is occurring or has taken place, to a government or law enforcement agency.

Coffey provides incentive for retailers and other employers to revisit handbook and policies on reporting illegal conduct.

Background

The plaintiff, Melissa Coffey, worked as an assistant store manager for DSW Shoe Warehouse. During her employment, one of Coffey’s subordinates informed her that a group of women, who the subordinate suspected of shoplifting in the past, had returned to the store that day. Coffey responded by announcing through her walkie-talkie, which connected her to all employees in the store, “I think we’re going to call the police.” A store employee, who heard Coffey’s announcement, took it as a directive and called the police. Police arrived, did a “walk-through” of the store, but did not make an arrest.

DSW subsequently terminated Coffey for violating its shoplifting and no apprehension policy, which prohibited employees from calling law enforcement, mall security, or third parties to respond to suspected theft. The policy included the following:

> Under no circumstances is law enforcement, mall security or any other third party to be called to notify or respond to a suspected shoplifting/theft incident. If special circumstances exist (such as a high dollar theft, grab and run, etc.), immediately contact your RLPM [Regional Loss Prevention Manager] for direction. The RLPM is the only individual who may authorize an exception. This authorization must be obtained prior to any call to law enforcement.

Coffey claimed her termination violated the IWA.

Decision

The court granted Coffey’s motion for summary judgment, finding the IWA applicable to retaliatory discharges based on reports of employer misconduct or third party misconduct (here, reporting suspected customer theft). Coffey’s termination, based on her violation of DSW’s policy, the court found, constituted retaliatory discharge.

Among its conclusions, the court found:

1. under the IWA, a whistleblower may directly or through another person, inform a governmental agency of unlawful conduct;
2. the IWA protects whistleblowers who report employer misconduct or third-party misconduct;
3. the IWA protects whistleblowers who report what they reasonably believe to be unlawful conduct;
4. Coffey engaged in protected activity by indirectly informing the police of suspected customer theft; and
5. her subsequent termination for violating DSW’s policy constituted retaliatory discharge.

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Employer Policies

Although the court did not expressly find DSW's policy in violation of the IWA, the statutory language appears to prohibit such policies.

Under the IWA, employers are prohibited from making policies "preventing an employee from disclosing information to a government or law enforcement agency...." 740 ILCS 174/10. However, the IWA is not clear as to whether an employer faces any monetary damages for having, but never enforcing, a policy prohibiting employees from directly reporting criminal activity to law enforcement.

The safest course may be to eliminate such "chain of command" criminal reporting requirements, thereby minimizing the likelihood that an unwary supervisor would discipline an employee for directly reporting criminal activity to law enforcement.

Please contact the Jackson Lewis attorney with whom you regularly work if you have any questions about this case, its implications, or any other workplace issues.