Case Study: Cooney v. Bob Evans Farms

Related Attorneys

Mark A. Knueve

Adam J. Rocco

Related Services

Employment Litigation

AUTHORED ARTICLE | 10.12.2010

Mark A. Knueve and Adam J. Rocco authored the article "Case Study: Cooney v. Bob Evans Farms," which appeared in the October 12, 2010 edition of *Employment Law360*.

Case Study: Cooney v. Bob Evans Farms

October 11, 2010 - In *Cooney v. Bob Evans Farms Inc.*, the Sixth Circuit Court of Appeals upheld a decision dismissing a plaintiff's whistleblower claim premised on a threat made by the plaintiff to her employer after she was already facing discipline and potential termination.[1]

The district court found that the employer, through an investigation, suspected that the plaintiff had "engaged in conduct warranting termination" prior to her threat to file a complaint with the Michigan Department of Civil Rights.[2]

Therefore, the district court concluded that the plaintiff could not show a causal connection between her threat and her termination.

The plaintiff, a server at a Bob Evans restaurant in Fenton, Mich., claimed that two of her co-workers had smoked marijuana in the restaurant's parking lot before the restaurant opened on two Mondays in October or November of 2007.

However, instead of immediately reporting this conduct to management, the plaintiff discussed the allegations with her fellow employees. The general manager of the restaurant eventually learned of the plaintiff's allegations and promptly conducted an investigation.

After the investigation was underway, the plaintiff reported the alleged drug use to an assistant manager at the restaurant. During the course of the investigation, the general manager interviewed several associates.

Each of the interviewees provided information that indicated the plaintiff's allegations were false and made in an attempt to retaliate against her co-workers.

For example, the plaintiff told an employee that she was "mad" at one of the employees alleged of drug use and that she wanted him to get "fired."[3]

Employees also reported that the plaintiff had a romantic relationship with one of the alleged drug users that had ended days before the alleged drug use.

Following these interviews, the general manager met with the plaintiff. According to the general manager, when the plaintiff was asked to identify the days the drug use took place, she identified three days on which one of the alleged drug users did not work opening shifts.

Based on the information discovered during the investigation, including the plaintiff's interview, the general manager suspended her employment.

After being informed of her suspension, the plaintiff told the general manager that she was "violating [her] civil rights ... and that [she] was going to file a formal complaint with the Michigan Department of Civil Rights because [she] was doing the right thing by coming forward and reporting the drug use."[4]

Over the next three days, the general manager continued her investigation and interviewed additional witnesses, all of whom confirmed her belief that the rumors of drug use were false and made for malicious purposes.

After concluding her investigation, the general manager terminated the plaintiff on Dec. 16, 2007.

In January 2008, the plaintiff filed suit against Bob Evans under the Michigan Whistleblowers' Protection Act (WPA).[5]

The plaintiff alleged that Bob Evans retaliated against her for threatening to file a complaint with the Michigan Department of Civil Rights.

Under the WPA, it is unlawful for an employer to discharge an "employee ... because the employee ... reports or is about to report ... a violation or suspected violation of a law or regulation."[6]

Although the district court concluded that the plaintiff had engaged in a protected activity by informing the general manager that she was going to file a complaint with the Michigan Department of Civil Rights, the court held that the plaintiff failed to establish a connection between her termination and the threat because: 1) prior to the plaintiff's threat, the general manager, through her investigation, had already determined that the plaintiff had engaged in conduct potentially warranting termination; 2) The plaintiff put forth insufficient evidence linking her termination to her threat; and 3) The plaintiff only made her threat after she knew she was facing serious discipline.

The court's holding is significant to both employers and practitioners. First, in determining that the plaintiff's threat and termination were not causally connected, the court relied heavily on the general manager's thorough investigation of the plaintiff's allegations and misconduct.

For instance, the court emphasized that the general manager interviewed witnesses, requested written statements from the witnesses, met with the plaintiff, and "reviewed work schedules for the relevant dates before the plaintiff made her threat."[7]

Additionally, the court noted that after the plaintiff had made her threat to go to the Michigan Department of Civil Rights, the general manager continued her investigation for several days and interviewed additional witnesses before terminating the plaintiff.

Second, the case stands for the proposition that employees facing serious discipline may not use the WPA to extort or threaten their employers.

The court held that the plaintiff could not establish a causal connection between her threat and her termination because she only threatened to go to the Michigan Department of Civil Rights after she knew she was facing serious discipline. "The primary motivation of an employee pursuing a [WPA] claim must be a desire to inform the public on matters of public concern."[8]

This is known as the WPA's public motivation requirement. Courts in Michigan, including the Cooney Court, have interpreted this public motivation requirement to mean that the WPA will not afford protection to employees who engage in protected activity in an effort to avoid termination.

Simply put, employees facing termination may not use the WPA to extort their employers. The plaintiff argued that she did not know she was facing "termination" at the time of her threat, and that therefore, her claim should be allowed to go forward.

In a logical extension of the rationale behind the public motivation requirement, the court held that the plaintiff's "knowledge that she faced an adverse employment action is sufficient to suggest that the [plaintiff's] … threat was made to pressure Bob Evans into withdrawing the suspension."[9]

As a result of the Cooney holding, and other similar holdings in state and federal courts in Michigan, employees that engage in protected activity under the WPA with knowledge that they are already facing serious discipline will have difficulty asserting WPA claims against their employers.

---

[1] *Cooney v. Bob Evans Farms Inc.,* 2010 WL 3398488 (6th Cir. Aug. 25, 2010).

[2] *Cooney v. Bob Evans Farms Inc.,* 645 F.Supp.2d 620, 631 (E.D. Mich. 2009).

[3] Id. at 625.

[4] Id. at 626.

[5] Plaintiff also brought a claim of gender discrimination under Michigan's Elliot-Larsen Civil Rights Act. The court dismissed plaintiff's discrimination claim finding that plaintiff had not engaged in an activity protected under the act.

[6] Mich. Comp. Laws. § 15.362.

[7] Cooney, 645 F.Supp.2d at 633.

[8] *Shallal v. Catholic Soc. Servs. of Wayne County*, 455 Mich. 604, 566 N.W.2d 571, 579 (1997).

[9] Cooney, 645 F.Supp.2d at 634.