RETALIATION: THE TAIL WAGGING THE DOG

By Kevin J. O'Connor*

A new decision from the District Court of New Jersey in *Nuness v. Simon & Schuster, Inc.*, Case 1:16-cv-02377-JBS-KMW (D.N.J. Nov. 17, 2016) offers a clear demonstration of how even the most marginal of racial discrimination cases can proceed on a theory of retaliatory discharge, even when the underlying claims have been dismissed. *Nuness* teaches that employers should be hesitant to discipline employees in close proximity to protected conduct and should closely analyze decisions to discharge employees in such circumstances.

In *Nuness*, an African-American Simon and Schuster employee had refused to continue working the same shift with a white coworker who had called her a "n**let." That employee was later terminated after not showing up for work for one week. She sued her employer on a theory of racial discrimination (hostile work environment), and for retaliation on account of her termination. The Court ruled that she could not proceed on a hostile work environment claim because the allegations did not meet the "severe and pervasive" test, but would be allowed to proceed on her claim of retaliatory discharge.

Plaintiff worked for about a year with a white co-worker who, from the allegations, appears to have been a troublemaker. He allegedly was frequently in trouble for speaking in an inappropriate manner to other employees and a department meeting had already been held regarding his behavior. In March 2015, the plaintiff complained to a supervisor that this co-worker had referred to her as a "n**let." HR got involved, and the white co-worker was suspended for one week, and then placed back on the same shift as the plaintiff. Her request that he be put on another (available) shift, was denied.

Plaintiff told her employer she was still uncomfortable working with this co-worker, and stated that she was going to see an attorney and did not feel comfortable returning to work. She was then allegedly told that "if she did not come to work she would be resigning." After one week of not coming to work, the employer allegedly terminated her employment.

In defending these cases, it is often the case that clients are surprised to learn that, even where the underlying claim is not sustainable or valid, a claim of retaliation may be permitted to proceed through discovery and potentially to trial. Here, although the Court granted the motion to dismiss with regard to the employee's racial harassment and constructive discharge claims since she had not alleged sufficient facts to overcome a dismissal motion, it concluded that she *stated* a claim for retaliatory discharge. First, there could be no question but that she engaged in protected activity by complaining of harassment and termination. The employee made the claim that the employer's rush to terminate her was motivated by its desire to retaliate for that protective conduct. The Court ruled that there was an issue of fact over whether she had voluntarily resigned, or was terminated, even after having dismissed her constructive discharge claim.

Clearly, the timing of the employer's actions were concerning to the Court and drove its decision to allow the termination claim to proceed. *Nuness* demonstrates that where an employee has engaged in protected conduct, employers need to be hesitant in taking action to terminate their employment in close proximity to such protected conduct where the circumstances can lead to an inference that the real motivation was retaliatory in nature. Arguably here the better approach would have been reassigning the white co-worker to a different shift.

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