

## Did They Just Say That? A Reminder That Off-The-Cuff Remarks Handcuff Employers In Employment Lawsuits

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A recent race discrimination and retaliation case in Pennsylvania underscores the risks of off-the-cuff remarks by managers. The case in the Middle District of Pennsylvania, *Johnson v. Hershey Creamery Corp.*, No. 1:11-cv-00776 (M.D. Pa. Mar. 8, 2013), involved an African-American who worked as a seasonal employee for Hershey Creamery. At the end of each season, the employee was laid off. One year, two of his Caucasian co-workers were hired as full-time, regular employees. When he asked why he was not hired, Hershey told him that the others had good attendance, attitude and performance, and also that one had a commercial driver's license, which he lacked.

The next year, at the end of the seasonal employment, the African-American employee again was passed over for a full-time position in favor of a Caucasian seasonal employee. This time, the African-American employee filed a charge of discrimination based on race. In his complaint, the employee alleged that a company vice-president and the plant supervisor occasionally used a racial epithet in the workplace.

To make matters worse for Hershey, after the charge of discrimination, the plant supervisor told the African American employee that he likely would not be hired – even as a seasonal employee the next year – *because he had filed an administrative complaint*. It should be no surprise that when Hershey sought to dismiss the retaliation claim on a motion for summary judgment, the Court denied it. The court viewed the plant supervisor's statement, by itself, as supplying the requisite causal nexus needed to proceed to trial on the retaliation claim. As we know, retaliation cases are among the most difficult cases to defend, and the off-the-cuff statement by the plant supervisor – no doubt made without thinking – doomed the employer's chances of getting it dismissed.

On the discrimination claim against Hershey, the Court considered the alleged use of the racial epithet. While the company officers denied using the epithet in front of the employee, they admitted to using it in their "younger days," and at least one of them admitted to mumbling the word in the car *and also at work*. Despite these admissions the court dismissed the discrimination claim because the employee had not shown a demonstrated nexus between the alleged racism of the individuals and their decision not to hire him. Still, it was a close shave, given the admitted remarks of the company officials.

This case stands as yet another reminder that employers should make sure that supervisors, managers, and company officers are educated on the significance of their behavior in the workplace. Those in positions of

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responsibility should be extra careful not to make off-the-cuff statements that will later be used against them.