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New Jersey Supreme Court Provides Guidance to Employers Defending Against Certain Supervisory Harassment Claims

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On February 11, 2015, the New Jersey Supreme Court for the first time directly addressed and adopted the standard set forth in the U.S. Supreme Court's 1998 decisions in *Burlington Industries, Inc. v. Ellerth*[1] and *Faragher v. City of Boca Raton*[2] regarding employer liability for a supervisor's harassment. In *Aguas v. State of New Jersey*, the court held that an employer can defend against a claim of supervisory harassment that did not result in a tangible employment action by showing (a) it had strong anti-harassment policies and reporting procedures in place and (b) the plaintiff unreasonably failed to take advantage of those policies and procedures. The court's ruling in this case not only provides an invaluable defense to New Jersey employers, but also serves to emphasize the importance of implementing and adhering to effective anti-harassment policies and procedures that comply with the requirements set forth by the U.S. Supreme Court.

The *Aguas* Decision

In *Aguas*, the defendant employer maintained a written anti-discrimination and harassment policy, which included extensive policies and procedures regarding investigations, reports of misconduct, and department-wide mandatory training. The policy required the designation of individuals to handle complaints, "encouraged" employees to report any incident of harassment, and mandated that the employer conduct prompt investigations of complaints.

Upon hire in 2004 and annually thereafter, the female plaintiff in *Aguas* acknowledged receiving a copy of the policy. Moreover, prior to the incident that was the subject of the case, she had twice submitted written complaints in accordance with the employer's policy. Both complaints (one in 2005 and one in 2007) were investigated by the employer and determined to be unsubstantiated.

During the time period covered by the litigation, the plaintiff claimed her supervisor sexually harassed her by, *inter alia*, making inappropriate comments, massaging her shoulders, grinding his pelvis on her and being hyper-critical of her performance. The plaintiff claimed she reported the harassment on several occasions to another superior, but admitted that she declined to file a written report for fear of retaliation and also declined to participate in a group meeting with the employer. The employer nevertheless conducted a multi-week investigation of the plaintiff's allegations, which included 20 witness interviews. The claims were found to be unsubstantiated.

1 524 U.S. 742 (1998).

2 524 U.S. 775 (1998).

The trial court granted the employer's motion for summary judgment and the Appellate Division affirmed. Both courts based the dismissal on the employer's comprehensive policy and procedures, and the plaintiff's unreasonable refusal to submit the required written complaint.

The plaintiff's appeal presented two questions to the New Jersey Supreme Court: (1) whether the *Ellerth/Faragher* affirmative defense is available to an employer when the harassment claim is based on supervisory conduct that did not result in a tangible employment action; and (2) the definition of "supervisor" applicable to hostile work environment harassment claims.

New Jersey courts have previously ruled that the presence or absence of an anti-harassment policy and reporting procedure is pertinent to an analysis of employer liability for a claim based on negligence or recklessness. The issue presented in *Aguas* was whether such a policy is also a defense to a claim for vicarious liability where the alleged harasser is a supervisor.[3] Vicarious liability is shown where the supervisor is deemed to be acting in the course and scope of his/her employment when the allegedly harassing conduct occurred.

The *Aguas* Court noted that the New Jersey Law Against Discrimination is intended to prevent harassment and hostile work environments, not provide a remedy in court. Thus, the majority held that allowing an affirmative defense to vicarious liability claims will encourage employers to protect employees and prevent harassment from occurring, while also motivating alleged victims of harassment to come forward and internally report offenses. Accordingly, when there is no tangible employment action, an employer may defend against a claim of harassment by demonstrating (1) it "exercised reasonable care to prevent and correct promptly and harassing behavior;" and (2) plaintiff "unreasonably failed to take advantage" of such policies or opportunities.

Accordingly, the holding further reinforces that employers should maintain and regularly distribute a comprehensive anti-harassment policy that includes:

- A clear grievance process with more than one individual to whom complaints may be reported;
- Provisions clearly prohibiting retaliation for such reporting;
- A prompt and impartial investigation process;
- Assurances that corrective actions will be taken; and
- Training sessions for all employees, including supervisors and management.

Recommended Actions

Although the full impact of the *Aguas* decision remains to be seen, New Jersey employers should proactively update their anti-harassment policies and procedures to conform to the decision. We also recommend the following:

- If an employer is currently engaged in litigation, ensure the handling attorney is aware of this holding and that the affirmative defense has been raised in the employer's responsive pleading.
- Review and revise all anti-harassment policies to ensure they comply with the above guidelines to maximize protection.
- Annually train all employees on anti-harassment law, the employer's policies and its reporting procedures.

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3 The *Aguas* court rejected the limited definition of "supervisor" recently adopted by the U.S. Supreme Court in *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443 (2013). The court chose instead to adopt the EEOC's more expansive definition, which includes individuals in charge of a complainant's day-to-day activities, even without having authority to make any tangible employment decisions. This aspect of the *Aguas* decision may serve to actually expand employer liability, as employers may now be liable for the acts of more individuals encompassed by the broader definition.