New Jersey high court decision will reshape employer liability in sexual harassment cases

Employment Alert

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On February 11, 2015, the New Jersey Supreme Court issued a significant sexual harassment decision that offers something positive for both employers and employees.

Employers will be happy that the Court has, after hinting for years, expressly adopted a potent affirmative defense that can shield employers from vicarious liability, while plaintiffs will enjoy the benefit of an expansive definition of who is a “supervisor,” thereby broadening the scope of individuals whose conduct can result in employer vicarious liability.

Background

The case, *Ilda Aguas v. State of New Jersey*, __ N.J. __, No. 072467 (Feb. 11, 2015), involved a female corrections officer who alleged that she was sexually harassed by two of her male supervisors at the New Jersey Department of Corrections facility where they worked. While the DOC had a written anti-discrimination policy and provided training to its employees, Aguas refused to file a written complaint as required under the policy, but
instead complained verbally about the alleged behavior. Nevertheless, the DOC investigated the claim and ultimately concluded that Aguas’s allegations were unsubstantiated. Two days later, Aguas filed a lawsuit, asserting negligence and vicarious liability claims against the DOC under the New Jersey Law Against Discrimination (NJLAD).

The trial court granted the DOC summary judgment, holding that, while the plaintiff had presented a *prima facie* showing of severe and pervasive sexual harassment, the state had established an affirmative defense: the DOC maintained a policy that required the filing of a written complaint and Aguas failed to take the required steps under the policy.

The Appellate Division affirmed, concluding that the state exercised due care in its investigation and rejected Aguas’s claims that the state was liable for the supervisor’s actions because the plaintiff failed to show that the supervisor used his authority to control the plaintiff’s day-to-day working environment to aid his sexual harassment of her.

The New Jersey Supreme Court granted *certiorari* to consider two issues: (1) the definition of “supervisor” for purposes of a hostile work environment sexual harassment claim; and (2) the impact of an employer’s anti-harassment policy on an employee’s claims for negligence or recklessness and for vicarious liability.

**More expansive, pro-plaintiff definition of “supervisor”**

With respect to the first issue, the Court held − for the first time − that an individual is a supervisor under the NJLAD if that person has the authority (a) to take or recommend tangible employment actions affecting the complainant; or (b) to direct the complainant’s day-to-day activities in the workplace. In so holding, the Court expanded the definition of “supervisor” to include not only individuals who are granted the authority to make tangible employment decisions, but also those who are placed in charge of a complainant’s day-to-day work activities.

The Court reasoned that a more expansive definition of “supervisor” furthers NJLAD’s paramount goal of eradicating sexual harassment in the workplace and also accounts for “the broad range of employer structures and factual settings in which sexual harassment occurs.”

**Affirmative defense for employers against vicarious liability**

In addressing the second issue of vicarious liability for employers based on the actions of supervisors, the New Jersey Supreme Court adopted the standards set forth by the Supreme Court of the United States in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Under the *Ellerth/Faragher* analysis, an employer in a hostile work environment sexual harassment case may assert as an affirmative defense to vicarious liability that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and “the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm otherwise,” provided that the employer has not taken a tangible adverse employment action against the plaintiff employee.

The Court reasoned that the *Ellerth/Faragher* affirmative defense advances the legislative goals of the NJLAD by “motivating employers to maintain effective anti-harassment policies and by encouraging employees to take prompt action against harassing supervisors in accordance with those policies.”

**Takeaways**

The opinion serves as an important reminder to New Jersey employers to implement and enforce meaningful and effective anti-harassment policies. The *Aguas* court made clear that employers that maintain ineffective policies, or fail to adequately enforce their policies, may not utilize the affirmative defense to vicarious liability. Employers should review and update their anti-harassment policies, provide proper training to employees and supervisors, and consistently enforce the terms of any such policies.

Moreover, employers should now be aware that, for purposes of the NJLAD, supervisors are not just “an elite group of decision-makers at the pinnacle of the organization,” but, rather, more broadly include employees who are granted the authority to direct the day-to-day responsibilities of subordinates. Employers therefore should consider expanding the group of individuals who receive anti-harassment training − in particular, to ensure
that anyone who could potentially be deemed a supervisor under New Jersey law understands clearly the employer’s anti-harassment policies and conforms his or her behavior accordingly.

Learn more about the impact of this decision on your business by contacting any of these partners in our New York and New Jersey offices:

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