New Jersey Supreme Court Decision Highlights the Importance of Workplace Harassment Training for Employees and Supervisors

Client Advisories

03.17.2015

Recently, the New Jersey Supreme Court issued its decision in Aguas v. State of New Jersey, NJ Sup. Ct., (A-35-12)(Feb. 11, 2015) which focused on the defenses available to employers to avoid liability for workplace harassment by supervisors under the New Jersey Law Against Discrimination. The Court also addressed the standards courts must use in determining whether a particular employee accused of harassment is actually a supervisor with respect to the harassed employee. The Court's decision highlights the importance of training supervisors and line employees with respect to workplace harassment as a significant factor in establishing a defense to employer liability. (See https://archerlaw.wpengine.com/practices/workplace-training-resources/ for Archer Training Resources.)

Since the Court's seminal decision in Lehmann v. Toys `R' Us, Inc., 132 N.J. 587 (1993), the test for employer liability for workplace harassment has depended on whether the alleged harasser was a co-worker or a supervisor with respect to the complaining employee. For co-workers, the standard has been a negligence standard, with the employer liable for harassment only when the complaining employee is able to establish that the employer was either negligent or reckless by failing to exercise due care to avoid harassment in the workplace. On the other hand, with respect to harassment by supervisors, the employer's potential for liability is heightened, with the employer being subject to vicarious liability for the acts of the supervisor according to certain agency principles.

In the Court's later decision in Gaines v. Bellino, 173 N.J. 301, 313 (2002), the Court identified five factors relevant to the issue of the employer's negligence, as follows:

Those factors include[] the existence of: (1) formal policies prohibiting harassment in the workplace; (2) complaint structures for employees' use, both formal and informal in nature; (3) anti-harassment training, which

must be mandatory for supervisors and managers, and must be available to all employees of the organization; (4) the existence of effective sensing or monitoring mechanisms to check the trustworthiness of the policies and complaint structures; and (5) an unequivocal commitment from the highest levels of the employer that harassment would not be tolerated, and demonstration of that policy commitment by consistent practice.

Id. Thus, it has long been clear that employers seeking to avoid liability for co-worker harassment are strongly advised to, among other things, have a clear formal policy prohibiting workplace harassment, as well as mandatory anti-harassment training for supervisors and managers, and voluntary training available to all others. These factors have not been applied to an employer's vicarious liability under New Jersey law for supervisory harassment.

The Aguas decision addressed, for the first time under the New Jersey Law Against Discrimination, what role, if any, the Gaines factors, including anti-harassment training, would play in establishing an employer defense to vicarious liability for harassment conducted by a supervisor. The Plaintiff, and various *amicus curiae* briefs submitted on behalf of plaintiffs organizations, urged the Court to adopt a standard of strict liability for supervisory harassment - that is, if a supervisor harassed any employee under his or her authority, the employer would be liable, regardless of the circumstances and regardless of its efforts to avoid or eliminate workplace harassment. Simply put, there would be no defense. The Court was being asked by the Plaintiff and the plaintiffs bar, to adopt a harsh standard rejected by the federal courts with respect to harassment claims under federal anti-discrimination laws such as Title VII of the Civil Rights Act of 1964.

Fortunately, the majority of the Court determined that strict liability, where employers were held vicariously liable for the conduct of their supervisors without regard to any other factors, would be both unfair, and would be contrary to the goal of providing incentives to employers to take strong preventative measures to avoid workplace harassment. Accordingly, the Court followed the standards established by the United States Supreme Court under the federal anti-discrimination laws which allow employers, under certain circumstances to establish an affirmative defense to liability for supervisory harassment.

The Aguas Court adopted the test set forth by the United States Supreme Court in Burlington Industries v. Ellerth, 524 U.S. 742, 765 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998). Aguas, supra, at slip op. 37. Under the Ellerth/Faragher analysis, the 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 preventive or corrective opportunities provided by the employer or to avoid harm otherwise," provided that the employer has not taken an adverse tangible employment action against the plaintiff employee. Ellerth, supra, 524 U.S. at 765; Faragher, supra, 524 U.S. at 807-08.

It is important to note that with the adoption of this standard, the Aguas Court specifically warned that employers would not be able to "hide behind a paper anti-discrimination policy" or policies which "exist in name only. Aguas, supra, at slip op. 39. The Court made clear that no affirmative defense would be available to an "employer who fails to implement effective anti-harassment policies, or fails to enforce its policy." Aguas, supra, at slip op. 40.

Accordingly, employers who wish to avail themselves of the possibility of an affirmative defense to liability for the conduct of a rogue supervisor must consider the factors announced in Gaines v. Bellino, and set forth above. It goes without saying that every employer should have a strong written anti-harassment policy, but that will not be enough. Employers seeking to establish that they have acted with due care must demonstrate a commitment to finding and eliminating workplace harassment and are well-advised to implement periodic comprehensive anti-harassment training, mandatory not only for managers and supervisors, but for non-supervisory employees as well. The failure to train will make it very difficult to establish that the employer acted with "due care"in order to avoid liability.

It should be noted that the Aguas decision was not all positive for employers. After concluding that the Ellerth/Faragher affirmative defenses are available to employers with respect to claims of supervisory harassment, the Court then addressed just who is a workplace supervisor. Unfortunately, the Court declined to follow the more restrictive (and employer-friendly) federal precedent and held that the accused is a supervisor if he or she had the authority to take or recommend tangible employment actions affecting the complaining employee, or to direct the complaining employee's day-to-day activities. Based on this definition, even lower level employees who cannot hire, fire, discipline or evaluate, but who are given some ability to direct other employee's day to day activities, could be considered supervisors and triggering the higher standards for employers to avoid liability for their harassing conduct. This aspect of the decision only highlights the importance of mandatory training for all employees, rather than only for supervisors and managers.

Archer's Labor and Employment Department offers a comprehensive workplace training solution to assist employers in avoiding claims and protecting against liability. Our attorneys frequently train both supervisors and non-supervisory employees regarding their responsibilities and rights pertaining to workplace harassment.

If you wish to arrange for training in your workplace, or if you have any questions about this advisory or other labor and employment matters, click here for more information, or please contact any member of the Labor and Employment Department of Archer in Haddonfield, N.J., at (856) 795-2121; in Philadelphia, Pa., at (215) 963-3300; in Princeton, N.J., at (609) 580-3700; in Hackensack, N.J., at (201) 342-6000; or in Wilmington, De., at (302) 777-4350.

DISCLAIMER: This client advisory is for general information purposes only. It does not constitute legal or tax advice, and may not be used and relied upon as a substitute for legal or tax advice regarding a specific issue or problem. Advice should be obtained from a qualified attorney or tax practitioner licensed to practice in the jurisdiction where that advice is sought.