New Jersey Supreme Court Reshapes Sexual Harassment Claims

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On February 11, 2015, the New Jersey Supreme Court issued a landmark ruling that will reshape hostile work environment sexual harassment cases brought under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49 (LAD). The court’s decision in Aguas v. State of New Jersey (A-35-13, February 11, 2015) both provides welcome relief to employers in some respects and expands employee protections in other respects. First, in a pro-employer ruling, the court unequivocally adopted the test previously established by the Supreme Court of the United States in Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton for imposing liability on employers for a supervisor’s sexual harassment. Thus, with proper anti-harassment policies in place, employers may now potentially avoid all liability for a supervisor’s sexual harassment when the complaining employee suffers no tangible adverse employment action. Second, in a pro-employee ruling, the court expanded the definition of a “supervisor” for purposes of hostile work environment claims under the LAD, this time departing from prior precedent established by the Supreme Court of the United States. In this respect, the court’s holding provides employees significantly greater opportunities to recover for sexual harassment than before.

Ilda Aguas, an employee of the New Jersey Department of Corrections (DOC), alleged that she was repeatedly sexually harassed by the highest-ranking supervisor on her shift, in the form of sexual propositions and innuendos, sexual gestures, and sexually suggestive physical contact. Aguas did not allege, however, that she suffered adverse tangible employment action (e.g., demotion, loss of pay, termination, etc.). The DOC defended the claims by relying upon its policy against discrimination and the prompt remedial action it took by thoroughly investigating Aguas’s claims once reported. The trial court granted summary judgment in favor of the DOC on this basis, and the Appellate Division affirmed.

On appeal, the New Jersey Supreme Court first addressed and clarified the impact of an employer’s anti-harassment policy on its liability for sexual harassment claims under the LAD—an issue it first addressed 20 years ago in Lehmann v. Toys R Us, Inc., 132 N.J. 587 (1993). When an employee seeks to impose “direct liability” on an employer under a negligence/recklessness theory, the New Jersey Supreme Court reaffirmed that an employer’s implementation and enforcement of an effective anti-harassment policy (or its failure to maintain one) is a critical factor in determining employer liability. Further, and of greatest significance, for claims alleging “vicarious liability” for supervisory sexual harassment, the court expressly adopted the Faragher/Ellerth affirmative defense: when no tangible employment action has been taken against the employee, an employer may avoid vicarious liability for sexual harassment by a supervisor by proving that “it exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and that the employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or to avoid harm otherwise.” The New Jersey Supreme
Court found that the Faragher/Ellerth approach provides a fair and practical framework for determining employer liability in supervisor sexual harassment cases and furthers the LAD's goal of eliminating sexual harassment in the workplace by providing employers with an incentive, through an affirmative defense, to unequivocally warn its workforce that sexual harassment will not be tolerated, to provide consistent training, and to strictly enforce its policy. The court also emphasized, however, that the Faragher/Ellerth affirmative defense is not available when a supervisor's harassment culminates in a tangible employment action (such as discharge or demotion).

In a second significant ruling, the New Jersey Supreme Court defined who a "supervisor" is (as opposed to a mere coworker) for purposes of hostile work environment claims under the LAD, which is a "pivotal factor" in determining whether an employer may be held vicariously liable for harassing conduct. The court declined to adopt the more restrictive definition of "supervisor" recently set forth in Vance v. Ball State University, where the Supreme Court of the United States limited the definition of "supervisor" to those employees with the authority to make tangible employment decisions relating to the complaining employee (for example, the power to fire, to demote, or to reduce salary or benefits). Rather, the New Jersey Supreme Court adopted the more expansive definition of "supervisor" promulgated by the Equal Employment Opportunity Commission, which defines "supervisors" as not only employees who are granted the authority to make tangible employment decisions relating to a complainant, but also those placed in charge of the complainant's daily work activities. Thus, an allegedly harassing employee is the complainant's supervisor if that employee had "the authority to take or recommend tangible employment actions affecting the complaining employee, or to direct the complainant's day-to-day activities in the workplace."

For employers, the lessons from the Aguas decision are clear. Employers should: (1) maintain written anti-harassment policies reflecting a lack of tolerance for any discriminatory conduct, including sexual harassment; (2) periodically publish their anti-harassment policies to all employees and ensure employees' receipt of same; (3) maintain an effective and practical process by which employees can make complaints about discrimination; (4) train employees, supervisors, and managers on how to recognize and eradicate discrimination and harassment in the workplace; and (5) promptly and effectively respond to complaints of sexual harassment, and take appropriate action when improper behavior has occurred. If an employer takes these steps it may potentially avoid all liability for a supervisor's acts of sexual harassment when the complaining employee has suffered no tangible employment action.