Labor & Employment
ALERT
Fox Rothschild LLP
ATTORNEYS AT LAW

February 2015

NJ Supreme Court Limits Employer Vicarious Liability in Harassment Cases; Expands Definition of Supervisor Under NJLAD

By Heather R. Boshak and Courtney D. Roach

After more than 15 years, New Jersey employers finally have a response to the previously unanswered question of whether the affirmative defense established by the United States Supreme Court for harassment cases under Title VII in *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton* is applicable to the New Jersey Law Against Discrimination (NJLAD).

In *Aguas v. State of New Jersey*, decided on February 11, 2015, the New Jersey Supreme Court answered the question in the affirmative and held that an affirmative defense is available to employers where an employee fails to avail him or herself of the employer's anti-harassment policy when the employer has a defined harassment policy, makes employees aware of how to raise complaints of harassment and promptly and reasonably investigates complaints of harassment.

Factual Background

The plaintiff in *Aguas* was a corrections officer for the New Jersey Department of Corrections (DOC) who filed a claim against the DOC alleging that it was vicariously liable for the sexual harassment Aguas endured in violation of NJLAD. Aguas claimed that she was subjected to repeated instances of sexually harassing conduct from October 2009 until March 2010, including sexually suggestive physical touching and inappropriate comments by the highest-ranking supervisor on her shift. Aguas verbally reported the conduct to a supervisor, claiming she was hesitant to put her complaints into writing for fear of retaliation. Shortly after she reported the alleged harassment, an internal investigation was launched and her claims were found to be unsubstantiated. In the meantime, two days after the investigation commenced, Aguas filed her lawsuit.

At the time of the alleged harassment, and since 1999, the DOC had an anti-harassment policy in place. The DOC distributed the policy to all employees and required every employee to be trained on the policy. The policy contained procedures for reporting, investigating and remedying claims of harassment. Aguas admitted she was given a copy of the policy and in fact, had previously filed claims under the policy. In this situation, Aguas orally complained to a superior but failed to file a written complaint as required by the DOC policy and further declined to participate in a group meeting to discuss her complaints. The DOC followed its policy as written and investigated Aguas' complaint in a thorough and timely manner.

Analysis

In a split decision (5-2), the New Jersey Supreme Court affirmed the lower courts, specifically adopting the *Faragher/Ellerth* defense. In embracing the defense, the Supreme Court recognized that the purpose of NJLAD is to prevent harassment and that this goal is better met by encouraging employers to implement effective policies

and take prompt remedial action when faced with a complaint of harassment rather than resorting to courtrooms. The Supreme Court stressed that a policy on paper alone is not enough to garner the use of the defense – the implementation of the policy must be meaningful and effective in actual practice. The Supreme Court reinforced that the affirmative defense provides a strong incentive to employers to unequivocally notify its workforce that harassment will not be tolerated, implement effective training on the policy and strictly enforce the policy. This decision is important to employers because it allows employers that have a valid and effective policy, not one in name only, to defend themselves against claims of vicarious liability for claims of harassment that do not involve a tangible employment action when they can show they acted swiftly and in accordance with a well-established policy to address, stop or prevent harassment.

The *Aguas* decision also provides long-awaited guidance on the definition of "supervisors," of which employers should take note. On this issue, the New Jersey Supreme Court adopted a more expansive definition. The Supreme Court specifically declined to the follow the United States Supreme Court's more restrictive definition of who is a supervisor, which limited the definition of supervisor to individuals who had the authority to make tangible employment decisions. Instead, under *Aguas*, the definition of supervisor for the purposes of a hostile work environment claim includes both an individual who is authorized to make tangible employment decisions regarding a plaintiff and one who is authorized to make decisions about a plaintiff's day-to-day work activities. The Supreme Court determined that a more expansive definition was more consistent with the purposes of NJLAD of eradicating harassment in the workplace. The Supreme Court reasoned that including employees who are granted the authority to direct the day-to-day responsibilities of employees will encourage employers to carefully select supervisory employees and ensure that they are appropriately and thoroughly trained.

What Employers Should Do

The Supreme Court's decision reaffirms the importance of an effective anti-harassment policy. As the Supreme Court emphasized, "an employer that implements an ineffective anti-harassment policy, or fails to enforce its policy, may not assert the affirmative defense." In view of the benefits to an employer, a review of the comprehensiveness of an anti-harassment policy and the effectiveness of the implementation of the policy should be undertaken. In addition, appropriate training on the policy should be ensured, especially with the broader definition of supervisor endorsed by the Supreme Court. The investment now of implementing a robust and effective anti-harassment policy could pay off dividends at a later time if faced with a suit from an employee who failed to utilize the policy in the absence of a tangible employment action.

For more information, or to have your own anti-harassment policy reviewed, please contact Heather Boshak at 973.994.7508 or hboshak@foxrothschild.com, Courtney Roach at 973.994.7516 or croach@foxrothschild.com or any other member of the firm's Labor & Employment Department.