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ALERT

Labor & Employment | February 2015

Ellerth/Faragher Officially Comes to New Jersey: State Supreme Court Recognizes Affirmative Defense to Hostile Environment Harassment Claims for Employers

On Feb. 11, 2015, in a landmark decision – its first specifically addressing workplace sexual harassment in more than a decade – the New Jersey Supreme Court in *Aguas v. State of New Jersey* adopted the U.S. Supreme Court's *Ellerth/Faragher* affirmative defense to vicarious liability hostile workplace harassment claims for employers who "exercised reasonable care to prevent and correct promptly" any harassing behavior where the plaintiff employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer" and no tangible employment action has been taken. Equally important, the Court also thoroughly addressed the definition of a "supervisor" in evaluating such claims. The Court's decision in *Aguas* provides New Jersey employers a timely opportunity to assess their anti-harassment policies, procedures for responding to such claims as well as like measures that the Court suggests in its lengthy opinion.

Corrections Officer Alleged Sexual Harassment by Several Supervisors

Plaintiff Ilda Aguas, a New Jersey Department of Corrections (DOC) officer, alleged that two male supervisors engaged in various forms of sexual harassment. Plaintiff did not, however, contend that her employer had taken any tangible employment action against her. Plaintiff acknowledged receiving DOC's anti-discrimination and harassment policy, which mandated training, although plaintiff denied receiving any training. The DOC's policy also: encouraged prompt reporting and investigations of complaints; included a "prompt [and] thorough" internal investigation mechanism; imposed severe discipline for violations; and barred retaliation against complaining employees.

Court Adopts *Ellerth/Faragher* Affirmative Defense to Hostile Environment Harassment Claims

The Supreme Court, after a comprehensive analysis of both federal and state law, "expressly adopt[ed] the [U.S. Supreme Court's] *Ellerth/Faragher* analysis [under Title VII] for supervisor sexual harassment

cases in which a hostile work environment is claimed pursuant to the [New Jersey Law Against Discrimination], and no tangible employment action is taken." In such cases, "the defendant employer has the burden to prove, by a preponderance of the evidence, both prongs of the affirmative defense: that the employer exercised reasonable care to prevent and to correct promptly sexually harassing behavior; and that the plaintiff employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to otherwise avoid harm." In other words, in summary judgment and potential trial proceedings, an employer may avoid vicarious liability "by demonstrating by a preponderance of the evidence that [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that [the complaining employee] unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm."

Court Embraces Broader Definition of "Supervisor"

The Court in *Aguas* also addressed the definition of a "supervisor" for purposes of sex (and other types of) harassment claims giving rise to an alleged hostile work climate. After again canvassing governing federal and state law, the Court rejected the U.S. Supreme Court's "restrictive" definition set forth less than two years ago in *Vance v. Ball State*, 133 S. Ct. 2434, 2443 (2013), and instead adopted a broad view of the term. In an amorphous holding, the Court concluded: "We agree with the EEOC that the term 'supervisor,' defined more expansively to include not only employees granted the authority to make tangible employment decisions, but also those placed in charge of the complainant's daily work activities[,]" accords with New Jersey's LAD.

Key Takeaways

The New Jersey Supreme Court's decision in *Aguas* encourages employers to undertake a thorough review of their anti-harassment policies and procedures for responding to such workplace complaints. On balance, *Aguas* makes it more challenging for plaintiffs in hostile work environment claims to succeed, provided they did not experience a tangible job action *and* the employer has effective, well-entrenched anti-harassment policies and training. To best take advantage of *Aguas*, employers should carefully consider the following proactive steps:

1. Review current anti-harassment policies to ensure they: (a) are clear; (b) include detailed complaint procedures and provide explicit contact information for individuals (or at least departments) whom allegedly aggrieved employees can speak with; and (c) prohibit retaliation for policy violations.

2. Issue these policies separately from handbooks and ensure every employee has acknowledged receipt.

3. Issue these policies annually, for example through e-mail notification to all employees that the policies are available on the company intranet, and carefully document having done so.

4. Post anti-harassment policies in conspicuous locations throughout the workplace, such as break-rooms and bulletin boards, and provide "gifts" such as paperweights, stress balls, etc., that include contact information for responsible individuals whom aggrieved employees may contact.

5. Conduct regular anti-harassment training for all employees, requiring written (or like) acknowledgement of attendance.

6. Review offer letters, job descriptions, performance appraisals, and similar form documents to clarify and sanitize verbiage suggesting "supervisory" roles where plainly unintended.

As the Court in *Aguas* largely followed federal law, all employers – not only those operating in New Jersey – are encouraged to follow these suggestions.

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