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Effective Measures in Harassment Cases

Have New Jersey courts established a reasonable standard of care?

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What constitutes "reasonable care" with regard to implementing an antiharassment policy? Can an employer immunize itself from all liability? Is it enough to institute a policy and provide employee training? What constitutes a "safe haven" or "safe harbor"? These questions have been raised in employment cases over the years.

While the courts are not always consistent in their interpretation of the seminal New Jersey cases in the area, their decisions provide some answers to these questions. (Though it is important to note that many of these decisions are unpublished, and therefore, under N.J. Court Rule 1:36-3, do not have precedential value.) It is clear that the courts scrutinize the preventive procedures, the remediation and the employee's action in availing herself (or not) of those practices.

Almost two decades ago, in *Lehmann v. Toys 'R' Us, Inc*., 132 N.J. 587 (1993), the New Jersey Supreme Court promulgated an analytical framework for gauging an employer's responsibility for an employee's sexual harassment of another employee, under a hostile environment theory. The Court, applying agency principles, held that an employer will be held vicariously liable for a supervisor's conduct outside the scope of employment when the employer contributed to the harm through its negligence, intent or apparent authority over the harassing conduct; or if the supervisor was aided in the commission of the harassment by the agency relationship. The Court also held that employer liability is not limited to agency-based claims of supervisory harassment, recognizing a negligence-based theory of liability arising from an employer's failure to have effective preventive and remedial mechanisms in place.

The Court determined that, in light of the known prevalence of sexual harassment, a plaintiff may show that an employer was negligent by its failure to have in place well-publicized antiharassment policies, enforcement of those policies, effective formal and informal complaint structures and training and/or monitoring mechanisms. The Court also held that the absence of such mechanisms did not automatically constitute negligence, nor did the presence of such mechanisms demonstrate the absence of negligence, finding instead that the existence of effective preventive mechanisms provides some evidence of "due care" on the part of the employer.

In 1998, the U.S. Supreme Court clarified the issue of employer liability for supervisory harassment in a pair of cases brought forth pursuant to Title VII of the Civil Rights Act of 1964. In those two cases, *Burlington Indust. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Court concluded that when no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages. The affirmative defense consists of two elements: (1) the employer exercised reasonable care to prevent and promptly correct the harassing behavior; and (2) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

After these key rulings, many employers began to implement antiharassment workplace policies, training and complaint mechanisms in an effort to reduce incidents of workplace sexual harassment, also

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anticipating that these efforts would allow them to make an affirmative defense to such claims. However, the New Jersey Supreme Court has not yet expressly ruled that the F*aragher/Ellerth* defense applies to a claim under the Law Against Discrimination (LAD).

In *Cavuoti v. N.J. Transit Corp*., 161 N.J. 107 (1999), the Court determined that employers who promulgate and support an active anti-harassment policy would be entitled to a "safe haven" from vicarious liability for the harassing conduct of an employee. Then, in *Gaines v. Bellino*, 173 N.J. 301 (2002), the Court referenced *Lehmann's* holding that "the establishment of an effective antisexual harassment policy and complaint mechanism evidences an employer's due care and may provide affirmative protection from vicarious liability." Notwithstanding, the Court noted that the absence of the remedial steps does not categorically demonstrate the absence of negligence. The Court did not mention *Faragher* or *Ellerth*, but restated the circumstances relevant to determining whether an employer can enjoy the benefit of a "safe haven": periodic publication of the employer's antiharassment policy; mandatory training for supervisors and managers, and training offered to all employees; monitoring mechanisms to determine if the policies and complaint structures are trusted; and an unequivocal commitment from the top concerning the policies. The court stated that these factors may be considered in determining the efficacy of an antiharassment policy.

In response to these seminal cases setting forth principles of vicarious liability and defining standards of care, employers in New Jersey have continued to develop and improve upon antiharassment policies, training and grievance mechanisms in an effort to eradicate the workplace of discrimination and harassment, and to satisfy the elements of this elusive "safe haven."

Cases Denying Defendant Summary Judgment

In *Velez v. City of Jersey City*, 358 N.J. Super. 224 (App. Div. 2003), the court reversed summary judgment that had been granted to the defendant and remanded since the plaintiff had not complained earlier. The defense argued that its obligation to investigate was not triggered until it had prior knowledge of an individual's discriminatory conduct, and that the plaintiff had not made a formal complaint. The court said that the proofs casted a doubt on whether the employer had exercised due care since the plaintiff and others had not received training, the plaintiff had told a supervisor "as a friend" about the incidents, no investigation was conducted, and no effort was made to remediate. In so ruling, the court relied on *Gaines* and *Lehmann*, stating that the policy must be more than mere words.

In *Colello v. Bayshore Comm. Health Svcs*. 2010 WL 1753164 (App. Div. 2010), the court found that there was a jury question regarding whether the policies adequately protected the plaintiff. There was no specific policy in place to address the doctor-nurse context, the doctor had received no antiharassment training, and no "real" disciplinary measure was taken against the doctor.

Likewise, in *Cerdeira v. Martindale Hubbell,* 402 N.J. Super. 486 (App. Div. 2008), the Appellate Division found that an employer may be held directly liable for the sexual harassment of co-workers if it failed to implement an effective sexual harassment policy. According to the facts in the case, it was not clear that the plaintiff was in receipt and aware of the policy. Relying on the *Lehmann* case, the court specified that employers seeking to limit liability should conduct mandatory antiharassment training, have formal and informal complaint structures and monitoring mechanisms. The court did not read the *Lehmann* decision as recognizing a negligence-based theory of liability arising from an employer's failure to have effective preventive mechanisms in place as being limited to claims of only supervisory harassment. In reversing the summary judgment that had been granted to the employer, the court reiterated that the absence of an effective sexual harassment policy did not automatically constitute negligence nor did the existence of such policy show absence of negligence.

Similarly, in *Dixon v. N.J. Dept of Corrections*, 2008 WL 4922531 (App. Div. 2008), the plaintiff was immediately directed to file an internal complaint when she reported harassment. There was a thorough investigation, and the harasser was suspended. The court, despite finding the response "more than adequate," reversed the summary judgment and remanded for more information regarding other alleged acts committed by the harasser prior to the plaintiff's complaint, which were allegedly witnessed by supervisors who did nothing.

Cases Affirming Summary Judgment in Favor of Defendant

In *Gibson v. State of New Jersey,* 2007 WL 737748 (App. Div. 2007), the court held that an employer is "entitled to assert the existence of an effective antisexual harassment policy as an affirmative defense to vicarious liability." In affirming a summary judgment in favor of the defense, the court found there was ample evidence of a policy and avenues to redress and remedy violations (although there was no specific detailed discussion of that ample evidence), but that plaintiff did not avail herself of those remedies. The Court said that the *Gaines* defense "is in accordance with *Faragher,"* in that it is comprised of two necessary elements: (1) reasonable care to prevent and correct harassment; and (2) plaintiff's unreasonable failure to avail herself of those polices. It held that the defense was available because the hostile environment complained of did not result in any tangible employment action.

In *Barnes v. State of N.J*., 2008 WL 5233544 (App. Div. 2008), the court affirmed summary judgment in favor of the defendant where there was a prompt investigation and a 30-day suspension issued against the plaintiff's superior officer (about whom she had complained). The court affirmed the trial court's ruling based upon the fact that the plaintiff had availed herself of the policy, and there was remediation. The court did not even discuss any facts regarding the policy, its dissemination, holding that the defendants were "shielded" from liability because it had a "viable" antiharassment policy that worked.

Similarly, In *D.M. v. Walgreens*, 2008 WL 2917121 (App. Div. 2008), the Appellate Division affirmed a summary judgment ruling in favor of the defendant in a case of co-worker harassment, holding that there was evidence of due care on the part of the employer because once the plaintiff brought her complaint to the attention of management, the company promptly investigated the allegations and thereafter took corrective action, terminating the employment of the alleged harasser. The plaintiff argued that Walgreens had known of previous incidents concerning the alleged harasser yet had done

nothing. The court held that after the plaintiff's complaint was made, the employer responded promptly, exercising due care; thus Walgreens was entitled to summary judgment.

In *Valentine v. State of N.J.*, 2009 WL 1108452 (App. Div. 2009), the court found that the anti-harassment policy was well publicized because the plaintiff knew about it and had availed himself of it. Once the plaintiff made a report of harassment (concerning conduct of a nonsupervisor, nonemployee), the employer immediately launched an investigation and took corrective action. When the plaintiff, in his subsequent civil action, complained about other incidents of sexual harassment by the same perpetrator, the court held that the defendant was entitled to summary judgment because the defendant's response to his complaint was immediate and it took remedial action and plaintiff had not availed himself of the established avenue of redress concerning his other issues until he filed the complaint.

In a recently decided sexual harassment case, *Allen v. Adecco,* 2011 WL 242026 (Jan. 27, 2011), the Appellate Division reversed the summary judgment ruling that had been granted in favor of the employer. In so doing, the court stated that providing an effective workplace policy alone does not shield the employer from liability based on its prior negligence or vicarious liability that led an employee who does not know about the policies to endure harassment before reporting it.

The court discussed factual disputes as to whether the policy was made known to the plaintiff, as well as whether there was effective training and monitoring. In citing *Gaines v. Bellino,* 173 N.J. 301 (2002), the *Allen* court said that this evidence is helpful to determine whether an institution may be permitted to disclaim vicarious liability on grounds of having established due care. The court acknowledged that an employer's antiharassment policy was not only relevant to negligence, but also to the employer's affirmative defense to vicarious liability, which is imposed on an employer under principles of agency that do not require proof of negligence.

The *Allen* case exemplifies the high level of factual analysis that is required in this area, sometimes leading to denial (or reversal) of summary judgment, but suggesting that an employer may be absolved from liability when due care has been shown.

In closing, employers will be able to assert a "safe haven" or "safe harbor" in certain situations. The employer's policies must be effective and known to victims of harassment. Victims of harassment will need to be prepared to respond to why they did not complain where there is a known and effective complaint procedure and policy prohibiting harassment. What is reasonable in terms of attempting to prove an "effective" policy continues to be fact-sensitive — which seems to be the very point in our New Jersey Supreme Court's *not* adopting a bright-line test. This encourages continued growth and development in policies and practices, advancing mutual and cooperative resolution early on. Implementing viable policies that work, setting high standards for all employees, and encouraging victims to come forward without fear of retaliation will bring us one step closer to eradication of the cancer of harassment and discrimination in the workplace. ■