Effective Measures in Harassment Cases: Have New Jersey Courts Established a Reasonable Standard of Care?

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What constitutes reasonable care or due care in connection with an employer's implementation of an anti-harassment policy? Can an employer immunize itself from all liability? Is it enough to institute a policy and provide employee training? Are all investigations adequate remedial measures? What constitutes a safe haven or safe harbor? Over the years, employment cases have raised these questions. Employers institute practices, policies, investigations, and remediation in an effort to eradicate unlawful harassment and with the hope their actions will also immunize them from liability. Accordingly, the evaluation of case law analyzing employers' actions is critical, including when assessing appropriate preventative and remedial anti-harassment practices.

When are New Jersey Employers Liable for Harassment?

While the courts are not always consistent in their interpretation of the seminal New Jersey cases in this area, their decisions provide some guidance and answers to these questions.[1] It is abundantly clear, however, that the courts scrutinize the preventive procedures, the remediation, and employees' actions in availing themselves (or not) of those practices.

Two decades ago, in *Lehmann v. Toys 'R' Us, Inc.*,[2] 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 agency relationship aided the supervisor in the commission of the harassment.

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 an employer was negligent by its failure to have in place well-publicized anti-harassment 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 United States 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*[3] and *Faragher v. City of Boca Raton*,[4] 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 anti-harassment workplace policies, training, and complaint mechanisms in an effort to reduce incidents of workplace sexual harassment, also anticipating these efforts would allow them to make an affirmative defense to such claims. However, as the below cases

demonstrate, the New Jersey Supreme Court has not yet expressly ruled the *Faragher/Ellerth* defense applies to a claim under the Law Against Discrimination (LAD).

In *Cavuoti v. N.J. Transit Corp.*,[5] the New Jersey Supreme Court determined 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*,[6] the Court referenced *Lehmann's* holding that "the establishment of an effective anti-sexual harassment policy and complaint mechanism evidences an employer's due care and may provide affirmative protection from vicarious liability." Notwithstanding, the Court noted 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, which include: periodic publication of the employer's anti-harassment 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.[7] The Court stated these factors may be considered in determining the efficacy of an anti-harassment 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 anti-harassment 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.

Summary Judgment Cases in Favor of Plaintiff

It is clear that merely having policies is not enough to satisfy an employer's affirmative defense. In *Gaines*, the New Jersey Supreme Court determined summary judgment was not appropriate in a case involving alleged sexual harassment by a female corrections officer at a county correctional facility.[8] The Court found there were factual issues surrounding whether the employer had an effective policy, training, and engaged in prompt remedial measures. Although the employer claimed to have an effective policy, the alleged harasser testified he never received training on the policy, and there was conflicting testimony on how well the employer actually distributed and enforced the policy at the plaintiff's worksite. Moreover, a high-level official and other supervisory employees were aware of the harassing conduct a year before it was actually investigated.

Employers must disseminate anti-harassment policies; train employees on the policies; and ensure that supervisors understand that a complaint, even if not formal, triggers the employer's obligation to investigate. In *Velez v. City of Jersey City*,[9] the Appellate Division reversed summary judgment that had been granted to the defendant and remanded the case because the plaintiff had not complained earlier. The defense argued 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 the proofs casted a doubt on whether the employer had exercised due care because 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 the "policy must be more than mere words."[10]

Each case requires a detailed, fact-specific analysis, as demonstrated by the Appellate Division's decision in *Allen v. Adecco*[11] There, the analysis was not only relevant to the evaluation of the affirmative defense, but the court suggested an employer may be absolved from liability when it has shown due care. In granting summary judgment, the trial court had relied on the fact that the employer had a policy and promptly reassigned the alleged harasser. The Appellate Division reversed the summary judgment ruling that had been granted in favor of the employer. In so reversing, the court referenced that having a policy and engaging in prompt remedial action are certainly relevant elements to consider, but such elements alone do not shield the employer from liability, especially when there is prior negligence or vicarious liability that led an employee who does not know about the policies to endure harassment before reporting it. The court found factual disputes regarding whether the employer made the policy known to the plaintiff, as well as whether the employer conducted effective training and monitoring. The court also referenced that the alleged harasser told the plaintiff a complaint would be futile and lead to her termination.

In citing *Gaines,* the *Allen* court said this evidence is helpful to determine whether an institution may be permitted to disclaim vicarious liability on grounds of having established due care.[12] The court acknowledged an employer's anti-harassment 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.

Training to educate all supervisory employees and remedial action are critical to an employer's effective response. In *Colello v. Bayshore Comm. Health Svcs.*,[13] the court found 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 anti-harassment training; and, the hospital did not take any "real" disciplinary measure against the doctor. Likewise, in *Cerdeira v. Martindale Hubbell,*[14] the Appellate Division found an employer may be held directly liable for the sexual harassment of coworkers if it fails to implement an effective sexual harassment policy.

According to the facts in the case, it was not clear that the plaintiff was in receipt of and aware of the policy. Relying on the *Lehmann* case, the court specified that employers seeking to limit liability should conduct mandatory anti-harassment training; have formal and informal complaint structures; and, have 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 the absence of an effective sexual harassment policy did not automatically constitute negligence, nor did the existence of a policy show absence of negligence.

Similarly, in *Dixon v. N.J. Department of Corrections,*[15] the employer immediately directed the plaintiff to file an internal complaint when she reported harassment; conducted a thorough investigation; and, suspended the harasser. The court, despite finding the response "more than adequate," reversed summary judgment for the employer 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.[16]

Summary Judgment Cases in Favor of Defendant

In the recently decided *Aguas v. State of New Jersey,*[17] the Appellate Division held that summary judgment was properly granted in favor of the employer. The court found the employer exercised "due care" in having implemented and distributed an effective anti-sexual harassment policy; offered training on the policy; and, completed a reasonably prompt comprehensive investigation into the allegations despite the absence of any written internal complaint by the plaintiff. The policy defined sexual harassment, detailed the responsibilities of employees and supervisors, and outlined the complaint procedure, with forms attached. The court found the policy was well publicized and published periodically. The plaintiff admitted receiving a copy of the policy almost every year. Although she denied training, the plaintiff was well aware of the complaint process and grievance procedure, as she previously utilized them to formally report workplace harassment. Moreover, the alleged harassers had received yearly training by the employer. The court also found there was no dispute that the defendant launched a comprehensive investigation into the alleged harassment.

The inquiry endured for over a month, and involved interviews of all relevant individuals and the taking of witness statements. In other words, this investigation was not in name only. The investigation was not only comprehensive, but reasonably prompt. The plaintiff also did not exercise her right to administrative appeal of the findings that her allegations were not substantiated.

As exemplified by *Aguas*, the New Jersey courts have found in favor of defendants when the employer has an effective and well-published policy, and the plaintiff fails to avail him or herself of it to redress his or her grievance.

In *Gibson v. State of New Jersey,*[18] the court held that an employer is "entitled to assert the existence of an effective anti-sexual 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 the plaintiff did not avail herself of those remedies. The court said 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) the plaintiff's unreasonable failure

to avail herself of such preventative policies.[19] It held the defense was available because the hostile environment of which the plaintiff complained did not result in any tangible employment action.

The courts have similarly viewed viable policies and prompt appropriate remedial action by an employer as effective measures against liability. In *Barnes v. State of New Jersey*,[20] the court affirmed summary judgment in favor of the defendant where the employer conducted a prompt investigation and issued a 30-day suspension against the plaintiff's superior officer (about whom she had complained). The court affirmed the trial court's ruling based upon the fact the plaintiff had availed herself of the policy, and there was remediation. The court did not even discuss any facts regarding the policy or its dissemination, holding the defendants were "shielded" from liability because they had a "viable" anti-harassment policy that worked.

Similarly, in *D.M. v. Walgreens*,[21] the Appellate Division affirmed a summary judgment ruling in favor of the defendant in a case of coworker harassment, holding 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 by terminating the employment of the alleged harasser. The plaintiff argued Walgreens had known of previous incidents concerning the alleged harasser, yet had done nothing. The court held that after the plaintiff's complaint, the employer responded promptly, exercising due care; thus, Walgreens was entitled to summary judgment.

The obligation of the employee to avail him or herself of the trusted complaint mechanisms are critical, and failure to do so may result in summary judgment in favor of the employer. In *Valentine v. State of New Jersey*,[22] the court found 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 non-supervisor, non-employee), 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 the defendant was entitled to summary judgment because the defendant's response to the complaint was immediate and it took remedial action, and the plaintiff had not availed himself of the established avenue of redress concerning his other issues until he filed the complaint.

Conclusion

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 must be prepared to respond to why they did not complain where there is a known and effective complaint procedure and policy prohibiting harassment. Employers that conduct effective training, respond promptly to complaints, perform thorough and objective investigations, and take other remedial measures will have persuasive arguments that they exercised due care. What is reasonable in terms of demonstrating 'effective' policies, training, and investigations continues to be a highly fact-sensitive analysis—which seems to be the very point in the New Jersey Supreme Court's *not* adopting a bright-line test. The authors believe this approach encourages continued growth and development in policies and practices, advancing mutual and cooperative resolution. 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 harassment and discrimination in the workplace. ■

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Endnotes

1. It is important, however, to note that many of these decisions are unpublished, and therefore, under N.J. Court Rule 1:36-3, do not have precedential value.
2. 132 N.J. 587 (1993).
3. 524 U.S. 742 (1998).
4. 524 U.S. 775 (1998).
5. 161 N.J. 107 (1999).
6. 173 N.J. 301 (2002).
7. *Id.* at 314 (*citing Cavuoti,* 161 N.J. at 121).
8. *Id.* at 333.
9. 358 N.J. Super. 224 (App. Div. 2003).
10. *Id.* at 236 (*quoting Gaines,* 173 N.J. at 319).
11. 2011 WL 242026 (Jan. 27, 2011).
12. *Id.* at *6 (*citing* 173 N.J. at 317-18).
13. 2010 WL 1753164 (App. Div. 2010).
14. 402 N.J. Super. 486 (App. Div. 2008).
15. 2008 WL 4922531 (App. Div. 2008).
16. *Id.* at *3.
17. 2013 WL 1136115 (App. Div. March 20, 2013).
18. 2007 WL 737748 (App. Div. 2007).
19. *Id.* at *13.
20. 2008 WL 5233544 (App. Div. 2008).
21. 2008 WL 2917121 (App. Div. 2008).
22. 2009 WL 1108452 (App. Div. 2009).