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**Practice Group:****Labor, Employment  
and Workplace Safety**

## New Jersey Supreme Court Recognizes Employer Defense against Liability for Supervisor Harassment

**Labor, Employment and Workplace Safety Alert****By Vincent N. Avallone and C. Bryan Cantrell**

On February 11, 2015, the New Jersey Supreme Court confirmed that the *Ellerth/Faragher* affirmative defense set forth by the United States Supreme Court in 1998 is available to an employer defending a claim of supervisory sexual harassment brought under the New Jersey Law Against Discrimination (“NJLAD”). Provided that the employer has not taken an adverse tangible employment action against the plaintiff-employee, an employer may avoid vicarious liability under the NJLAD for hostile work environment sexual harassment committed by a supervisor if it can show (1) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior AND (2) that the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

At the same time, the Court declined to adopt the United States Supreme Court’s test for determining whether an employee accused of sexually harassing another employee is the complaining employee’s supervisor for purposes of a hostile work environment claim. See *Vance v. Ball State University*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2434, 186 L. Ed. 2d 565 (2013). Instead, an allegedly harassing employee is a “supervisor” under the NJLAD if that employee either (1) had the authority to take or recommend tangible employment decisions affecting the plaintiff or (2) directed the plaintiff’s day-to-day activities in the workplace.

### ***Aguas v. State of New Jersey***

The plaintiff in *Aguas* was a correctional officer who alleged that Darryl McClish, the highest-ranking officer on her shift, and Sergeant Robin Hill, who assisted McClish, created a hostile work environment in violation of the NJLAD. *Aguas*, who was never subjected to any tangible employment action against her, sued her employer, the State of New Jersey, for compensatory and punitive damages arising from the alleged harassment. The trial Court granted summary judgment on behalf of the employer because the employee failed to file a written complaint of harassment. The Appellate Division affirmed. In a lengthy opinion, the New Jersey Supreme Court addressed the two legal theories for employer liability for harassment committed by supervisors and clarified the role of an employer’s anti-harassment policy in defending against such a claim. The Court reversed and remanded the case to the trial court for further proceedings under the proper standards.

### **Two Theories of Employer Liability for Supervisor Hostile Work Environment**

The New Jersey Supreme Court reiterated two theories of employer liability under the NJLAD for hostile work environment harassment by supervisors. Both theories are premised on the Restatement (Second) of Agency, § 219. The Court then explained the relevance of an employer’s anti-harassment policy under each theory.

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Under the first theory, an employee can assert a direct cause of action against the employer for negligence or recklessness causing the hostile work environment. To prevail, a plaintiff must show that the employer failed to exercise due care with respect to sexual harassment in the workplace, that its breach of the duty of due care caused the plaintiff's harm, and that she sustained damages. In a prior opinion, *Gaines v. Bellino*, 173 N.J. 301 (2002), the Court recognized five factors relevant to a hostile work environment claim against an employer under the negligence theory: (1) formal policies prohibiting harassment; (2) formal and informal complaint structures available to employees; (3) anti-harassment training, which must be mandatory for supervisors and managers and available to all other employees; (4) existence of effective sensing or monitoring mechanisms to check the trustworthiness of the policies and complaint structures; and (5) an unequivocal commitment from the highest levels of the employer that harassment would not be tolerated, and demonstration of that commitment through consistent practice. As such, the existence of an anti-harassment policy is evidence weighing against employer liability. However, existence of an anti-harassment policy alone is not sufficient to avoid liability, nor is an employer liable *per se* if it lacks an anti-harassment policy.

The second theory for employer liability is that an employer is vicariously liable for the actions of its supervisor, who is its agent. To establish vicarious liability, a plaintiff must show (1) the employer delegated authority to the supervisor to control the situation about which the plaintiff complains, (2) the supervisor exercised that authority, (3) the supervisor's exercise of that authority resulted in a violation of the NJLAD, and (4) the authority delegated by the employer to the supervisor aided the supervisor in injuring the plaintiff. It was under this theory that the Court confirmed the availability of the affirmative defense previously recognized by the U.S. Supreme Court in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Under the *Faragher/Ellerth* cases, an employer has an affirmative defense against vicarious liability if it can prove (1) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior AND (2) that the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

### U.S. Supreme Court's Definition of Supervisor Rejected

The New Jersey Supreme Court also clarified who would qualify as a "supervisor" for purposes of establishing employer liability for supervisory sexual harassment. The U.S. Supreme Court recently held that, under Title VII, a "supervisor" is an employee who is "granted the authority to make tangible employment decisions," but rejected the Equal Employment Opportunity Commission's inclusion of employees who are "placed in charge of the complainant's daily work activities" as "supervisors." The New Jersey Supreme Court declined to adopt the U.S. Supreme Court's reasoning and, instead, adopted the broader approach of the EEOC, and held that supervisors included *both* types of employees for purposes of analyzing supervisory sexual harassment claims under the NJLAD.

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### Implications for Employers

The Court's decision in *Aguas* serves as a useful reminder of the importance for New Jersey employers to implement and enforce comprehensive and effective policies prohibiting discrimination, including hostile work environment sexual harassment. The *Aguas* decision confirms that an employer can overcome vicarious liability with effective anti-harassment policies, and such practices also weigh against employer liability under a negligence theory. At the same time, *Aguas* reminds employers that the NJLAD may not be construed in the same manner as Title VII, and employers must diligently enforce anti-discrimination and anti-harassment policies to minimize the risk of liability.

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