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New Jersey Supreme Court Adopts Affirmative Defense for Hostile Work Environment Claims, Making Training Even More Important

In a significant ruling making it more difficult for employers to be held liable for workplace harassment under the New Jersey Law Against Discrimination, the New Jersey Supreme Court recently adopted the affirmative defense previously set forth by the United States Supreme Court in two 1998 cases involving claims under federal anti-discrimination law, *Burlington Industries v. Ellerth* and *Faragher v. Boca Raton*.

Specifically, in *Aguas v. State of New Jersey*, the New Jersey Supreme Court made clear that in the absence of a tangible action taken against an employee (e.g., discipline or discharge), employers may assert an affirmative defense to liability for harassment claims. Such defense is available if the employer exercised reasonable care in preventing and correcting any harassment (e.g., implemented an effective anti-harassment policy and conducted thorough investigations and training) and if the plaintiff failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm (e.g., failed to timely complain, thus preventing the employer from addressing the harassment).

In 1993, in *Lehmann v. Toys 'R' Us, Inc.*, the New Jersey Supreme Court had previously ruled that when a supervisor acts beyond the scope of his employment by harassing an employee, the employer will be liable if it contributed to the harm through its negligence, intent or apparent authorization of the harassing conduct, or if the supervisor was aided in the harassment by his/ her relationship with the employer.

In *Aguas*, Justice Patterson noted that adoption of the *Ellerth-Faragher* defense would provide incentives for both employers and employees to help accomplish the paramount objective identified by the New Jersey Supreme Court in *Lehmann*?-- the prevention of sexual harassment. Specifically, employers should implement and enforce anti-harassment policies and provide training on those policies, and employees should report harassment internally, allowing their employers to take immediate action. Even though the case addresses only sexual harassment claims, the same affirmative defense would likely be available for other claims of harassment, including but not limited to those based on race or religion.

Given this decision, ensuring that supervisors and employees are properly trained on anti-harassment policies and procedures becomes much more important to avoid employer liability for workplace harassment claims under New Jersey state law. The attorneys at Day Pitney can assist in that effort. We frequently conduct training on employment-related topics. For more information on training we offer, please see our Employment Training brochure.