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Labor and Employment Alert: New Jersey Supreme Court Simultaneously Limits and Expands an Employer's Liability for Sexual Harassment

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CLIENT ALERT | 2.20.2015

Under the New Jersey Law Against Discrimination (NJLAD), an employer can be liable for hostile work environment harassment in two ways. First, an employee can assert a cause of action directly against the employer for negligently or recklessly causing the hostile environment. Second, the employer can be vicariously liable for the acts of its supervisors. The New Jersey Supreme Court's recent ruling in *Aguas v. State*, 2015 N.J. LEXIS 131 (2015), significantly impacts the state's employers when it comes to defending against that second theory of sexual harassment and reinforces the importance of effective anti-harassment procedures.

In *Aguas*, the court adopted the U.S. Supreme Court's *Faragher/Ellerth* affirmative defense to sexual harassment claims under the NJLAD. The *Faragher/Ellerth* cases provide an employer with an affirmative defense to vicarious liability if (1) the employer (or the employer's agent) has not taken an adverse, tangible employment action against the employee, (2) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (3) the employee complaining of the harassment unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. This defense, which the employer must prove, is now available to New Jersey employers defending against claims of hostile work environment harassment predicated on vicarious liability.

At the same time that the *Aguas* court provided an affirmative defense to harassment, the court opened the door to increased employer liability for supervisors' actions by expanding the definition of who constitutes a "supervisor." Under Title VII, the U.S. Supreme Court has limited the meaning of "supervisor" to an employee who has the power to take tangible employment actions against another employee. *Vance v. Ball State University*, 133 S. Ct. 2434 (2013). In *Aguas*, however, the New Jersey Supreme Court found that approach too "restrictive." Instead, the court adopted a more expansive definition (one long advocated by the EEOC). So now, under the NJLAD, a supervisor

includes “not only employees granted the authority to make tangible employment decisions, but also those placed in charge of the complainant's daily work activities.” Thus, employees who direct subordinates day-to-day responsibilities may be considered supervisors.

The *Aguas* decision makes clear that employers must take affirmative steps to eradicate and respond to harassment “by promoting responsible efforts by employers to detect, address, and punish it” in order to avail themselves of the affirmative defense. These steps include having robust anti-harassment and retaliation policies, complaint mechanisms, employee training that includes anyone who could potentially be considered a supervisor under the NJLAD, and prompt and effective responses to complaints. Contact your Vorys lawyer to review your harassment policies and discuss anti-harassment training for your managers and employees.