



N.J. Human Resources Law Alert

A Publication of Saiber LLC's Employment Law Group
Sean R. Kelly, Esq. and DanaLynn Colao, Esq., Co-Editors
www.saiber.com

Article Author: John M. Losinger, Esq.

MARCH 2015

RECENT DECISION BY THE NEW JERSEY SUPREME COURT REMINDS EMPLOYERS OF THE IMPORTANCE OF HAVING MEANINGFUL AND EFFECTIVE ANTI-HARASSMENT POLICIES

Every employer fears that it will be served with a Complaint alleging that one of its employees has sexually harassed another employee. Even though the offending employee was acting outside the scope of his or her employment, an employer may be held liable under the New Jersey Law Against Discrimination ("LAD") for the employee's actions if: (1) the employer was negligent or reckless in allowing the harassment to take place, or (2) the offending employee was a "supervisor."

A few weeks ago, in Aguas v. State of New Jersey, A-35-13, No. 072467 (Feb. 11, 2015), the Supreme Court of New Jersey held that New Jersey's LAD extends to employers the same affirmative defense that the federal courts have recognized for several years in cases under Title VII of the Federal Civil Rights Act in cases involving harassment, including harassment by a supervisor. That affirmative defense allows an employer to avoid liability if it has a meaningful and effective anti-harassment policy, and the complainant failed to take advantage of the corrective opportunities provided by the employer.

While the adoption of the affirmative defense is good news for employers, the Court countered this benefit by increasing the universe of employees who may be considered "supervisors" and whose conduct might therefore trigger liability. Contrary to the interpretation of the federal anti-discrimination statute, New Jersey's state anti-discrimination statute is now interpreted broadly such that the term "supervisor" is now defined to include not only individuals with the authority to make tangible employment decisions, such as hiring and firing, but also individuals in charge of the complainant's daily work activities. Therefore, a New Jersey employer may be vicariously liable for the sexually harassing conduct of any employee who merely has control over the day-to-day activities of other employees.

The Takeaway

In order to reduce the risk of liability, an employer must maintain and enforce comprehensive anti-harassment and anti-discrimination policies. If an employer fails to enforce its policies, or fails to promptly investigate allegations of harassment, it will be unable to assert the affirmative defense.

An employer's policies must be detailed enough to be provide employees with meaningful protections against harassment and discrimination. In order to ensure that the policies are fully understood and complied with, an employer should provide regular training to its employees and supervisors on appropriate conduct in the workplace.

If you have questions about your anti-harassment and anti-discrimination policies, or if you are interested in conducting a training at your workplace, please contact [DanaLynn Colao, Esq.](#)

About the Co-Editors

For over 30 years, [Sean Kelly](#) has focused his practice on counseling employers and defending employment cases, and has successfully tried many employment cases to verdict. He is certified by the Supreme Court of New Jersey as a Civil Trial Attorney, has been repeatedly included in New Jersey Monthly Magazine's list of New Jersey "Super Lawyers," holds the highest rating awarded by the Martindale-Hubbell Lawyers Directory, has been named a Master of two separate American Inns of Court, and is included on the New Jersey Superior Court roster of court-approved mediators.

[DanaLynn Colao](#) focuses her practice on business litigation with an emphasis on employment issues. She counsels and provides training for clients on a wide array of issues that arise in the workplace including medical leaves of absence, wage and hour claims, employment agreements and non-compete agreements. Strategic thinking and affirmative measures enable DanaLynn to significantly reduce potential liability for her clients. DanaLynn was selected to the *New Jersey Law Journal's* list of leading lawyers in the "Forty Under 40" selection and she has been listed since 2009 in NJ Super Lawyers.

About the Author

[John M. Losinger](#) focuses his practice on a wide range of civil litigation matters, including commercial disputes, employment actions, environmental and toxic tort litigation, and the defense of professional malpractice claims. He also has experience conducting comprehensive investigations for public and private clients. Additionally, Jack regularly represent property owners in the Tax Court of New Jersey and in the County Boards of Taxation.

Disclaimer

This notice is for informational purposes only and should not be relied upon as legal advice applicable to any specific employment situation. The reader should consult with an attorney to determine how the information discussed in this notice may apply to a particular workplace context.