

New Jersey Supreme Court Rules That An Effective Anti-Harassment Policy Can Be A Defense To Sexual Harassment Claim

Justin P. Kolbenschlag

Greenbaum, Rowe, Smith & Davis LLP Client Alert

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On February 11, 2015, in *Aguas v. New Jersey*, the New Jersey Supreme Court held that, consistent with federal law, employers are not strictly liable under New Jersey's Law Against Discrimination for sexual harassment committed by their employees. Quoting the United State's Supreme Court Decision in *Burlington Industries v. Ellerth*, New Jersey's highest court ruled that the employer in a hostile work environment sexual harassment case may "assert as an affirmative defense to vicarious liability that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise" provided that its employer has not taken an adverse employment action against the plaintiff employee.

The *Aguas* Court also held that the employer can establish the first prong of this test — that the employer exercised reasonable care to prevent and correct harassing behavior — by implementing and enforcing an effective anti-harassment policy. The Court cautioned, however, "an employer that implements an ineffective anti-harassment policy, or fails to enforce its policy, may not assert the affirmative defense."

Finally, the Court defined who is considered a "supervisor" for purposes of a hostile work environment sexual harassment claim. The Court held "an allegedly harassing employee is the complainant's supervisor if that employee had the authority to take or recommend tangible employment actions affecting the complaining employee, or to direct the complainant's day-to-day activities in the workplace."

Employers should contact their employment counsel for guidance to ensure that their anti-harassment policies and training are up to date and compliant with the standards set forth in *Aguas*. Employers are also encouraged to contact employment counsel any time a claim for harassment is made by an employee so that the appropriate investigatory measures can be implemented.

The author of this Alert, **Justin Kolbenschlag**, is a member of the firm's Employment Law Practice Group.