

Management Alert



NJ Supreme Court Adopts *Faragher-Ellerth* and Expansive Definition of “Supervisor”

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In a decision with important implications for all New Jersey employers, the New Jersey Supreme Court released its decision on Wednesday in *Aguas v. State of New Jersey*, expressly adopting the well-known “*Faragher-Ellerth* defense” for hostile work environment claims brought under the Law Against Discrimination (“LAD”). As established by the U.S. Supreme Court, the *Faragher-Ellerth* defense provides that an employer cannot be held vicariously liable for a supervisors hostile work environment sexual harassment where: (i) it exercised reasonable care to prevent and promptly correct any harassing behavior; and (ii) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm otherwise.

Although opinions differ on whether this ruling constitutes a sea change for employers (prior case law intimated that the *Faragher-Ellerth* defense applied to LAD claims), the Court in *Aguas* has now confirmed the availability of the defense in LAD claims. An employer in a hostile work environment case can assert as an affirmative defense 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, however, that the employer has not taken a tangible adverse employment action against the plaintiff employee.

While embracing the U.S. Supreme Court’s *Faragher-Ellerth* standard, the Court decided to buck them on the definition of a supervisor—a term undefined by the LAD. The Court expressly rejected the standard set forth in *Vance v. Ball State University*, 133 S. Ct. 2434, 2443 (2013) and instead adopted a more expansive definition of supervisor—that urged by the Equal Employment Opportunity Commission—that includes not only employees granted the authority to make tangible employment decisions, but also those placed in charge of the employee’s daily work activities.

Case Background

Although Plaintiff verbally complained about harassment from her supervisor, she failed to strictly follow the employer’s complaint procedures—procedures she had used in the past. Notwithstanding, the employer undertook an investigation of her allegations, concluded no harassment had occurred, and later asserted an affirmative defense to bar Plaintiff’s claims, because it took “prompt and remedial action” once it learned of Plaintiff’s claims and that she had failed to avail herself of its well-established complaint procedure—the “*Faragher-Ellerth* defense.”

Applicability of *Faragher-Ellerth*

In deciding to expressly adopt the *Faragher-Ellerth* defense, the Court provided an in depth review of its prior decisions in this area, as well as the federal precedent governing Title VII. The Court concurred with the U.S. Supreme Court that the

Faragher-Ellerth defense “provides a fair and practical framework for supervisor sexual harassment cases,” and further noted that it was not giving a “free pass” to employers as the defense may not be asserted when the supervisor’s harassment culminates in a tangible employment action (e.g. termination) or when the employer’s sexual harassment policy fails to provide meaningful and effective policies and procedures for employees to use in response to harassment. In short, the defense motivates employers and employees alike to accomplish the paramount objective of the LAD—the prevention of sexual harassment.

Definition of Supervisor

After noting that neither the LAD nor the Court’s prior case law clearly defined a “supervisor”, the Court reviewed the definition espoused by the EEOC, as well as that of the U.S. Supreme Court in *Vance v. Ball State University*. The EEOC’s broader definition includes as supervisors “not only employees granted the authority to make tangible employment decisions, but also those placed in charge of the complainant’s daily work activities.” Conversely, the Supreme Court in *Vance* adopted a narrower view under which an employee is a “supervisor” for purposes of vicarious liability under Title VII only if he is empowered by the employer to take or recommend tangible employment actions against the victim, *i.e.*, effect a “significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”

The Court adopted the more expansive EEOC definition because it “furthers the paramount goal of the LAD: the eradication of sexual harassment in the workplace” by forcing employers to focus their attention on all employees granted the authority to direct day-to-day responsibilities of subordinates, not just “on an elite group of decision-makers at the pinnacle of the organization.”

What this Means for New Jersey Employers

Aguas is a “must read” for employers with operations in New Jersey. By recognizing the *Faragher-Ellerth* defense, the Court has empowered New Jersey employers to not only eliminate harassment in the workplace, but also better manage their exposure should it occur. To this end, employers should review their anti-harassment policies and procedures to ensure that they provide a meaningful and effective means for employees to report harassment, and for the employer to take prompt remedial measures. Making sure that employees are aware of these policies—whether through annual distribution and/or workplace training—is equally important. Employers should continue to thoroughly and promptly investigate any harassment, discrimination, or retaliation claims to avoid any allegations of failing to take appropriate action to address offending conduct.

Given the new expansive definition a “supervisor”, employers should also review and, if need be, revise job descriptions and performance expectations of employees in supervisory positions.

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Seyfarth Shaw LLP Management Alert | February 13, 2015

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