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New Jersey Employer May Be Liable For Alleged Sexual Harassment by Co-Worker

In a case of first impression, the Superior Court of New Jersey – Appellate Division allowed a female employee to proceed with her claim directly against the employer for alleged sexual harassment by a male co-worker despite the existence of a written anti-harassment policy. In *Cerdeira v. Martindale-Hubbell*, ---A.2d---, 2008 WL 4239213 (N.J.Super.A.D.), the Court found that the mere existence of a written policy is not sufficient to shield an employer from direct liability for sexual harassment by a co-worker.

The Court relied upon a broad interpretation of *Lehmann v. Toys ‘R’ Us*, 132 N.J. 587, 626 A.2d 445 (1993), and two federal cases in determining the protection to employers afforded by anti-discrimination policies and procedures. In *Lehmann*, the Court recognized that employers may be directly liable for hostile work environment under a theory of negligent failure to have effective sexual harassment policies in place. Although *Lehmann* involved harassment by a supervisor, the appellate division did not read the case as limiting the cause of action to only those cases. It reasoned that *Lehmann* must be read broadly to encourage employers to adopt “proactive sexual harassment policies that are well-publicized and directed to all employees.”

Because there had never been a New Jersey decision that allowed this type of direct liability against an employer for a co-worker’s harassment based on the failure to have an effective and well-publicized sexual harassment policy, the Court looked to two federal decisions for guidance. Specifically, the U.S. Supreme Court, in the case of *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), rejected the employer’s defense that the existence of an anti-discrimination policy and grievance procedure together with the employee’s failure to utilize the procedure insulated it from directly liability.

The 4th Circuit in *Ocheltree v. Scollon Prods.*, 335 F.3d 325 (4th Cir. 2003) upheld a jury verdict against the employer, holding that a reasonable jury could have found constructive knowledge of the harassment where the employer did not provide reasonable avenues to the employees for complaining about sexual harassment.

In reaching its decision in *Cerdeira*, the Court reiterated *Lehmann’s* five elements of an effective anti-harassment policy. Employers in New Jersey would be wise to take heed, and review current policies to ensure they contain those elements in order to effectively shield themselves from direct liability for a co-worker’s sexual harassment.

Those necessary elements are:

- Sexual harassment policies and complaint procedures, both formal and informal;
- Mandatory training for supervisors and managers;
- Available training for all employees;
- Effective monitoring system to determine if policies and complaint procedures are trusted;
- Unequivocal and consistent commitment to the policy from the top level in words and practice.

The New Jersey courts have found that, “[e]mployers that effectively and sincerely put [those] five elements into place are successful at surfacing sexual harassment complaints early, before they escalate.” *Cerdeira, supra, citing, Lehmann, 132 N.J. at 621-22*. Accordingly, employers that put the above five elements into place and ensure that they are effectively and sincerely enforced, will be in the best position to defend against liability for co-worker sexual harassment.

Please contact Nicolson Associates LLC for further information, questions and comments about this article.