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# Boon to New Jersey Employers: State Supreme Court Confirms that Federal Faragher/Ellerth "Affirmative Defense" Now Applies to Sexual Harassment Claims Under State Law

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[Mark A. Saloman](#)

**Executive Summary:** On February 11, 2015, New Jersey's Supreme Court formally decided an important issue left open for nearly two decades concerning New Jersey's Law Against Discrimination (LAD). In [Aguas v. State of New Jersey](#), \_\_ N.J. \_\_, No. 072467 (2015), the state's highest court definitively held that an employer can rely upon the company's anti-harassment policy as an "affirmative defense" to an employee's claims of negligence or vicarious liability brought under the LAD. In doing so, the Court aligns the standard for employer liability under the LAD with that set forth by the U.S. Supreme Court in its landmark 1998 decisions, *Faragher v. City of Boca Raton* and *Burlington Indus. v. Ellerth*. A copy of the decision is available [here](#).

The key issue in *Aguas* centered on efforts made by New Jersey's Department of Corrections (DOC) to prohibit workplace discrimination and harassment. The DOC instituted a comprehensive written anti-discrimination policy and mandated training on the policy for all employees. Plaintiff Aguas, a corrections officer, alleged that she was sexually harassed on several occasions by two different officers. The DOC's Equal Employment Division (EED) advised Aguas that it had initiated an investigation of her verbal complaint of sexual harassment. After several weeks and 20 interviews, the EED investigator ultimately concluded that Aguas's allegations were unsubstantiated. Only two days after the EED began its investigation, however, Aguas filed her lawsuit alleging that the two officers subjected her to a hostile work environment based on her gender, and that the state retaliated against her because of her objections to that harassment, in violation of the LAD.

The trial court granted summary judgment to the state, holding that though Aguas presented a *prima facie* showing of sexual harassment and a hostile work environment, the state established an affirmative defense that the DOC's policy provided a legitimate complaint procedure that Aguas ignored. An Appellate Division panel affirmed the trial court's grant of summary judgment, agreeing that the state had

established an affirmative defense.

Upon review, the New Jersey Supreme Court confirmed that the scope and legitimacy of DOC's anti-harassment policy must be central to the determination of Aguas' claims for liability under the LAD and applied this finding to claims brought under both theories of negligence/recklessness and of vicarious liability for supervisory harassment. In doing so, the Court adopted the governing standard set forth in *Faragher/Ellerth*, namely that an employer in a hostile work environment sexual harassment case may assert the affirmative defense that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Aguas*, No. 072467, slip op. at 41-42. The Court, therefore, concluded that the state may avoid vicarious liability under the LAD by demonstrating by a preponderance of the evidence that the DOC exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that Aguas unreasonably failed to take advantage of any preventive or corrective opportunities provided by the DOC, or to otherwise avoid harm. *Id.* In adopting this position, the Supreme Court fully embraced the position advocated by *amicus curiae* intervener Employers Association of New Jersey (EANJ). *Id.*, slip op. at 16.

Another important change made by the *Aguas* decision is its new, more expansive definition of the term "supervisor" for purposes of a hostile work environment claim under LAD. The Court compared the more restrictive definition of "supervisor" recently adopted by the U.S. Supreme Court in *Vance v. Ball State University*, 133 S. Ct. 2434 (2013), with the Equal Employment Opportunity Commission's broader definition and chose to adopt the latter. Unlike an analysis under Title VII, the LAD now defines "supervisor" to include employees who are granted the authority to make tangible employment decisions and those placed in charge of the complaining employee's day-to-day activities in the workplace. *Aguas*, No. 072467, slip op. at 46-47.

**Employers' Bottom Line:** In breaking new ground for New Jersey employers, this decision also reinforces the legislative goal of deterring sexual harassment "by promoting responsible efforts by employers to detect, address, and punish it." *Id.* at 34. To that end, employers everywhere may benefit from a review of their existing policies and procedures prohibiting workplace discrimination and harassment. To be sure, the affirmative defense provides no benefit to employers in any state who "empower sexually harassing employees who take tangible employment actions against their victims" or "fail to implement effective anti-harassment policies" or whose policies "exist in name only." *Id.* at 38-39. If you have any questions regarding this Alert or other labor or employment related issues, please contact the author, [Mark A. Saloman](mailto:msaloman@fordharrison.com), [msaloman@fordharrison.com](mailto:msaloman@fordharrison.com), who is a partner in our Berkeley Heights, New Jersey office and briefed and argued the EANJ's *amicus* position endorsed and adopted by the Supreme Court. You may also contact the FordHarrison attorney with whom you usually work.

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