Are Employers Feeling Parched Post-*Aguas*? A Look at Recent Decisions

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The New Jersey Supreme Court's February 11, 2015 decision in *Aguas v. State of New Jersey*, 220 N. J. 494 (2015) has been extensively analyzed, summarized, criticized and lauded. The much-anticipated decision clarified two critical issues in determining employer liability for supervisor harassment under the Law Against Discrimination. First, to the delight of employers, the court adopted the *Ellerth/Farragher* affirmative defense from federal jurisprudence and held that, where the employee alleges employer vicarious liability and there has been no tangible employment action, the employer may avoid liability by proving "first, that [it] exercised reasonable care to prevent and to correct promptly sexually harassing behavior; and second, that the plaintiff employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to otherwise avoid harm." *Aguas*, 220 N.J. at 525. Second, to the delight of employees, the court expanded the definition of "supervisor" to include not only those authorized to undertake tangible employment decisions, but also individuals who direct the day-to-day work activities of employees. *Id.* at 529. Six months have passed since the *Aguas* decision, and several cases of note have been decided in its wake.

The first decision to rely upon *Aguas* in some way was *Smith v. Hutchinson Plumbing Heating and Cooling*, 2015 N.J. Super Unpub. LEXIS 413 (App. Div. March 2, 2015), where the Appellate Division reversed summary judgment in favor of the employer on the plaintiff's hostile work environment claim. A number of reasons were cited, including a factual dispute over whether the plaintiff had complied with the employer's policy by promptly reporting an incident involving his supervisor, an essential element of the newly-enunciated affirmative defense. In addition, the Appellate Division noted that the employer's policy was ineffective because it was incomplete, without providing any explanation. The employer had also not provided any training on workplace discrimination or harassment and, according to the court, "the defendant's proof of lack of training on the policy put its effectiveness in issue and precluded summary judgment to defendant on the basis of the affirmative defense." *Id.* at *19.

Just three months later, the Appellate Division reached a different conclusion, affirming summary judgment in favor of the employer in *Dunkley v. S. Coraluzzo Petroleum Transporters* (SCPT), 2015 N.J. Super. LEXIS 106 (App. Div. June 24, 2015). This was not the first time the case was before the Appellate Division. The Appellate Division (by Judges Lihotz, Maven and Hoffman) originally granted summary judgment in favor of the employer in its pre-*Aguas* September 14, 2014 decision, *Dunkley v. S. Coraluzzo Petroleum Transporters*, 437 .N. J. Super 266 (2014), where the facts are more fully recited. According to the earlier decision, the plaintiff was an oil delivery driver with the defendant employer (SCPT). When he began his employment, he received a handbook containing an anti-discrimination policy and had two days of in-class training, a portion of which was devoted to discrimination and harassment in the workplace. The plaintiff claimed that, during his on-the-job training with another driver, that driver made numerous race-related comments. The plaintiff did not report to work one day and was contacted by SCPT's safety director, who inquired about the reason for this absence. During a subsequent meeting with several supervisors, the plaintiff reported the comments made by the other driver. He was promptly assigned a new trainer, and there were no further incidents or harassing or discriminatory behavior. In its 2014 decision, the Appellate Division relied on pre-*Aguas* case law, including *Lehmann v. Toys 'R' Us*, 132 N.J. 587 (1993), and concluded that SCPT had adopted a formal anti-harassment and anti-discrimination policy,

adopted a complaint procedure and investigation process, and distributed the policy to employees and provided training. Moreover, the court held that the plaintiff had failed to take advantage of the policy by reporting his concerns. Plaintiff's efforts to attack the employer's policy and the procedures followed were rebuffed by the court: "[i]n hindsight, unquestionably, one could suggest improvement in the depth of the process or the supervisors' training on these issues. Further publicizing the Human Resources or other office charged with enforcing the procedures is preferable. However, we cannot conclude the methods used here fail to meet established standards.".

In March 2014, the New Jersey Supreme Court granted the employee's petition for certification and then immediately remanded the case to the Appellate Division in light of its decision in *Aguas, see* 221 N.J. 217 (2015), with instructions to specifically consider whether there were genuine issues of material fact that precluded summary judgment on the negligence and vicarious liability claims against the employer. On remand, the Appellate Division relied on the court's analysis and holding in *Aguas* but did not reach a different conclusion. The court analyzed the two distinct theories for employer liability in the same manner as the *Aguas* court, finding that summary judgment remained the proper result. On the negligence claim, the plaintiff argued that the employer did not satisfy all of the factors enunciated by the New Jersey Supreme Court in *Gaines v. Bellino*, 173 N.J. 301 (2002). Among other things, the plaintiff claimed that there was no effective monitoring of the policy's effectiveness and that the supervisors did not receive adequate training. In the court's analysis of the various arguments advanced by the plaintiff, a few points are worth noting. For one thing, it is clear that the Appellate Division looked at the totality of the evidence before it, without focusing on one possible infirmity in the employer's process as a basis to deny summary judgment. For example, the court was clearly persuaded by the fact that it was a supervisor's inquiry to the plaintiff concerning his absence from work that led to the revelation of the plaintiff's complaints, not the plaintiff's own actions. Moreover, the employer took quick action to remedy the problem and the plaintiff admitted there was no further discrimination or harassment. The court was persuaded by these facts and not shaken by the "sparse" evidence on the existence of monitoring mechanisms or by the employer's decision not to fire the alleged discriminator. Not surprisingly, the court also rejected the vicarious liability claim, once again focusing on the plaintiff's failure to report his concerns and the immediate action taken by the employer to enforce its policies. The second *Dunkley* decision is interesting not only because it is the first case to meaningfully apply *Aguas* but also because it does not apply an overly rigid standard.

The most recent post-*Aguas* decision came from Judges Fuentes, Ashrafi and O'Connor in *Jones v. Dr. Pepper Snapple Group*, 2015 N.J. Super. Unpub. LEXIS 1848 (August 3, 2015). The plaintiff alleged that, during a seven-month period in 2011 while working as a temporary employee, she was subjected to sexual harassment by a supervisor. During that period, she did not report the supervisor's behavior. She was re-hired as a temporary employee in 2012 and complained to a supervisor about the prior conduct. The second supervisor said that he would take care of it, but then engaged in his own bad behavior, which was also not reported. Plaintiff became a permanent employee and, for the first time, was given an employee handbook containing the employer's sexual harassment policy. She resigned soon thereafter and, at her resignation, advised Human Resources of the harassment.

The employer conceded on summary judgment that the plaintiff had established a *prima facie* case of hostile work environment sexual harassment but argued that it was not vicariously liable because of its effective harassment policy and because the individuals involved were not the plaintiff's supervisors. The trial court granted summary judgment in favor of the employer and the Appellate Division reversed. There was no dispute that the employer had an anti-

discrimination and anti-harassment policy that contained formal and informal complaint procedures. However, there was an issue of fact over whether the employer could show that it had exercised reasonable care to prevent and correct sexually harassing behavior when it failed to distribute its handbook to temporary employees like the plaintiff or to provide training on its policies. The court reached a similar conclusion on the plaintiff's vicarious liability claim, finding that "[p]laintiff may not have endured—or at least may have been able to minimize—the sexual harassment she experienced if defendant had advised her when initially hired as a temporary employee of the remedies available in the event she were harassed." *Id.* at *10. The court's decision raises some interesting questions for employers because quite often, temporary employees are employees of the agency that supplied them and not of the company to which they are assigned. As such, the company may not distribute its handbook to or train the temporary employee on the company's policies. The court's decision implies that in that instance, the company cannot avail itself of the defenses to liability that come with an effective policy. The court did not decide whether the individuals involved in the alleged harassment were the plaintiff's supervisors, leaving that to the trial court on remand in light of the expanded definition from *Aguas*.

After just six months, it is difficult to evaluate the true impact of the *Aguas* decision. Still, there is something to be learned from the early adopters and interpreters of the *Aguas* decision by both employers and employees. For employers, a robust, well-written anti-discrimination and anti-harassment policy with formal and informal complaint and investigation procedures should be accompanied by both supervisory and employee training, and then followed by periodic re-circulation of the policy and monitoring of its effectiveness. This has long been the recommended course for New Jersey employers, but *Aguas* raises the stakes, and employers stand to lose a valuable defense for their non-compliance. For employees, taking advantage of employer complaint procedures is imperative. To be sure, there are many reasons why employees elect not to complain. However, that election could prove costly when future courts scrutinize an employee's own inaction in bringing complained-of conduct to an end.