

## EPLI Carriers, Beware: Preventive Anti-Harassment Training is Now Mandatory in New Jersey

On July 24, 2002, the New Jersey Supreme Court issued a decision that dramatically changes the landscape of sexual harassment law, and is likely to affect every employer doing business in New Jersey—*Maria Gaines v. Joseph Bellino, et al.*<sup>1</sup> The most significant ruling in the case is that an employer is now required to provide sexual harassment training to its supervisors and managers, and is required to offer sexual harassment training to its other employees. Although this may sound simple, the practical consequences of these requirements are complicated and far-reaching, all the more so because the anti-discrimination statute under which *Gaines* was decided, the New Jersey Law Against Discrimination,<sup>2</sup> applies to every employer regardless of how many employees it has.

In *Gaines*, the plaintiff, Maria Gaines, was employed as a correctional officer at the Hudson County Correctional Facility for several years. The Facility had distributed written employee handbooks containing sexual harassment policies that contained procedures for complaining about sexual harassment. Gaines alleged that she had been sexually harassed, physically and verbally, by a captain at the facility, Joseph Bellino, and had discussed the situation with other people and informally complained to Bellino. However, she had not formally complained to the Facility in writing. In defense of the claim, the Facility relied upon the defense articulated in *Ellerth-Faragher*,<sup>3</sup> that Gaines had not availed herself of the complaint pro-

cedure set forth in the sexual harassment policy. The court rejected this defense because Gaines had presented evidence that the Facility had done little if anything to implement the policy and train its employees.

In doing so, the court greatly expanded employers' obligations to prevent sexual harassment. Previously, sexual harassment training was one of several methods by which an employer could enforce a sexual harassment policy, but a lack of training alone did not necessarily expose an employer to liability.<sup>4</sup> The employer could still protect itself by promulgating an adequate policy, notifying its employees of it, and applying it appropriately.<sup>5</sup> Now, however, under *Gaines*, employers who have employees in New Jersey must provide "anti-harassment training, which must be mandatory for supervisors and managers, and must be available to all employees."<sup>6</sup> This clearly creates a new affirmative obligation for New Jersey employers, and imposes a greater obligation than the federal requirements of promulgating, disseminating, and following an anti-harassment policy and complaint procedure, to which employers have become accustomed in recent years. This also will undoubtedly apply to other forms of discriminatory harassment under the Law Against Discrimination, so such other forms of harassment should be included in training programs as well.

Unfortunately, the court offers little guidance to help employers determine which employees qualify as "super-

visors and managers," and how much training must be provided. At the outset, therefore, the employer must itself determine which employees are supervisors and managers and require the mandatory training. In the absence of court guidance, the employer must instead analyze the job duties of each and every employee. In general, supervisors and managers will include executives, department heads, and those with the power to hire, fire, and make decisions and recommendations about the employment of lower-ranked employees. However, just who is a supervisor/manager and must be trained will more than likely be the subject of future court decisions.

The employer must also decide how much training would be sufficient to satisfy the employer's obligation. Training all management and supervisory employees once or twice a year may be sufficient, depending on the thoroughness of the training program. The program must also be offered to other employees who may wish to attend, in order to satisfy the requirement of making it "available" to them, but it is not clear if the program must be available to them equally as often.

This anti-harassment training mandate also has very significant practical consequences on employment practices liability insurance coverage. Insurance carriers underwriting EPLI coverage policies in New Jersey are well-advised to revise their applications and policies to make adequate training a condition precedent to coverage. The carrier could, for example, set its own guidelines for the training, require its approval of the person(s) or entity that would conduct it, require copies of any manual or other materials distributed, and require signed copies of sign-in sheets acknowledging not only attendance but also substantive participation.

Finally, this training requirement is just the latest case law development affecting employers and EPLI carriers. Another recent development, with perhaps even greater impact, is the United States Supreme Court's decision in *Circuit City Stores, Inc. v. Adams*,<sup>7</sup> which confirmed the enforceability of an employer's mandatory arbitration clause in an application for employment, which required the employee to

arbitrate his employment discrimination claims instead of litigating them in court. As the courts increase employers' potential exposure to awards for damages by creating new training and other obligations, the wisdom of using mandatory arbitration to minimize litigation costs and damages awards is becoming more and more apparent. In light of *Gaines* and *Adams*, EPLI carriers should require insureds, through express policy language and endorsements upon renewal or at least encourage through discounts, to include mandatory arbitration and/or mediation clauses which expressly apply to employment claims in employment applications and policy handbooks. ♦

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1 173 N.J. 301 (July 24, 2002).

2 N.J.S.A. §§ 10:5-1 et seq.

3 *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

4 *Lehmann v. Toys 'R' Us*, 132 N.J. 587, 621 (1993).

5 *Ellerth; Faragher*.

6 *Gaines*, 173 N.J. at 314.

7 532 U.S. 105 (2001).

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