

labor & employment law newsletter

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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.*¹

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 antidiscrimination statute under which *Gaines* was decided, the New Jersey Law Against Discrimination,²

she had not formally complained to the facility in writing. In denying the claim, the facility relied upon the defense articulated in *Ellerth-Faragher*³ — that Gaines had not availed herself of the complaint procedure 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 its application.

In so doing, the court greatly expand-

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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, which included procedures for complaining about sexual harassment. Gaines alleged that she had been sexually harassed, verbally and physically, by a captain at the facility, Joseph Bellino, and had discussed the situation with other people and informally complained to Bellino. However,

ed 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.⁴ The employer could still protect itself by promulgating an adequate policy, notifying its employees of it and applying it appropriately.⁵ Now, however, under *Gaines*, employers that have employees in New Jersey must provide "anti-harassment training, which is

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mandatory for supervisors and managers, and must be available to all employees.”⁶ This clearly creates a new affirmative obligation for New Jersey employers, and imposes a greater obligation than the federal requirements, which employers have become accustomed to, of promulgating, disseminating and following an anti-harassment policy and complaint procedure.

Undoubtedly, this also will apply to other forms of discriminatory harassment under the New Jersey 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 “supervisors 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 or manager and must be trained will more than likely be the subject of future court decisions.

The employer must also decide how

The employer must also decide how much training would be sufficient to satisfy the employer’s obligation.

much training would be sufficient to satisfy the employer’s obligation. Training all management and supervisory employees once or twice a year may be enough, depending on the thoroughness of the 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 made available to them equally as often.

Finally, this training requirement is just the latest case law development affecting employers. Another recent development, with perhaps even greater impact, is the United States Supreme Court’s decision in *Circuit City Stores, Inc. v. Adams*,⁷ which confirmed the enforceability of an employer’s mandatory arbitration clause in an application for employment. The clause requires employees to arbitrate 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 prevalent.

New Jersey Court Expands Public Policy Claims

On August 30, 2002, Middlesex County Superior Court Judge Yolanda Ciccone

Granting Transfers to Disabled Employees: Having a Facially Neutral Company Policy Is Not Enough

In *Equal Employment Opportunity Commission v. Yellow Freight System, Inc.*, a New York federal court recently held that a trucking company could not enforce the terms of facially nondiscriminatory return-to-work-without-restrictions medical leave policy and a union agreement on employee transfers in an attempt to avoid transferring a disabled union employee. The return-to-work policy required an employee out on medical or disability leave to obtain a doctor’s note releasing the employee to his or her former job “without restrictions” before returning to work. The union agreement — a cross-bid agreement” (separate from the collective bargaining agreement) — enabled an employee in one classification to apply for a transfer into another classification for the following year or upon returning from certain types of leaves of

absence, such as workers’ compensation or medical leave.

The employee in this case, Ronald Walden, a truck driver, became disabled and unable to perform his job after he suffered a back injury that made sitting for more than 30 to 45 minutes too painful. As a result of the pain, Mr. Walden commenced workers’ compensation leave. Upon returning from leave, he sought a transfer to a dock worker position under the cross-bid agreement and obtained a doctor’s note releasing him into the dock worker position, but he could not return to work as a truck driver due to his injury. The company denied his transfer request on the grounds that he had not complied with its return-to-work policy because he had

not obtained a doctor’s note releasing him to work in his former truck driver position without restrictions.

At the bench trial, the company argued that the terms of the facially nondiscriminatory cross-bid agreement, rather than any disability-based motive,

The federal court rejected the company’s arguments and entered a judgment in favor of Mr. Walden.

prevented Mr. Walden from transferring into the dock worker position because the cross-bid agreement required him to be released without restrictions into his former job *before* transferring into the new one. The company also presented evidence that it had previously denied transfer requests by

held that “a supervisor who had a consensual sexual relationship with a coworker can pursue a claim that the company violated a public policy mandate by discharging him for harassment he never committed.” The case, *Grasser v. United Healthcare*, is one of several recent decisions expanding employee rights under New Jersey law.

The significance of the *Grasser* decision is that it appears to provide that at-will employees who are subject to inadequate investigations and suffer adverse employment actions may have viable causes of actions against their employers. The public policy analysis under New Jersey law dates back to 1980, in the case of *Pierce v. Ortho Pharmaceutical Corp.*, whereby the New Jersey Supreme Court barred a whistleblower’s dismissal as violative of public policy. ⚙

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)

two other employees who had initially submitted doctors’ notes releasing them only to the new positions, but that it had later allowed those two employees to circumvent the cross-bid agreement and granted the transfers once they obtained and submitted doctors’ notes releasing them to the former positions. The company argued that Mr. Walden could therefore have obtained another note from another doctor releasing him to the truck driver position without restrictions, and, if he had done so, the company would have honored it and granted the transfer. The federal court rejected the company’s arguments and entered a judgment in favor of Mr. Walden, holding that the company had discriminated against Mr. Walden on the basis of his disability when it had used the return-to-work-without-restrictions policy to prevent him from transferring under the cross-bid agreement, and holding that he was not obligated to submit a dishonest medical opinion in order to obtain a transfer. ⚙



Hostile Work Environment: Employees Cannot Hit Employers with Complaints and Then Run

New Jersey Supreme Court Holds That an Employee Claiming a Hostile Work Environment Must Do What Is Reasonable and Necessary to Remain Employed Rather Than Quit.

Recently, in *Shepherd v. Hunterton Development Center*, the New Jersey Supreme Court dismissed a plaintiff’s constructive discharge claim because the employee failed to attend a counseling session to discuss his internal hostile work environment complaint. The complaint arose out of charges of retaliation against the employee, allegedly for providing supportive testimony to another employee claiming discrimination. The divided court, in a four to three opinion, ruled that the employee’s decision to simply quit, rather than avail himself of appropriate internal complaint mechanisms, destroyed his constructive discharge claim. In so finding, the Supreme Court reasoned that a “constructive discharge claim requires more egregious conduct than the level necessary to sustain a hostile work environment claim.”

While this ruling does not necessarily cut off an employee’s claim for emotional distress damages caused by a hostile working environment, it could have significant effects on economic damage (i.e., lost wages) claims asserted by employees who simply quit their jobs in reaction to unlawful forms of harassment. The court requires employees to make some effort to avail themselves of internal complaint mechanisms designed to eradicate such mistreatment. This case also teaches us the importance for employers to have published and disseminated anti-harassment policies and internal complaint mechanisms. Certainly, if no such mechanisms are available to employees, the protections afforded in *Shepherd* do not become available to rebut a plaintiff’s constructive discharge claims. ⚙

The New Frontier in Employment Practices Liability Insurance (EPLI) Investigations

Ready or not, we're in the midst of the "information age," and anyone who hasn't figured out how this new era can be a tremendous benefit to EPLI defense work is surely providing a disservice. As strange as it might sound, the independent adjuster can be that new addition to your team, as well as serve as that cost-saving alternative to help you navigate through the sometimes large influx of usable data.



What role can adjusters play? Consider the following scenario:

A young woman alleges sexual harassment against a supervisor who has no prior history of such conduct. An adjustment firm is retained to perform a full background search of the plaintiff before her deposition. Through investigation, it is revealed that she is not the wholesome victim her complaint portrays. Her prior employers have been called, and one reports a termination due to her sexual advances against various members of management. A second termination at another job was the result of her use of sexually explicit language before a visiting client. A claim history search shows two other EPLI claims in her past, and a search of state court filings indicates that yet another civil action is still pending. A complete address history over the past 10 years uncovers an ex-boyfriend who was quickly found to provide an unfavorable statement about her disdain not only for her former

supervisor, but for the company as a whole. A little more digging uncovers a bankruptcy filing under Chapter 11 made two months prior to her EEOC charge for the incident at hand.

How was this investigation successfully completed in less than a two-day period? By the retention of an adjusting firm that rides on the cusp of new technology, allowing it the capacity to immediately access thousands of database records, while still mixing in some good, old-fashioned legwork.

What's the best way to ascertain whether the independent adjuster you know is right for you? We have several suggestions:

- Determine if it is a "one stop shop," i.e., it can do all aspects of the inves-

tigation in-house: fieldwork, searches, etc. What is the diversity of its staff? The most well-rounded firms will have nationally trained insurance adjusters from both the carrier and independent sides of the business, as well as a team of fraud investigators and ex-law enforcement officials. It doesn't have to be the largest adjusting company, but it had better think and act like one!

- Another important question that is so often overlooked is whether all staff are licensed, bonded and insured. Do they have experience testifying at trials? Are they protective of their products? In most venues, an adjuster's work is discoverable; thus, a quick telephone call from the field can save the hassle of having an unwanted statement attached to your file.

An adjustment firm with these abilities can make all the difference in the final outcome of a litigated EPLI claim. The trick is finding one that can draw upon a vast background in true claims handling, while discerning what information will also be helpful in building a strong defense.

Sierra Claim Services, LLC, is a firm of independent, multilined adjusters servicing the New York and New England metropolitan areas and the Pennsylvania/Delaware region. Sierra Claims works closely with major EPLI and D&O carriers by providing specialty claims investigations to assist insureds' counsel during litigation. ⚙

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