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A Safe Harbor for Employment Claims

Ensure minimal liability from discrimination claims

By Thomas B. Lewis and Michael Brittan

When discrimination occurs in the workplace, the aggrieved employee should bring the inappropriate behavior to the attention of the employer, who, ideally, would then investigate the allegation and take prompt, appropriate remedial action. What happens, though, when, after an employer conducts an investigation and then reprimands or terminates the offending employee, the aggrieved employee continues to pursue legal action against his or her employer? Can the employer still be held liable even though the employer took prompt, remedial action, or is there a safe harbor for the employer?

Most courts — at both the state and federal level in New York, New Jersey and Pennsylvania — opine that employers may avert exposure if an objective investigation was conducted and prompt, remedial action occurred. For example, the Appellate Division of the New Jersey Superior Court, in *Barnes v. the State of New Jersey*, No. A-0573-07T3 (App. Div. December 17, 2008), recently reaffirmed the general rule that when employers have in place policies aimed to address workplace discrimination and take remedial action in response to a complaint of discrimination, the employer may not be held vicariously liable for the discriminatory actions of its employees. In *Barnes*, which is illustrative of many cases in which this issue arises, the Appellate Division addressed plaintiff Jennifer Barnes's appeal from the trial court's decision to grant summary judgment in favor of her employer — the State of New Jersey, the Department of Correction and the East Jersey State Penitentiary (collectively "the State").

The case arose when, on March 23, 2004, Ms. Barnes filed a complaint with the Equal Employment Division of the Department of Corrections ("DOC"), alleging that her superior officer, Lieutenant Daniel Murray, had made repeated, unsolicited sexual advances to her. The DOC investigated the charges, and, after a hearing that was held on June 1, 2004, Lieutenant Murray was found to have violated the antidiscrimination and antiharassment policies. For his actions, Lieutenant Murray was given a 30-day suspension.

Despite these remedial actions, Ms. Barnes, on March 4, 2005, filed a lawsuit against both the state and against Lieutenant Murray, alleging violations of the Federal Civil Rights Act and also alleging violations of the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. § 10:5-1 et seq. In granting summary judgment to the state, the trial court held that, because the state had in place viable and operative policies against discrimination and harassment, and because it acted on those policies, the state could not be held vicariously liable for the discriminatory or harassing actions of its employee. In effect, the trial court held that the state's harassment and discrimination policies shielded it from liability in this situation. Ms. Barnes then appealed this decision.

In rejecting Ms. Barnes's arguments on appeal, the Appellate Division agreed with the lower court's reasoning. The Appellate Division stressed that the record indicated that the state promptly engaged in an investigation of the charges and ultimately disciplined the offending employee. Then, citing the New Jersey Supreme Court's decision in *Cavuoti v. New Jersey Transit Corp.*, 161 N.J. 107 (1999), the Appellate Division stated that:

> A company that develops policies reflecting a lack of tolerance for harassment will have less concern about hostile work environment

Lewis is the Chair of and Brittan is an Associate with the Employment Litigation Group of Stark & Stark in Lawrenceville.

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> or punitive damages claims if its good-faith attempts include periodic publication to workers of the employer's anti-harassment policy; an effective and practical grievance process; and training sessions for workers, supervisors, and managers about how to recognize and eradicate unlawful harassment.

Again citing the *Cavuoti* decision, the Appellate Division held that "a form of safe haven [exists] for employers who promulgate and support an active[] anti-harassment policy." These conclusions are not at all unique — both the United States Court of Appeals for the Second Circuit and the United States Court of Appeals for the Third Circuit follow this line of reasoning, as exhibited in cases such as *Curtis v. Citibank, N.A.*, 70 Fed. Appx. 20 (2nd Cir. 2003), and *Andreoli v. Gates*, 482 F.3d 641 (3rd Cir. 2007).

Applying this reasoning to Ms. Barnes's case, the Appellate Division noted, first, that the state had a well-publicized antiharassment and antidiscrimination policy in place. Second, the state provided employees like Ms. Barnes with appropriate grievance procedures. And third, when Ms. Barnes utilized the state's grievance procedures, the state engaged in an investigation and then took remedial action. The Appellate Division further noted that Ms. Barnes filed her initial complaint with the Equal Employment Division on March 23, 2004, and by July 28, 2004, disciplinary actions against the offending employee had been imposed. The Appellate Division concluded that the state's response was both prompt and remedial, and was sufficient to provide the state with safe harbor from Ms. Barnes' claims of discrimination and harassment.

From the standpoint of employers who work to implement aggressive anti-harassment policies, and who take prompt, objective action in response to complaints of workplace discrimination, the safe harbor protections make sense. Employers who make a concerted effort to eliminate discrimination and harassment in the workplace should not be punished for their efforts, particularly when prompt, remedial action is taken by the employer and the inappropriate behavior ceases.

In conclusion, should an employer wish to ensure minimal liability from discrimination claims, the employer should follow the procedure described by the New Jersey Supreme Court in *Cavuoti*, as reinforced by the Appellate Division in *Barnes*, and is in line with case law from most other jurisdictions, including New York and Pennsylvania: (1) an employer should have in place well-publicized anti-discrimination and antiharassment policies; (2) an employer should implement grievance procedures in order to address claims of discrimination made against its employees; (3) when an employee utilizes the grievance procedures, the employer should conduct a full and thorough investigation; and (4) if an employer determines that an employee has violated the law or the company's antidiscrimination or anti-harassment policies, the employer should take prompt, appropriate remedial action. Following the above guidelines, a safe harbor may exist for the employer. ■