In The Supreme Court of New Jersey

Docket No.: 72,467

ILDA AGUAS,	ON PETITION FOR CERTIFICATION
Plaintiff-Petitioner,	DOCKET NO.: A-4423-11T4
v.	**Civil Action**
STATE OF NEW JERSEY,	**Sat Below:**
Defendant-Respondent.	**Hon. Anthony J. Parrillo, J.A.D.** **Hon. Douglas M. Fasciale, J.A.D.** **Hon. Peter A. Buchsbaum, J.S.C.**

AMICUS CURIAE BRIEF OF EMPLOYERS ASSOCIATION OF NEW JERSEY AND APPENDIX OF UNPUBLISHED CASES

PROSKAUER ROSE LLP
One Newark Center - 18th Floor
Newark, New Jersey 07102
973.274.3200
Attorneys for Employers
Association of New Jersey

Of Counsel and On the Brief:

Mark A. Saloman, Esq.
Nicholas M. Tamburri, Esq.

and

John J. Sarno, Esq. (Employers Association of New Jersey)

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PRELIMINARY STATEMENT

EANJ[1] respectfully submits that the trial and appellate courts correctly recognized that no New Jersey employer can be responsible for a hostile work environment if it "took prompt remedial action in response to [a] plaintiff's complaint of sexual harassment." (Trial Op. at 6; accord App. Div. Op. at 25).[2] The detailed and undisputed facts of the comprehensive record below make undeniably clear that the employer-defendant exercised due care to remedy the issues raised by employee-plaintiff here, even in the absence of her formal complaint. Indeed, both lower courts found that:

- The employer maintained a written policy prohibiting discrimination, harassment, and retaliation (entitled "Policy Prohibiting Discrimination in the Workplace") that explicitly bans sexual discrimination and harassment in the workplace, defines sexual harassment, offers numerous examples of prohibited behavior, and set forth procedures for reporting misconduct;[3]

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[1] As a non-profit organization comprised of more than 900 employers within New Jersey and dedicated exclusively to helping employers make responsible employment decisions through education, informed discussion, and training, the Employers Association of New Jersey ("EANJ") is uniquely situated to submit this *amicus curiae* brief in opposition to any undue judicial narrowing or modification of the affirmative defense available to New Jersey employers based upon their prompt remedial action taken to remedy a complaint of harassment.

[2] "Trial Op." refers to Aguas v. State of New Jersey, Docket No. HNT-L-160-10 (Law Div. Apr. 20, 2012) (Buchsbaum, J.S.C.). "App. Div. Op." refers to Aguas v. State of New Jersey, Docket No. A-4432-11T4 (App. Div. March 20, 2013).

[3] Trial Op. at 7; App. Div. Op. at 22.

- The Policy details the responsibilities of employees and supervisors, outlines the complaint procedure, attaches forms for ease of use, is well-publicized, and is re-published periodically;[4]

- The officers at the facility were annually trained in the Policy;[5]

- Plaintiff-employee admitted to receiving a copy of the Policy almost every year; understanding her rights under that Policy; and exercising her rights under the Policy to formally report workplace harassment and violence in 2005 and 2007;[6]

- Plaintiff-employee reported the alleged misconduct at issue to her union representative on January 25, 2010;[7]

- Plaintiff-employee also reported the alleged misconduct that day to the employer's Equal Employment Division ("EED") Liaison, who encouraged plaintiff-employee to file a complaint;[8]

- Plaintiff-employee refused to file such a complaint—despite her knowledge of how to report such misconduct;[9]

- Plaintiff-employee's refusal notwithstanding, the employer nonetheless conducted a thorough EED investigation;[10]

- The employer comprehensive investigation included interviews of plaintiff-employee, the alleged harasser, and

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[4] App. Div. Op. 22-23.

[5] App. Div. Op. at 25.

[6] Trial Op. at 7; App. Div. Op. 23.

[7] Trial Op. at 2.

[8] Trial Op. at 3, 8.

[9] Trial Op. at 2-3.

[10] Trial Op. at 3.

other alleged witnesses and the results were documented in a 30-page report and three-page addendum of findings;[11] and

- Plaintiff-employee failed to appeal the employer's determination, even though she was advised of the opportunity to do so.[12]

Plaintiff-employee nonetheless contends that she was entirely justified in refusing to follow her employer's complaint procedure because of her "bare fear" of retaliation. (Trial Op. at 7). EANJ urges the Court to confirm that purely subjective and factually unsubstantiated trepidation is insufficient as a matter of law to render the employer's remedial measures ineffective. Such an unambiguous finding is long overdue.

LEGAL ARGUMENT[13]

An Employee's Subjective Apprehension Of Retaliation Is Insufficient To Circumvent An Employer's Complaint Procedures Designed To Prevent And Remediate Workplace Harassment

To meet the duty of care they owe to employees and to satisfy the standard of an affirmative defense to both supervisory and co-worker harassment, New Jersey employers are required to institute effective complaint procedures. See Gaines

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[11] Trial Op. at 8; App. Div. Op. at 23.

[12] Trial Op. at 9; App. Div. Op. at 23.

[13] EANJ relies upon the Procedural History and Statement of Facts set forth in Respondent's original briefing in support of its motion for summary judgment, and its opposition to Appellant's appeal and application for certification, incorporated herein by reference.

v. Bellino, 173 N.J. 301, 318 (2002). Though there is no bright-line test, employees must use the complaint procedures made available to them. See Payton v. New Jersey Turnpike Authority, 292 N.J. Super. 36, 46 (App. Div. 1996), aff'd, 148 N.J. 542 (1997) (employer not responsible for harassment when it takes prompt remedial action).

EANJ notes the profound cultural and organizational changes that have occurred (and continue to occur) in the workplace over the course of the past two decades since Lehmann was decided. Through training and education, employees are routinely encouraged to report incidents of harassment and employers are on notice that they must respond promptly and thoroughly without retaliation or risk potentially serious liability. See Tractenberg, P. ed., Courting Justice: Ten New Jersey Cases that Shook the Nation, 170 (Rutgers Univ. Press 2013)("[T]he Lehmann decision was guided both by the concern for the business costs of tolerating and perpetuating a sexually hostile workplace and by a concern of the personal costs, financial and psychological, of being victimized by workplace harassment.")

As both the trial and appellate courts correctly determined here, plaintiff-employee met her burden in establishing a *prima facie* case and the employer met its standard in establishing its affirmative defense. Summary judgment was properly entered in favor of the employer because there was no material dispute of

fact that the employer took prompt and effective remedial measures.

In the absence of objective facts to the contrary, plaintiff-employee nevertheless contends that, because she subjectively feared retaliation, her employer's carefully crafted and effectively administered anti-harassment policies and procedures must be disregarded. If, however, the Court endorses this view and allows a plaintiff-employee to circumvent an employer's effective remedial measures based upon groundless, idiosyncratic, and unsubstantiated fears, such a result would wreak havoc in every workplace in New Jersey and fundamentally undermine the very core teaching of Lehmann—namely, the creation of incentives for both employers and employees to collaborate together to develop and maintain a harassment-free working environment.

The record below lacks even the hint of the employer's coercion, pressure, or intimidation. Plaintiff-employee merely asserts a subjective feeling that she might have been retaliated against in some unknown way if she utilized the employer's anti-harassment procedures to pursue correction of the offending conduct. Remarkably, the absence of objective evidence supporting this feeling is magnified by the fact that plaintiff-employee formally reported workplace harassment and violence in 2005 and 2007 to her satisfaction and without being the subject

of retaliation or reprisals. See Trial Op. at 7; App. Div. Op. 23.

In granting summary judgment in favor of the employer, the trial court properly found (and the appellate court affirmed) that plaintiff-employee's "bare fear" of retaliation— without an objectively reasonable belief supported by facts—could not invalidate the employer's complaint procedures or render them less effective. As the appellate court carefully reasoned:

> Although not formally adopted in New Jersey as an affirmative defense to LAD violation claims, the Ellerth/Faragher test does not differ substantially from the principles developed in Lehmann and later in Gaines v. Bellino, 173 N.J. 301 (2002), wherein the Court stated, 'A defendant is entitled to assert the existence of an effective anti-sexual harassment workplace policy as an affirmative defense to vicarious liability. . .'."

App. Div. Op. at 16 (footnote omitted). The Ellerth/Faragher affirmative defense to workplace harassment as articulated by the U.S. Supreme Court is as follows:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.... The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee *unreasonably failed* to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998) (emphasis

added).

Thus, applying Lehmann, Gaines, and the wholly consistent Ellerth/Faragher affirmative defense, summary judgment was properly granted because the employer exercised reasonable care to promptly prevent and correct improper workplace conduct and plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided to her. Indeed, this Court should follow the law in numerous other jurisdictions and also hold that an employee's unsupported "fear" does not excuse her from following an employer's documented internal complaint procedures. See Ahmed v. Interstate Mgmt. Co., 2012 U.S. Dist. LEXIS 103512, at *36-37 (D.N.J. July 25, 2012) (finding that employer established its affirmative defense because plaintiff did not report harassment and a fear of retaliation does not excuse plaintiff's failure to use employer's complaint process); Lauterborn v. R & T Mech., Inc., 2006 U.S. Dist. LEXIS 82142, at *28 (M.D. Pa. Oct. 30, 2006), affirmed 2008 U.S. App. LEXIS 8194 (3d Cir. 2008) (holding that employee's failure to report harassment because of potential negative reaction of co-workers legally insufficient to preclude summary judgment); accord Reed v. MBNA Mktg. Sys., 333 F.3d 27, 35 (1st Cir. 2003) (more than ordinary fear and embarrassment needed for plaintiff to overcome duty to take advantage of employer's complaint procedures); Leopold v. Baccarat, Inc., 239

F.3d 243, 246 (2d Cir. 2001) ("[a] credible fear [of retaliation] must be based on more than the employee's subjective belief."); Matvia v. Bald Head Island Mgmt., 259 F.3d 261, 270 (4th Cir. 2001) ("nebulous fear" of retaliation from co-workers insufficient to deprive employer of affirmative defense); Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 267-68 (4th Cir. 2001) ("[a]llowing subjective fears to vitiate an employee's reporting requirement would completely undermine Title VII's basic policy"); Weger v. City of Ladue, 500 F.3d 710, 725 (8th Cir. 2007) (employee must demonstrate a "truly credible threat of retaliation" to render delay in reporting reasonable); Walton v. Johnson & Johnson Servs., 347 F.3d 1272, 1291 (11th Cir. 2003) ("subjective fears of reprisal . . . do not excuse an employee's failure to report a supervisor's harassment."); Fierro v. Saks Fifth Ave., 13 F. Supp. 2d 481, 492 (S.D.N.Y. 1998) (holding that "[t]o allow an employee to circumvent the reasonable complaint requirements of Faragher and [Ellerth] by making conclusory allegations of feared repercussions, would effectively eviscerate [the] affirmative defense"); Madray v. Publix Super Mkts., 30 F. Supp. 2d 1371, 1375 (S.D. Fla. 1998), aff'd 208 F.3d 1290 (11th Cir. 2000) ("[a]n employee's generalized fear of repercussions cannot form the basis for an employee's failure to complain to his or her employer.").

Finally, *amicus curiae* National Employment Lawyers Association of New Jersey (NELA-NJ) avers that there is no precedent that the employer's duty to take action begins "when it has notice of unlawful harassment in writing or through some other formal process." (NELA-NJ brf. at 16). Though technically correct, this narrow point is totally irrelevant to the disposition of this case. Here, plaintiff-employee unreasonably failed to pursue *any* preventive or corrective opportunities provided to her; yet the employer still promptly launched a comprehensive investigation and took effective remedial measures designed to end the complained-of conduct. The employer thus satisfied the burden of its affirmative defense and there are no material facts to conclude otherwise. Thus, this Court need not address NELA-NJ's non-issue and the Appellate Division's finding—"that the record is devoid of any proof upon which to hold defendant vicariously liable for the offending conduct of any of its employees"—should not be disturbed. (App. Div. Op. at 29).

CONCLUSION

For the aforementioned reasons, *amicus curiae* Employers Association of New Jersey respectfully urges the Supreme Court to affirm the appellate and trial courts and hold that an employee's subjective apprehension of retaliation is insufficient to circumvent an employer's complaint procedures designed to prevent and remediate workplace harassment.

Respectfully submitted,

PROSKAUER ROSE LLP

Mark A. Saloman
Nicholas M. Tamburri
One Newark Center, 18th Floor
Newark, New Jersey 07102
Attorneys for Employers
Association of New Jersey
Amicus Curiae for the Respondent

and

John J. Sarno
Employers Association of New Jersey
30 West Mount Pleasant Avenue
Suite 201
Livingston, New Jersey 07039