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By RONALD H. DeMARIA AND DONNA duBETH GARDINER

Anti-Harassment Training Is Mandatory For Managers and Supervisors

New Jersey Supreme Court rewrites *Lehmann*, establishes a bright-line rule for the standard of negligence required in sexual harassment claims

If there were any lingering questions about the importance of harassment and discrimination training for employees or the need for continuous auditing of the effectiveness of an employer's policies, they were answered on July 24, 2002, when the New Jersey Supreme Court issued its opinion in *Gaines v. Bellino*, 2002 NJ LEXIS 1083 (July 24, 2002).

Writing for a unanimous Court, Justice LaVecchia clarified — if not rewrote — the holding in *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587 (1993), making supervisor and management anti-harassment training mandatory and imposing an even heavier burden on New Jersey employers.

The plaintiff, Maria Gaines, was employed by Hudson County as a corrections officer at the county jail beginning in August 1989. In 1998, she filed a verified complaint naming the county

and her shift supervisor, Joseph Bellino, as defendants. Gaines alleged that in 1990, Bellino had grabbed her and had kissed her against her will. She further alleged that the following year she had a second encounter with Bellino during a tour of a new jail facility in which he brought up the kissing incident and stated that he “would not force himself” on her again.

Two years later, Bellino brought up the kissing incident again, this time in front of a high-ranking officer, remarking that Gaines had “shivered” in his arms. The officer did nothing but “cover his ears.” In 1995, Bellino also raised the incident — this time with the top-ranking officer — and again in the plaintiff's presence. In that conversation, Bellino was also reported as stating that if he or the other officers raped Gaines, no one would believe her. The ranking officer told Bellino to “stop playing.”

In December 1996, the county, following an internal investigation spurred on by Gaines's testimony about her experiences in an unrelated case, disci-

plined Bellino, suspending him without pay for 30 days. Shortly after the discipline was imposed, Bellino retired.

Testimony at deposition revealed that Gaines had never filed a formal complaint with Hudson County but had told numerous employees and supervisors about her encounters with Bellino. Evidence also demonstrated that the county had not provided its employees with consistent training on the policy-and-complaint procedures.

The county moved for summary judgment, relying on its written policies and procedures as an affirmative defense to vicarious liability for Bellino's actions. The county contended that it had taken sufficient preventative measures regarding sexual harassment so that no material issues of fact existed on the issue of its vicarious liability.

The trial court granted the county's motion and the Appellate Division affirmed, holding the county was insulated from vicarious liability because its policy was publicized through posters, promulgated through various editions of the employee handbook, and because it

DeMaria and duBeth Gardiner are co-chairs of the labor and employment group at McElroy, Deutsch & Mulvaney of Morristown.

conducted employee training and disciplined the wrongdoer once the incidents came to its attention.

The New Jersey Supreme Court reversed, finding that material fact issues existed concerning “whether the county’s anti-harassment policy provided effective and practical anti-harassment prevention and protection mechanisms ... or whether it was an anti-harassment policy that existed in name only.”

The Court declared that two important factors in determining whether an employer’s anti-harassment policy is effective are: (1) the organization’s implementation and enforcement of “anti-harassment training, which must be mandatory for supervisors and managers, and must be available to all employees of the organization”; and, (2) “the existence of effective sensing or monitoring mechanisms to check the trustworthiness of the policies and complaint structures.”

Therefore, an employer seeking “a safe haven from vicarious liability” will be required to demonstrate that it has promulgated and supported an “active anti-harassment policy” that enjoys “unequivocal commitment from the highest levels of the employer that harassment would not be tolerated.”

Rewriting *Lehmann*

In attempting to flesh out what constitutes effective harassment-prevention practices, Justice LaVecchia, at the very least, clarified prior law and indulged in rewriting the Court’s prior position.

Prior to *Gaines*, the seminal sexual harassment opinion in New Jersey was *Lehmann*. The *Lehmann* Court determined that although an employer would be strictly liable for all equitable relief owed to a plaintiff because of a supervisor’s harassing conduct, the employer would only be vicariously liable for compensatory damages under agency principles.

Thus, an employer could be liable for a supervisor’s harassing conduct if (1) the supervisor was acting within the scope of employment; (2) the employer intended the conduct; (3) the employer was negligent or reckless; (3) the conduct violated a nondelegable duty of the

employer; or (4) there was apparent authority for the supervisor’s actions or the supervisor was aided in accomplishing the harassment by the existence of the employer-employee relationship.

The *Lehmann* Court also held that the absence of effective anti-harassment policies-and-complaint procedures would be evidence — but not conclusive evidence — of an employer’s negligence. Conversely, the *Lehmann* decision also noted that an employer could establish an affirmative defense to negligence by demonstrating that it had promulgated effective policies and procedures.

Significantly absent from the *Lehmann* opinion was an absolute mandate addressing what employer conduct would be sufficient to support the affirmative defense, and certainly the *Lehmann* Court never clearly announced that employers’ anti-harassment training for supervisors and management must be mandatory in order for an employer to defend against vicarious liability in New Jersey.

Indeed, the concept of mandatory training was referred to only once by the *Lehmann* Court, when it noted a quote from 1991 testimony before the House Committee on Education and Labor during hearings on the then-pending Civil Rights Act of 1991. In that testimony, Doctor Freada Klein stated:

Employers that effectively and sincerely put five elements into place are successful at surfacing sexual harassment complaints early, before they escalate. The five elements are policies; complaint structures, and that includes both formal and informal structures; training, which has to be mandatory for supervisors and managers and needs to be offered for all members of the organization; some effective sensing or monitoring mechanisms, to find out if the policies and complaint structures are trusted; and then, finally, an unequivocal commitment from the top that is not just in words but backed up by consistent practice.

The *Gaines* Court, however, took that

language and transformed it into law, stating:

Although [in *Lehmann*], a bright-line rule was not established for the standard of negligence required in sexual harassment claims, several factors were identified as being relevant to determining whether an employer had acted negligently in failing to establish an anti-harassment policy in its workplace. ... Those factors included the existence of: (1) formal policies prohibiting harassment in the workplace; (2) complaint structures for employees’ use, both formal and informal in nature; (3) anti-harassment training, which must be mandatory for supervisors and managers, and must be available to all employees of the organization; (4) the existence of effective sensing or monitoring mechanisms to check the trustworthiness of the policies and complaint structures; and (5) an unequivocal commitment from the highest levels of the employer that harassment would not be tolerated, and demonstration of that policy commitment by consistent practice.

Justice LaVecchia also emphasized the importance of an employer’s ongoing monitoring of the effectiveness of its procedures, finding that the evidence raised fact issues “concerning the county’s sensing and monitoring of its asserted anti-harassment policy.” The Court noted that resolution of that factual dispute “will fundamentally affect the fact-finder’s conclusion concerning whether the employer exercised due care to prevent sexual harassment and the creation of a hostile working environment.”

The *Gaines* Court also undercut another approach often relied on by employers when it held that *Gaines*’s failure to follow the county’s complaint procedure did not bar her claims. Rather, the Court noted that the failure to file a complaint “must be considered in the context of whether the county had been negligent in combating the cre-

ation of a sexually discriminatory hostile work environment by failing to establish meaningful and effective policies and procedures for employees to use in response to harassment.”

The Court gave little weight to Gaines’s failure to file a formal complaint, observing that she had orally protested to several “co-workers and superior officers immediately after the incident of harassment took place.” The Court noted:

The response by higher-level officers, and the reaction of co-officers, fails to support any workplace confidence in the existence of a meaningful anti-sexual harassment policy. Indeed, the record here could support a jury finding that the supervisors placed in responsibility for the jail, and for the shift to which plaintiff was assigned, had been permitted to create an atmosphere where such allegations were brushed aside, ridiculed, or viewed as cause for retribution.

Although it has long been suspected that New Jersey was rivaled only by California in providing far-reaching protections to employees, the *Gaines* opinion has left no doubt. The New Jersey Supreme Court’s enforcement and interpretation of an employer’s vicarious liability for a supervisor’s conduct under the state Law Against Discrimination has just become more onerous and more costly. No matter the size of the organization, employee anti-harassment training is no longer an option — it is mandatory.

Lack of Flexibility

Although the Court had the opportunity to adopt the more flexible standard for imposing vicarious liability under federal civil rights statutes as articulated by the U.S. Supreme Court in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742

(1998), it deliberately eschewed that opportunity.

As U.S. District Court Judge Joseph E. Irenas predicted in *Mancuso v. City of Atlantic City*, 193 F. Supp. 2d 789 (D.N.J. 2002), “it is by no means clear that the New Jersey Supreme Court will reach the same conclusions as did the Court in *Ellerth* and *Faragher*.”

By expressly stating that training is mandatory for supervisors and managers, the Court sent a clear message that failing to train managers will clearly result in a finding that an employer was negligent. As such, it will be vicariously liable for the acts of a supervisor — even when not complained of and unintended by the employer.

As an aside, it is also important to note that the Court stated that training must be available to nonmanagement employees. One wonders if the Court is setting the stage for a new standard of employer liability for harassment by nonmanagement employees.

Furthermore, under the agency principles cited in both *Lehmann* and *Gaines*, an employer will be held strictly liable because of either the real or apparent authority given to the supervisor by the employer. By training all employees, an employer may be able to limit the “apparent authority” of its supervisors, by telling its employees that no employee, including supervisors and managers, has the authority to harass or otherwise engage in discriminatory conduct. Thus it can possibly limit its exposure under the Restatement of Agency, 2d, §219(2)(d) (1958), which provides:

A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: ... (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the exist-

tence of the agency relation. Additionally, effective and frequent training should provide the employer with solid and credible evidence that it did not grant the supervisor the “authority to control the work environment,” to the extent that a supervisor could engage in harassing or discriminatory conduct. Finally, effective training should raise the level of awareness of supervisors and provide assistance in eliminating acts of discrimination or harassment.

The messages are clear to every attorney practicing in this area. An employer must offer meaningful and effective training, not only to its supervisors and managers, but to all employees.

An employer must not only have a policy that encourages the filing of complaints, but the policy must also provide adequate assurances that there will be no retaliation of any kind against anyone who files a complaint.

Finally, under no circumstances should managers and supervisors ever suggest or imply that the employer’s policies are not an effective means of dealing with the problem.

It comes as no surprise that the Supreme Court continues to increase the pressure on employers to eliminate harassment in the workplace. This was foreshadowed when the *Lehmann* Court observed:

The most important tool in the prevention of sexual harassment is the education of both employees and employers. ... We think that providing employers with the incentive not only to provide voluntary compliance programs but also to insist on the effective enforcement of their programs will do much to ensure that hostile work environment discrimination claims disappear from the workplace and the courts.

What was, at best, hinted at in *Lehmann*, is now the law. ■