Sills Cummis & Gross P.C.

Client Alert **Employment & Labor**

Employers Cannot Solely Rely on Harasser's Status or Existence of Sexual Harassment Policy as Defense to Vicarious Liability Under LAD

Employers in New Jersey were recently reminded that they cannot depend on the mere existence of a sexual harassment policy to shield them from vicarious liability. In *Wallace v. Mercer County Youth Det. Ctr*., No. A-5006-09T1, 2011 N.J. Super. Unpub. LEXIS 2577 (App. Div. Oct. 12, 2011), the NJ Appellate Division reaffirmed that employers may be held vicariously liable for a co-worker's harassment under the New Jersey Law Against Discrimination (the LAD) when the employer fails to implement sufficient "preventative mechanisms" to address harassment complaints.

The court re-emphasized that the mere existence of a sexual harassment policy is not an automatic affirmative defense to vicarious liability. Instead, an employer must be able to demonstrate that its policy was adequately disseminated and updated, that both employees and supervisors were frequently trained, that the training was thorough, and that those employees tasked with conducting investigations received specialized training and could demonstrate that they possessed a clear understanding of the applicable standards and law. If New Jersey employers fail in any of these areas, they could face vicarious liability under the LAD.

In *Wallace* plaintiffs were both allegedly harassed by a co-worker while working at the Mercer County Youth Detention Center ("the employer"). Each Plaintiff filed an

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incident report with her respective supervisor. The incident reports were sent to the Mercer County (the County) personnel department, but plaintiffs were not contacted regarding their claims until almost a month later. In addition, the incident reports were sent to the alleged harasser by the County. An investigation was conducted by the County assistant personnel director, who had negligible sexual harassment training. The assistant personnel director concluded that there was not enough information to sustain plaintiffs' allegations, even though, as the court noted, plaintiffs' claims fit "neatly" within MCYDC's sexual harassment policy's (the Policy's) definitions of sexual harassment.

Their appeal from the trial court's dismissal of their claims focused on two issues: 1) whether co-worker harassment may create vicarious liability and 2) whether the mere existence of a sexual harassment policy is an affirmative defense to liability.

Reversing the trial court, the Appellate Division found that plaintiffs raised several issues of fact regarding whether (i) the employer was negligent in implementing, carrying out or monitoring its policy, (ii) the training the employer provided to its supervisors was adequate; (iii) the speed and effectiveness of the supervisors' investigation complied with the policy; (iv) discernible criteria were used to properly evaluate plaintiffs' claims, and (v) the policy's effectiveness was effectively monitored.

Wallace serves as a reminder to employers that neither an alleged harasser's status as a co-worker nor the mere existence of a sexual harassment policy prevents a finding of vicarious liability. We recommend the following in light of the appellate court's ruling:

- All employees should be trained about the employer's sexual harassment policy, not just once, but on an ongoing basis.
- Supervisors should receive regular training regarding how to address a harassment complaint once it is reported, as well as to report incidents of harassment of which they become aware.
- Employers must be vigilant in training those charged with investigating harassment complaints to ensure that they understand both the law and the process.

- Employers would be well-advised to train their investigators to review each step in the investigation process with counsel, and to seek input of counsel prior to implementing corrective action.

For additional information, please feel free to contact the following attorneys from our Employment and Labor Practice Group.

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