



New Jersey Employers Liable for Co-Worker Sexual Harassment

Insights

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In the first New Jersey state court decision of its kind, the New Jersey Appellate Division has held that an employer can be liable under state law for an employee's sexual harassment at the hands of a co-worker in the absence of an effective anti-harassment policy, even if the employer was unaware of the harassment. *Cerdeira v. Martindale-Hubbell*.

Background

For years it has been well understood that under New Jersey's Law Against Discrimination, employers could be liable for the sexual harassment of employees at the hands of supervisors in the absence of an anti-harassment policy with "effective preventative mechanisms." Until now, it was not clear whether the absence of such a policy could subject an employer to liability for co-worker harassment. *Cerdeira* makes it clear that it can.

Robin Cerdeira began working for Martindale-Hubbell in 1983 and continues to do so. Cerdeira alleges that beginning in 2001, Melvin Bowers, a co-worker who worked in a different department, was not Cerdeira's supervisor, and was not a manager in his own department, began sexually harassing her. Bowers' purported conduct included making sexually explicit telephone calls to Cerdeira and sending her sexually explicit pictures and underwear. Cerdeira never told her supervisor or anyone else about Bowers' conduct, except another co-worker who did not encourage Cerdeira to report it.

According to the testimony, Bowers' conduct continued until July 2003, when a mail-room supervisor (not Cerdeira's) saw one of the sexually explicit photographs on her desk. The supervisor told Cerdeira that if she did not report it, he would. Several days later, Cerdeira told her supervisor about the harassment, and she, in turn, immediately reported it to Martindale's director of human resources. Bowers was fired within days and Cerdeira was permitted to take leave, with full benefits, for as long as she needed. Cerdeira did so, returning to work in November.

In 2001, Cerdeira had received a copy of Martindale's Code of Conduct, which promised the company would "make every reasonable effort to provide an environment free from harassment of any kind," and advised employees with "questions" about the Code to direct them to their "immediate supervisor, local Human Resources Representative, or the ... Legal Department." Martindale also claimed to have distributed several memos addressing sexual harassment, but there was no evidence Cerdeira had received them.

Cerdeira sued Martindale (as well as Bowers) in 2005 for maintaining a hostile work environment based on Bowers' sexual harassment. Martindale argued that because it had not known of Bowers' conduct, it could not be liable under state law, regardless of whether its anti-harassment policy was effective. The lower court agreed and dismissed Cerdeira's case. The Appellate Division reversed.

The Court's Ruling

In 1993, the New Jersey Supreme Court ruled that employers could be liable for a supervisor's sexual harassment if the employer negligently lacked effective and well-publicized sexual harassment policies. In *Cerdeira*, the Appellate Division extended this ruling to co-worker harassment to avoid "potentially discourag[ing] employers from adopting proactive sexual harassment policies that are well-publicized and directed to all employees."

While nothing can guarantee insulation from liability, the Appellate Division repeated the five elements identified by the Supreme Court as fitting the description of an effective policy: 1) an anti-harassment policy, 2) with a complaint structure that allows for formal and informal complaint procedures; 3) training that is mandatory for supervisors and managers and offered to all members of the organization; 4) effective monitoring mechanisms, to determine whether the complaint structure is trusted; and 5) "an unequivocal commitment from the top that is not just in words but backed up by consistent practice."

How This Affects New Jersey Employers

If *Cerdeira* teaches anything, it is that prevention is more important than cure. Upon learning of the harassment, Martindale acted immediately, firing the alleged offender and giving the victim a generous leave. But acting quickly and effectively after the event is now clearly insufficient. The wise employer should already have effective training and enforcement policies. Now is a very good time to review those policies.

For any policy to be effective, employees at every level must understand what is expected of them and how to report a violation. Employees must especially be reassured that "as the law requires" they cannot be subjected to retaliation for making or acting on a harassment complaint. This calls for *mandatory* training for all employees, perhaps with different emphases as appropriate for management- and supervisory-level employees, on the one hand, and rank-and-file employees, on the other.

Policies should also be in writing and circulated to all employees (a good place to do this is at mandatory training), who should be required to sign written acknowledgments that they have received both training and a copy of the policy. Finally, policies must address harassment and other forms of discrimination not just on the grounds of sex, but also on such other grounds as race, religion, national origin, ancestry, age, sexual orientation, gender identity, disability, and marital status, all of which are prohibited under New Jersey law.

For more information contact any attorney in our New Jersey office at 908.516.1050.

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