

## **LEGISLATIVE UPDATE**

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### **"Cat's Paw" Liability Based on Conduct of Subordinate Recognized by New Jersey State Court**

A state appellate court for the first time in New Jersey has adopted the imposition of the “cat’s paw” liability, whereby an employer may be liable for a lower-level supervisor’s discriminatory behavior even though the ultimate decision maker is incapable of discrimination.

In *Kwiatkowski v. Merrill Lynch, et. al.*, Docket No. A-2770-06T1 (App. Div. Aug. 13, 2008), the State Appellate Division held that an employee could proceed to trial on his sexual orientation discrimination claims brought under the New Jersey Law Against Discrimination (the “LAD”), *N.J.S.A. § 10:5-1 et seq.*, although the individual who terminated him was unaware of his sexual orientation. The court further ruled that an alleged single, offensive comment made by the employee’s direct supervisor about his homosexuality created questions for a jury with respect to his hostile work environment and intentional infliction of emotional distress claims.

The plaintiff, on appeal after his claims had been dismissed at the trial court level, argued that the employer could not escape liability for his wrongful termination simply because the decision maker – the Vice President – did not intend to discriminate against the employee. The appellate court found that the influence exerted by his lower-level supervisor in the termination decision was substantial: the Vice President failed to conduct an independent investigation of the incident or of the plaintiff’s prior work history and relied solely upon the information provided by the plaintiff’s supervisor. The court also observed that if the supervisor was biased against gay employees, a reasonable jury could find that her attitude influenced her report to the Vice President. Accordingly, the court reversed summary judgment on the plaintiff’s wrongful termination claim relying upon the theory of “cat’s paw” liability, which the United States Court of Appeals for the Third Circuit, whose jurisdiction includes New Jersey, has adopted, but the state courts in New Jersey had not addressed until now.

The case cautions New Jersey employers of the need to conduct a thorough investigation of any incident that may result in an adverse employment action because they may be liable for the actions of lower level supervisors even when the decision maker is incapable of discrimination. The decision also reminds New Jersey employers that a single, derogatory remark may result in liability for the company, as well as the individual who made the comment.

## **NJ Court Stresses Need for Effective Anti-Harassment Policies**

In a case of first impression, 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-Hubble*, 402 N.J. Super. 486 (App. Div. 2008)

The plaintiff, hired in 1983, alleged that beginning in 2001, a co-worker who was not her supervisor, and was not a manager in his own department, began sexually harassing her. The purported conduct included making sexually explicit telephone calls and sending her sexually explicit picture. The plaintiff never told her supervisor or anyone else about the conduct, except another co-worker. In July 2003, a mail-room supervisor saw one of the sexually explicit photographs on the plaintiff's desk and told her that if she did report it, he would. After thinking about it over the weekend, the plaintiff told her supervisor about the harassment, and she, in turn, immediately reported it to the Company's director of human resources. The alleged harasser was suspended, and then fired, in a matter of days. Moreover, the Company gave the plaintiff several months of leave, with full benefits, and then allowed her to return to work to her former position.

A lawsuit followed. In it, the plaintiff alleged that the Company was negligent because it had not known of the alleged conduct as a result of its failure to have an effective anti-harassment policy in place. The lower court agreed and dismissed the case. The Appellate Division reversed. In so doing, the Appellate Division stressed that employers can be liable under NJ law 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." The Appellate Division stressed that there are certain steps and procedures that must be in place to ensure that harassment is remediated. Because there were unresolved questions about the distribution and effectiveness of the policy, the case was remanded for further proceedings.

Clearly, New Jersey courts have stressed in the past that effective policies are a must. This case reinforces that. Policies must not just reside on paper – they must become living, breathing ideals. Training is critical, as is regular distribution of policy statements.