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NEW JERSEY COURT REQUIRES PLAINTIFF TO USE EMPLOYER'S ANTI-HARASSMENT COMPLAINT POLICY AS CONDITION OF RECOVERY

On March 13, 2007, the New Jersey Appellate Division upheld the dismissal of a plaintiff's claims under the New Jersey Law Against Discrimination (LAD) because of her failure to utilize the anti-sexual harassment policies and procedures that were in place to redress such claims (*Gibson v. State of New Jersey*, A-1426-05T2, 03/13/07). This decision represents the most specific and detailed statement by a New Jersey Appellate Court of the specific and affirmative obligations that a plaintiff may have to use such procedures to preserve a claim.

The Court held that even though plaintiff presented some evidence of severe and ongoing conduct in the form of sexual comments that amounted to a change in the terms and conditions of employment, her hostile work environment claim must be dismissed because she did not avail herself of defendants' policies to prevent sexual harassment and address and remedy violations.

The Court additionally held: (1) without further evidence of adverse impact, plaintiff's failure to obtain an interview for a particular position does not constitute an adverse employment action under the LAD; and (2) plaintiff's request to meet with a supervisor does not constitute a protected activity in order to establish a retaliation claim under the LAD.

In *Gibson*, the plaintiff, a female and former officer with the New Jersey State Police, alleged that her former employer violated the LAD based on gender discrimination and hostile work environment. Plaintiff alleged hostile work environment based upon defendants' statements made by supervisors and co-workers to the effect that "women should not be troopers" and other sexual disparaging remarks. She also alleged that she was socially excluded by her peers; and rumors were spread about her having affairs when she befriended male colleagues.

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Plaintiff alleged discrimination on the basis of gender because she was not awarded an interview for a Gaming Bureau position and claimed that similarly or less qualified men were selected to interview for the position. Further, plaintiff claimed that defendants retaliated against her, in violation of the LAD, after she requested an interview with a superior officer as a result of not being interviewed for the Gaming Bureau position. The lower court granted defendants' motion for summary judgment as to all claims, and plaintiff appealed.

The Appellate Division determined that the comments made to plaintiff during her tenure as a state trooper were severe and pervasive enough to make a reasonable employee believe that the working environment was hostile or abusive, thereby meeting the test for a hostile work environment claim of sexual harassment espoused by the New Jersey Supreme Court in *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 603-04 (1993). The court rejected defendants' argument that the statements should be considered in light of the fact that plaintiff worked in a "male dominated military-like institution," reasoning that state employees should not be afforded less protection under the LAD.

The Court, however, upheld the dismissal of plaintiff's hostile work environment claim because she did not avail herself of the formal remedies that defendants made available to her and because she never complained to anyone of the discrimination that she contended had occurred over a period of 11 years. The court held that defendants were entitled to dismissal as a matter of law because there was ample evidence in the record demonstrating defendants created and provided anti-sexual harassment policies, plaintiff failed to avail herself of those remedies over the course of her employment, and plaintiff suffered no "tangible employment action." The Court explained that dismissal was appropriate because even though a constructive discharge resulting from sexually harassing conduct of a supervisor does constitute a "tangible employment action," plaintiff did not set forth any evidence that she suffered constructive discharge, nor did she provide any evidence that the hostile work environment complained of resulted in any "tangible employment action."

The Court also upheld the lower court's dismissal of plaintiff's claim for gender discrimination under the LAD, holding that plaintiff failed to establish a *prima facie* claim of discrimination because she failed to establish that she suffered an adverse employment action. The Court rejected plaintiff's contention that she suffered an adverse employment action when she was denied the opportunity to interview for the Gaming Bureau position. Holding that the failure to obtain an interview for a particular position does not constitute an adverse employment action, the court reasoned that plaintiff's performance evaluations recommended her for promotions, and plaintiff did, in fact, earn other promotions within the State Police. A lost opportunity to obtain a particular promotion does not automatically qualify as an actionable adverse employment action. Moreover, the Court determined that dismissal was appropriate because defendants provided evidence that they employed a gender-neutral, non-biased selection process and plaintiff failed to present evidence that the non-discriminatory process proffered by defendants was merely a pretext for discrimination.

On the issue of retaliation under the LAD, the Court explained that plaintiff was required to demonstrate that: (1) she engaged in a protected activity known by the employer; (2) she suffered an adverse employment action; and (3) her participation in the protected activity caused the retaliation. Plaintiff alleged that she engaged in a protected activity by requesting a meeting with a superior officer to discuss why she had never been



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interviewed for the Gaming Bureau position. Plaintiff contended that she suffered an adverse employment action when she was transferred to a less desirable position in retaliation for requesting the meeting. The court dismissed the claim and held that plaintiff's request to meet with a superior officer did not qualify as a "complaint" under the statutory language of the LAD. Plaintiff, therefore, failed to establish a *prima facie* case of retaliation under the LAD because the request for a meeting was not a protected activity. The Court explained that although a lateral transfer may constitute an adverse employment action, the retaliatory act must be sufficiently severe to have altered the plaintiff's conditions of employment in a material manner. The Court did not decide whether plaintiff's transfer constituted an adverse employment action because the record established that the transfer order was signed before plaintiff requested the meeting, so plaintiff was unable to establish that her activity caused the alleged adverse employment action.

The *Gibson* decision should serve as a reminder to employers to ensure that anti-harassment policies are updated and distributed to all employees. An affirmative defense based upon such anti-harassment policies may be available against allegations of hostile work environment if the employer can establish that it made the employee aware of the policies but the employee never availed himself/herself of the formal remedies under the policies. Furthermore, employers can protect themselves against discrimination claims for failure to hire or failure to promote if they can establish that they employed a neutral, non-biased selection process. Failure to hire and promote in accordance with an established neutral, non-biased selection process increases the risks of legal challenges and discrimination claims.

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Please feel free to contact **James Flynn** in the Firm's **Newark** office at (973) 639-8285 or jflynn@ebglaw.com if you have any questions or comments. **Daniel R. Levy**, an associate in the Labor and Employment Department, assisted in the preparation of this Alert.

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