STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EG14WG-63125

A.B. and Craig Sashihara, Director of the New Jersey Division on Civil Rights,	)	
Complainants,	)	Administrative Action
v.	)	**Order Vacating Finding of Probable Cause and Dismissing the Complaint**
The New Jersey Department of Corrections, and Frank Pedalino, in his individual capacity,	)	
Respondents.	)	

On October 16, 2014, the Director of the Division on Civil Rights (DCR) issued a finding of probable cause (FPC) in this employment discrimination matter. On February 24, 2016, the Director, *sua sponte,* asked the parties to show cause why the FPC should not be vacated in light of an intervening opinion of the New Jersey Supreme Court, i.e., Aguas v. State, 220 N.J. 494 (2015). Respondents New Jersey Department of Corrections (DOC) and Frank Pedalino submitted letter briefs on March 17, 2016. Complainant did not submit a response. For the reasons set forth below, the Director hereby vacates the FPC and dismisses the verified complaint.

As noted in the FPC, the DCR investigation found sufficient evidence to support a threshold determination that former DOC Assistant Superintendent Pedalino subjected A.B. to severe or pervasive sexual harassment in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Applying the legal standard articulated in Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 624 (1993), the Director determined that DOC could be vicariously liable for a supervisor's misconduct.[1] Specifically, the Director noted that

[1] In Lehmann, supra, the Court declined to impose strict liability on an employer for sexual harassment committed by a supervisor, instead preferring to analyze each case on an individual basis using the standards set forth in agency law. Id. at 623-24. Under Lehmann, an employer would be vicariously liable for harassing conduct if (a) the supervisor was acting within the scope of his/her employment, (b) the supervisor acted outside the scope of his/her employment but the employer "contributed to the harm through its negligence, intent, or apparent authorization of the harassing conduct," or (c) if the supervisor was "aided in the commission of the harassment by the agency relationship." Id. at 624.

because DOC placed Pedalino in a senior management position and endowed him with facility-wide privileges and authority, his conduct was imputed to the agency by operation of law. The Director also concluded that probable cause existed to find Pedalino liable for aiding and abetting DOC in violating the LAD because he sexually harassed Complainant and thus violated his supervisory duty to guard the workplace against discrimination.

In 1998, the United States Supreme Court decided two companion cases, Burlington Industries v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998), which established a two-pronged affirmative defense for employers in hostile work environment cases where no tangible employment action was taken against the plaintiff. Ellerth, supra, at 765.

Meanwhile, DCR and New Jersey courts continued to apply the standard set forth in Lehmann and its progeny, waiting to see if the New Jersey Supreme Court would adopt the Ellerth/Faragher doctrine in LAD cases. The issue came to a head last year in Aguas, when the Court was asked to consider an employer's vicarious liability for supervisory misconduct under the LAD. The Court reviewed Lehmann and its progeny and ultimately adopted the Ellerth/Faragher affirmative defense. See Aguas, supra, 220 N.J. at 524. In particular, the Court held that in an LAD case, an employer can escape liability for a supervisor's sexual harassing behavior if it can prove two prongs by a preponderance of the evidence:

> first, that the employer exercised reasonable care to prevent and to correct promptly sexually harassing behavior; and second, that the plaintiff employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to otherwise avoid harm. The employee may rebut the elements of the affirmative defense.

Ibid. (citations omitted). The Court noted that the affirmative defense was available only in cases where no tangible employment action was taken against the employee. Ibid. In formally adopting the Ellerth/Faragher affirmative defense, the Aguas Court clarified—some say altered—the LAD's standards on employer vicarious liability for sexual harassment by a supervisor.

In this case, there was no allegation or evidence of a tangible employment action taken against Complainant. Moreover, the Director found that DOC responded promptly and effectively to Complainant's internal complaint. At the outset of DOC's internal investigation, it granted Complainant's request for a reassignment. Next, as noted in the FPC, DOC "conducted a comprehensive and thorough internal investigation, imposed a significant discipline on Pedalino, re-assigned him to a facility where he would have no further contact with A.B., required him to undergo targeted training . . . [and] Pedalino's harassment of A.B. ceased once DOC officials were alerted to the complaint[.]" Based on the above, the Director is satisfied that DOC "exercised reasonable care to prevent and to correct promptly sexually harassing behavior," 220 N.J. at 524, and therefore satisfied the first prong of the Aguas affirmative defense.

Respondent produced evidence during the investigation that it distributed the State Policy Prohibiting Discrimination in the Workplace (State EEO Policy) to employees on a yearly basis, and that Complainant had a copy of same, which put her on notice of her rights and the procedures to follow if she felt that she was being harassed. Complainant told DCR that the harassment began in early 2011 and intensified in November 2011. She was aware of her right to file a complaint under State EEO Policy but waited over a year, i.e., until June 2012, hoping that the harassment would simply cease on its own. Based on the above, the Director is satisfied that Complainant "unreasonably failed to take advantage of preventative or corrective measures," ibid., and that DOC therefore satisfied the second prong of the Aguas affirmative defense.

Because Complainant has supplied no evidence or argument to show that Aguas is not applicable to this case, or that the evidence gathered in DCR's investigation does not establish both prongs of the Aguas affirmative defense for the DOC, or offered any opposition to the dismissal of the aiding and abetting claim against Pedalino, the FPC is hereby vacated, and the verified complaint is dismissed with prejudice.[2]

DATE: 4-12-16

Craig S. Sirinha, Director
NJ DIVISION ON CIVIL RIGHTS

[2] Aguas addressed liability for a violation of the LAD, rather than the standards defining sexual harassment or the standards for a violating the State EEO Policy. For that reason, nothing in this Order should be construed as evidence that Pedalino's conduct did not constitute severe or pervasive sexual harassment. Nor should it be construed as evidence to counter any determination that Pedalino's conduct violated the State EEO Policy.