N.J. APPELLATE DIVISION AFFIRMS ITS DECISION IN *DUNKLEY* AFTER REMAND FROM N.J. SUPREME COURT

By Kevin J. O'Connor*

A new published decision by the Appellate Division in Dunkley v. S. Coraluzzo Petroleum Transporters, A-3252-12T1 (App. Div. June 24, 2015) has served to reaffirm that Court's prior decision on the showing that must be made for constructive discharge and vicarious liability for acts of alleged discrimination by supervisors. Applying the ruling in Aguas v. State of New Jersey, 220 N.J. 494 (2015), as directed by the New Jersey Supreme Court after the decision in Dunkley v. S. Coraluzzo Petroleum Transporters, 437 N.J. Super. 366 (App Div. 2014) was issued, the Appellate Division has again affirmed dismissal of racial discrimination charges.

On February 11, 2015, the Court rendered its decision in Aguas. That case held that for claims alleging vicarious liability for supervisory sexual harassment, the Court has adopted as the governing standard the test set forth by the United States Supreme Court in Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998). The employer in a hostile work environment sexual harassment case may assert as an affirmative defense that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise," provided that the employer has not taken an adverse tangible employment action against the plaintiff employee.

Aguas has the potential to impact many LAD cases, and the Court has already put it to work in a significant case that was rendered last year by the Appellate Division, Dunkley. In

Dunkley, the Appellate Division had recognized the limits on vicarious liability of an employer for harassing acts of a non-supervisory employee, as well as the significant proofs that must be marshaled in order to prove constructive discharge. The Court established that co-worker backlash against an employee for having made a discrimination complaint cannot, standing alone, be enough to impose liability on an employer for either retaliation or constructive discharge. Dunkley v. S. Coraluzzo Petroleum Transporters, 437 N.J. Super. 366 (App Div. 2014). Dunkley also provided a great recitation of the significant hurdle that must be made to prove constructive discharge.

On March 16, 2015, the Court granted certification in Dunkley for purposes of remanding the case to the Appellate Division to consider, in light of Aguas, whether there was a genuine issue of fact for trial on the claims. 221 N.J. 217. In a comprehensive decision yesterday, the Appellate Division has affirmed its prior dismissal, applying Aguas. The opinion makes clear that an employer who adopts and implements an effective anti-discrimination policy, and actively investigates a claim of harassment in the workplace, will be rewarded with dismissal of such claims if an employee later sues.

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