New Jersey court of appeals recently made employers’ New Jersey Law Against Discrimination (“LAD”) defense toolbox significantly lighter. Until recently, New Jersey courts were silent on whether an employer could be held liable for harassment by a nonsupervisory co-worker, about which the company had no knowledge. This led some employers to believe that such liability would not attach as a matter of law. But unless and until the state’s high court says otherwise, Cerdeira v. Martindale-Hubbell jettisons that argument. The Cerdeira court reversed a trial court’s grant of summary judgment to the defendant-employer, holding that a discrimination case will not be stymied simply because the alleged harasser is a co-worker. The court then remanded the case for determination of whether Martindale-Hubbell’s anti-harassment policy was sufficiently effective to shield the company from liability.

THE FACTS: Robin Cerdeira worked at Martindale-Hubbell without incident for almost two decades. Then, in 2001, she became the target of sexual harassment by Melvin Bowers, a non-supervisory coworker who worked in another department. For the next two years, Bowers harassed Cerdeira by sending her sexually explicit photographs, giving her Victoria’s Secret and Frederick’s of Hollywood catalogues, and making obscene phone calls to her at work. One time, he left provocative undergarments, perfume, and a camera at her workstation and then called to ask her to take photographs of herself. Cerdeira kept Bowers’s behavior a secret, shared only with one co-worker, until a mail room supervisor happened upon one of the photographs Bowers had sent to Cerdeira in July of 2003. This supervisor encouraged her to report the harassment, and warned Cerdeira that if she chose to remain silent, he was obligated to report the incident. Cerdeira then made a report to her supervisor, Barbara Dorner. Dorner immediately contacted the company’s Director of Human Resources, who met with Cerdeira 15 minutes later.

Martindale-Hubbell moved swiftly, suspending Bowers immediately and firing him two days later. The company then told Cerdeira to take off as much time as she needed to recover from the ordeal. She remained on leave with full benefits for several months and then resumed her position with the company, where she continues to work.

THE LAWSUIT: Cerdeira sued both Bowers and Martindale-Hubbell; the latter under a theory that the company fostered a hostile work environment. Martindale-Hubbell moved for summary judgment, arguing that it could not be held liable under the LAD for harassment by a nonsupervisory co-worker about which the company had no knowledge. The trial court granted this motion, but the appeals court reversed and remanded.

On appeal, the appellate court looked to the seminal case of Lehmann v. Toys ‘R’ Us, in which the New Jersey Supreme Court recognized that employers can be held liable for hostile work environment claims under a negligence theory where the employer does not have in place an effective anti-harassment policy. That case was decided in the context of harassment by a supervisor. Noting that the Lehmann Court declined to articulate a negligence standard to govern such cases, the Cerdeira court reasoned they must be “analyzed under traditional negligence principles, which draw upon notions of fairness, common sense, and morality.”

The court then looked to federal courts’ decisions in Meritor Savings Bank v. Vinson and Ocheltree v. Scollon Productions, which recognize that employer liability for co-worker harassment can flow from the employer’s failure to have in
place effective and well-publicized anti-harassment policies. Agreeing with these decisions, the Cerdeira court interpreted Lehmann's holding as not being limited to harassment by supervisors. Thus, Cerdeira was sent back to the trial court for determination of whether Martindale-Hubbell's policy was sufficient and, if not, whether the absence of an effective policy proximately caused Cerdeira's harm.

THE LESSON FOR EMPLOYERS: Employers in New Jersey should examine their anti-harassment policies to ensure that they are comprehensive, well-publicized, and contain instructions for reporting incidents of harassment. These policies must be distributed to all personnel, preferably on an annual or semi-annual basis, and employers should keep on file a signed acknowledgment of receipt from each employee. This effort must extend to all employees, not just supervisory personnel. Further, employers should document periodic efforts to ensure that their reporting systems work, and must respond swiftly to all employee complaints.