

Springdale City Attorney's Office

The M.A.P.

The Municipal Attorney Periodical

U.S. Eighth Circuit Court of Appeals Rules in Favor of City of Ladue, Missouri in Sexual Harassment Claim

Two communications officers with the City of Ladue, Missouri filed a sexual harassment lawsuit against the City of Ladue, the communications supervisor and the Chief of Police in the District Court for the Eastern District of Missouri under Title VII of the United States Code. The District Court granted summary judgment to the City of Ladue based on the *Ellerth-Faragher* affirmative defense. Thus, the Eight U.S. Circuit Court of Appeals, as part of this appeal, only considered whether the City of Ladue proved the affirmative defense as a matter of law.

For a more detailed summary of this case, this article can be found on page 1.

➔ Other Articles of Interest ←

Notice Required Before Adoption of Technical Codes by the City Council
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A Variety of Issues Involving City Council Matters—a question and answer format
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2007 Graffiti Statistics Released

The number of reported graffiti incidents in 2007 increased dramatically over 2006, with 454 incidents being reported in 2007 in comparison to only 220 in 2006. As a result, the City has incurred costs in removing graffiti from City property. Because of the dramatic increase of incidents of graffiti and the costs involved, an emphasis has been placed on the arrest and conviction of those responsible for the acts of vandalism.

S.N.A.P. has also partnered with various community organizations and businesses to assist in the cleanup of graffiti, and there is little doubt that 2008 will see the same level of cooperation regarding graffiti removal.

This full article can be found on page 14.

Must a Civil Service Commissioner Live Within the City Three Years Immediately Preceding Their Appointment

An opinion was requested on behalf of the City of Springdale by State Representative Eric Harris on whether a civil service commissioner is required to be a resident of the City for more than three years immediately preceding their appointment, or must they have resided in the City for a total of more than three years at any point prior to the appointment. In his opinion, the Attorney General opined that although the issue is not free from doubt, under Ark. Code Ann. §14-51-202(a), as amended, he believed a commissioner need only have resided in the city he serves for more than three years at any point prior to his appointment.

For a more indepth review of the opinion, see the full article on page 11.



Daylight Savings Time
begins March 9, 2008
Remember to spring forward



U.S. Circuit Court of Appeals Rules in Favor of City of Ladue, Missouri in Sexual Harassment Claim

Facts Taken From the Opinion: Julie Weger and Mary Meghan Murphy (collectively the “Plaintiffs”) were hired by the City of Ladue, Missouri Police Department (“Department”) as communications officers in 1999 and were continuously employed by the Department since that time. During Weger’s application process, Captain William Baldwin, then a lieutenant, learned that Weger had undergone breast reduction surgery and informed Sergeant John Wagner, then a detective. Wagner communicated this fact to Lieutenant Chris Baker, then a detective. In addition, during Murphy’s application process, Baldwin commented to Wagner and Baker something to the effect that, though Murphy was not attractive, she had large breasts. Following their hire, Wagner informed the Plaintiffs of Baldwin’s remarks. Eventually, the fact of Weger’s prior surgical procedure became well known throughout the Department, resulting in Weger being subjected to teasing by her coworkers.

Plaintiffs work in the communications department, which consists of six dispatchers and one civilian supervisor. In 2000, Baldwin became the uniformed supervisor for the communications department. Baldwin also served as the Department’s internal affairs investigator and second in command to Chief of Police Donald Wickenhauser, Baldwin’s longtime friend. While serving as Plaintiffs’ supervisor, Baldwin worked weekdays from 7 a.m. to 4 p.m., and Plaintiffs worked rotating schedules such that they worked roughly the same hours as Baldwin only one month every six months. However, Plaintiffs

often encountered Baldwin as they were coming on to their shifts and he was leaving and vice versa. From the commencement of Baldwin’s assignment as Plaintiffs’ supervisor, Baldwin sexually harassed the Plaintiffs, even though they continually expressed to Baldwin that they considered his conduct to be unwelcome and inappropriate. As of the fall of 2001, Baldwin engaged in daily harassment of the Plaintiffs.

In the winter of 2001, Detective Norman witnessed an incident where Baldwin put his arm around Murphy’s shoulder and leaned in close to her face, and Murphy stood up and stated, “I can’t stand him.” At an unspecified time, Officer Bonney saw Baldwin come up behind Murphy, who was standing in the communications area, and place his hands on her hips in an attempt to tickle her, Murphy became angry and told Baldwin to stop, Baldwin let go but followed Murphy with outstretched hands as if he was going to tickle her again, and Murphy told Baldwin to leave her alone. Also, at an unspecified time, Detective Lucas saw Baldwin moving his hands on Weger’s shoulders and then saw Weger roll her eyes. Finally, in September 2002, Officer Bonney and Sgt. Wagner saw Murphy walking down the hallway with Baldwin behind her, he was rubbing her shoulders, she grimaced and turned away from Baldwin in an effort to break his grip on her shoulders, and, in response, Wagner shook his head and said “I can’t believe that.”

At the inception of Plaintiffs’ employment with the Department, they received and reviewed a copy of its antiharassment policy. This policy specifically prohibits sexual harassment and outlines a complaint procedure for employees who believe they are being harassed or those that witness harassment of other employees. The policy

requires supervisors to: (1) monitor the Department's work environment for any signs of harassment on a daily basis; (2) advise employees about the types of behavior prohibited and complaint procedures; (3) stop all observed acts of harassment regardless of whether the employees involved are under his or her supervision; and (4) take immediate action to limit the work contact between employees involved in a complaint of harassment pending investigation. Moreover, all Department employees are required to report observed acts of harassment to a supervisor and failure to do so is grounds for discipline. The policy also provides a comprehensive complaint procedure with multiple avenues to report harassment, including any supervisor, the Chief of Police, and the Mayor of Ladue. Upon receipt of a harassment complaint, the policy's procedure provides that the Department will immediately limit work contact between the alleged harasser and the complainant, and the Chief of Police is responsible for the investigation of the complaint. Finally, the policy prohibits retaliation against complainants and those participating in complaint investigations.

On November 5, 2002, Murphy encountered Baldwin in the kitchenette area adjacent to the communications area. Murphy had been out from work the day before because she had two teeth extracted, and she and Baldwin were discussing that procedure. Murphy described what happened next:

[A]s I was standing there conversing with him, [Baldwin] approached me with his hands very close . . . attempting to cup my face and asked if . . . it hurt. He actually brushed my face. I did [not] know if he was going to kiss me or hug me or what. It made feel very uncomfortable. At that point in time, I had had it.

Murphy then went immediately upstairs to Lt. Baker's office and reported the incident as well as previous instances of Baldwin's harassment. This was the first time that Murphy informed any Department supervisor that she was being sexually harassed by Baldwin. Baldwin's harassment of the Plaintiffs ended that day.

Baker reported Murphy's complaint to Chief Wickenhauser the following day, November 6th. Wickenhauser interviewed Murphy that day, and, along with describing the incident that had given rise to her complaint, she discussed Baldwin's prior harassment. After the interview, Wickenhauser contacted Baldwin and instructed him not to enter the communications area or have contact with any communications personnel until further notice. Wickenhauser then began an investigation of Murphy's complaint.

Wickenhauser's investigation consisted of interviewing Baldwin, Wagner, and Baker as well as Lieutenant Richard Wooten, Detective Chris Schmitz, Det. Norman, and Officer Richard Bonney. Wickenhauser informed some of the interviewees that they should consider retaining an attorney because Baldwin could sue them for slander. Several of the interviewees reported having witnessed Baldwin acting inappropriately toward four female employees: Murphy, Weger, Kristin Goin, a communications officer, and Pat Allison, who had served as the civilian supervisor for the communications department since 2001. In addition, Wagner, Schmitz, and Norman reported hearing other unnamed employees refer to Baldwin as "Captain Tickles" and "Tickle Me Elmo," which they believed grew out of his propensity for tickling female employees. Wickenhauser, Baker, and Wooten stated that they were not aware of Baldwin's nicknames.

Wickenhauser also interviewed all communications personnel. Allison and Goin denied that Baldwin had harassed them; however, Weger substantiated Murphy's claims, informing Wickenhauser that Baldwin tried to hug her and had touched or rubbed her shoulders, neck, and arms on many occasions. Weger joined Murphy in her complaint. With regard to Baldwin's nicknames, Allison and Weger were not aware of them. However, Murphy had heard Department employees refer to Baldwin as "Captain Tickle" and "Tickle Me Elmo" intermittently.

About two weeks later, on November 19th, Wickenhauser completed his investigation, finding that Baldwin had not unlawfully sexually harassed Murphy or Weger. Rather, Wickenhauser determined that Baldwin touched the shoulders and arms of both male and female employees in a nonsexual manner when engaging in conversation with them, and that, though the touching was meant to be nonsexual, Murphy and Weger found it offensive. Although Wickenhauser refused to provide Plaintiffs with the results of his investigation, he shared this information with Baldwin, including the names and statements of the witnesses. Additionally, Wickenhauser issued a memorandum to Baldwin providing that: (1) though Baldwin had not engaged in unlawful harassment, the aforementioned touching offended some individuals; (2) the touching violated the Department's antiharassment policy; (3) Baldwin should, in the future, refrain from touching any Department employee; and (4) any future substantiated accounts of Baldwin's violation of the policy or retaliation against Plaintiffs or anyone involved in the investigation would result in his termination. Additionally, Baldwin was permanently removed as Plaintiffs' supervisor but remained their superior within the Department as he remained head of internal

affairs and continued to serve as acting chief when necessary.

On November 21st, two days after the investigation ended, Wickenhauser issued directives to the entire Department, which he characterized as "safeguards," as a result of his investigation. These directives provided that: (1) not more than two detectives could eat lunch together; (2) when leaving the Department, detectives must call out their locations on the radio; (3) officers were no longer allowed to enter the communications area for any reason other than a business purpose; (4) a number of items that were normally located in the main work space of the communications area were moved to the kitchenette area in the rear, so officers could access those items from the back, decreasing traffic through the main work area; and (5) the communications officers were no longer allowed to take breaks in the detective bureau. Plaintiffs felt that the directives were in retaliation for their harassment complaint and were meant to isolate them by making it difficult for them to interact with their coworkers for both social and work-related purposes.

Plaintiffs also felt ostracized by officers, who acted indifferent towards them, and Chief Wickenhauser, who ignored them. Moreover, Baldwin's continued presence in the communications area, though for work-related reasons, made the Plaintiffs feel uncomfortable because they believed that Baldwin did this in order to indicate his superior position. In addition, Allison began taking more detailed notes of Plaintiffs' work activities. Although Allison's notes with regard to Murphy's activities amounted to only a page and a half in the seventeen months prior to her complaint, Allison took seven pages of notes relating to Murphy's activities in the twelve months following her complaint. On the whole, Allison's notes concerning Plaintiffs' postcomplaint work

activities record both positive and negative events as well as Plaintiffs' sick days and requests for leave.

In 2003, the Department, for the first time since Plaintiffs were hired, reinstated a policy requiring annual written evaluations for all communications officers. On March 5, 2003, about four months after Plaintiffs' complaint, Weger underwent her first performance review, receiving the highest possible marks in all but two categories, quality of work and personal relations, for which she earned above standard and standard marks, respectively. It appears that Murphy did not undergo her first performance review until March 5, 2004, about sixteen months after Plaintiffs' complaint. Murphy received above standard ratings in all but two categories, reporting habits and personal contacts, for which she received standard and needs improvement ratings, respectively.

Plaintiffs brought their charges of sexual harassment and retaliation to the Equal Employment Opportunity Commission ("EEOC"). The EEOC found sufficient evidence to support Plaintiffs' sexual harassment claim, but not their retaliation claim, and directed the parties to begin settlement negotiations. The matter was not resolved, and, after exhausting their administrative remedies, Plaintiffs filed a twelve count complaint against the City of Ladue, Capt. Baldwin, and Chief Wickenhauser on June 2, 2004, alleging hostile work environment sexual harassment and retaliation under Title VII, the Missouri Human Rights Act ("MHRA"), and 42 U.S.C. § 1983 in violation of the Fourteenth Amendment. By an order dated December 30, 2004, the district court dismissed Plaintiffs' MHRA claims against Baldwin and Wickenhauser, in their individual capacities, finding Plaintiffs had failed to state a claim against them as a matter of law.

On June 1, 2005, the Defendants moved for summary judgment on the Plaintiffs' remaining claims. The district court granted the motion and dismissed all of the Plaintiffs' claims, finding that: (1) the hostile work environment sexual harassment claims failed because, assuming Plaintiffs demonstrated a prima facie case, the Defendants established the affirmative defense announced by the Supreme Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) ("*Ellerth-Faragher* affirmative defense") as a matter of law, and (2) the retaliation claims failed because Plaintiffs could not make out a prima facie case where there had not shown that they underwent an adverse employment action.

The Plaintiffs appealed only the grant of summary judgment to the City of Ladue, contending that genuine issues of fact preclude the application of the *Ellerth-Faragher* affirmative defense and that they have demonstrated a prima facie case of retaliation.

Decision by Eighth U.S. Circuit Court of Appeals: The Eighth U.S. Circuit noted in their opinion that Title VII prohibits employers from "discriminat[ing] against any individual with respect to [her] compensation, terms, conditions, or privileges or employment, because of such individual's . . . sex" 42 U.S.C. § 2000e-2(a)(1). "Discrimination based on sex that creates a hostile or abusive working environment violates Title VII." *Nitsche v. CEO of Osage Valley Elec. Coop.*, 446 F.3d 841, 845 (8th Cir. 2006) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). In order to make a prima facie showing of hostile work environment based on supervisor sexual harassment, Plaintiffs must show: (1) they belong to a protected group; (2) they were subject to Baldwin's

unwelcome harassment; (3) a causal nexus exists between the harassment and their protected group status; and (4) Baldwin's harassment affected a term, condition, or privilege of their employment. *Gordon v. Shafer Contracting Co., Inc.*, 469 F.3d 1191, 1194-95 (8th Cir. 2006). For purposes of the summary judgment motion, the district court found that Plaintiffs had met the first three elements and assumed the final element such that Plaintiffs demonstrated a prima facie case of hostile work environment sexual harassment. However, the district court granted summary judgment to the City of Ladue based on the *Ellerth-Faragher* affirmative defense. Thus, the Eighth Circuit, as a part of this appeal, only considered whether the City of Ladue proved the affirmative defense as a matter of law.

The Court noted that because the hostile work environment sexual harassment that Plaintiffs were subjected to in this case was perpetrated by a supervisor, the City is vicariously liable for the harassment unless it demonstrates its entitlement to the *Ellerth-Faragher* affirmative defense, which is potentially applicable in situations where, as in this case, no tangible employment action is alleged. The *Ellerth-Faragher* defense consists of "two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior[] and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* At 976 (quoting *Faragher*, 524 U.S. at 807).

Despite Plaintiffs' admission that they were aware of the Department's antiharassment policy throughout the period of Baldwin's harassment and that the harassment came to an end on the day Murphy filed her complaint, Plaintiffs contended that genuine

issues of material fact existed as to whether the Department satisfied the *Ellerth-Faragher* affirmative defense because: (1) the Department's antiharassment policy was ineffective; (2) the Department had both actual and constructive notice of the harassment before Murphy's complaint due to a supervisor and employees observing instances of harassment over the preceding two years; (3) the Department's corrective actions were harsh and skewed in favor of Baldwin; and (4) the Plaintiffs did not unreasonably delay in invoking the Department's complaint procedure because they possessed credible fears of retaliation and believed that Chief Wickenhauser would not conduct a fair investigation of the matter because of his close relationship with Baldwin.

The Court found that the Department acted reasonably to prevent harassment as a matter of law because it had a facially valid antiharassment policy that, when invoked by Plaintiffs, brought an immediate end to Baldwin's harassment. Thus the City of Ladue satisfied the prevention prong of the first element of the *Ellerth-Faragher* affirmative defense as a matter of law.

The Plaintiffs also contended that the Department had not satisfied the correction prong as a matter of law because: (1) it had both actual and constructive notice of Baldwin's harassment via its employees observation of the harassment prior to Murphy's complaint; (2) its investigation of Plaintiffs' complaint was flawed; and (3) its remedial action was harsh and skewed in favor of Baldwin.

The correction prong requires the Department to demonstrate that it "exercised reasonable care . . . to correct promptly any sexually harassing behavior." *Faragher*, 524 U.S. at 807. Therefore, in applying the correction prong, "the employer's notice of

the harassment is of paramount importance . . . therefore the Court held that they must determine when the Department had notice of Baldwin's harassing behavior in order to evaluate the promptness of its response.

The Plaintiffs asserted that the Department had actual notice of Baldwin's harassment prior to November 5, 2002, because at least one supervisor, who was designated to receive harassment complaints under the Department's policy, observed the harassment. Plaintiffs further contend that, because the policy required employees who observed harassment to report it, their coworkers' observation of Baldwin's harassment also constituted actual notice to the Department prior to Murphy's complaint. However, the Court noted that where an employer has a complaint procedure delineating the individuals to whom notice of harassment must be given, employee observations are not relevant to the actual notice inquiry.

Rather, because the Department had a published policy that provides a procedure for reporting suspected harassment, Plaintiffs must have invoked this procedure in order to establish actual notice. "[O]nce an [antiharassment] policy has been effectively disseminated to an employer's employees 'it is incumbent upon the employees to utilize the procedural mechanisms established by the company specifically to address the problems and grievances.'" (quoting *Madray*, 208 F.3d at 1298-99). Prior to Murphy's complaint to Lt. Baker on November 5, 2002, which provided actual notice to the Department, Murphy admitted that she failed to inform any Department supervisor or any other individual designated by the policy that she was being sexually harassed by Baldwin. Because the record is devoid of any indication that Plaintiffs invoked the Department's harassment complaint

procedure prior to Murphy's complaint, the Department did not have actual notice of Baldwin's harassment until November 5, 2002.

The Plaintiffs also asserted that the Department's correction of Baldwin's harassment was not reasonably prompt because the Department had constructive notice of such harassment prior to Murphy's complaint via supervisor and coworker observation of Baldwin's inappropriate conduct. An employee can show an employer's constructive knowledge of sexual harassment by demonstrating that "the harassment was so severe and pervasive that management reasonably should have known of it." *Watson*, 324 F.3d at 1259; see *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1265 n.3 (8th Cir. 1997) (recognizing that constructive notice of harassment exists where "the harassment was obvious to everyone"); see also *Taylor v. Jones*, 653 F.2d 1193, 1199 (8th Cir. 1981) (affirming the district court's finding that "the atmosphere of racial discrimination and of prejudice was so pervasive and so long continuing . . . that the employer must have become conscious of it").

The Court noted that the district court considered the following six instances in determining whether constructive notice, prior to Murphy's complaint, should be imputed to the Department: (1) Baldwin's comment to Sgt. Wagner with regard to Weger's breast reduction surgery in February 1999; (2) Baldwin's remark to Sgt. Wagner and Lt. Baker with regard to Murphy's appearance in October 1999; (3) the incident witnessed by Det. Norman in the winter of 2001, which ended with Murphy stating that she could not "stand" Baldwin; (4) Officer Bonney's observation of Baldwin touching Murphy and attempting to tickle her after she told him to stop where Murphy eventually told Baldwin to leave her

alone; (5) Det. Lucas's observation of Baldwin touching Weger's shoulders and Weger rolling her eyes; and (6) the September 2002 incident where Officer Bonney and Sgt. Wagner saw Baldwin rubbing Murphy's shoulders and Murphy grimaced and turned away from Baldwin.

The district court found, as a matter of law, that these instances did not impute constructive notice to the Department that Baldwin was sexually harassing the Plaintiffs because they occurred over a substantial period of time and no single officer observed more than three incidents. Though the behavior attributed to Baldwin is reprehensible, the six instances observed by Department employees lack the requisite pervasiveness to support a finding that it "was obvious to everyone." *See Smith*, 109 F.3d at 1265 n.3. Therefore, as a matter of law, the Court held that constructive knowledge that Baldwin was sexually harassing the Plaintiffs cannot be imputed to the Department before it received actual notice via Murphy's complaint on November 5, 2002. The Court therefore held that the district court properly evaluated the promptness of the Department's efforts to correct Baldwin's harassment from that date.

Finally, the Plaintiffs contended that despite the fact that Baldwin's harassment ended the day of Murphy's complaint that the Department failed to satisfy the correction prong because its investigation of Murphy's complaint was flawed and its remedial action was harsh and skewed in favor of Baldwin. Generally, where the employer responds to a sexual harassment complaint in such a way as to promptly stop the sexual harassment, there is no basis for finding employer's postcomplaint actions not sufficiently corrective.

The Plaintiffs pointed to a number of defects in Wickenhauser's investigation, which

were addressed by the district court, to establish the unreasonableness of the Department's corrective actions. As the district court stated, "Wickenhauser found against the weight of the evidence, that Baldwin did not harass Murphy and Weger. In addition, he dealt harshly with witnesses who buttressed Plaintiffs['] claims, advising them that Baldwin could sue them for slander." Furthermore, Wickenhauser compromised the confidential nature of the investigation by relaying the content of the interviewees' statements to Baldwin. While the district court correctly characterized these "flaws" as "significant," they do not show that the Department failed to fulfill its duty under the correction prong, which seeks to ensure that once employers are alerted to harassment they act promptly to bring it to an end, because Baldwin's harassment undisputedly stopped the day that Murphy reported it. Thus, the Court held that the flaws in the Chief's investigation do not create a genuine issue of fact with regard to the correction prong.

Plaintiffs also contended that the Department's postcomplaint actions do not satisfy the correction prong because they were harsh and skewed in Baldwin's favor. However, "[i]f an employer has . . . notice of harassment but takes immediate and appropriate corrective action, the employer is not liable for the harassment." *Watson*, 324 F.3d at 1261. The Court held that here, as their previous analysis established, the Department had notice of Baldwin's harassment on November 5, 2002. When Chief Wickenhauser became aware of Murphy's complaint the following day, he took immediate action to discuss the claims with Murphy, investigate them, and distance Baldwin from Plaintiffs by temporarily relieving him of his supervisory duties for the communications officers and instructing him not to enter the communications area unless in the company of another supervisor

and for a work related purpose. Moreover, at the conclusion of investigation, Wickenhauser permanently reassigned Baldwin so that he was no longer Plaintiffs' uniformed supervisor. See *McCurdy v. Ark. State Police*, 375 F.3d 762, 771 (8th Cir.), *cert denied*, 543 U.S. 1121 (2005) (finding that employer took proper remedial action where it "immediately . . . insulate[d] [the alleged victim] from further offensive conduct"). Most significant, Baldwin's harassment ended the day the Department received notice of it.

Therefore the Court held there was no genuine issue of fact with regard to the timeliness and adequacy of the Department's corrective actions. Thus, the Court held that the district court correctly found that the City of Ladue acted reasonably to prevent and promptly correct sexually harassing behavior such that it has satisfied the first element of the *Ellerth-Faragher* affirmative defense as a matter of law.

Plaintiffs also contended that the district court erred in finding that, as a matter of law, the Plaintiffs unreasonably delayed reporting Baldwin's harassment. The Court noted that In order to satisfy the second element of the *Ellerth-Faragher* affirmative defense, the Department must show that "the [Plaintiffs] unreasonably failed to take advantage of any preventative or corrective opportunities provided by the [Department] or to avoid harm otherwise." Though "proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Ellerth*, 524 U.S. at 765, 118 S.Ct. 2257; *Faragher*, 524 U.S. at 807-08, 118 S.Ct.

2275. The Court noted there was no brightline rule as to when a failure to file a complaint becomes unreasonable, but the Court has previously found four months delay in invoking an employer's grievance procedure unreasonable. See *Williams*, 407 F.3d at 976-77.

The Court further noted that Plaintiffs admitted they knew the Department's antiharassment policy was in effect at the inception of Baldwin's harassment and that they were to invoke the Department's complaint procedure the first time they were harassed. However, Murphy did not report the harassment for over a year, and Weger only did so when directly questioned about Baldwin's conduct toward her during Chief Wickenhauser's investigation. Therefore, the Court held that absent some credible basis for Plaintiffs' admitted year long delay in reporting Baldwin's harassment, the City of Ladue has established the second element of the affirmative defense.

Plaintiffs contended that their delay was not unreasonable in light of their credible fears of retaliation and their belief that they would not receive a fair investigation due to Baldwin's and Wickenhauser's close relationship. The Court, while recognizing the enormous difficulties involved in lodging complaints about discrimination in the workplace, including sexual harassment, noted that the complaint mechanism, after all, can be used to address threats of retaliation as well as harassment.

The Court held that because the record is devoid of any threat by any Department employee, Plaintiffs' fear of retaliation is not credible and, thus, does not excuse their year long delay in reporting Baldwin's harassment. Furthermore, the Court held that the reasonableness of Plaintiffs' fears of retaliation is further called into question because the Department's antiharassment

policy contained an antiretaliation provision. Additionally, the Court held that Plaintiffs' concerns that they would not receive a fair investigation of their complaint due to Chief Wickenhauser's relationship with Baldwin are insufficient to excuse their delay. The Court therefore held that Plaintiffs' unreasonably delayed reporting Baldwin's harassment, satisfying the second element of the affirmative defense as a matter of law. The Court therefore affirmed the judgment of the district court that the City of Ladue was entitled to the *Ellerth-Faragher* affirmative defense as a matter of law.

The Plaintiffs also contend the district court erred in finding that they had failed to make out a prima facie case of retaliation, specifically, that they did not establish an adverse employment action in light of an intervening Supreme Court case, *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. ___, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). The Court noted that in addition to proscribing sexual harassment in the workplace, Title VII prohibits retaliation against employees who allege, or participate in an investigation or proceeding alleging, a violation of Title VII by his or her employer. To make out a prima facie case of retaliation, Plaintiffs must show: (1) they engaged in protected conduct; (2) reasonable employees would have found the challenged retaliatory action materially adverse; and (3) the materially adverse action was causally linked to the protected conduct. *See Burlington N.*, 126 S.Ct. at 2415.

Plaintiffs challenged a number of the Department's post-complaint activities as materially adverse actions, including: (1) isolating them from their coworkers through Chief Wickenhauser's directives; (2) supervisor Allison "papering" their personnel files; (3) conducting performance evaluations of Plaintiffs for the first time; (4) ostracizing Plaintiffs; (5) failing to

provide Murphy compensatory time equal to other communication officers; (6) failing to provide equitable overtime to Weger; and (7) removing Weger from her position as a training officer.

On these arguments, the Court first held that Chief Wickenhauser's directives were not materially adverse because they were issued to the Department as a whole, resulted in only minor changes in workplace procedure, and impacted the Plaintiffs in the same way as all other communications officers. Though the Plaintiffs contended that the directives were designed to isolate them from their co-workers, the directives did not, in any way, single out the Plaintiffs.

Second, the Court held that supervisor Allison's increased note taking with regard to Plaintiffs' work activities does not satisfy *Burlington Northern's* materially adverse standard where the notes were largely positive or neutral and Plaintiffs failed to raise any allegations as to how the inclusion of Allison's notes in their personnel files had any negative impact on their lives. Absent such an allegation, the Court held they were unable to characterize this as an *adverse* action, let alone a materially adverse one. The Court further held that Plaintiffs' reliance on *Kim v. Nash Finch Co.*, 123 F.3d 1046 (8th Cir. 1997) is misplaced. There, the Eighth Circuit Court used the term "papering" to refer to the employer's practice of filling the plaintiff-employee's personnel file with negative reports, some of which "involved petty and insignificant incidents," as well as two written reprimands. *Id.* at 1061. However, the Court held that Allison's increased note taking activities do not approach the kind of retaliatory activity in *Kim* because the Plaintiffs do not allege that the "papering" of their files included even a single reprimand and, in fact, it largely consisted of positive or neutral reports.

Third, addressing the requirement that Plaintiffs received performance evaluations, for the first time, following their harassment complaint was not materially adverse because, again, this policy applied to, and affected all, communications officers equally. Furthermore, the evaluations were not adverse where the Plaintiffs received primarily "superior" or "above standard" ratings, and neither asserted any negative impact from these evaluations. The Court also noted that the first performance evaluation of either plaintiff took place on March 5, 2003, four months after Murphy's complaint.

On the fourth issue, the Court held that the fact that Plaintiffs felt ostracized by Chief Wickenhauser and other officers falls short of *Burlington Northern's* materially adverse standard because Plaintiffs did not suffer significant harm. The only specific instances of ostracism alleged by the Plaintiffs is Murphy's exclusion from several of the male police officers' "happy hours," which she had been invited to prior to her complaint; however, ostracism of this sort was specifically addressed and found lacking by the *Burlington Northern* Court. There, the Court instructed that "[a] supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination." The Court noted that the "petty slights and snubs" Murphy experienced in being excluded from after work social activities, without facts showing how this exclusion "materially and adversely affected [her] life such that a reasonable employee in her shoes would be dissuaded from complaining," are akin to the sort of trivial harms that do not rise to the level of retaliation. The Court further opined that,

"we cannot allow Plaintiffs' subjective feelings about being ostracized to steer our analysis because to do so would result in "the uncertainties and unfair discrepancies" the Supreme Court expressly sought to avoid in *Burlington Northern*. See 126 S.Ct. at 2415."

Finally, with regard to Plaintiffs' three remaining allegations, the Court held they did not need to examine whether they are sufficiently adverse to satisfy *Burlington Northern* because they all fail for lack of evidentiary support. The Department's alleged failure to provide Murphy with equitable compensatory time and Weger with equitable overtime as well as its alleged removal of Weger from her position as a training officer amount to nothing more than unsupported, conclusory allegations, which are insufficient to defeat a motion for summary judgment. The Court held that in short, Plaintiffs did not demonstrate a genuine issue of fact where they produced any evidence that the Department actually engaged in these acts.

In sum, the Eighth Circuit concluded that the City of Ladue established the *Ellerth-Faragher* affirmative defense as a matter of law and that Plaintiffs failed to demonstrate a prima facie case of retaliation. Therefore, the Eighth U.S. Circuit Court of Appeals affirmed the judgment of the district court, dismissing Plaintiffs' hostile work environment sexual harassment and retaliation claims against the City of Ladue.

Note from City Attorney: The City of Springdale's unlawful harassment policy is set out in Policy 3.4 of the Personnel and Procedures Manual. Like the policy in the City of Ladue, the City of Springdale's policy prohibits any unlawful or job related retaliation against the employee who has either instigated or cooperated in the investigation of alleged harassment.

Case: This case was decided by the Eighth U.S. Circuit Court of Appeals on September 13, 2007. The case cite is *Weger v. City of Ladue*, 500 F.3d 710 (8th Cir. 2007).

Jeff Harper
City Attorney

**Arkansas Attorney General’s
Opinion Concerning Whether a
Civil Service Commissioner
Must Live Within the City Three
Years Immediately Preceding
Their Appointment**

We previously had an issue come up in regard to residency requirements of civil service commissioners within the City of Springdale, and whether or not they have to be a resident of the City for three years immediately preceding their appointment. This question was answered in Arkansas Attorney General Opinion No. 2007-063, which was addressed to the Honorable Eric Harris, State Representative, who requested the opinion on the City’s behalf.

The questions related to Ark. Code Ann. § 14-51-202(a) and the question posed was whether a civil service commissioner is required to be a resident of the City for more than three years immediately preceding their appointment, or must they have resided in the City for a total of more than three years at any point prior to their appointment. The facts posed concerned a situation where a person lived in Springdale most of their life, moved away, returned to Springdale, and, after residing there for two years, applied for appointment on the Civil Service Commission.

The Attorney General noted that although the statute would benefit from legislative clarification, he believed a review in court would in all likelihood construe the statute as having removed by amendment what had been a previous requirement that civil service commissioners be residents of the City for more than three years immediately preceding their appointment. The Attorney General opined that although the issue is not entirely free from doubt, under Ark. Code Ann. § 14-51-202(a), as amended, he believed a commissioner need only have resided in the city he serves for more than three years at any point prior to his appointment.

The Attorney General noted in the opinion that a 1993 amendment to the law dropped the word “next” from the phrase “next preceding” and therefore, in his opinion, it must be read as relaxing the previous residency requirement, notwithstanding the fact that the legislature never expressly stated an intention to do so and that the Code Revision Commission, in summarizing the substance of the 1993 amendment, apparently consider the dropping of the term “next” from the statute too insignificant to warrant mention. The Attorney General did opine that although he believed accepted rules of construction dictate the reading of the statute offered in the opinion, legislative clarification nevertheless is warranted.

Note from City Attorney: The Arkansas Attorney General’s Opinion is numbered 2007-063, issued on June 18, 2007. The opinion was prepared by Assistant Attorney General Jack Druff, and was approved by the Arkansas Attorney General, Dustin McDaniel.

Jeff Harper
City Attorney

Notice Required Before Adoption of Technical Codes by the City Council

Ark. Code Ann. § 14-55-207 sets out the procedure for adoption of technical codes by reference. This statute authorizes every municipality in the State of Arkansas to pass a municipal ordinance to adopt by reference technical codes, regulations, or standards, without setting forth the provisions of the code or parts thereof, if three copies of the code, or the pertinent parts thereof, and any related documents are filed in the office of the city clerk for inspection and view by the public prior to the passage of the ordinance.

Under Ark. Code Ann. § 14-55-207(b), technical codes is defined as any building, zoning, health, electrical, and plumbing codes, and the terms "regulations" means any criminal code of the State of Arkansas. Any city passing a code by reference as provided for in Ark. Code Ann. § 14-55-207(c), has the duty to give a notice to the public, by publication in a paper of general circulation within the municipality, stating that copies of the code, or the pertinent parts thereof, and the related documents are open to public examination prior to the passage of the ordinance adopting the code.

All department heads who are asking the Springdale City Council to adopt technical codes, need to contact the City Clerk within a reasonable time before you plan on bringing the technical code to the Council for approval. The City Clerk can then give the required notice and have the three copies of the code on file in advance of the Council reviewing the ordinance.

Jeff Harper
City Attorney

2007 Graffiti Statistics Released

Graffiti Reports and Prosecution

Sgt. Billy Turnbough, head of the Springdale Nuisance Abatement Partnership (S.N.A.P.), recently released information pertaining to incidents of graffiti in the City of Springdale for 2007.

The number of reported graffiti incidents in 2007 increased dramatically over 2006. In 2007, there were 454 incidents or reports of graffiti in the City of Springdale, compared to only 220 in 2006. This is an increase of 106%. As a result, the City has incurred costs in removing graffiti from City property. In 2007, the City incurred the following costs to remove, cover up, or replace graffiti damage to City property:

- A. Cover up with paint under bridges, and drainage ditches.
 - 1. 288 man hours at \$31.50 each = \$9,072.00
 - 2. 50 gallons of paint at \$17.60 each = \$880.00
- B. Sign replacement due to graffiti.
 - 1. 31 various traffic signs = \$1,410.00
 - 2. 39 man hours at \$65.00 each = \$2,535.00
- C. Miscellaneous (traffic boxes, asphalt grinding, sidewalks etc.)
 - 1. Paint remover and graffiti wipes = \$220.00
 - 2. 25 man hours at \$65.00 ea = \$1,625.00

Total for 2007 = \$ 15,742.00

Given the dramatic increase of the incidents of graffiti, and its cost to the City, an added emphasis has been placed on the arrest and conviction of those responsible for these acts of vandalism. In 2007, over 25 different

individuals were arrested for graffiti. It is the standard practice of the Springdale City Attorney's Office to request the maximum fine and maximum jail time for graffiti offenders, and several individuals have been convicted and sentenced to one (1) year in jail and a \$1,000 fine. In addition, these offenders are required to pay victim restitution for the damage they caused. Many of the offenders arrested are juveniles, and the Washington County Juvenile Court has also been issuing the maximum sentence for these arrests.

The City continues its fight against graffiti in 2008, and 3 individuals have already been convicted in Springdale District Court for graffiti, and have each been sentenced to one (1) year in jail and have each been ordered to pay a \$1,000 fine.

Victim Assistance

In addition to prosecuting offenders through the criminal process, the S.N.A.P. Team has also taken non-violent prisoners and community service workers out to clean and remove graffiti all over the city. During 2007, these prisoners and community service workers provided a total of 285 man hours of removing graffiti, all free of charge to the City.

The S.N.A.P. Team partnered Spectrum Paint Store on East Robinson. During 2007, the Spectrum Paint Store donated 300 gallons of paint to help with the graffiti clean-up process. In some cases, they actually mixed the paint to match as needed, which greatly assisted the elderly and disabled.

In addition, the S.N.A.P. Team partnered with the Northwest Arkansas Hispanic Council, who donated up to 50 people at a time to do the physical work of painting and removing graffiti. They also donated

equipment which was essential to the graffiti removal process.

Also, during 2007, the S.N.A.P. Team partnered with area businesses in the fight against graffiti. Specifically, National Home Center donated graffiti remover to use on brick surfaces. Lowe's of Springdale donated graffiti remover, paint rollers, and paint brushes. Meek's Lumber also donated paint brushes. All of these resources together have been able to assist victims in the City who had graffiti painted on their homes, fences, buildings, as well as the City's ditches and bridges.

Sgt. Turnbough correctly points out that an important aspect of this graffiti removal process is its benefit to the taxpayers. In 2007, the total cost to taxpayers for graffiti removal by the S.N.A.P. program was \$22.00 for gas in a power washer, and Sgt. Turnbough's salary for supervising the workers removing the graffiti.

There is little doubt that 2008 will see the same level of cooperation between the City, community organizations, and area businesses regarding graffiti removal.

Proactive Stance

The S.N.A.P. Team has been very proactive in pursuing graffiti violations. In addition, the Springdale Police Department has done an outstanding job of assisting S.N.A.P. with unmarked police cars and additional foot patrols in certain areas where graffiti has been a problem. This police presence sends the message that the Springdale Police Department and S.N.A.P. are actively pursuing graffiti offenses, and, hopefully, will act as a deterrent against future incidents of graffiti.

During 2007, the S.N.A.P. Team also conducted Crime Prevention Through

Environmental Design (CPTED) security evaluations for graffiti victims to help make certain areas more safe, and to help reduce the likelihood that graffiti would be repeated at that particular location. Some businesses have already installed cameras and others have installed dummy cameras to try to prevent or discourage graffiti. S.N.A.P. has also used the various media outlets in Northwest Arkansas to get the word out on graffiti arrests and convictions.

Looking Ahead

2007 was obviously a turning point year for the City of Springdale with regards to graffiti. The incidents of graffiti forced the City to adapt its manpower and policies from not only prosecuting graffiti, but instituting measures which would deter future graffiti incidents. S.N.A.P. is committed to making sure that these measures are further implemented and utilized in 2008. Graffiti is a problem that affects the appearance of the city, affects business growth and tax revenue, and leads to additional crime.

Anyone interested in obtaining more information on S.N.A.P., or anyone interested in assisting in the graffiti removal program, can contact Sgt. Billy Turnbough at (479) 750-8139 or at his email bturnbough@springdaleark.org.

Ernest Cate
Senior Deputy City Attorney

A Variety of Issues Involving City Council Matters

The following issues involve matters on voting and other procedural issues of the City Council. I have put the issues in

question and answer form so they will be easier to read.

Question No. 1: How many different times does an ordinance have to be read in order to pass?

Answer: All ordinances must be distinctly read on three different days unless two-thirds of the members composing the municipal council shall dispense with the rule (A.C.A. §14-55-202). It takes six votes on the Springdale City Council in order to dispense with this rule.

Question No. 2: How many votes does it take to pass an ordinance or resolution?

Answer: It takes a concurrence of a majority of a whole number of members elected to the Council (A.C.A. §14-55-203). In Springdale, this means it takes five votes to pass an ordinance or resolution.

Question No. 3: Can the Mayor be one of the six votes to dispense with the rules under *Question No. 1*, and can the Mayor be one of the five votes it takes to pass an ordinance as described in *Question No. 2*?

Answer: The Mayor shall have a vote when his vote is needed to pass any ordinance, by-law, resolution, order or motion (A.C.A. §14-43-501(b)(1)(B)). In *Question No. 1*, a motion to suspend the rules is involved, and in *Question No. 2*, a passage of an ordinance is involved, so the Mayor can vote in both cases. In *Question No. 1*, his vote can make the sixth vote necessary to suspend the rules, and in *Question No. 2*, his vote can be the fifth vote necessary to pass the ordinance.

The Mayor’s vote cannot be counted, however, in the passage of an emergency clause, because Amendment 7 to the Arkansas Constitution requires “two-thirds vote of all the members elected to the City Council” in order for an emergency clause to pass. An emergency clause means the ordinance goes into effect immediately.

Question No. 4: Can the Mayor cast the deciding vote on issues involving appropriations of money?

Answer: Yes. The Arkansas Supreme Court has held that the Mayor can vote to pass an ordinance, even if the ordinance involves an appropriation of money for the City’s fiscal year. Gibson v. City of Trumann, 311 Ark. 561 (1993).

Note from City Attorney: About the only time the Mayor cannot vote to pass a motion, ordinance or resolution is in the passage of an emergency clause or when the vote is one to repeal an initiated ordinance (an ordinance initiated by the people through petition under Amendment 7 of the Arkansas Constitution). Any other time, the Mayor can cast the deciding vote to pass a motion, ordinance or resolution.

Question No. 5: Who can call a special meeting of the City Council?

Answer: The Mayor, OR any three City Council members. Reference: A.C.A. §14-43-502(b)(2)(B).

Question No. 6: If three members or the Mayor want to call a special meeting, how much notice do they have to give the press?

Answer: Two hours before such meeting takes place.

Question No. 7: A resolution or an ordinance is proposed at a City Council meeting, but one member of the City Council is absent. Four members vote in favor of the resolution or ordinance, and three Council members vote against the ordinance or resolution. The Mayor decides not to vote. Since the vote is 4 - 3, and there was a quorum, does it pass?

Answer: No. Under Arkansas law, for an ordinance or resolution to pass, it is required that a majority of the whole number of members elected vote to pass the resolution or ordinance. Since Springdale has eight Council members elected, this means there has to be five votes to pass a resolution or ordinance, regardless of how many Council members show up for the meeting. As noted above, the Mayor’s vote can be the fifth vote.

Question No. 8: Can the Mayor be counted in making up a quorum? For instance, four members of the City Council show up at a meeting, along with the Mayor. Does this constitute a quorum?

Answer: Yes. Under Act 354 of 2001, which amended A.C.A. §14-43-501(b), the Mayor of a first class city can have a vote to establish a quorum at any regular meeting of the City Council.

Note from City Attorney: Note that this is at a regular meeting of the City Council, and would not apply to a special meeting. Therefore, it would take 5 City Council members to have a quorum at a special called meeting, but only 4 plus the Mayor to

have a quorum at a regular City Council meeting.

Question No. 9: If a commission or board of the City knows that they are calling a meeting solely to discuss a personnel matter, which is allowed to be conducted in executive session, does the press have to be notified of the meeting?

Answer: Yes. The press has to be notified of the meeting, even though the sole purpose of calling the meeting is so the board can go into executive session to discuss an authorized personnel matter. Before voting to go into executive session, you have to call the open public meeting to order, establish that a quorum is present, and then take up the motion to go into executive session.

Question No. 10: When are executive sessions allowed?

Answer: Only to discuss the employment, appointment, promotion, demotion, disciplining or resignation of a specific public employee.

Question No. 11: If the Council or a board goes into executive session to discuss the employment, appointment, promotion, demotion, disciplining or resignation of a specific employee, do we have to give the name of the employee involved before we go into executive session?

Answer: No. However, Arkansas did pass a new law in the 1999 Legislative Session (Act 1589 of 1999) and this law adds another requirement to governing bodies that go into executive session. Under Act 1589 of 1999, "the specific purpose of the

executive session shall be announced in public before going into executive session." By using the words "specific purpose," the Legislature made plain that the announcement must reflect why the governing body is going into executive session. For instance, a member of the governing body can make a motion as follows, "I make a motion we go into executive session to consider the resignation (or whatever authorized reason) of an employee." This announcement must be made before the governing body goes into executive session.

Note from City Attorney: An earlier version of Act 1589 would have required the governing body to disclose the name of the particular employee, but this provision did not pass. It seems the purpose of an executive session would be defeated if you had to give the name of the employee involved.

One thing also to remember is that you must be talking about a specific employee or employees, not a general class. For instance, the Council could not call an executive session for the purpose of discussing whether all public safety employees should receive a bigger raise than normal. This is a policy issue rather than a personnel issue, and such policy issues shall be discussed in public.

Question No. 12: Who can go into executive session with the governing body?

Answer: Only the person holding the top administrative position in the public agency, department, or office involved, the immediate supervisor of the employee involved, as well as the employee, when so requested by the governing body, board, commission or other public body holding the

executive session (A.C.A. §25-19-106(c)(2)(A)). All these people mentioned are allowed to be in the executive session, but only if the governing body, board or commission wants them in the executive session.

Question No. 13: When we come out of executive session, do we have to tell what we did?

Answer: Only if a resolution, ordinance, rule, regulation or motion is to be considered. If no action is taken, then it is not necessary for such a resolution, ordinance, rule, regulation or motion to be brought up after the executive session.

However, under the law, no resolution, ordinance, rule, contract, regulation or motion is valid unless there is a public vote. (A.C.A. §25-19-106(c)(4)(A))

Question No. 14: Does the Arkansas Freedom of Information Act apply to committees and sub-committees of governing bodies?

Answer: Yes, the press has to be notified of committee meetings, just like they are notified of meetings by the whole Council, board or commission.

Jeff Harper
City Attorney



The M.A.P. is a publication of the Springdale City Attorney's Office. The purpose of this publication is to educate Springdale city officials and city administration on laws, court decisions and other legal information which may affect their positions with the City.

