

## Eleventh Circuit Applies Recent Changes in Sexual Harassment Law

The Eleventh Circuit Court of Appeals, the federal circuit court with jurisdiction over appeals from Alabama federal district courts, has decided a sexual harassment case that illustrates the changes made by the United States Supreme Court in recent years in this area of law. In this case, the Eleventh Circuit ruled that Tuskegee University was not liable with respect to a claim of sexual harassment and retaliation made by its employee, Patricia Arnold. *Arnold v. Tuskegee*, No. 06-11156 (11th Cir. Dec. 19, 2006)

Ms. Arnold originally was hired by Tuskegee in 1989. Shortly thereafter, she used Tuskegee's sexual harassment policy and procedures to file a complaint against her supervisor. As a result of the complaint, she was transferred to another department. The fact that Arnold was familiar with the established procedure for complaining about sexual harassment at Tuskegee would turn out to be important to the Eleventh Circuit.

Arnold was laid off in 1997 due to an unrelated budgetary problem. She was rehired by Tuskegee in December of 1999, and was soon subjected to sexual harassment by her supervisor. In March and April of 2000, she had sexual relations with her supervisor at his home. In late April, she ended the sexual relationship and applied for a transfer to a higher paying position. As a part of the processing of her transfer application, Arnold met with the Vice President for Human Resources. During the course of this meeting, she made no mention of her supervisor's sexual harassment. This failure to timely report the sexual harassment was a significant factor in the Eleventh Circuit's ultimate decision against her.

Finally, in October of 2000, Arnold did, in fact, report the sexual harassment to the Vice President for Human Resources, who initiated an investigation the next day. The supervisor admitted the sexual relationship, although he maintained it was consensual. As a result of the investigation, Arnold was moved to a different supervisor. The original supervisor was told to have minimal contact with her and warned not to retaliate against her in any way. Arnold was not satisfied with the outcome and filed a charge of sexual harassment with the Equal Employment Opportunity Commission. By the spring of 2003, Arnold was having job performance problems with her latest supervisor. She was first suspended and then terminated by Tuskegee in April of 2003. She finally filed suit in federal district court.

Arnold claimed both *quid pro quo* and hostile environment sexual harassment, along with retaliation. The district court granted Tuskegee's motion for summary judgment, and Arnold appealed to the Eleventh Circuit Court of Appeals. The appellate Court first noted that the United States Supreme Court had refined the law in this area, with an attendant change in terminology, in the companion landmark cases of *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). The Supreme Court in *Faragher/Ellerth* held that if a plaintiff-employee establishes the occurrence, in fact, of sexual harassment, a court must next determine whether the employee suffered an adverse "tangible employment action," such as termination, demotion, reassignment, loss of benefits, etc., in connection with that harassment. In a case in which adverse tangible employment action is present, the defendant-employer is absolutely liable. This type of sexual harassment has

traditionally been known as “*quid pro quo*” (“something for something” or “one thing for another”).

If the plaintiff-employee has not suffered an adverse tangible employment action, the *Faragher/Ellerth* Court held that employer liability for a supervisor’s conduct requires the employee to prove harassment so severe and pervasive as to effectively change the terms and conditions of employment. This type of sexual harassment has generally been referred to as a “hostile environment” claim. *Faragher/Ellerth* did offer some good news for employers who have been proactive in dealing with this type of harassment claim. An employer has a good defense to a hostile environment claim if the employer has exercised reasonable care to prevent and correct sexually harassing behavior and the employee failed to take advantage of available preventive and corrective opportunities. The Supreme Court offered some guidance as to how to establish this defense. An employer can show “reasonable care to prevent and correct sexually harassing behavior” by proving that it adopted a comprehensive sexual harassment policy, that the policy was widely disseminated in the workforce, and that it was consistently applied.

Finally, the Eleventh Circuit noted that, in another Supreme Court case, *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006), the high court had broadened the basis for an employee’s retaliation claim. Retaliation, under *Burlington*, is no longer limited to adverse employment actions. It now includes any action that is “materially adverse,” in the sense that it “well might have ‘dissuaded a reasonable employee from making or supporting a charge of discrimination.’” *Id.* at 2415.

Since Arnold was appealing the lower court’s grant of summary judgment in favor of Tuskegee, the Eleventh Circuit was obligated to resolve all factual disputes in her favor. The Court reasoned that Arnold did not have an adverse tangible employment action (*quid pro quo*) claim. Though she did suffer adverse employment action (when she was suspended and then fired), the alleged harasser was not the decision maker. She was therefore obligated to present evidence showing a causal connection between the harassment and the subsequent adverse employment actions. She failed to do this. Over two years had elapsed between the time of the harassment and the time of the later adverse actions, and, in view of this extended period of time, Arnold was not entitled to a presumption of causal connection based upon temporal proximity.

The Court did not fully consider whether Arnold had a viable hostile environment claim, because it was convinced that Tuskegee was entitled to the application of the *Faragher/Ellerth* affirmative defense. It was undisputed that Tuskegee had a comprehensive sexual harassment policy and that it was widely disseminated, and consistently applied. The Court noted that Arnold obviously knew about the policy since she had filed an earlier (1989) complaint of sexual harassment under the policy. Furthermore, the Court held that Arnold’s delay in reporting the 1999-2000 harassment constituted an unreasonable failure to avoid the harm under the *Faragher/Ellerth* doctrine. Finally, the Court noted that Tuskegee had articulated several legitimate, non-discriminatory reasons for suspending and terminating Arnold and that she had offered no evidence showing that the proffered reasons were pretextual.

This case presents several important lessons. For an employer, it is not sufficient to merely adopt a comprehensive sexual harassment policy. A regular program of training is necessary to ensure that the policy is widely communicated and understood. Additionally, the employer should act promptly and decisively when sexual harassment is reported. For an employee-victim, significant delays in reporting the harassment may prove to be disadvantageous if a lawsuit is subsequently filed. And, as a practical matter, while office romances are not illegal, they have a great potential for ending badly.