

December 14, 2015

Failure to allow employee to rescind resignation could be retaliation

By Michael R. Lied

Michael R. Lied, of Howard & Howard Attorneys PLLC, has practiced employment, labor and immigration law for more than 30 years. A frequent author and lecturer on these subjects, he is former chair of the Illinois State Bar Federal Civil Practice Section Council and Employment Law Section Council. He can be reached at mlied@howardandhoward.com and 309-999-6311.

Tyrikia Porter first worked at the Houma Terrebonne Housing Authority in Houma, La., from February 2001 to January 2005. During that time, her duties included answering phones and receiving housing applications.

She left briefly to work in a chemistry lab, but Jan Yakupzack asked Porter to return to the authority in July 2005 as a "housing manager 1" — a position with greater responsibilities. In 2010, the authority promoted Porter to "housing manager 2," a promotion that granted her still more supervisory authority.

In April 2006, the authority hired Wayne Thibodeaux as executive director. Within a year, his behavior was making Porter uncomfortable. He asked her to lunch and asked if she would attend training sessions with him involving overnight travel. He made comments on Porter's appearance, clothes and weight, making some comment more or less on a daily basis.

His comments included statements that she "must have been thinking about him as [she] got dressed." He would even single her out in meetings to make these comments.

Thibodeaux also continually stared at her. When the entire office exchanged "kiddy" Valentine's Day cards, he displayed the one he received from Porter (but not those received from other co-workers) in his office. When leaving voice mails, Thibodeaux twice commented on her "sexy" voice.

In about 2011, Thibodeaux stated that Porter was fornicating with her fiance Troy Johnson and that "fornication" caused her to miscarry in 2009. Thibodeaux then blocked his office door to prevent her leaving until she asked him to move several times.

Porter tried to avoid Thibodeaux and to adjust her behavior to stave off his comments. Throughout her time at the authority, Yakupzack was her direct supervisor. Porter reported some of Thibodeaux's conduct to her, but did not file a formal grievance.

Porter tendered her resignation on June 6, 2012, to take effect in the summer on Aug. 1. She was aware other employees had been allowed to rescind resignations, but at the time of her resignation, Porter did intend to actually quit. On July 25, she requested that her resignation be put off so that she could complete projects, train staff and assist in inspections. Thibodeaux approved the request the same day, thus extending her resignation to Sept. 1.

In connection with an unrelated matter, Porter's fiance and fellow authority employee, Johnson, was scheduled to testify at a grievance hearing he initiated on or about July 12. Porter decided to also testify at the hearing about Thibodeaux's behavior toward her.

Before testifying, Porter was contacted by the authority's chairman, Allan Luke, who asked her if she planned to pursue any charges and asked her to consider rescinding her resignation. Porter said she would consider his request and would decide what to do about sexual harassment charges after testifying at the hearing on Johnson's grievance.

Porter testified about Thibodeaux's inappropriate conduct at the grievance hearing. As a result of the hearing, the authority board directed that Thibodeaux and his employees undergo sexual harassment training and ruled his behavior needed to improve.

In late August, Yakupzack also asked Porter to consider rescinding her resignation.

On Sept. 4., Porter wrote a letter stating that she had decided to rescind her resignation notice and remain an authority employee. She also requested — and Yakupzack granted — 52 hours of personal leave, beginning that same afternoon and continuing through the end of the following Tuesday.

Yakupzack forwarded the rescission letter to Thibodeaux, stating that she fully supported retaining Porter and that both she and Thibodeaux both knew that Porter was an asset to the authority.

Thibodeaux denied the request on Sept. 10. Thibodeaux stated that he had determined that Porter was not satisfied or happy being an authority employee. This was the only time an employee was separated from the authority against Yakupzack's advice. Porter and her supporters reached out to the board to alter the decision but did not succeed.

Porter filed suit, asserting Title VII and state law claims for retaliatory discharge and sexual harassment/hostile work environment. The authority moved for summary judgment, which the court granted over Porter's objection. Porter appealed.

To establish a prima facie retaliation case, Porter had to show: (1) she was engaged in protected activity; (2) she was subjected to an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse employment action.

There was no dispute about the first element since Porter's testimony was a protected activity. One contested issue was whether or not the authority's refusal to accept Porter's rescission of her resignation constituted an adverse employment action.

Burlington Northern v. White, 548 U.S. 53 (2006) established a less demanding standard for judging whether conduct is actionable as retaliation.

In light of *Burlington Northern*, the appeals court considered whether Porter experienced an adverse employment action. The U.S. District Court found that because Porter had offered her resignation prior to testifying at the grievance hearing, she suffered no adverse employment action.

As a general matter, it seemed unlikely that a reasonable worker would tender her resignation and plan to leave while nonetheless depending on her employer to accept rescission of her resignation. The *Burlington Northern* standard, however, required that the court consider the context.

In this case, circumstances suggested that a reasonable employee in Porter's shoes might have legitimately expected that her rescission of resignation would be accepted.

First, prior to her testimony, she was asked to consider rescinding her resignation by the authority board chairman. Her direct supervisor, Yakupzack, also asked her to consider rescission after her testimony and spoke with her mother and pastor.

While neither of these individuals had authority to make the decision themselves, their requests may have led Porter to believe she was at liberty to rescind, especially considered in light most favorable to Porter.

Second, her request to stay on a month longer than her initial effective resignation date was immediately approved, plausibly creating an expectation that her resignation was still negotiable and not finalized.

Porter also had Yakupzack's support, which was especially significant in light of the fact that Thibodeaux's decision not to accept Porter's rescission was the only separation decision he ever made contrary to Yakupzack's advice.

Finally, Porter identified four individuals who had resigned their positions at the authority and then been allowed to rescind those resignations.

While an employee might not normally expect that she was entitled to rescind her resignation, in this particular context, a reasonable employee in Porter's shoes might have expected it. In light of the expectation, a fact-finder could determine that Porter was dissuaded from making a charge of sexual harassment if she knew it would destroy the chance that her rescission would be accepted.

Because rejecting an employee's rescission of resignation can sometimes constitute an adverse employment action, and Porter presented a substantial conflict of evidence on the question of whether the authority would have taken the action but for the protected activity, the district court's grant of summary judgment was reversed.

Porter v Houma Terrebonne Housing Authority Board Of Commissioners, F.3d , 2015 WL 7273321 (5th Cir. 2015)

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