Fifth Circuit Rules that Denial of Employee's Attempt to Rescind Resignation Can Be Unlawful Retaliation

Labor & Employment Law Update

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Last month, in *Porter v. Houma Terrebonne Housing Authority Board of Commissioners* ("HTHA"), the U.S. Court of Appeals for the Fifth Circuit ruled that a former employee's claim of unlawful retaliation based on complaints of sexual harassment should proceed to trial.

Such a ruling is not necessarily unusual, but what makes this one unique is the court held that an employer's refusal to let an employee rescind her resignation can be an "adverse employment action"—one of the three prima facie elements of a claim for unlawful retaliation under Title VII of the Civil Rights Act of 1964.

Tyrikia Porter, the employee at issue, tendered her resignation and before her last day of work, testified in a grievance hearing that she had been sexually harassed by the HTHA's executive director. Both prior to and after the hearing, HTHA management encouraged Porter to rescind her resignation. Shortly after her resignation date, Porter accepted that encouragement and sent the HTHA a letter asking to rescind her resignation. Porter's direct supervisor forwarded the letter to the Executive Director, with the supervisor's recommendation that Porter be allowed to come back to work. The Executive Director refused Porter's request.

Faced with this scenario, the court repeatedly stated that the "context" of the employer's refusal was absolutely critical in determining whether an adverse employment action occurred. That context, according to the court, showed that Porter might have legitimately expected that she would be allowed to rescind her resignation.

In reaching that conclusion, the court noted that several HTHA representatives actually asked Porter not to go through with her resignation, and that her direct supervisor recommended that the Executive Director accept the rescission. There was also evidence that the Executive Director had never before made a separation decision contrary to the direct supervisor's recommendation. The court also noted that Porter had already asked—and been allowed—to continue working for a month longer than her originally-planned resignation date.

With those facts in mind, the court ruled that it was both reasonable for Porter to believe she would be allowed to rescind her resignation, and that she might have been dissuaded from complaining of sexual harassment had she known it would affect whether or not she was allowed to rescind her resignation.

Employers should note that this decision does not change the fact that courts generally have **not** accepted refusals to rescind resignations as adverse employment actions for discrimination claims, as opposed to retaliation claims. But employers must also remember that courts have, for many years, ruled that the definition of an adverse employment action is much broader in retaliation claims, as compared to discrimination claims. Bearing all of that in mind, the Fifth Circuit's ruling is a clear warning to employers across the country that mixed signals from management and deviations from prior practices—whether in the context of a resignation or any other employment action—may give rise to unlawful retaliation claims.