
**Federal Court Report**

**Employee’s Request for Severance Was Not a Voluntary Resignation**

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An employee's request for severance after complaining of sexual harassment and retaliation was not an offer to resign that could be accepted by the employer, ruled the 1st U.S. Circuit Court of Appeals, reversing in part a lower court's grant of summary judgment to the employer.

The plaintiff was employed as a senior manager at an online home furnishings company when, in August 2019, she e-mailed her former manager about alleged inappropriate physical and verbal conduct toward her by a co-worker. After the manager forwarded her e-mail complaint to the company's human resource division, an HR employee undertook an investigation of her complaint. After completing that investigation, the HR employee told the plaintiff on Sept. 16 that her allegations had not been substantiated.

The next day, the plaintiff reported to the HR employee that her supervisor had threatened to take her off his team, allegedly in retaliation for her prior complaint of harassment. On Sept. 19, the HR employee informed the plaintiff by phone that her allegation of retaliation had also not been substantiated.

During their Sept. 19 call, the plaintiff told the HR employee that she was "very interest[ed]" in having the HR department "put together a compelling severance package." The HR employee responded that he could not commit to anything "or even talk about whether that's even an option," but that he would "certainly present her request."

On Sept. 20, the plaintiff took a paid day off, and she was scheduled to take a business trip on Sept. 24. But before that could happen, on Monday, Sept. 23, the HR employee sent the plaintiff an e-mail attaching a separation agreement and indicating that the company "had accepted her resignation" offer from Sept. 19.

In her lawsuit, the plaintiff asserted three claims arising under Title VII of the Civil Rights Act of 1964 and parallel state law: that she was subjected to unlawful sexual harassment, that she was terminated as a result of her gender, and that she was terminated in retaliation for her complaints.

The lower court granted the employer's motion for summary judgment on all three claims.

The employer defended against the two termination claims on the ground that it could not be held liable for terminating the plaintiff because she had voluntarily resigned when she requested a severance package, and the lower court agreed.

The appeals court was not so persuaded. Considering at length the transcript of the call with the HR employee, which the plaintiff had recorded, the 1st Circuit not only disagreed with the employer's interpretation of events, but found that the employer's claim to have reasonably believed the plaintiff to have voluntarily resigned was "implausible."

The appeals court acknowledged that the plaintiff had expressed concerns about working for the company going forward, and had stated that she thought a severance would be "the best path forward" for her, but the court denied that such comments amounted to a resignation that the employer could accept.

The appeals court pointed to the fact that the plaintiff requested that the employer make her a severance offer, after which she contemplated having her lawyer work with the employer, finding that she had not made an offer to resign that the employer could accept by making a severance offer it unilaterally deemed sufficient.

Because it determined that the plaintiff had not voluntarily resigned, the 1st Circuit reversed the grant of summary judgment to the employer on both the retaliation and the gender discrimination claims, but let stand the lower court's ruling that the plaintiff had failed to demonstrate any basis for imputing to the employer liability for the co-worker harassment she had alleged.

*Forsythe v. Wayfair Inc*., 1st Cir., No. 21-1095 (Feb. 28, 2022).

**Takeaway:** Employees raising workplace complaints often express concern about their ability to continue in their current employment, and sometimes suggest that they depart with severance. An employer must take great care in responding to any such requests, particularly those following a workplace complaint. While circumstances may indeed recommend the parting of ways, an employer should continue to treat an employee who requests severance as a worker in good standing, unless and until the employee announces an unequivocal resignation or the parties have entered into a separation agreement.

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