
Coates' Canons Blog: Bad Employee? Suggest He Resign?

By Robert Joyce

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This guy is a bad employee. His work is poor. His conduct around other people is objectionable. You (that is, the city or the county or other public employer) would be better off without him.

You could just fire him. Grounds for dismissal seem reasonably clear. But firing someone is so distasteful. And it can be time consuming and awkward. Will there be a hearing? And maybe an appeal? No, you think, it would be better not just for you but for him, too, if he would simply resign. After all, who wants a record of dismissal in their personnel file?

Why not call him into your office and try to talk him into it?

Whoa. That very kind of thinking recently cost a North Carolina school system \$680,000.

Here's how it happened—viewing the evidence as the jury must have. Mr. L was a tenured teacher with a good record. At the beginning of a new school year, at a new school, several female students complained that Mr. L had inappropriately touched them. The principal talked to Mr. L about it and Mr. L apologized to the girls. Then, some months later, other girls voiced similar complaints. This was trouble, especially considering that the school system had recently received bad publicity related to its handling of very inappropriate conduct by another teacher in another school.

The school's HR person questioned Mr. L right away. Mr. L acknowledged a little bit of the alleged conduct, and the HR person told him that his admitted conduct violated school policy. He had only three options, she said. He could do nothing. In that case, he would be suspended immediately and would face an investigation by law enforcement. He would almost certainly be dismissed after the investigation. Or he could resign effective immediately. Or he could resign effective at the end of the school year. A resignation would be "in lieu" of a criminal investigation and his record would not show that he was terminated for cause. Everybody would win.

The HR person gave Mr. L a resignation form. He filled it out, resigning effective at the end of the school year.

On the spot, Mr. L began to regret his decision. Even before he left the office, he told the HR person he had changed his mind. Too late, she said. He had offered his resignation and she, with the appropriate authority to do so, had accepted it. Mr. L was escorted off the property, never to work for the school system again. He did get paid for the rest of the school year.

The police were called in. It turned out that the resignation was not in fact "in lieu" of an investigation. There was a resignation and an investigation. Mr. L was criminally charged and tried. He was eventually acquitted.

Two years later, Mr. L sued the school system. He based his lawsuit on a kind of claim that only an employee of the government can bring—a claim of a denial of due process. No private employee can sue his employer for denial of due process, because private entities have no obligation to provide due process. That obligation attaches to governments, through the Fourteenth Amendment to the U.S. Constitution. Government may not deprive individuals of property without due process of law.

Here, Mr. L said, he had property—his job was his property because the government (that is, his school system employer) had given him teacher tenure. The law is clear on that point. When the government gives an employee job protection like tenure (as when a city or county passes an ordinance giving employees "just cause" protection against termination), the employee gains a property interest in his employment.

And, Mr. L said, he had been deprived of his property—his job—without due process.

No, said the school system. Mr. L was not “deprived” of his property. He freely gave it away with his resignation. First the judge (in a summary judgment decision, 2011 WL 1499747) and then the jury disagreed.

Sure, a governmental employee who has tenure or other property interest in his employment can decide to resign. It happens all the time. People change jobs. Employees retire. A voluntary resignation gives up the property interest and no due process is required. There is no “deprivation.”

But where a resignation is involuntary, that is the equivalent of getting fired. An involuntary resignation is a deprivation of a tenured employee’s property. What makes a resignation involuntary? Two things, both laid out clearly by our federal court of appeals in *Stone v. Univ. of Maryland Med. Sys.*, 855 F.3d 167 (4th Cir. 1988).

First, a resignation is not voluntary if it is forced through duress or coercion. It’s not enough that the employee is in a hard place, put to a hard choice—resign or get fired. It’s got to be more than that, some kind of genuine unreasonable compulsion. This was not really Mr. L’s argument.

Second, a resignation is not voluntary if the employer obtains the resignation through misrepresentation or deception. This was what carried the day for Mr. L. He believed that he was being told that if he resigned there would be no law enforcement investigation and his record would remain clean. Instead, there was in fact an investigation and it led to a criminal prosecution.

The jury agreed. The HR person had the authority to accept resignations, it found, and she was responsible for Mr. L’s involuntary resignation. He lost his job involuntarily, without due process. For that violation of his constitutional rights, the jury, in February 2012, ordered the school system to pay him \$1,121,560. A short time later, the parties brought the matter to a final conclusion by agreeing to a payment of \$680,000 and an end to the litigation.

What’s the lesson?

A governmental employer must take care in how—and whether—it raises the idea of a resignation with a bad employee. Don’t press for an immediate resignation. Give the employee time to consult with a lawyer if he chooses. Don’t make promises about the benefits of a resignation until you have cleared those promises with your attorney. And in any conversation in which resignation may be discussed, have a witness present.

The jury award in Mr. L’s case was compensation to him for the deprivation of his due process rights, rights that were his because of his tenure. But what about a governmental employee who does not have tenure? What about a regular old at-will employee who, because of his at-will status, has no property interest in his employment and can be fired without due process? Such an employee would not have the same due process claim available. But the possibility of a governmental employer being held liable on some other basis when such an employee resigns still exists. A forced resignation can constitute a constructive discharge and serve as the basis for a claim of unlawful discrimination, for example. So, the advice with respect to resignations is the same: don’t press; give the employee time; don’t make unauthorized promises; and have a witness.