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Administrative position statements can play role in Title VII cases

It is well-settled that administrative position statements are not entitled to substantial weight as substantive evidence in Title VII lawsuits. However, such submissions may be relevant in considering an employer's shifting explanations in connection with a challenged adverse employment action.

Accordingly, when combined with other evidence, a position statement can be used to cast doubt upon an employer's explanation for taking action against an employee. That doubt can affect the appropriateness of summary judgment being entered in a Title VII case.

In *Donley v. Stryker Sales*, Kelley Donley sought to have the 7th U.S. Circuit Court of Appeals overturn the U.S. District Court's order granting her former employer, Stryker Sales, summary judgment on Donley's Title VII retaliation claim.

Stryker is a medical-equipment manufacturer and retailer. Donley joined Stryker in 2010 as the corporate accounts director. However, she was subsequently demoted to a clinical manager position for work-performance reasons unrelated to this lawsuit. She occupied that position in 2014.

In June of that year, a co-worker advised Donley that a Stryker sales manager had sexually assaulted a subordinate employee. Donley, in turn, filed a formal, internal complaint of harassment with Stryker's director of human resources.

After the director completed her internal investigation, the male sales manager was discharged. However, he received a generous severance package in connection with his discharge.

In August 2014, just after the firing of the male sales manager, the human resources director began investigating Donley for potential misconduct — taking compromising pictures of a high-ranking inebriated vendor at a June 2014 Stryker work function. Donley was discharged at the

conclusion of that investigation, but she was not offered a severance package.

The foregoing facts are not in dispute.

At the district court level, the court determined that Donley had not proffered sufficient evidence supporting a causal link between her protected activity and termination of employment six weeks thereafter. The court also concluded that Donley was not similarly situated to the male sales manager who received the severance package at discharge.

On appeal, the majority of the facts discussed below were in dispute. As the nonmovant, Donley's viewpoint of the disputed facts were assumed true by the 7th Circuit. After identifying the factual position of each party, this article will also construe the disputed facts in Donley's favor.

According to Donley, she escorted a female CEO of a Stryker vendor from the hotel bar to the CEO's hotel room because she feared for the CEO's safety. In her charge with the Equal Employment Opportunity Commission, Donley claimed to have shown her direct supervisor copies of the pictures Donley had taken that same evening.

The 7th Circuit, in reversing summary judgment, found that the conflicting testimony and the EEOC position statement could lead a reasonable jury to believe that (Kelley) Donley was terminated for her protected activity.

In Stryker's EEOC position statement, Stryker wrote that the supervisor was "unamused" by those photos and instructed Donley to delete them. This, however, conflicted with the supervisor's later deposition testimony, in which he denied that the pictures were shown to him on the night they were taken.

According to the supervisor, he heard about the pictures some

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time later and subsequently brought the matter to the attention of the human resources director. This also conflicted with the deposition testimony of the director, who testified that she did not hear about the incident until August 2014 — then while conducting an exit interview.

Donley took the position that Stryker's stated reason for her discharge was a pretext because, despite knowing about the photo incident for weeks, neither her supervisor nor the human resources director sought to have Donley investigated or fired until after they had learned about her protected activity.

According to Donley, this multiweek delay raises a fact issue as to whether Stryker truly believed that Donley had engaged in a terminable offense or had only used that earlier conduct as a mask for engaging in unlawful retaliation. Donley also pointed to conflicting deposition testimony and the EEOC position statement Stryker

activity and, therefore, could not have been motivated by unlawful animus.

Stryker next argued that the position statement should not be admitted as evidence because 7th Circuit case law provides that position statements are not entitled to substantial weight. Stryker also argued that the sales manager was not similarly situated to Donley, as they were not equal in rank, reported to different supervisors and were subject to different standards.

The 7th Circuit, in reversing summary judgment, found that the conflicting testimony and the EEOC position statement could lead a reasonable jury to believe that Donley was terminated for her protected activity. Donley's evidence and timeline, if believed, could show that Stryker knew about the photos for many weeks, but demonstrated a willingness to tolerate that conduct until learning that Donley had exercised protected rights.

Whether the direct supervisor knew about that protected activity was irrelevant because the human resources director clearly knew about the protected activity and was part of the processes involving the investigation and termination of Donley's employment.

As to Stryker's EEOC position statement, the court found that 7th Circuit precedent limiting the weight afforded to position statements should not be read as a bar to including such evidence in establishing inconsistencies in an employer's position. The EEOC position statement and conflicting deposition testimony by Stryker deponents created a triable issue on pretext.

Finally, the appeals court agreed with Stryker in finding that, based on the record on appeal, the sales manager and Donley were not similarly situated, as they held different rank, reported to different supervisors and were held to different standards.

This finding, however, did not preserve summary judgment in Stryker's favor.