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In This Issue

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Position Statements to the EEOC: A Trap for the Unwary

By Eve B. Masinter and Melissa M. Mulkey

Two recent cases once again demonstrate why it is so critical to carefully scrutinize any submission employers intend to provide to the EEOC. In these cases, employers were either misleading or simply inaccurate in the information provided. Their statements to the EEOC came back to haunt them by creating a disputed issue of fact in one instance and by demonstrating bad faith justifying punitive damages in the other.

Lampley v. Onyx Acceptance Corp., 340 F.3d 478 (7th Cir. 2003)

In this case, the plaintiff, Gerald Lampley, worked as an account manager for Onyx Acceptance Corp. After approximately one year of employment, Lampley sought to receive a higher level of "buying authority," which would allow him to approve a higher level of loans without the need for counter-approval. Despite repeated requests for this increase in authority, Lampley did not receive the same. Lampley concluded that he had been denied the increase in authority due to his race. Lampley did not contact Human Resources, but did go the EEOC in order to file a claim. Lampley's supervisor telephoned him while he was at the EEOC, and Lampley advised his supervisor of what he was doing. Lampley's supervisor scheduled a meeting just three days after Lampley filed his charge, wherein Lampley claims his supervisor told him "[w]e can't have anybody working here who complains to the EEOC. I want your resignation." When Lampley refused to resign, he was terminated.

Lampley amended his EEOC charge to include a claim for retaliation. In connection with the EEOC proceeding, Onyx

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submitted a position statement. In that position statement, the Company made several assertions designed to demonstrate that Lampley had been having performance problems and that these problems were the reason for his termination. Specifically, Onyx set forth what it claimed were Lampley's loan figures for the two months preceding his termination, both of which fell below target. It also asserted that Lampley had received a written warning regarding the performance issues days before he filed his first charge with the EEOC. Based on this position statement, the EEOC dismissed Lampley's charge of discrimination with a finding of no evidence of discrimination.

Lampley filed suit alleging race discrimination and retaliation, and the jury found in his favor on both counts. With regard to damages, the jury awarded \$1,000.00 compensatory and no punitive damages for the race claim. However, it awarded \$75,000.00 compensatory damages and \$270,000.00 punitive damages on the retaliation claim. On appeal, Onyx argued that there was insufficient evidence to warrant the imposition of punitive damages. Specifically, it argued that it is entitled to invoke the defense set forth in *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999), that it "engaged in good faith efforts to implement an antidiscrimination policy." The Seventh Circuit was not persuaded. Although Onyx claimed to have a widely disseminated anti-discrimination policy, it failed to produce evidence of such a policy at trial. Further, even if it had such a policy, the Court held that there was "sufficient evidence for a jury to believe that Onyx failed to engage in good faith efforts at Title VII compliance after it became aware of Lampley's retaliatory discharge claim." In this regard the Seventh Circuit focused in on the evidence presented by Onyx to the EEOC in its position statement, in particular, the statistics regarding Lampley's loan figures and the alleged written warning. At trial, Lampley presented evidence specifically demonstrating that the statistics provided by Onyx to the EEOC were

false. Indeed, while the evidence Onyx presented gave the impression that Lampley was under target, the true facts (as presented by Lampley at trial) were that he was significantly over target. Additionally, while Onyx represented Lampley had received a written warning prior to the filing of his charge, it was unable to produce the same at the time of trial. Based on this conduct, the Seventh Circuit held that "a jury could have found that Onyx engaged in a cover-up rather than a good faith investigation of Lampley's retaliatory discharge claim." Accordingly, the Court found that the issue of punitive damages had properly been presented to the jury.

Hernandez v. Hughes Missile Systems Company, 298 F.3d 1030 (9th Cir. 2002), cert. granted, U.S., No. 02-749

You will recall that last month we profiled this case now pending before the U.S. Supreme Court. It involves the question of whether a neutral policy of prohibiting rehire of employees who resign in lieu of termination is discriminatory when it results in the refusal to rehire a recovered drug addict. Another significant aspect of this case, however, had to do with the factual dispute created by virtue of the company's position statement to the EEOC.

Recall that this case involved a claim by Joel Hernandez. Mr. Hernandez worked for Hughes Missile Systems (later acquired by Raytheon) for 25 years. In July of 1991, Mr. Hernandez tested positively for cocaine use on the job, an offense which was grounds for his immediate termination. Mr. Hernandez was given the option to resign in lieu of termination, which he chose to do. This was noted on his personnel file and, pursuant to an "unwritten" policy, resulted in his ineligibility for rehire. Two and a half years later, in January of 1994, Mr. Hernandez applied to be rehired with Hughes. He was not selected for rehire based on the unwritten policy against the rehire of individuals who had resigned in lieu of termination.

The actual rehire decision was made by Joanne Bockmiller, who testified that she knew Mr. Hernandez had resigned in lieu of discharge but that she knew nothing about the underlying offense. However, when Hughes submitted its position statement to the EEOC, George Medina, Manager of Diversity Development for Hughes, wrote that “[Hernandez’s] application was rejected based in his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation.” Hughes tried to explain away this statement by urging that Ms. Bockmiller made the decision, not Mr. Medina, so his statement should not be considered. Given that all inferences must be drawn in favor of the non-moving party, the Ninth Circuit rejected this argument and held that Bockmiller’s testimony “does not eliminate the question of fact that arises as a result of Hughes’s explicit statements to the EEOC that the application was rejected because of Hernandez’s prior drug addiction.” Accordingly, the Court held that a material issue of fact existed as to whether Hernandez was not rehired due to his past record of drug addiction, thereby precluding summary judgment.

Avoiding The Trap:

These cases underscore the importance of adhering to strict criteria when preparing statements to the EEOC:

1. When claiming that there is a policy or writing that evidences a point being presented in the position statement, make

sure the document exists and, better yet, attach it to the position statement.

2. Make every effort to ensure that the information contained in the position statement is one hundred percent accurate. To the extent possible, trace all information back to the original source.

3. Never put anything in a position statement that cannot be defended in court.

4. Never overstate facts or evidence, as doing so may create a triable issue of fact in litigation when the actual evidence is presented.

5. Do not use the position statement as a means to build a case against an employee after the fact. Any good faith defense may be undercut by doing so, and punitive damages may be back on the table.

As attorneys, we can never be too vigilant in ensuring that our clients do not doom potential litigation before it even hits the courthouse. As is evident from these two cases, providing accurate position statements to the EEOC is more important than ever.