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Seventh Circuit: SEC Filing May Constitute Title VII Retaliation

By Matthew J. Feery

A claim is filed against a company, and the company describes the claim as "meritless" and says it will "vigorously defend" itself. That language, or language like it, is often used in position statements, correspondence to government agencies, and even in public documents. It is used so often, and in so many contexts, that it is likely skipped over by most readers as boilerplate. After all, how often does a company publicly take the stance that a claim has merit or say that it has no plan to defend itself? But this language, included in a public, mandatory filing and connected to a former employee's name, was recently found by a panel of the United States Court of Appeals for the Seventh Circuit (covering Illinois, Indiana, and Wisconsin) to be enough to constitute possible retaliation under Title VII in the case *Greengrass v. International Monetary Systems, LTD*.

Celia Greengrass began working for International Monetary Systems, LTD ("IMS") in January 2007. In September of that year, she made an internal, written complaint alleging sexual harassment against a high-level manager. Ms. Greengrass quit her job in late November 2007 and filed a charge of discrimination with the EEOC in January 2008.

The subsequent events, however, are what gave rise to the Court's holding and make this decision noteworthy. IMS, as a publicly traded company, has annual filing requirements with the Securities and Exchange Commission ("SEC"). One of those filing

requirements required IMS to disclose and describe any material legal proceedings against it. For its 2008 filing, the company's CFO consulted with an accountant about whether Ms. Greengrass' EEOC charge needed to be disclosed. After the consultation, the company did not include her charge in its 2008 annual disclosures, although it did refer to a separate charge against the company without naming the complainant.

In July 2008, the EEOC sent IMS a letter asking for information on other sexual harassment claims made against the company. The company's general counsel then sent an email to the company's management team about how the company should respond to the EEOC's request. In the email, the general counsel noted that the request seemed to be a form letter, that there was a possible ambiguity in the scope of the EEOC request, and that the company should see if the EEOC's request could be narrowly interpreted. The general counsel also said the company should seek to avoid any finding by the EEOC of a "pattern" of harassment at the company, because that finding would make it more likely the agency itself would file suit. If Ms. Greengrass was left to pursue her claim on her own, she would not have the resources for a protracted litigation and be less likely to obtain a large award.

In January 2009, the EEOC requested to conduct interviews related to Ms. Greengrass' charge, which the Seventh Circuit described as a "major ramping up of the agency's involvement in Greengrass's case." In the company's April 2009 SEC 10-K filing, it disclosed her charge of discrimination, stating, "On January 20, 2008, Celia Greengrass filed a sexual harassment complaint with the [EEOC]. The claim is still under investigation by the EEOC but IMS believes the claim to be meritless and will vigorously defend itself." This statement was repeated in two subsequent SEC filings. Other former employees with claims against IMS were also specifically named in the filings, and the company also described some of the other claims as having no merit.

The EEOC and IMS eventually resolved Ms. Greengrass' complaint through conciliation in December of 2009. In its subsequent Form 10-K Annual Report, IMS reported that it was defendant in "two cases of note" and that settlement was reached in the EEOC matter. It did not name any employee by name.

After quitting IMS, Ms. Greengrass struggled to find work. She alleged this was because IMS specifically named her in its SEC filings, which kept showing up as results when someone performed a Google search of her name. She also alleged that a recruiter told her that she was "unemployable" because this information was online. In September 2010, she filed another charge with the EEOC, this time alleging IMS retaliated against her for her previous complaint by placing information about that complaint into the public record in

order to prevent her from obtaining new employment. The district court granted IMS summary judgment, and Ms. Greengrass appealed.

The Seventh Circuit reversed, finding that Ms. Greengrass painted a "convincing mosaic" that could allow a jury to find she was retaliated against. First, the court found that naming Ms. Greengrass in the SEC filings constituted a materially adverse employment action. For its reasoning, the court stated, "As Greengrass's allegations regarding the recruiter make clear, an employee's decision to file an EEOC complaint might be negatively viewed by future employers. So, naming EEOC claimants in publicly available SEC filings could" dissuade employees from making charges of discrimination, "the essence of a materially adverse employment action."

The court then found there was a causal link between Ms. Greengrass' first EEOC charge and her being named in the SEC filing. Even though IMS did not name her in an SEC filing until 14 months after she filed her first charge, the court nevertheless found "suspicious timing" because IMS named her in its first filing after it received the EEOC's request to conduct interviews. According to the court, that request, combined with the general counsel's earlier email stating that Ms. Greengrass did not have the resources to pursue her claim on her own, was enough for a reasonable jury to believe that IMS chose not to retaliate until after the company "saw that the EEOC was taking the charge seriously." The case has been remanded to the district court, where it will now go to trial.

So where are employers left after *Greengrass*? As an initial matter, the decision should prompt employers with SEC or other required (and publicly available) filings to review the language used to describe any pending lawsuits or charges. Regardless of one's thoughts on this decision, it will be noticed by plaintiffs' attorneys, and it will be used as another theory of retaliation.

Internally, be cautious about how ongoing litigation is discussed via email. The general counsel's email in *Greengrass* contained statements typical for any litigation, such as discussing case strategy and typical overbroad EEOC requests. (That the email was produced in discovery is another topic for another day.) However, the court described the email as showing a "disdain" for the EEOC process and "animus" toward Ms. Greengrass, serving as a good reminder that those not in the trenches with the EEOC may interpret understandable frustration with the agency to be something that it is not.

Overall, however, *Greengrass* serves as yet another reminder of the expansion of retaliation claims and of the expanding universe of conduct - even seemingly innocuous conduct - that can constitute

retaliation.

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