

Publically Traded Companies Beware: An SEC Filing Can be Evidence of an Adverse Employment Action in a Claim of Retaliation

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A Title VII plaintiff can prove retaliation using either the direct or indirect method. Under the direct method a plaintiff must prove (1) that she engaged in a statutorily protected activity; (2) that she was subjected to an adverse employment action; and (3) that there was a causal connection between the two.

In *Greengrass v. International Monetary System Ltd.*, No. 13-2901 (7th Cir. Jan. 12, 2015), the Seventh Circuit Court of Appeals reversed a summary judgment decision of the District Court and determined that an adverse employment action included listing an employee's name in publically available filings with the Securities and Exchange Commission ("SEC").

In September 2007, Greengrass made a written complaint to IMS alleging harassment by a manager, and subsequently quit her job in November 2007. In January 2008 Greengrass filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC") against IMS alleging sex discrimination, national origin discrimination, and retaliation. In July 2008 IMS received correspondence from the EEOC seeking information regarding other sexual harassment claims leveled against the company and, in January 2009, IMS received notices that the EEOC wanted to conduct interviews regarding Greengrass's charge of discrimination. In September 2009 the EEOC found reasonable cause to believe that Greengrass and other females as a class were subject to harassment because of their sex and national origin, and Greengrass and females, as a class, were constructively discharged because of their sex, national origin, and in retaliation for engaging in protected activity. In December 2009 the parties resolved Greengrass's original EEOC charge of discrimination through conciliation, which did not include IMS's rehiring of Greengrass.

As a publically traded company, IMS is subject to the Securities and Exchange Commission ("SEC") periodic reporting requirements. Specifically, IMS is required to describe any material legal proceedings, including principal parties, facts giving rise to the proceeding, and the relief sought. See 17 C.F.R. § 299.103. IMS did not refer to Greengrass's charge of discrimination in its 2008 SEC disclosures. However, for the next SEC filing in April 2009, *and less than three months after IMS received notices that the EEOC wanted to conduct interviews* (in January 2009), IMS chose to include Greengrass's EEOC charge of discrimination and to specifically identify her, stating: "On January 20, 2008, Celia Greengrass filed a sexual harassment complaint with the [EEOC]. The claim is still under investigation by the EEOC and IMS believes the claims to be meritless and will vigorously defend itself." These SEC disclosures were repeated in a subsequent amendment to the annual report and in a quarterly disclosure in May 2009.

After leaving IMS, Greengrass had difficulties finding and maintaining regular employment, and she attributed this to IMS's SEC filings that specifically identified her. Greengrass claimed that a Google search of her name displayed results of IMS's SEC filings that included her name, and further claimed that a recruiter informed her that she was "unemployable" due to this information. Thus, in September 2010, Greengrass filed a second EEOC charge of discrimination alleging IMS retaliated against her by identifying her in its SEC filings because of her previous charge of discrimination, and after receiving the EEOC right-to-sue letter, subsequently filed a lawsuit against IMS alleging retaliation under Title VII of the Civil Rights Act, as amended.

The Seventh Circuit found that listing Greengrass's name in publically available SEC filings and referring to her complaint as "meritless," constituted a materially adverse employment action. According to the Court, Greengrass assembled a convincing array of circumstantial evidence. Specifically, the court stated that a reasonable jury could find that IMS decided to retaliate against Greengrass not when she filed her EEOC charge, but rather when IMS saw that the EEOC was taking the charge seriously in January 2009, and that the IMS retaliation occurred in its next scheduled SEC filing in April 2009 (evidence of suspicious timing). Greengrass also provided circumstantial evidence of animus and IMS pretext sufficient to demonstrate a causal link that IMS would not have taken the adverse action but for Greengrass's protected activity.

Publically traded companies should heed this opinion when reporting any material employment-related legal proceeding under the SEC requirements. A company should maintain a policy of being consistent in its application of disclosing material legal proceedings under the SEC reporting obligations, and look to its past reports of material legal proceedings for guidance. Furthermore, a disclosure could lead to negative consequences if it appears to be solely aimed at dissuading employees from making or supporting claims of discrimination. It is important to note that once an EEOC charge of discrimination is filed, the claimant's name and basic information about the allegations of discrimination will be disclosed to the employer, and during the course of the investigation information about the charging party and the respondent will be kept confidential by the EEOC and will not be disclosed to the public by the EEOC. If a claim or charge of employment discrimination is not made public, then perhaps it would be wise that publically traded companies not identify the name of the employee/claimant until such time a publically available lawsuit is filed in federal (or state) court.