

—Courtesy of Jessica Linehan, Brian R. Rosenau and Joel O'Malley, Dorsey & Whitney LLP

A recent Seventh Circuit decision provides a cautionary tale for employers deciding what level of detail about litigated matters to include in publicly disclosed U.S. **Securities and Exchange Commission** filings. The court held a former employee could assert retaliation against her former employer when the company listed her by name and described her discrimination claim as “meritless” in the company’s annual report on Form 10-K filing with the SEC.

Celia Greengrass filed a discrimination charge with the United States **Equal Employment Opportunity Commission** against her employer, International Monetary Systems Ltd. As a publicly traded company, IMS is subject to the SEC’s periodic reporting requirements, including filing annual reports on Form 10-K.

In particular, as specifically recognized by the Seventh Circuit, Item 103 of the SEC’s Regulation S-K requires a company to describe, in its annual reports on Form 10-K, any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the company or any of its subsidiaries is a party or of which any of their property is the subject. That description must include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, the alleged facts giving rise to the proceeding, and the relief sought.

Although whether a particular legal proceeding is “material” will depend on the specific facts and circumstances, for purposes of Item 103 of Regulation S-K, any legal proceeding that involves primarily a claim for damages generally will not be considered material if the amount involved, exclusive of interest and costs, does not exceed 10 percent of the current assets of the company and its subsidiaries on a consolidated basis.

Certain actions, regardless of potential damages, are considered material, including (a) bankruptcy, receivership and similar proceedings; and (b) proceedings to which any director, officer or affiliate of the company, or any owner of more than 5 percent of any class of voting securities of the company, or any of their associates, is an adverse party or has a material adverse interest. In addition, environmental proceedings with governmental authorities involving monetary sanctions of \$100,000 or more are generally considered material. It is not clear from the court’s decision why IMS considered Greengrass’ charge to be material.

Departing from its past practice of not identifying claimants by name, IMS’ Form 10-K filing for 2008 listed Greengrass by name, and stated, “The claim is still under investigation by the EEOC but IMS believes the claims to be meritless and will vigorously defend itself.” Later in 2009, and after Greengrass had left IMS’ employment, the parties resolved Greengrass’ EEOC charge. IMS’ subsequent SEC filings generically noted IMS settled certain harassment claims, but returned to not identifying Greengrass by name when referencing the settlement.

Greengrass struggled to find and maintain new employment. She attributed her employment difficulties to IMS' SEC filings that identified her by name. In fact, a Google search of her name hit upon multiple entries on the first results page regarding IMS' SEC filings that included her name.

In 2010, Greengrass returned to the EEOC to newly allege that IMS retaliated against her for having filed her previous charge by including her name in the SEC filings. After the EEOC found reasonable cause to believe IMS violated Title VII of the Civil Rights Act of 1964's anti-retaliation provision, Greengrass sued IMS in federal district court. The court granted IMS' summary judgment motion dismissing her case, but Greengrass appealed and the Seventh Circuit reversed, holding Greengrass' claim should be decided by a jury.

The Seventh Circuit held there was "no dispute" filing an EEOC charge was "the most obvious form of statutorily protected activity," and a company naming an EEOC claimant in a publicly available SEC filing was "the essence of a materially adverse action," due to the risk of those publicly available SEC filings having a negative impact on the claimant's prospective employment prospects. The court focused particularly on IMS' reversal in its practice of not including claimants' names in its SEC filings, finding there was enough evidence to show a causal connection between Greengrass' filing her second EEOC charge and IMS then including her name in the SEC disclosure.

While this decision is directly controlling only over district courts within the Seventh Circuit (Illinois, Indiana and Wisconsin), the ruling provides a number of important lessons for publicly traded employers.

First, if employers currently disclose material nonroutine legal proceedings in their SEC filings pursuant to Item 103 of Regulation S-K, but do not name the principal parties to the proceedings, that policy should be reexamined in light of the requirements of Item 103.

Second, if for whatever reason an employer elects to disclose a legal proceeding even though not specifically required by Item 103 of Regulation S-K (i.e., a nonmaterial proceeding), the company should carefully consider whether to name the principal parties thereto. Employers should generally be consistent with respect to all disclosed proceedings, unless there is a specific reason to deviate from the company's customary practice in a particular instance.

Third, if an employer believes it is necessary to make a change to its prior disclosure practices relating to legal proceedings, it should thoroughly document the change, including the specific reasons and any advice received. IMS' downfall was not so much the description of Greengrass' charge as "meritless" (that descriptor is routine), but in the company's flip-flopping from not including names, to including them, and then returning to not including them, all without being able to explain its reasons for doing so.

Finally, employers should remember they can be liable for retaliation against both current and former employees, including for actions taken after the individual has left employment.

