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Seventh Circuit Holds Failure to Conciliate is Not a Defense Available to Employers in Litigation with the EEOC

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In *EEOC v. Mach Mining, LLC*,[1] the Seventh Circuit became the first federal circuit to foreclose an employer's ability to use the implied affirmative defense that the Equal Employment Opportunity Commission (EEOC) failed to conciliate prior to bringing suit. Under Title VII, after finding reasonable cause to believe a charge of discrimination has merit, the EEOC may sue only after it "has been unable to secure from the respondent a conciliation agreement acceptable to the Commission."[2] The court of appeals held that, based on the conciliation language in Title VII and Seventh Circuit precedent, the EEOC's approach to conciliation during the administrative charge process is not judicially reviewable and not an affirmative defense to be used against the agency. The Seventh Circuit's holding is contrary to every other circuit that has evaluated this issue.[3]

Procedural History

In 2011, the EEOC filed a lawsuit against Mach Mining, alleging that it had discriminated against women since 2006, specifically in relation to hiring practices. In response, Mach Mining denied the allegations and asserted the affirmative defense that the EEOC did not conciliate in good faith prior to bringing suit against the company. The EEOC moved for partial summary judgment on this affirmative defense and argued that, based on the Seventh Circuit's decision in *EEOC v. Caterpillar, Inc.*,[4] the conciliation process was not subject to judicial review. The district court denied the EEOC's motion, relying on decisions from other circuits permitting an employer to challenge the EEOC's conciliation efforts, holding that "the EEOC's conciliation process is subject to at least some level of judicial review and that review would involve at least a cursory review of the parties' conciliation." Based on the importance of the issue, the district court certified an interlocutory appeal of the court's order to the Seventh Circuit.

1 2013 U.S. App. LEXIS 25454 (7th Cir. Dec. 20, 2013).

2 42 U.S.C. § 2000e-5(f)(1).

3 The Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits have all held that the EEOC's conciliation efforts are subject to varying levels of judicial review.

4 409 F.3d 831 (7th Cir. 2005).

The Seventh Circuit's Analysis

In reversing the district court's denial of summary judgment, the Seventh Circuit held that the "language of the statute, the lack of a meaningful standard for courts to apply, and the overall statutory scheme convince us that an alleged failure to conciliate is not an affirmative defense to the merits of a discrimination suit."

In its ruling, the court of appeals focused on five considerations.

First, the court reviewed the statutory language of Title VII, which does not suggest that the EEOC's approach to conciliation is reviewable. The court noted the express statutory language made clear that conciliation efforts are left solely to the EEOC's discretion, and that the confidentiality provision governing the process, which provides for criminal penalties, conflicts with making that information reviewable by courts.

Second, the court determined that there is no statutory standard for review of the conciliation process, noting that other courts "applying a failure to conciliate defense have varied widely in what evidence they consider and what actions they require of the EEOC." The court distinguished the standard employed under the National Labor Relations Act (NLRA), which is frequently relied on by courts for guidance in evaluating failure-to-conciliate defenses, by pointing out that the NLRA contains "an explicit statutory command" to negotiate in "good faith." Title VII contains no such provision regarding conciliation. Furthermore, "case-by-case adjudication of the sufficiency of the EEOC's conciliation efforts would require that courts be given some metric by which to analyze the parties' conduct," which Congress had not provided, leaving review of the defense without a "workable legal standard."

As a third basis, the appeals court asserted that judicial review of conciliation undermines the process, as it opens the door to employers focusing on building a record of the EEOC's failure to conciliate to prepare a defense, as opposed to participating in the conciliation process. The Seventh Circuit rejected the arguments of Mach Mining and amici that, without judicial review, the EEOC would abandon or misuse conciliation. Notably, the court of appeals stated that "there is no indication that Title VII's directive to conciliate was for the special benefit of employers or that they have a right to conciliation." Rather, the court reasoned that the EEOC has historically filed a low number of cases after unsuccessful conciliation efforts, and it is subjected to oversight by other branches of government; therefore, its conciliation efforts are already subject to "meaningful scrutiny."

Fourth, the Seventh Circuit relied on its own precedent, including *Caterpillar*, to demonstrate its "consistent skepticism toward employers' efforts to change the focus from their own conduct to the agency's pre-suit actions." In Caterpillar, the Seventh Circuit held that the EEOC's determination of whether there was probable cause to sue was generally not judicially reviewable.[5]

Fifth and finally, the Seventh Circuit acknowledged that it was "the first circuit to reject explicitly the implied defense of failure to conciliate," and further acknowledged that it was proceeding "as if we are creating a circuit split." The three-judge panel issuing the decision, however, expressly noted that it had circulated the decision to other members of the Seventh Circuit, and none favored a rehearing en banc. The court stated that its decision addressed the issue directly, whereas some circuits had not, and disagreed with other circuits that had adopted unclear tests with respect to the adequacy of conciliation efforts.

At the end of its opinion, the court discussed at length its view that dismissal of a case for failure to conciliate offered little toward resolving employment discrimination litigation. Specifically, the "failure to conciliate" affirmative defense is based solely on insufficiency of process, and not the underlying facts or merits of the EEOC's claims. The Seventh Circuit opined that dismissal based on a procedural issue such as failure to conciliate is a drastic remedy that could "excuse the employer's (assumed) unlawful discrimination" and is contrary to the intent of Title VII.

What This Means for Employers

The EEOC has hailed the *Mach Mining* ruling as a "landmark decision," taking the view that at least in the Seventh Circuit (*i.e.*, Illinois, Indiana and Wisconsin), this decision will eliminate the failure-to-conciliate defense and "compel all parties to focus on the issue of whether or not

5 *Id.* at 833.

there actually was employment discrimination."[6] In other words, the EEOC will now take the view that its conciliation efforts, at least in the Seventh Circuit, cannot be second-guessed by employers or the courts. This could lead to the EEOC's Chicago District Office again taking the lead in systemic litigation efforts.

Other circuits that have addressed the issue have adopted varying standards of oversight of the EEOC's conciliation efforts. As an example, the Second, Fifth, and Eleventh Circuit Courts of Appeals appear to require courts to evaluate "the reasonableness and responsiveness of the EEOC's conduct under all the circumstances."[7] Based on this standard, the EEOC must at least: (1) outline to the employer the reasonable cause for its belief that a violation of the law occurred; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer.[8] For example, several months prior to the Seventh Circuit's decision in *Mach Mining*, the U.S. District Court for the Southern District of Texas rejected the EEOC's argument that its conciliation efforts are not judicially reviewable, provided the EEOC has engaged in conciliation of some kind. The district court noted the Fifth Circuit has regularly held that lower courts "'remain free' to scrutinize the EEOC's conciliation attempts."[9]

The Fourth and Sixth Circuits, on the other hand, have adopted a standard that is much more deferential to the EEOC.[10] Under this standard, a court "should only determine whether the EEOC made an attempt at conciliation. The form and the substance of those conciliations is within the discretion of the EEOC ... and is beyond judicial review."[11]

Various court decisions over the past year clearly indicate that the EEOC's approach to the conciliation process may still be subject to challenge. In one case, the U.S. District Court for the Western District of Pennsylvania stayed the litigation and ordered the EEOC to re-open conciliation negotiations, noting the EEOC's conciliation efforts did not meet "even the low standard" applied in some circuits.[12] In that case, the EEOC denied the employer an extension to respond to the invitation to conciliate, instead requiring the employer to respond to a nearly $6.5 million demand with its "best offer" within nine days.[13] After the employer responded with a counteroffer and expressed willingness to engage in further negotiations, the EEOC responded in less than a week with a Notice of Failure to Conciliate.[14] In finding the EEOC's actions bore no indication of a meaningful desire to conciliate, the court held: "By any measure, a demand for the payment of more than $6 million dollars, coupled with nine (9) days to either say 'yes' or to make a 'best and final' response in these circumstances ... is so devoid of reasonableness as to lead this Court to the conclusion that it was not a meaningful, good faith conciliation effort."[15]

Similarly, a district court in New York granted the employer's summary judgment motion with respect to pregnancy discrimination and retaliation claims brought by non-intervening claimants, on the grounds that the EEOC failed to exhaust its conciliation efforts.[16] In this case, the court found that the EEOC: (1) pursued a pattern-or-practice claim based on the allegations of three identified individuals and on behalf of an unidentified number of potential class members; (2) refused to disclose to the defendant the identity of any potential class members; (3) identified approximately 78 members of the class after commencing litigation; (4) pursued 32 individual claims only after dismissal of its class-wide claims; and (5) failed to show that the narrowing of the number of claims did not result from bootstrapping its investigation to discovery. Thus, the court held that the EEOC failed to satisfy its pre-litigation obligations, and the employer did not have a reasonable opportunity to conciliate. In addition, the court prevented the litigation from moving forward because doing so would further prejudice the employer, and would serve as a proper sanction against the EEOC for its conciliation deficiencies.

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6 *See* EEOC, Press Release (Dec. 20, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/12-20-13b.cfm.

7 The following states are encompassed by the Second, Fifth, and Eleventh Circuits: New York, Connecticut, Vermont (Second Circuit); Texas, Louisiana, Mississippi (Fifth Circuit); and Florida, Georgia, and Alabama (Eleventh Circuit).

8 *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996); *EEOC v. Klinger Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981); *EEOC v. Asplundh Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003).

9 *EEOC v. Bass Pro Outdoor World, LLC*, 2013 U.S. Dist. LEXIS 142796 (S.D. Tex. Oct. 2, 2013).

10 The following states are encompassed by the Fourth and Sixth Circuits: Maryland, Virginia, West Virginia, North Carolina, South Carolina (Fourth Circuit); and Michigan, Ohio, Kentucky, and Tennessee (Sixth Circuit).

11 *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC v. Keco Industries, Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984).

12 *EEOC v. Ruby Tuesday, Inc.*, 2013 U.S. Dist. LEXIS 8268, at *27 (W.D. Pa. Jan. 22, 2013).

13 *Id.* at *6.

14 *Id.* at *7.

15 *Id.* at **21-22.

16 *EEOC v. Bloomberg L.P.*, 2013 U.S. Dist. LEXIS 128385 (S.D.N.Y. Sept. 9, 2013).

These cases illustrate that the scope of the EEOC's obligations in the conciliation process remains unsettled.

It remains to be seen whether other circuits will adopt the reasoning of *Mach Mining*, or if the U.S. Supreme Court will ultimately resolve this split. In the meantime, in the event of potential litigation by the EEOC, employers may still assert a failure-to-conciliate defense (other than in the Seventh Circuit). Proposed federal legislation to amend Title VII to expressly require "good faith" in the conciliation process is another option to consider, although the likelihood of enacting such legislation in the current Congress is slim.

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