

No Implied Failure-to-Conciliate Defense For Employers Against EEOC, Says Seventh Circuit

Article By:

William J. Anthony

The **Equal Employment Opportunity Commission (“EEOC”)**, an agency that has suffered a number of very public setbacks in its litigation efforts in 2013, will finish the year on a high note. In a much-anticipated [decision](#), the U.S. Court of Appeals for the Seventh Circuit, breaking ranks with its sister circuits, held that employers cannot challenge the EEOC’s good-faith settlement efforts in Title VII-discrimination suits pursued by the agency. *EEOC v. Mach Mining, LLC* (7th Cir. 2013). “The language of the statute, the lack of a meaningful standard for courts to apply, and the overall statutory scheme” convinced the appeals court “that an alleged failure to conciliate is not an affirmative defense to the merits of a discrimination suit.” For the Court, finding otherwise would add to Title VII “an unwarranted mechanism by which employers can avoid liability for unlawful discrimination.” Anticipating possible review of its decision by the U.S. Supreme Court, the Seventh Circuit explained that its “decision makes us the first circuit to reject explicitly the implied affirmative defense of failure to conciliate. Because the courts of appeals stand divided over the level of scrutiny to apply in reviewing conciliation, our holding may complicate an existing circuit split more than it creates one, but we have proceeded as if we are creating a circuit split.”

Hoping the Seventh Circuit would have dealt another blow against an agency that has been perceived to engage in questionable pre-suit settlement tactics, employers now, in light of this ruling, may face an EEOC more energized than ever before. All employers, especially those who fear the prospect of a class-based systemic enforcement action by the EEOC, should take note of this important decision.

Seventh Circuit's Analysis

In evaluating whether employers have a legally viable affirmative defense for failure to conciliate, the Seventh Circuit considered the statutory language of Title VII, whether there was a workable standard for the defense, whether the defense fit into the broader statutory scheme, and the relevant case law both in and out of the circuit.

Statutory Language of Title VII Militates Against Affirmative Defense For Failure-to-Conciliate

The Court prefaced its analysis of the text of the statute with an acknowledgement of the Supreme Court's recent admonition in *Nasser* that Title VII is a precisely drawn statutory scheme that should be read as written. Heeding this admonition, the Seventh Circuit emphasized that Title VII contained no express provision for an affirmative defense based on an alleged defect in the conciliation process. The Court found this silence compelling. Moreover, the Court concluded that the express statutory language in Title VII made clear that "conciliation is an informal process entrusted solely to the EEOC's expert judgment" and that "process is to remain confidential." Title VII expressly directs that all details of the the conciliation process remain strictly confidential. As such, the Seventh Circuit concluded that "[a]n implied affirmative defense for failure to conciliate conflicts directly with the confidentiality provision."

No Workable Standard for Judicial Review

The Court also concluded that an implied failure-to-conciliate defense also lacks a meaningful reviewable standard. Illustrating the problems inherent in a standard, the Court wrote that "[a] court reviewing whether the agency negotiated in good faith would almost inevitably find itself engaged in a prohibited inquiry into the substantive reasonableness of particular offers—not to mention using confidential and inadmissible materials as evidence—unless its review were so cursory as to be meaningless." It further stated that a

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. Congress's failure to provide even the outlines of such a standard tends to show that it did not intend for judicial review of conciliation through an implied affirmative defense. This conclusion becomes compelling when considered alongside the language of the statute, including the prohibition on evidence from the conciliation process.

Finding Implied Affirmative Defense Undermines Broader Statutory Scheme

An implied affirmative defense for failure to conciliate "invites employers to use the conciliation

process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute.” The Seventh Circuit saw “no persuasive reason to find that a statute meant to encourage voluntary compliance on the part of employers implied a defense that would create such contrary incentives for them.” In response to arguments that the EEOC requires judicial oversight of its conciliation efforts, “lest it either abandon conciliation altogether or misuse it by advancing unrealistic or even extortionate settlement demands,” the Seventh Circuit found that available data revealed that the EEOC had “powerful incentives” to conciliate and its practices and priorities were appropriately checked by the legislative and executive branches. “If the EEOC’s demands are so high that they offer no real chance at bargaining, a trial on the merits should bring them back to earth . . . If the employer feels it lacked the time or information necessary to settle before suit is filed, litigation will provide both.”

Case Law From Other Circuits Fails To Persuade Seventh Circuit

Rejection of the affirmative defense was consistent with earlier cases within the circuit. “Nothing in the language of Title VII or our past case law invites courts to review the agency’s finding of probable or reasonable cause, and the same is true of its approach to conciliation.” The Court recognized that the Second, Fifth, and Eleventh Circuits evaluate conciliation under a searching three-part inquiry and that the Fourth, Sixth, and Tenth Circuits require the EEOC to meet a minimal level of good faith in its conciliation efforts. But the Seventh Circuit was not persuaded by either of these approaches. The Court “was skeptical that court oversight is necessary or that it encourages compliance rather than strategic evasion on the part of employers.” The Court also noted that even if there were a sound basis for disregarding the confidentiality provision and subjecting the EEOC’s conciliation efforts to judicial review, dismissing the case on the merits is not an appropriate remedy.

Takeaway

In a footnote, the Court indicated that no judge in the circuit favored a rehearing *en banc*. So the likely next step for the *Mach Mining* case, in light of the Seventh Circuit’s divergence from seven other circuit courts, is to the Supreme Court. In the meantime, the EEOC will likely take its winning argument to those circuits that have not specifically determined the issue. Considering the various approaches the circuit courts have taken with respect to conciliation challenges, employers should consult with counsel on how best to navigate Title VII actions brought by the EEOC.

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