

## Supreme Court to decide whether employers can challenge EEOC conciliation efforts

The Supreme Court has agreed to decide whether employers can challenge — and courts can review — the EEOC's efforts to resolve discrimination claims before bringing suit. Of the circuit courts that have considered the issue, only the US Court of Appeals for the Seventh Circuit holds that those efforts are nonreviewable and the failure to conciliate cannot be used as an affirmative defense to an EEOC suit. The case is an important one for employers, as the Supreme Court's decision will affect EEOC enforcement policy.

### Background

Title VII of the Civil Rights Act of 1964 makes it illegal to discriminate against an employee or job applicant on the basis of race, color, religion, national origin, or sex. The Equal Employment Opportunity Commission (EEOC) is responsible for enforcing Title VII, and has authority to investigate employment discrimination charges, settle charges, and file lawsuits alleging employment discrimination.

Title VII contains a directive for the EEOC to negotiate first and sue later. Specifically, the statute says: "If the Commission determines after such investigation that there is reasonable cause to believe the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion." The EEOC is authorized to file a lawsuit only if it is unable to secure a conciliation agreement acceptable to it from the employer.

In 2010, the EEOC found reasonable cause to believe that Mach Mining had discriminated against female applicants. The following year, the EEOC sued Mach Mining, alleging that the company received applications from many qualified women, but failed to hire any female miners since it began operations in 2006. Mach Mining sought to dismiss the case on the grounds that the EEOC failed to properly conciliate before filing suit against it. The EEOC challenged the availability of a failure-to-conciliate defense, arguing that its conciliation efforts were not subject to judicial review. The federal district court disagreed, holding that courts should determine whether the EEOC made a sincere and reasonable effort to negotiate. In view of the importance of the issue, the court allowed the EEOC to immediately appeal the ruling.



## The ruling

On December 20, 2013, the US Court of Appeals for the Seventh Circuit (7<sup>th</sup> Circuit) reversed the district court, [ruling](#) that an employment discrimination case should not be dismissed because the EEOC allegedly failed to engage in good faith conciliation before filing suit. In reaching that conclusion, the 7<sup>th</sup> Circuit relied on the language of Title VII, the lack of a workable statutory standard that courts can apply, and the general statutory scheme favoring dispute resolution. The court further explained that allowing a failure-to-conciliate defense would potentially allow employers to delay or avoid liability for unlawful discrimination through protracted litigation and endless disputes over whether the EEOC tried hard enough to settle the matter.

The 7<sup>th</sup> Circuit took a different view than other appellate courts, including the Second, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits. Those hold that Title VII's directive to the EEOC to negotiate first and sue later does create an affirmative defense available to employers who have allegedly violated Title VII, and that judicial review of conciliation is appropriate in that context.

**Buck comment.** Although this case revolved around allegations of gender discrimination in violation of Title VII, the procedures under Title VII also apply to charges filed under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act.

## EEOC's obligation to conciliate

Although Title VII directs the EEOC to try to negotiate an end to an employer's unlawful employment practices before bringing suit, the terms of a conciliation agreement must be acceptable to it. While effectively leaving it to the EEOC to determine whether a matter can be conciliated, Title VII says nothing about whether the EEOC must use one or all of the informal methods — conference, conciliation, and persuasion — or how hard it has to try to resolve the matter before resorting to litigation. Rather, it gives the EEOC broad discretion to accept or reject an employer's offer.

Notably, the 7<sup>th</sup> Circuit declined to impose a good faith conciliation standard on the EEOC, saying it was not required by Title VII. In the absence of a good faith standard or any statutory metric to measure the EEOC's conciliation efforts, the 7<sup>th</sup> Circuit rejected as unworkable a case-by-case judicial review of the adequacy of those efforts as a prerequisite to bringing suit.

**Buck comment.** The 7<sup>th</sup> Circuit noted that, in the absence of judicial review, the EEOC's practices are checked by Congressional oversight, budgetary restrictions, statutory amendments, and the confirmation of EEOC commissioners.

## Using information from conciliation

Title VII expressly prohibits the EEOC from making the details of the conciliation process public, and from using what was said and done during that process "as evidence in a subsequent proceeding without the written consent of the persons concerned." According to the 7<sup>th</sup> Circuit, Title VII provides no exception that would allow information to be admitted to prove to a court that the EEOC's efforts to conciliate were sufficient. Thus, if permitted, an implied affirmative defense for failure to conciliate would directly conflict with the statute's broad confidentiality protections surrounding conciliation efforts.

## The appeal

On February 25, 2014, Mach Mining requested that the US Supreme Court (No. 13-1019) review the 7<sup>th</sup> Circuit's decision and determine whether — and to what extent — courts may enforce the EEOC's duty to conciliate discrimination claims before filing suit. On May 27, the EEOC agreed that the Court should intervene to resolve the circuit split. On June 30, the Supreme Court [agreed](#) to hear the appeal.

## In closing

When the Supreme Court weighs in on the EEOC's pre-suit processes next term, it will have important implications for employers. If the Court rejects the 7<sup>th</sup> Circuit's view, employers may find they have more leverage to reach pre-litigation settlements with the EEOC. A contrary ruling has the potential to significantly affect EEOC enforcement policy under Title VII and likely under other statutes as well.

### Authors

Nancy Vary, JD  
Abe Dubin, JD

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