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Seventh Circuit: EEOC's Failure to Conciliate Not an Affirmative Defense

Authors: Sarah Katherine Casey

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The Seventh Circuit Court of Appeals has ruled that the EEOC's alleged failure to conciliate is not an affirmative defense to a discrimination suit. The court of appeals overruled the district court's decision in *EEOC v. Mach Mining, LLC*, No. 13-2456 2013 WL 6698515 (7th Cir. Dec. 20, 2013)

Under Title VII, the EEOC must attempt to negotiate an end to an employer's alleged discriminatory practices before bringing suit. Mach Mining pled the EEOC's failure to engage in good faith conciliation as an affirmative defense to the EEOC's sex discrimination suit against it. The EEOC filed a motion for summary judgment to dismiss the defense, arguing that the court should look no further than the face of the complaint for the sufficiency of the conciliation process. The district court denied the motion, finding that the case law presented by the EEOC did not support a finding that the EEOC's conciliation process was not subject to judicial review. The district court's ruling followed similar rulings by the Second, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits.

The Seventh Circuit disagreed, finding that Title VII did not expressly create an affirmative defense, left the conciliation process to the EEOC's sole judgment, and mandated that the process remain confidential. In addition, the court found that there was no meaningful standard of review to apply if a court were to evaluate the conciliation process. As a practical matter, the court indicated that allowing employers to challenge the sufficiency of the EEOC's conciliation process would lead to extended, expensive litigation that would serve as a distraction from the discrimination issue itself and would decrease an employer's incentive to reach a pre-suit agreement with the EEOC. The Seventh Circuit was not persuaded by Mach Mining's argument that the courts need to police the EEOC.

In light of the Circuit split on this issue, the Supreme Court may weigh-in and provide clarity.