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EMPLOYER LAW BLOG

Is the “failure-to-conciliate” affirmative defense available to employers? Not in the Seventh Circuit.

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What is “conciliation”?

If the EEOC investigates a claim and determines that discrimination or retaliation has occurred, it is statutorily required to attempt to resolve findings of discrimination through "informal methods of conference, conciliation, and persuasion." See 42 U.S.C. 2000e-5. After the parties have been informed by letter that the evidence gathered during the investigation establishes that there is "reasonable cause" to believe that discrimination has occurred, the parties will be invited to participate in conciliation discussions.

During conciliation process, the EEOC investigator works with the claimant and the employer to develop an appropriate remedy for the discrimination or retaliation. If the conciliation is successful, the parties enter into a written agreement resolving the claim. If conciliation fails, the EEOC can file suit against the employer in Federal Court or can give the claimant permission to pursue the claim in Federal Court.

What happens if the EEOC fails to engage in conciliation?

The Second, Fourth, Fifth, Sixth, Tenth and Eleventh circuit courts recognize a failure-to-conciliate affirmative defense for employers faced with discrimination claims brought by the EEOC.

What about the Seventh Circuit?

The Seventh Circuit Court of Appeals recently issued an opinion deviating from these other circuits on the issue of what the EEOC is required to plead in complaints it files in Federal Court. *EEOC v. Mach Mining, Inc.*, No. 13-2456, 2013 WL 6698515 (7th Cir. Dec. 20, 2013).

The Seventh Circuit only requires that the EEOC plead on the face of its complaint that it has complied with all procedures required under Title VII and the relevant documents are facially sufficient to satisfy review of the conciliation process.

In *Mach Mining*, the EEOC found there was reasonable cause to believe the company had discriminated against a class of female job applicants at one of its mines. The EEOC notified the company that it intended to begin informal conciliation. Although the parties discussed resolution, they failed to reach an agreement.

About a year later, the EEOC advised the company that it had determined the conciliation process to be unsuccessful. The EEOC then filed suit against the employer in Federal Court about two weeks later.

Responding to the suit, the company denied the claim of unlawful discrimination and raised several affirmative defenses. One of those defenses was that the EEOC failed to negotiate in good faith in the conciliation process.

The EEOC asked the Court for summary judgment on the company's "failure-to-conciliate" defense. arguing that its conciliatory efforts are not subject to judicial review. The district court followed the holdings in the other circuits and denied the EEOC's request for summary judgment. The district court held that courts are permitted to evaluate whether the EEOC made a sincere and reasonable effort to conciliate.

The EEOC appealed to the Seventh Circuit, which reversed the district court and held in favor of the EEOC on this issue.

In reaching its decision, the Seventh Circuit found:

- The text of Title VII provides no statutory support for the court to allow an affirmative defense for failure-to-conciliate.
- There is a strong deference given to the EEOC in making informal efforts to reach a conciliation agreement it finds "acceptable" before it may sue; and
- There is a direct conflict between the implied affirmative defense and the statute's strict requirement that the conciliation process stay confidential.
- There are no statutory standards for courts to apply to review the EEOC's conciliation efforts.
- An implied affirmative defense does not fit well within the broader statutory scheme of Title VII.
- Earlier Seventh Circuit case law has rejected similar attempts by employers to focus on the EEOC's pre-suit processes rather than on their own employment practices.

It is likely the EEOC will pursue the argument from this case in other circuits which have not yet determined this issue. A split of opinion in the circuit courts makes it more likely the Supreme Court will review the issue.

By Courtney Cox

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Case cite: EEOC v. Mach Mining, Inc., No. 13-2456, 2013 WL 6698515 (7th Cir. Dec. 20, 2013).