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According to the EEOC, Courts Have No Business Reviewing its Efforts to Conciliate Charges of Discrimination

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Recent Developments in the EEOC's Effort to Avoid Review of the Conciliation Process

The EEOC is making a concerted effort in courts across the country to shield from judicial review its actions during the pre-suit conciliation phase. The EEOC argues that the judiciary should not review for reasonableness and good faith the actions is takes to resolve a charge of discrimination by throwing arguments based on everything from the Administrative Procedure Act (APA) to sovereign immunity against the wall in hopes something will stick. But nothing has stuck, and two recent cases provide a good overview of the response the EEOC is receiving.

Overview of EEOC's Duty to Conciliate Charges

After a charge of discrimination is filed with the EEOC, the EEOC must make good faith efforts to resolve it before bringing suit on behalf of the charging party. This attempt to resolve workplace disputes without resorting to litigation, called the conciliation process, is one of the agency's founding purposes. Congress initially granted the EEOC power only to resolve disputes through "conference, conciliation, and persuasion," and if this failed, the charging party could seek redress by filing suit in federal court. Only in 1972 did Congress amend Title VII to allow the EEOC to bring suit on behalf of a charging party. In doing so, however, Congress made clear that the "EEOC was to continue, settling disputes, if possible, in an informal, noncoercive fashion." *EEOC v. Bass Pro Outdoor World, LLC*, *et al.*, No. 11-CV-3425 (S.D. Tex. Oct. 2, 2013). Indeed, the U.S. Court of Appeals for the Fifth Circuit noted in 2009 that conciliation remains "the preferred means of achieving the objectives of Title VII." *EEOC v. Agro Distrib., LLC*, 555 F.3d 462, 468 (5th Cir. 2009).

EEOC's Recent Attempts to Shield Conciliation from Review

Recently, though, it seems that the agency has increasingly ignored this precondition to suit and proceeded directly to litigation. In response, employers have called the agency on its failure to conciliate in good faith, and raised the issue as an affirmative defense after suit is filed. The EEOC sees its handling of the conciliation process differently, of course, and views such an affirmative defense as a new fad, recently characterizing it as a now "routine tactic" attempted by employers to escape liability. (EEOC's Reply Brief at 1 [Doc. 23] in *EEOC v. Mach Mining, LLC*, No. 13-2456, filed Sept. 27, 2013 in 7th Cir.) The EEOC is thus making a nationwide push to neutralize this defense by convincing courts that because it is an agency with purported expertise in this area, its actions and decisions should not be subject to judicial review.

The Courts Aren't Buying It

One of the courts the EEOC is trying to persuade that the judiciary should let EEOC employees do as they please during conciliation is the U.S. Court of Appeals for the Seventh Circuit. In the underlying district court case, *EEOC v. Mach Mining, LLC*, No. 11-CV-879 (S.D. Ill.), the EEOC alleged a pattern or practice of not hiring women for mining positions or maintaining a hiring policy that disparately impacted women. The EEOC ambitiously moved for summary judgment on Mach Mining's affirmative defense that the EEOC failed to conciliate in good faith. The district court denied the motion, holding that all of its sister courts within the circuit

"have concluded that the EEOC's conciliation process is subject to at least some level of review."*Mach Mining*, 2013 WL 319337, at *3 (S.D. Ill. Jan. 28, 2013). The court noted, however, that the circuits were split on the appropriate level of review.

In response, the EEOC appealed the decision to the Seventh Circuit, and the agency recently filed its Reply Brief. The EEOC's argument is essentially this: Title VII gives the EEOC unlimited discretion in conciliation efforts because "established" administrative law places the decision within the agency's judgment, and review of such actions will only result in "more litigation about conciliation and more victims of discrimination without remedies." Reply Brief at 2. Whether the Seventh Circuit will agree remains to be seen.

A U.S. District Court Judge in Texas didn't buy a similar argument, though, as he explained in a recent opinion in *EEOC v. Bass Pro Outdoor World, LLC*, *et al*., No. 11-CV-3425, Doc. 149 (S.D. Tex. Oct. 2, 2013). Here, the EEOC also moved for partial summary judgment on the defendants' affirmative defense of failure to conciliate in good faith. (Interestingly, it seems that the EEOC is picking these fights.) In its motion, the agency argued that while the court could review *whether* it attempted conciliation, it could not review *how* the agency conducted conciliation. The EEOC attempted to convince the court that this true by invoking the APA, sovereign immunity, and a separation of powers argument.

The court was not impressed, and Judge Keith P. Ellison was candid in his dismissal of the EEOC's arguments. He first noted that he had no choice in dismissing the argument that the EEOC's conciliation efforts were not reviewable in the Fifth Circuit, writing that "Fifth Circuit precedent squarely forecloses such a holding." *Id*. at 4.

Judge Ellison nevertheless addressed the EEOC's individual arguments, and found each lacking. He first explained that the APA was inapplicable because the suit was brought by the EEOC and not a private citizen. He disagreed with the EEOC's argument that the defendants had no standing to challenge the EEOC's conciliation efforts, instead finding that the defendants' "simply seek to challenge a precondition to the EEOC's authority to file suit." *Id*. at 6.

He also dismissed the sovereign immunity claim by noting that "[i]t would make little sense for Congress to impose certain conditions precedent on the EEOC's authority to bring suit if the EEOC could just turn around and claim sovereign immunity from judicial enforcement of that condition." *Id*. at 7.

Finally, the court was not convinced by the EEOC's argument that it should not be second-guessed because conciliation is more properly accomplished by it, an executive agency, than by the judiciary. Judge Ellison pointed out that the courts "do not wade into whether the EEOC should accept or reject specific conciliation offers", but only enforce the precondition as the statute requires. *Id*. at 8-9.

Bottom Line

So, what should employers make of these recent developments? For one, the EEOC is consistent and persistent. If you are dealing with this issue in a pending lawsuit, expect to see these arguments. But there are some general lessons too. If you are hit with a charge of discrimination and the process reaches conciliation, it is a good idea to engage for a number of reasons:

- If the EEOC is willing to abide by Title VII and be reasonable, it may result in a quick resolution of the dispute.
- But no matter the outcome, engaging is a good idea because you will learn facts in the process that allow more accurate evaluation of the dispute. This information is essentially "free discovery" that will allow you to determine the scope of the dispute and refine the factual and legal issues.

- Engaging in informal settlement talks will also give you a better feel for what the EEOC and the charging party are really seeking.
- Finally, if the EEOC does not conciliate in good faith, your good-faith engagement may result in a strong defense to an eventual lawsuit or at least leverage in settlement discussions.

Further Reading

Other cases in which this issue has been litigated recently include:

- EEOC v. Bloomberg L.P
- ., 07 Civ. 8383 (S.D.N.Y. Sept. 9, 2013)
- *EEOC v. St. Alexius Medical Center*, No. 12-CV-7646, 2012 WL 6590625 (N.D. Ill. Dec. 18, 2012).