

Seventh Circuit: Failure To Conciliate Is Not A Defense In EEOC Lawsuits

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Employers who are defendants in actions brought by the EEOC in federal court cannot assert failure to conciliate as an affirmative defense, the U.S. Court of Appeals for the Seventh Circuit has ruled. In so doing, the Seventh Circuit is the first federal circuit court of appeal to explicitly reject the failure-to-conciliate defense, the Court noted in its lengthy opinion released Friday.

In determining a question of law brought up on an interlocutory appeal, the Seventh Circuit ruled in *EEOC v. Mach Mining, LLC* that “the language of [Title II], the lack of a meaningful standard for the courts to apply, and the overall statutory scheme convince us that an alleged failure to conciliate is not an affirmative defense to the merits of a discrimination suit.”

The three-judge panel of the Court provided multiple reasons for its determination that Title VII should not be read to contain an implied failure-to-conciliate defense. In particular, the opinion stated that such a defense would add “an unwarranted mechanism by which employers can avoid liability for unlawful discrimination” through “protracted and ultimately pointless litigation over whether the EEOC tried hard enough to settle.”

The Court also noted that in its view an implied failure-to-conciliate defense

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is counter to a broad statutory prohibition in Title VII on using statements and actions from the conciliation process as evidence in later legal proceedings, and would undermine the conciliation process.

Although Title VII requires the EEOC to try to resolve a disputed charge of discrimination before filing a lawsuit, the Seventh Circuit panel also gave weight to its view that there is no workable standard for courts to apply in determining whether EEOC did enough during the conciliation process to meet its statutory obligation to engage in “conference, conciliation, and persuasion.” The Court stated that Title VII gives the EEOC “complete discretion to accept or reject an employer’s offer for any reason. Such an open-ended provision looks nothing like a judicially reviewable prerequisite to suit.”

The practical effect for Defendant Mach Mining is that it was unable to secure a dismissal of the gender discrimination case at an early stage. Barring any further appeal or settlement, the case will continue to move forward in the Southern District of Illinois.

Meanwhile, in the Seventh Circuit at least, employers can expect that the EEOC will be emboldened by the ruling as it engages in the conciliation process while discrimination charges are at the investigation and conciliation phase.

And given the division among the circuits, it is possible that the issue may eventually be presented to the U.S. Supreme Court.

The full opinion can be [accessed here](#).