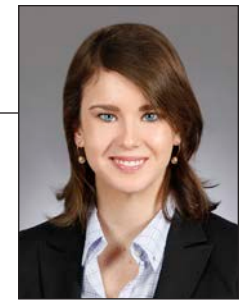
by Laura E. Carlisle



Rules of the Game: The EEOC's Pre-Suit Conciliation Obligations and the Scope of Judicial Review

When the U.S. District Court for the Northern District of Illinois issued a decision on Oct. 7 dismissing the EEOC's Complaint in *EEOC v. CVS Pharmacy Inc.*, _F. Supp. 3d_(N.D. Ill. Oct. 7, 2014), many expected a ruling on the substance of Title VII's protections and the fate of employers' standard-form severance agreements. Filed earlier this year, the case was one of a pair of cases in which the EEOC challenged standard-form severance agreements as patterns or practices of resistance to the full enjoyment of rights secured by Title VII.[1]

But the district court did not dismiss the EEOC's complaint against CVS based on the merits of the EEOC's allegations or the legality of CVS's severance agreements. The court did not even reach the substance of the dispute. Instead, it disposed of the case on a purely procedural issue: the EEOC's failure to engage in pre-suit conciliation efforts pursuant to 42 U.S.C. § 2000e-5(b).[2]

While the court's decision was not the landmark decision many anticipated, it points to a significant, ongoing debate and circuit split regarding the EEOC's enforcement authority and the scope of judicial review when it comes to Title VII's pre-suit enforcement process—a debate that is currently sitting before the U.S. Supreme Court.

Specifically, while most courts agree that Title VII imposes on the EEOC a mandatory obligation to attempt conciliation with an employer before it files suit, federal courts are divided as to whether the EEOC's pre-suit efforts should be subject to judicial review and, if so, what the level of scrutiny should be. The policy considerations are multiple: potential abuse by what some consider to be an overly aggressive EEOC, the risk of employers derailing Title VII litigation with judicial probing into the pre-suit enforcement process, concerns over the statutorily mandated confidentiality of that process, the difficulty of crafting a standard of review in the absence of congressional guidance, and so forth. The case of *Mach Mining, LLC v. EEOC,* 738 F.3d 171 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2872, places these considerations and the current circuit split squarely before the Supreme Court. Its decision will likely change the way both employers and the EEOC approach Title VII disputes.

I. The EEOC's Pre-Suit Conciliation Obligation

Title VII permits suits by both individual claimants and the EEOC; however, the text and legislative history of the statute reflect a preference for cooperation and voluntary compliance. To this end, "Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in federal court."[3] Conciliation is one step in this pre-suit enforcement procedure.

Pursuant to 42 U.S.C. § 2000e-5(b), once the EEOC determines that reasonable cause exists to support a Title VII charge, the agency "*shall* endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion" (emphasis added). At this point in the pre-suit enforcement process, the agency typically notifies the employer and offers informal conciliation to resolve the matter and obtain enforcement. In the event the employer declines the invitation or conciliation fails, the EEOC may then file suit against the employer in federal court or issue a right-to-sue letter to the claimant to pursue her claim in court on her own behalf. The conciliation process and any information exchanged during the course of conciliation efforts are strictly confidential.[4]

II. The Current Circuit Split

Most courts, as well as the EEOC, have observed that Section 2000e-5(b) imposes on the agency a *mandatory* obligation to attempt conciliation with an employer before it files suit, but the consensus ends there. For now, the federal circuits are divided on both whether the EEOC's conciliation efforts are subject to judicial review in the first instance and, if so, what level of scrutiny should apply.

The Historic Divide Between a Good-Faith Standard and More Demanding Inquiry

Until recently, the federal circuits largely agreed that the EEOC's duty to engage in conciliation is a judicially enforceable

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obligation subject to judicial review. In this regard, most courts agree that the EEOC's failure to attempt conciliation subjects a suit filed by the agency to dismissal via the employer's affirmative defense or a motion to dismiss. However, the federal circuits have disagreed over the level of scrutiny to apply. Title VII itself provides no guidance as to proper scope or standard of review.

On the one hand, the Fourth, Sixth, and Tenth circuits tend to apply a minimal good-faith standard, requiring only that the EEOC make a genuine effort to conciliate before filing suit. For example, the EEOC must have attempted to conciliate the same claims included in the suit, with the same defendant, and permitted the defendant reasonable time to respond to conciliation efforts. The standard is modest, the idea being that courts should not be prying (too far) into what is designed to be an informal, confidential process. At the same time, the standard has been critiziced as inherently subjective.

The Second, Fifth, and Eleventh circuits adopt a more searching, three-part inquiry. While premised on a good faith standard, this inquiry specifically asks whether the EEOC: (1) outlined to the employer its cause for believing Title VII has been violated; (2) gave the employer a chance to comply voluntarily; and, (3) responded "in a reasonable and flexible manner to the reasonable attitudes of the employer."[5] For these courts, it is not enough for the EEOC to present a conciliation demand to the employer and then file suit if the demand is rejected; rather, the EEOC must engage in a reasonable give and take with the employer.[6] Inherent in this inquiry is a certain suspicion of the EEOC and its pre-suit processes and procedures, which some courts have viewed as arbitrary and coercive of the employer.

The Seventh Circuit and *Mach Mining LLC v. EEOC*

In late 2013, the Seventh Circuit threw a wrench into whatever consensus existed among the federal circuits. The case began as *EEOC v. Mach Mining LLC,* Civil Action No. 3:11-cv-879, U.S. District Court, Southern District of Illinois, and arose from a charge of discrimination from a woman who claimed that the defendant had rejected several of her applications for coal-mining jobs because of her gender. After investigating the charge, the EEOC determined that reasonable cause existed to believe that the defendant had discriminated against a class of female applicants. The agency notified the defendant of its determination and intention to begin informal conciliation. Though the parties discussed possible resolution, they did not reach an agreement, and the EEOC notified the defendant that it had determined conciliation had failed and further efforts would be futile. It then filed suit.

Mach Mining asserted an affirmative defense in the district court based on the EEOC's failure to conciliate in good faith. The EEOC later moved for summary judgment on the limited issue of whether, as a matter of law, an alleged failure to conciliate is judicially reviewable as an affirmative defense to alleged discrimination. The district court denied the motion but certified for interlocutory appeal the question of whether and to what extent conciliation is judicially reviewable through an implied affirmative defense. Breaking rank with the other federal circuits, the Seventh Circuit ruled that it is not.

The Seventh Circuit was unapologetic as to the effect of its ruling: "Our decision makes us the first circuit to reject explicitly the implied affirmative defense of failure to conciliate. Because the courts of appeals already stand divided over the level of scrutiny to apply in reviewing conciliation, our holding may complicate an existing circuit split more than it creates one, but we have proceeded as if we are creating a circuit split."[7]

Ruling that "alleged failures by the EEOC in the conciliation process simply do not support an affirmative defense for employers," the Seventh Circuit rejected the notion that the EEOC's conciliation efforts are subject to any kind of substantive judicial review; for the court, it was sufficient that the EEOC "pled on the face of the complaint that has complied with all procedures required under Title VII and the relevant documents are facially sufficient."[8] In other words, so long as the EEOC pleads that it attempted conciliation, and its complaint appears in order, there is nothing more for the courts to consider.

The Seventh Circuit's reasoning here is manifold. First, the court reasoned that Title VII simply does not permit an affirmative defense insofar as it does not expressly provide for the defense and makes clear that conciliation is an informal, *confidential* process entrusted to the EEOC's judgment. Second, neither the text nor the legislative history of Title VII provides a meaningful standard of review. The Seventh Circuit found other circuits' efforts to craft such a standard unworkable and unpersuasive. Finally, the court reasoned that permitting employers an affirmative defense based on the EEOC's failure to conciliate is inconsistent with Title VII's preference for cooperation and voluntary compliance and risks sanctioning employers who simply wish to use the defense to derail Title VII litigation and avoid liability. Unlike those courts that have adopted the more searching three-part inquiry discussed above, the Seventh Circuit's reasoning does not reflect any particular suspicion of the EEOC's pre-suit processes and procedures in handling charges.

The Seventh Circuit issued its ruling on Dec. 20, 2013. On February 25, 2014, Mach Mining filed a petition for writ of certiorari with the U.S. Supreme Court, which was granted on

June 30. The question now before the Supreme Court is whether and to what extent a court may enforce the EEOC's duty to conciliate Title VII claims before filing suit. The Court heard oral argument in the case on Jan. 13, 2015, the date this article went to publication.

III. Conclusion

It is hard to predict what the Supreme Court will do with the current circuit split. On the one hand, it is true that Title VII's pre-suit enforcement scheme embodies a preference for voluntary compliance and informal, confidential resolution—a process not intended to be carried out under the eyes of the courts. And the ability of employers to derail Title VI litigation—whether meritorious or not—with judicial inquiries into the EEOC's pre-suit efforts is a plausible concern. In *EEOC v. CVS Pharmacy,* it was undisputed that the EEOC had failed to attempt conciliation with CVS, making dismissal an almost easy call for the district court; but it is still true that the inquiry into the EEOC's efforts was capable of derailing a more substantive ruling on the validity of CVS' severance agreements. At the same time, there are those who would say that the case only reached the courts as a product of an overly aggressive, even coercive EEOC set on challenging the practices of a large employer—the kind of behavior that calls for checking by the courts.

Ultimately, this balancing of policy considerations perhaps begs a more fundamental question—that is, whether conciliation should be mandatory at all. Indeed, if, as they say, the EEOC is determined to stake out new ground by challenging employer practices in the courts, making its pre-suit efforts little more than a formality, and if, as they say, inquiries into the EEOC's pre-suit efforts are not only inherently subjective but capable of derailing litigation and the vindication of employee rights, an inevitable question becomes: What purpose do those pre-suit efforts serve?

Absent legislative change, pre-suit conciliation is likely to remain mandatory. But, the Supreme Court's decision with respect to the case now before it will have to stake out some position as to whether that process should be trusted solely to the EEOC or whether, instead, the courts should be invited in via a judicially reviewable affirmative defense or motion to dismiss. The case is thus most certainly one for the EEOC, employers, and employees alike to watch.

Endnotes

[1]The other case is *EEOC v. CollegeAmerica Denver Inc.,* Civil Action No. 14-cv-01232, United States District Court, District of Colorado. In that case, on Dec. 2, 2014, the district court granted in part and denied in part the defendant's motion to dismiss. More specfically, the court dismissed the EEOC's claim related to the defendant's separation agreement due to the EEOC's failure to engage in pre-suit conciliation efforts with respect to that claim.

[2]On Dec. 5, 2014, the EEOC filed a notice of appeal in the district court indicating that it would seek review of the court's decision from the Seventh Circuit Court of Appeals.

[3]*Occidental Life Ins. Co. v. EEOC,* 432 U.S. 355, 359 (1979); *see also Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974).

[4]*See* 42 U.S.C. § 2000e-5(b).

[5]*See,* e.g., *EEOC v. Agro Distribution LLC,* 555 F.3d 462, 468 (5th Cir. 2009).

[6]*See Id.* at 468 and n.6.

[7]*Mach Mining,* 738 F.3d at 182.

[8]*Id.* at 184.

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now have three different models they can review to see how best to accomplish that goal: (1) Washington's multiple-choice question model; (2) South Dakota's essay model; and (3) New Mexico's stand-alone course model. Time will tell whether one or those models, or some other model yet to be created, most successfully instills a minimum of Indian law knowledge throughout the practicing attorney community. ⊙

Endnotes

[1]Michael Gross, *New Mexico Pioneers Indian Law on the Bar Exam,* 71 Bar Examiner No. 3, 25, 30 (August 2002).

[2]*See* Angelique EagleWoman, Sherri Fremont, Gloria Valencia-Weber, and Joseph Williams, *Recognizing the Importance of Indian Law on State Bar Examinations,* 60-APR Fed. Law 30 (April, 2013).

[3]*See* Matthew Fletcher, *July 2007 NY State Bar Exam Indian Law Question,* Turtle Talk (Jan. 18, 2008), turtletalk.wordpress.com/2008/01/18/july-2007-ny-state-bar-exam-indian-law-question.

[4]*See* Cindy L. Martin, *Local Law Distinctions in the Era of the Uniform Bar Examination: The Missouri Experience (You Can Have Your Cake and Eat It Too),* 80 Bar Examiner No. 3, 7 (September 2011).

[5]*See* Felicia Fonseca, *In Arizona, Push for Indian Law on State Bar Exam,* Associated Press, Sept. 27, 2009, www.native-times.com/index.php/life/education/2439-in-arizona-push-for-indian-law-on-state-bar-exam.

[6]*See* Washington Law Component Research Materials, January 2013, www.wsba.org/~/media/Files/Licensing_Lawyer%20Conduct/Admissions/WASHINGTON%20LAW%20COMPONENT.ashx (containing description of test and substantive outlines for state-specific subjects, including Indian law).

[7]New Mexico Supreme Court Order No. 14-8500, at 1 (Oct. 10, 2014).

[8]*Id.*

[9]*See* NMRA 15-107 (as amended by New Mexico Supreme Court Order No. 14-8300-001, April 3, 2014).

[10]Email correspondence with New Mexico Board of Bar Examiners Executive Director Carol Skiba.

[11]*See generally* Phil Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Indian Law,* 110 Harv. L. Rev. 1754 (1997) (discussing incoherence in federal Indian law doctrine).