

EEOC SEEKS DETERMINATION FROM SEVENTH CIRCUIT THAT ITS PRE-SUIT CONCILIATION EFFORTS CANNOT BE REVIEWED

The EEOC is statutorily obligated to enter into confidential conciliation efforts with an employer prior to commencing a lawsuit. Only if the EEOC is unable to secure a conciliation agreement acceptable to it may it bring a civil action, as conciliation is a condition precedent to the EEOC's power to sue. The purpose of this requirement is to encourage settlement of discrimination cases through voluntary compliance, rather than litigation. If the EEOC commences suit against an employer without first engaging in a good faith effort to conciliate the case, the employer may seek dismissal of the lawsuit because conciliation raises a quasi-jurisdictional issue.

Despite case law to the contrary, the EEOC has now attempted to argue that a federal district court is without authority to review the EEOC's pre-suit conciliation efforts. In *EEOC v. Mach Mining*, the EEOC has argued that an employer cannot challenge the EEOC's pre-suit conciliation efforts because Title VII prohibits disclosure of conciliation efforts in a subsequent proceeding. The federal district judge, however, was not persuaded by the EEOC's argument as he found that the prohibition was in conflict with Title VII's mandate that the EEOC must attempt to conciliate with the employer prior to bringing a civil action. Moreover, the federal district judge also held that Title VII's prohibition regarding disclosure of conciliation efforts goes to the introduction of such evidence relative to the merits of the case and not to introducing such evidence for the purpose of determining whether the EEOC first satisfied its prerequisite to bringing suit.

Nevertheless, the federal district judge granted the EEOC's motion to seek an interlocutory appeal before the Seventh Circuit because there exist a split between the federal circuits as to the scope of a court's review of the EEOC's conciliation efforts – an issue that the Seventh Circuit has not yet addressed. Some circuits employ a “deferential standard” inquiring only whether the EEOC made an attempt to conciliate whereas other circuits apply a “heightened scrutiny standard” which requires the EEOC to make a sincere and reasonable effort to negotiate by providing the employer with an explanation as to the reasonable cause for its belief that Title VII has been violated and an adequate opportunity to respond to all charges and negotiate a possible settlement.

The federal district court certified the following two questions for the Seventh Circuit on appeal: (1) Is the EEOC's conciliation process subject to judicial review?, and (2) if so, is that level of review a deferential or heightened scrutiny level of review? It would be anticipated that the Seventh Circuit will hold that the EEOC's conciliation is subject to judicial review and will most likely find that a district court's scope of review will include a determination as to whether the EEOC in fact engaged in conciliation and whether that effort was made in good faith. We will update this blog article when the Seventh Circuit issues its decision.