

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT SETS STANDARD FOR EEOC CONCILIATION EFFORTS

On Wednesday, April 29, 2015, the U.S. Supreme Court issued its unanimous decision in *Mach Mining LLC v. Equal Employment Opportunity Commission*, addressing the issue of the level of judicial review allowed regarding the EEOC's duty to conciliate charges of discrimination prior to litigation. We have discussed this decision in this blog from its early stages ([here](#), [here](#), and [here](#)), and the Supreme Court has finally proven what we said in July 2013, that the EEOC's conciliation efforts are indeed subject to judicial review, to be true. However, the Supreme Court did not choose to hold the EEOC to the "good faith" standard that many employers had hoped for or the mere facial examination that the EEOC had championed, instead striking a balance between the two by limiting the court's review to a "narrow" one. In rendering its decision, the Supreme Court recognized the EEOC's extensive discretion to determine the kind and amount of communication necessary with any employer to satisfy its statutory duty to engage in conciliation efforts prior to filing suit. Under this new standard, a court's review is limited to reviewing only that the EEOC gave the employer notice of the charge and an opportunity to achieve voluntary compliance.

It has always been the law under Title VII that, prior to the EEOC suing an employer for discrimination, it must first engage in conciliation. Not until after efforts at conciliation have failed may the EEOC file a lawsuit in federal court. The Supreme Court held that Congress meant to allow judicial review of administrative actions, including the duty to attempt to conciliate. The Court obviously rejected the EEOC's "just trust us" method of review.

According to the Supreme Court, in order to show that the EEOC has met its statutory burden to conciliate, it must notify the employer of the claim and give the employer an opportunity to discuss the matter. The judicial review is limited to those elements. Simply, the EEOC must inform the employer about the specific discrimination alleged by describing what the employer has done and which employees have suffered. The EEOC must then try to engage the employer in a discussion in order to give it a chance to remedy the alleged discrimination, although the EEOC is still allowed substantial flexibility in the process. The Court found that delving into whether or not the EEOC had conciliated in good faith conflicted with the latitude Title VII gives the EEOC, imposed extra procedural requirements, and was in conflict with Title VII's protection of the confidentiality of conciliation efforts. It is still within the discretion of the EEOC to accept a settlement or bring a lawsuit. Typically, a sworn affidavit from the EEOC that it has performed these obligations will be sufficient.

If the employer alleges through concrete evidence, either through its own affidavit or otherwise, that the EEOC has failed in its duty to conciliate, courts are allowed to engage in

necessary fact-finding to decide the issue. If a court decides that the EEOC did not meet its statutory duty to conciliate matters prior to filing suit, the appropriate remedy is to stay the action, rather than dismissal, and order the EEOC to undertake the mandated conciliation efforts.

Although the EEOC will likely still be aggressive in its litigation efforts, the Supreme Court's decision will ensure that the EEOC must engage in some form of articulable conciliation efforts, even if it is just a minimal effort, before commencing suit against an employer. Employers who believe that the EEOC has not met its statutory obligation to engage in conciliation will still have, thanks to the Supreme Court's decision, the "failure-to-conciliate" defense in its quiver.

EMPLOYMENT LAWSCENE ALERT: SEVERANCE AGREEMENTS REMAIN IN EEOC'S CROSSHAIRS

In February 2014, the EEOC filed suit in Illinois federal court against CVS Pharmacy, Inc. alleging that the company's separation agreements constituted a pattern or practice of unlawfully discouraging employees from exercising their rights under Title VII of the Civil Rights of 1964 to communicate with the EEOC or to file discrimination claims. The EEOC's complaint stated that CVS had used a five-page, single-spaced separation agreement that included, among other things, a requirement that employees notify CVS if they became part of an administrative investigation, a promise to not disparage the company or its officers, directors, or other employees, a non-disclosure agreement, a release of claims, and a covenant not to sue. Although the agreements contained express language stating that nothing in the agreement was meant to interfere with the employee's right to participate in any legal proceedings or cooperate with an agency's investigation, the EEOC claimed that that language was not sufficient because the non-disparagement and nondisclosure provisions made cooperation impossible.

In April 2014, CVS filed a Motion to Dismiss the EEOC's complaint calling their severance agreements "run-of-the-mill" and stating that they did not violate the law. CVS further argued that the agreements, even if they restricted employees unlawfully, were not a pattern or practice of interfering with employees' rights but merely constitute unenforceable contracts. CVS' Motion to Dismiss was given support by an *amicus* brief filed by the Retail Litigation Center, Inc., which said that the language used by CVS was substantially similar to agreements used by employers nationwide and a ruling for the EEOC could result in the invalidation of agreements far beyond CVS and result in a flood of litigation.

The federal district court judge dismissed the EEOC's suit, however, not on its merit. The EEOC's case was dismissed because the EEOC failed to meet its pre-suit conciliation efforts before bringing the lawsuit. The federal district court found that the EEOC did not engage in any conciliation procedure and, as a result, was not legally authorized to commence suit. The EEOC, in response, acknowledged that it had not engaged in any pre-suit conciliation efforts but argued that it was proceeding under a portion of Title VII that did not require the agency to conciliate.

The EEOC has appealed the district court's decision to the Seventh Circuit, which oversees the federal district courts in Illinois, Indiana, and Wisconsin. Given that the federal district court dismissed the case on procedural grounds, it is very unlikely that the Seventh Circuit, on appeal, will address the merits of the EEOC's claim regarding the legality of CVS's severance agreements. If the EEOC is successful with its appeal at the Seventh Circuit, then it would be most likely that the case will be remanded back to the district court for further proceedings.

This leaves the question open of whether the EEOC will stay the course and continue to press its case against CVS or whether it will select another employer as its target in pursuing its claim that "run-of-the-mill" severance agreements violate Title VII in preventing individuals the full enjoyment of rights afforded by Title VII.

Until a decision on the merits is reached on this issue, it is recommended that employers include explicit and express provisions in their severance agreements that make clear (i) that employees are allowed to participate in agency proceedings that enforce discrimination laws; (ii) that the waivers and releases are not to be construed to interfere with the EEOC's rights and responsibilities to enforce federal anti-discrimination statutes under its jurisdiction or those rights of any state administrative agency; and (iii) that the employee has the protected right to file a charge or participate in an investigation or proceeding conducted by the EEOC or any state administrative agency charged with the authority to enforce anti-discrimination laws.

EMPLOYMENT LAWSCENE ALERT: ACCOMMODATING EMPLOYEES UNDER THE ADA — THE EFFORT DOESN'T HAVE TO BE PERFECT, IT JUST HAS TO BE MADE

The Americans with Disabilities Act requires employers to make reasonable accommodations

for employees with disabilities. This process requires that employers and employees engage in an interactive process to discuss potential reasonable accommodations. The interactive process requires an informal dialogue between the employer and the employee in which the parties discuss reasonable accommodations for an employee's disabilities. A recent case out of the First Circuit shows that the process does not have to be perfect to be adequate and that both the employee and the employer have to engage in the interactive process in good faith.

In *EEOC v. Kohl's Department Stores, Inc.*, No. 14-1268, the employee suffered from Type I diabetes and claimed that her unpredictable work schedule as a sales associate was aggravating her condition and endangering her health. When the employee supported her request for accommodation with a doctor's note, her supervisor spoke with human resources. When the employee and the supervisor met, the employee requested a consistent schedule, which the supervisor said she could not give her. This was a valid decision by the employer as the accommodation given does not have to be the accommodation the employee specifically requests. Instead of proposing another accommodation or discussing the options, the employee got upset and quit. While the employee was leaving, the supervisor asked that she reconsider her resignation and asked to discuss other potential accommodations. The employee refused and left the premises. A week later, the supervisor again called the employee and requested that she come back to work and they could discuss accommodations. The employee did not accept this offer.

The interactive process requires bilateral cooperation and communication and, because the employee did not cooperate in the process and was responsible for the breakdown of communication, the court found that the employer could not be held liable for failure to provide a reasonable accommodation. The lesson for employers is that their efforts do not need to be perfect to fulfill their requirements under the Americans with Disabilities Act; employers simply need to engage in the interactive process in good faith, be willing to discuss potential accommodations with the employee, and, if appropriate, provide the employee with a reasonable accommodation, not necessarily the employee's preferred accommodation, that permits the employee to perform his or her job.

EMPLOYMENT LAWSCENE ALERT: RELIGIOUS ACCOMMODATIONS AND YOUR WORKPLACE

Under Title VII of the Civil Rights Act of 1964, employers are required to accommodate employees' religious beliefs. Two recent cases demonstrate the importance of recognizing when religious accommodations might be necessary.

In March 2014, the EEOC published guidance on religious garb and grooming in the workplace. The guidance states that an employee does not have to use “magic words” to request an accommodation and that a request for a religious accommodation may not even be necessary when the religious practice is “obvious.” Of course, the EEOC’s guidance is only guidance and does not have the force of law.

Whether notification to the employer and a specific request is necessary to succeed on a Title VII religious discrimination case will be decided by the United States Supreme Court in the coming year when it hears the case *EEOC v. Abercrombie and Fitch*. The case stems from a Muslim applicant who was not given a job at the retailer, allegedly because she wore a headscarf to her interview that conflicted with the store’s dress code, which prohibited headgear. The case was dismissed because the Tenth Circuit found that forcing employers to infer that an accommodation was necessary was too burdensome and that a request for accommodation from the employee is necessary before the employer is required to act on it. The Supreme Court will determine whether that is the correct standard for religious discrimination. Until a final decision is made, employers should be aware of the potential need for a religious accommodation even if the employee does not request it because the EEOC is likely to support employees who bring these kinds of claims.

Another recent example is the January 15, 2015 jury verdict out of a West Virginia federal court. In *EEOC v. CONSOL Energy, Inc. and Consolidated Coal Company*, the jury determined that the employer had violated Title VII by failing to accommodate a mine worker’s religious objection to using a biometric hand-scanning system that tracked employee time. The employee claimed that he had a sincerely-held religious belief that the hand-scanning system was connected to the “mark of the beast” and the Antichrist and retired instead of using the device. Although the employer offered to let the employee use his left hand with his palm up, the jury determined that it was not a reasonable accommodation.

Employers need to be aware of the need to discuss accommodations for sincerely-held religious beliefs with their employees and their applicants when those issues arise.

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT HEARS ORAL ARGUMENTS ON THE EEOC’S DUTY TO CONCILIATE

On Tuesday, January 13, 2015, the United States Supreme Court heard oral arguments in *Mach Mining LLC v. EEOC*, 13-1019, the outcome of which will have a significant effect on the

EEOC conciliation process and a case we have posted on this blog previously. The dispute revolves around whether — and to what extent — courts can enforce the EEOC’s obligation under Title VII to conciliate before filing a lawsuit.

The EEOC initially filed a Title VII gender discrimination complaint against Mach Mining in 2011 for allegedly failing to hire or refusing to hire women because of their gender. The EEOC claims that it filed suit after trying to reach a prelitigation settlement through its conciliation process. Mach Mining disagreed and asserted as an affirmative defense in its answer to the complaint that the EEOC had failed to conciliate in good faith as required by the statute.

The Seventh Circuit Court of Appeals created a circuit split when it ruled that employers cannot allege as a defense that the EEOC didn’t work hard enough to reconcile disputes before filing suit. All other circuit courts have held that the adequacy of conciliation is subject to court review, although the standard of review varies between courts. According to the Seventh Circuit, the failure-to-conciliate defense went against the statutory prohibition on using what was said and done in conciliation as evidence in future proceedings.

During oral arguments, Mach Mining’s attorney suggested that courts be able to conduct a “modest inquiry” into whether the EEOC attempted to resolve a claim of discrimination through conciliation and, if determined that the EEOC had not done so, to require it to conciliate. The EEOC, on the other hand, does not want the courts to have any ability to review its pre-suit conciliation efforts. Chief Justice Roberts, however, voiced his concern that he was “troubled by the idea that the government can do something that [the courts] can’t even look at whether they’ve complied with the law.” Justice Breyer echoed Chief Justice Roberts’ concerns by saying that “everything just about” is subject to judicial review. Justice Scalia called the EEOC’s request that its conciliation efforts be exempted from judicial review as “extraordinary.”

The main concern over any judicial inquiry into the EEOC’s pre-suit conciliation efforts is the level of inquiry a court should undertake. This is where the appellate circuit courts differ. The Second, Fifth, and Eleventh Circuits evaluate conciliation under a three-part inquiry whereas the Fourth, Sixth, and Tenth Circuits require instead that the EEOC’s efforts meet a minimal level of good faith.

Justices Kagan and Ginsburg’s questions seemed to belie a belief that Congress has not put an onerous requirement on what was required of the EEOC in conciliation. Justice Sotomayor stated that she didn’t “know how you make something that’s designated by Congress as informal into a formal proceeding.” Justice Kennedy stated that Title VII’s requirement that the EEOC try to eliminate allegedly unlawful employment practices “by informal methods of conference, conciliation, and persuasion” were “very difficult words” for Mach Mining’s position. Mach Mining responded by stating that “informal” did not mean that the EEOC could

do whatever it wanted.

Although the Court continued to ask the parties to give them a rule that would be acceptable to them, neither came up with an answer the Justices seemed satisfied with. The EEOC initially argued that it should only be required to show that an attempt to conciliate had been made. Justice Scalia, however, honed in on the fact that the EEOC is obligated to try to obtain an agreement that is acceptable to it but, in order to try to obtain an agreement, you have to tell the other side what you want. Similarly, Chief Justice Roberts did not like the “just trust us” approach. The EEOC eventually conceded that the Court could require it to say that it informed the employer of what it objected to and that they had communicated about the issue.

Mach Mining argued that the Court should require that the EEOC reach out to the employer and, if the employer responded that it wanted to conciliate, that the EEOC should have to tell the employer what would be an acceptable offer, which they could legally obtain in court, and how they had arrived at that number. Justice Kennedy stated that this would be akin to enforcing the good faith bargaining of contracts and labor law, which he referred to as “a morass.” Justice Kagan called this inquiry “intrusive.”

The decision in this case will have a large impact on how the EEOC conciliates cases prior to litigation and how employers will need to approach such conciliation efforts. If the Court rules in the EEOC’s favor, it would likely mean that the EEOC could become even more aggressive with its charge to the courthouse with high profile cases, as a lack of good faith or reasonableness would not create a barrier to the EEOC’s efforts to litigate a case that an employer might be more than willing to conciliate on fair and reasonable terms — if only given an opportunity.

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT TO DECIDE PREGNANCY ACCOMMODATION CASE

On December 3, 2014, the United States Supreme Court will hear oral arguments in *Peggy Young v. United Parcel Service Inc.*, No. 12-1226, and the outcome could have a significant impact on employers and their pregnant employees.

Peggy Young was a UPS delivery driver. She went out on leave for in vitro fertilization and, when she returned, had lifting restrictions. Although workers who had temporary restrictions from on-the-job injuries, were disabled, or had lost their Department of Transportation

certification were allowed temporary alternate assignments, Ms. Young was denied a similar accommodation for her pregnancy-related restriction. In 2008, she filed a discrimination suit based on the claim that UPS violated Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act by refusing to accommodate her pregnancy by letting her perform light duty work. UPS rests its argument on the fact that federal law does not require special treatment or accommodations for pregnant employees, and that its facially neutral policy cannot become discriminatory simply because it does not extend the privilege to pregnant employees. Under UPS' policy, any worker who was injured or had a condition that did not stem from work was not accommodated. Although the United States District Court for the District of Maryland and Fourth Circuit Court of Appeals agreed with UPS, the United States Supreme Court granted certiorari in July 2014.

Interested parties on both sides have weighed in on the case by filing amicus briefs. Most recently, on October 31, 2014, the U.S. Chamber of Commerce filed a brief supporting UPS that stated that Ms. Young's interpretation would blur the line between intentional and unintentional pregnancy bias and should not be allowed to go forward. They, and other groups, have advocated that federal law requires only that pregnant and non-pregnant workers receive equal treatment, not that pregnant employees should get preferential treatment.

The outcome of this case will help guide employers on whether and when employers are required to provide work accommodations to pregnant employees when they provide them to non-pregnant employees who are similar in their ability or inability to work. The Supreme Court's decision could signal a shift in the law and enforcement of law related to pregnant employees that has already been evident elsewhere. In July, the EEOC issued additional guidance on pregnancy discrimination and accommodations, which stated that employers should offer accommodations to pregnant employees in the same way that accommodations were offered to non-pregnant employees with similar abilities or disabilities to work. The EEOC's guidance is not binding legal authority but, instead, the agency's interpretation of how the law should be implemented. The Supreme Court now has the option to embrace the EEOC's more expansive interpretation of the PDA or to reign in the EEOC and limit what accommodations employers are required to give to pregnant employees. The Pregnant Workers Fairness Act, which would require reasonable accommodations for pregnant employees, is also pending in the House of Representatives.

Employers should monitor the outcome of this case and, depending on the outcome, review their policies to ensure that they are compliant with the law.

EMPLOYMENT LAWSCENE ALERT: WHAT THE MIDTERM ELECTION RESULTS MEAN FOR LABOR AND EMPLOYMENT LAW

In the midterm elections on Tuesday, November 4, 2014, the Republican Party gained a majority in the U.S. Senate. Now with control of both the House and the Senate, it is likely that the GOP will introduce legislation in an attempt to stop many of the current administration's employment agendas. Although President Obama maintains veto power, the Republican Party could curtail certain efforts that are currently being made.

Areas for employers to watch for potential changes include the NLRB and other federal administrative agencies. As this blog has covered recently, the NLRB has been aggressive in its enforcement of the National Labor Relations Act, and the penalties for violators have been stiff. There is currently proposed legislation to alter the composition of the NLRB from five members to six, three being from each major political party.

Increased congressional hearings that will scrutinize the Obama administration's labor and employment agenda are also likely. A target of these hearings may be the EEOC, which has also been pursuing an aggressive agenda of discrimination cases that some consider to be an attempt to expand the reach of Title VII.

Control by the Republicans of both the House and Senate could lead to budget cuts for federal agencies that enforce labor and employment laws as well. While this would not change the laws themselves, it would restrict the agencies' ability to enforce them.

Republicans will also have the ability to block or hold up nominations for various posts in the administration related to labor and employment law. There is speculation that Secretary of Labor Thomas Perez could be nominated to take over for U.S. Attorney General Eric Holder when he resigns. If that happens, the Republicans will have a larger, and likely more employer-friendly, say in who takes over as Secretary of Labor.

EMPLOYMENT LAWSCENE ALERT: EEOC ISSUES UPDATED ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION

On July 14, 2014, the U.S. Equal Employment Opportunities Commission ("EEOC") issued

updated enforcement guidance regarding the Pregnancy Discrimination Act (“PDA”) and the Americans with Disabilities Act (“ADA”) as they apply to pregnant workers. The EEOC’s guidance discusses a number of issues related to pregnancy discrimination and other pregnancy related issues and provides insight into the agency’s interpretation of those issues and employers’ obligations under the PDA and ADA relative to pregnant employees. The EEOC also issued a question and answer sheet about the EEOC’s enforcement guidance and pregnancy related issues and a fact sheet for small businesses.

Among a number of other issues, the EEOC’s guidance discusses:

- The PDA’s coverage as it relates to current pregnancy, past pregnancy, and a woman’s potential to become pregnant or intended pregnancy.
- Discrimination based on lactation and breastfeeding and other medical conditions related to pregnancy or child birth.
- When employers may be required to provide light duty for pregnant employees.
- The prohibition against forcing an employee to take leave because she is pregnant and other issues related to parental leave.
- When employers may have to provide reasonable accommodations to employees with pregnancy-related impairments.
- Other legal requirements affecting pregnant workers, such as the Family and Medical Leave Act and Section 4207 of the Patient Protection and Affordable Care Act (requiring employers to provide “reasonable break time” for breastfeeding employees to express breast milk).
- The EEOC’s proffered best practices for employers in handling pregnancy-related matters in the workplace.

The EEOC’s updated guidance provides a clear indication of the EEOC’s position and interpretation relative to the PDA and ADA as they relate to pregnancy discrimination and other pregnancy related issues in the workplace. While this guidance may provide some insight into the agency’s position and likely enforcement efforts, employers should remember that it is merely guidance and does not have the force and effect of law.

One of the more controversial elements of the EEOC’s new guidance arises from the EEOC’s position that employers’ failure to treat pregnant employees the same as non-pregnant employees similar in their ability or inability to work is a violation of the PDA. This becomes problematic for employers who have traditionally reserved light duty positions for workers with restrictions resulting from an on-the-job injury while not providing light duty to employees who have similar temporary restrictions. The EEOC takes the position that the PDA requires employers who offer light duty work to employees who have restrictions resulting from injury on the job to offer that same light duty work to a pregnant employee with the same restrictions.

In light of this new guidance, employers should reevaluate their practices and policies related

to pregnancy and pregnancy-related issues, especially with regard to requests for accommodation, and more carefully consider each and every employment action and decision involving pregnancy in the workplace.

EMPLOYMENT LAWSCENE ALERT: EEOC ISSUES NEW PUBLICATIONS ON RELIGIOUS DRESS AND GROOMING

On March 6, 2014, the Equal Employment Opportunity Commission announced that it released two new publications addressing religious dress and grooming rights and responsibilities in the workplace under Title VII of the Civil Rights Act of 1964 (Title VII), in response to an increased number of religious discrimination charges filed with the agency.

The EEOC has published a [question-and-answer guide](#) and a [fact sheet](#) in an effort to provide employers and employees practical guidance for complying with Title VII, which, under certain circumstances, requires employers to provide reasonable accommodations to employees and applicants who wear clothing or follow certain grooming practices for religious reasons, unless doing so poses an undue hardship on the employer's business operations.

The two publications address a number of topics, including examples of common religious dress and grooming practices and when an employer's duty to consider an accommodation request is triggered, potential claims against employers for failing to accommodate religious requests, tips for preventing and addressing workplace harassment and retaliation against employees who request religious accommodations, and examples of when these requests have posed undue hardship on employers.

If you have questions about religious accommodation under Title VII, please contact one of our [Employment Law attorneys](#).

EEOC OBTAINS VICTORY IN SEVENTH CIRCUIT IN PREVENTING JUDICIAL REVIEW OF PRE-SUIT

CONCILIATION EFFORTS

In July, the Employment LawScene™ advised our readers that a federal district court granted the EEOC's motion to seek an interlocutory appeal before the Seventh Circuit as to whether the EEOC's alleged failure to conciliate prior to commencing suit is subject to judicial review in the form of an implied affirmative defense to the EEOC's suit. Title VII of the Civil Rights Act of 1964 requires the EEOC, prior to commencing suit against an employer, to "endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). The federal district court granted the EEOC's motion for an interlocutory appeal because the Seventh Circuit had not yet directly addressed the issue and because there was a split between other federal circuits as to the scope of a court's review of EEOC's pre-suit conciliation efforts.

In a somewhat surprising decision, the Seventh Circuit became the first federal circuit court of appeals in the country to explicitly reject an employer's ability to assert an implied affirmative defense that the EEOC failed to comply with its conciliation efforts prior to commencing suit. The Seventh Circuit's decision also breaks ranks with the Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits who have all held that the EEOC's pre-suit conciliation efforts are subject to judicial review, despite the fact that these courts are divided as to the level of scrutiny to apply in reviewing the EEOC's conciliation efforts. The Second, Fifth, and Eleventh Circuits evaluate conciliation under a three-part inquiry whereas the Fourth, Sixth, and Tenth Circuits require instead that the EEOC's efforts meet a minimal level of good faith. The Seventh Circuit, based upon the plain language of the statute, rejected the notion that the EEOC's pre-suit conciliation efforts are subject to any level of judicial review or scrutiny.

The Seventh Circuit reasoned that the language of Title VII, the lack of a meaningful standard for the courts to apply, and the overall statutory scheme that Congress set forth in Title VII precluded a court from reviewing the EEOC's pre-suit conciliation efforts and likewise precludes an employer from asserting an affirmative defense on that basis. The Seventh Circuit found the language of Title VII made clear that conciliation is an informal process entrusted solely to the EEOC's expert judgment and that the conciliation efforts between the EEOC and an employer must remain confidential. The Seventh Circuit also found persuasive that there is no meaningful standard to apply in determining whether the EEOC's efforts to conciliate were sufficient. The Seventh Circuit even rejected applying a good faith standard because in applying such a standard, the court reasoned, a reviewing court could not help but to engage in a prohibited inquiry into the substantive reasonableness of particular settlement offers – not to mention using confidential and inadmissible materials as evidence. In rejecting the application of a good faith review standard, the Seventh Circuit found compelling that Congress granted the EEOC the unreviewable discretion on the choice to settle or not to settle. Finally, the Seventh Circuit held that the broader statutory scheme of

Title VII in protecting individuals from unlawful discrimination trumps an employer's interests in asserting an affirmative defense based on the EEOC's failure to conciliate because, according to the Seventh Circuit, "the conciliation defense tempts employers to turn what was meant to be an informal negotiation into the subject of endless disputes over whether the EEOC did enough before going to court."

At least in the Seventh Circuit, which oversees the federal district courts in Illinois, Indiana, and Wisconsin, the manner in which the EEOC conducts pre-suit conciliation efforts may very well change as its efforts, and whether such efforts were conducted in good faith, are no longer subject to challenge by an employer or review by a court. This lack of oversight gives the EEOC wide-latitude and considerable leverage in negotiations with an employer prior to commencing suit. The question will become whether the EEOC will use that leverage and its relatively large litigation budget to force employers into needless litigation. Employers, on the other hand, as always will have to weigh the cost/benefit of surrendering to the EEOC's attempt to extract a high monetary settlement through the conciliation process versus the high cost of litigating against the EEOC. Given the Seventh Circuit's decision precludes judicial review of the EEOC's conciliation efforts, there will be no watchdog over whether the EEOC's pre-suit settlement demands are made in good faith and commensurate with the merits of a particular case.

The Seventh Circuit's decision and the clear split that now exists between other federal circuits on this issue provides a basis for the Supreme Court of the United States to address this issue and resolve the dispute among the different circuit court of appeals. We will let our blog readers know if the U.S. Supreme Court decides to hear this case to resolve this important issue.