THE EEOC’S DUTY TO CONCiliate BEFORE FILING SUIT

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ABSTRACT

In a recent case of first impression before the Seventh Circuit, EEOC v. Mach Mining, LLC, the court created a circuit split in a decision that the EEOC hailed as a major victory in Title VII jurisprudence. The court refused to allow the respondent’s affirmative defense seeking judicial review of the EEOC’s conciliation efforts. This outcome was contrary to that of the Second, Fourth, Fifth, Sixth, Eighth and Tenth Circuits, all of which have allowed the defense. Mach Mining presently awaits the Supreme Court’s decision on its petition for certiorari.

INTRODUCTION

The Equal Employment Opportunity Commission (EEOC or Commission) is charged with administering Title VII which prohibits employment discrimination on the basis of race, color, religion, sex or national origin.\(^1\) When Title VII was enacted as part of the Civil Rights Act of 1964, the EEOC’s role was limited to addressing unlawful employment practices through “informal methods of conference, conciliation, and persuasion.”\(^2\) Congress’ goal was to encourage employers to comply voluntarily with Title VII.\(^3\) In 1972, Congress expanded the EEOC’s enforcement powers by authorizing the agency to bring a civil action in federal district court against private employers suspected of violating Title VII.\(^4\) The statute preserves an individual’s right to pursue his or her action, but also authorizes the EEOC to file suit on behalf of the individual or on its own initiative if it believes that an employer engaged in a pattern or practice of discrimination.\(^5\)

The statute identifies several pre-suit obligations for the EEOC. First, the EEOC must file a charge of discrimination on behalf of the aggrieved party or on its own behalf alleging an unlawful employment practice.\(^6\) The EEOC must then serve notice of the charge on the employer and begin an investigation.\(^7\) If, after investigation, the EEOC determines that there is reasonable cause to believe that the charge is true, it “shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”\(^8\) The statute specifies that the informal conciliation procedures are confidential.\(^9\) If the EEOC is unable to resolve the charges through informal processes, it may file a civil suit against the employer.\(^10\)
A recent case in the Court of Appeals for the Seventh Circuit raises questions about the EEOC’s pre-suit obligations. In EEOC v. Mach Mining, LLC, the employer argued that the EEOC’s failure to conciliate was an affirmative defense in the sex discrimination lawsuit filed against it by the EEOC.\(^{11}\) In a bold decision that parts ways with decisions by other circuit courts of appeal, the Seventh Circuit held that the EEOC’s conciliation efforts are a matter of agency discretion and are not subject to judicial review.\(^{12}\) Other courts have reviewed the conciliation process without specifically addressing the issue of whether or not Title VII allows such review.\(^{13}\) These courts have required that the EEOC demonstrate at least good faith efforts to conciliate. While the most significant split is between the Seventh Circuit and the other circuits that have considered failure to conciliate as an affirmative defense, other substantial differences exist among the circuits regarding conciliation efforts. Notably, the circuits disagree on the scope of litigation when conciliation fails as well as the remedy a court should fashion if it finds the EEOC failed to conciliate in good faith.\(^{14}\) Some courts have dismissed the EEOC’s suit or granted summary judgment to the employer upon finding that the EEOC did not conciliate in good faith.\(^{15}\) Other courts have found that the better remedy is to stay the case to provide additional time for conciliation.\(^{16}\)

Whether or not the EEOC’s conciliation efforts are judicially reviewable – and the extent to which they might be reviewable – has important consequences. In its Strategic Enforcement Plan (SEP) for 2013 to 2016, the EEOC has identified preventing systemic discrimination as one of its top priorities.\(^{17}\) The EEOC defines systemic discrimination as involving “a pattern or practice, policy, or class case where the alleged discrimination has a broad impact on an industry, profession, company or geographic area.”.\(^{18}\) Some commentators suggest that in pursuing cases involving systemic discrimination, the EEOC has been overly aggressive in its litigation strategy, seeking publicity in high profile cases or making unrealistic settlement demands.\(^{19}\) They argue that the EEOC will be more diligent in fulfilling its pre-suit obligations if failure to do so could result in dismissal of the suit or summary judgment for the employer. In Mach Mining, however, the court dismissed such concerns, noting that the EEOC litigates such a small percentage of charges filed that leaving conciliation to agency discretion imports little risk of harm to employers.\(^{20}\)

This article considers whether the Seventh Circuit’s decision not to recognize the affirmative defense of failure to conciliate has advantages that the other circuit courts have not adequately considered and which approach best serves the objectives of Title VII in curtailing unlawful discrimination in employment. This paper focuses primarily on cases arising under Title VII but some cases arising under other statutes administered by the EEOC are relevant, as the administrative process is the same for the Americans with Disabilities Act (ADA)\(^{21}\) and the Age Discrimination in Employment Act (ADEA).\(^{22}\) Part I introduces the specifics of the EEOC’s pre-suit obligations. Part II summarizes the court’s decision in Mach Mining. Part III identifies the key differences among the circuit courts of appeal, focusing on whether or not there is a workable standard of judicial review. Part IV considers whether courts must consider the extent of conciliation efforts in determining which individuals may be included in the EEOC’s suit. Part V maintains that the Seventh Circuit’s approach is more balanced than that of other circuits in that it appropriately balances the discretion Congress accorded to the EEOC and the overarching objective of preventing and remedying unlawful discrimination. Part VI concludes that the judicial recognition of an affirmative defense based on failure to conciliate is unworkable and counter-productive to Title VII’s goals.
I. THE EEOC’S PRE-SUIT OBLIGATIONS

Courts have emphasized that, although the EEOC has the authority to bring suits against employers reasonably suspected of violating Title VII, conciliation and voluntary compliance are the preferred methods of resolution. In Ford Motor Co. v. EEOC, the Court recognized that “voluntary compliance” could end “discrimination far more quickly than could litigation proceeding at its often ponderous pace.” A preference for voluntary compliance, however, does not provide guidance to the EEOC or to courts on exactly what the EEOC must do before filing suit. In Occidental Life Insurance Co v. EEOC, the Court referred to Title VII’s “integrated, multistep enforcement procedure,” stating that the EEOC is “required by law to refrain from commencing a civil action until it has discharged its administrative duties . . . if possible, in an informal noncoercive fashion.” A closer look at the process the EEOC follows provides background for further discussion of how or whether courts should review the conciliation process.

After investigating a charge of unlawful discrimination, the EEOC may find that there is no reasonable cause to proceed and dismiss the charge. If it finds that there is reasonable cause to believe that the charges are true, it enters into informal conciliation with the employer. Charges that are not part of the priorities listed under the SEP are frequently referred to mediation. Thus, in 2012, the EEOC resolved 76 percent of the 11,380 charges individuals and employers agreed to mediate. In some cases, however, the EEOC may file suit, particularly if the suit is of the type identified as a top priority in the SEP. Section 706 (f)(1) states that the EEOC may bring a civil action if it is unable to reach a “conciliation agreement acceptable to the Commission.” The United States Supreme Court has recognized that once the EEOC files a suit it is “the master of its own case” and has the authority “to evaluate the strength of the public interest at stake.”

Aside from establishing that voluntary compliance is the preferred method of addressing discrimination in the workplace and recognizing the established EEOC process, neither Title VII nor the Supreme Court provides guidance on how far the EEOC must go to conciliate and what consequences there should be if the court determines that the EEOC did not make an adequate effort to conciliate.

The EEOC drafted a Quality Control Plan (QCP), giving some indication of what it considers to be quality investigations and conciliations. According to the QCP, a quality investigation is one in which:

1. The Commission identifies the bases, issues, and relevant allegations of the alleged unlawful employment action in a charge.
2. The Commission conducts an investigation consistent with its Priority Charge Handling Procedures (PCHP).
3. The Commission applies the law to the facts to determine if there is reasonable cause to believe that unlawful employment discrimination has occurred.
4. The Commission communicates with the Charging Party and the Respondent (or with their lawyers, if represented) to obtain sufficient information to make its determination.

A quality conciliation is defined as:

1. The Commission seeks targeted, equitable relief.
2. The Commission informs the parties of the proposed categories of relief and how monetary terms were reached.
3. The Commission responds appropriately to reasonable offers made by the parties.
The QCP is intended to be for internal guidance only and the EEOC cautions that it is not to be used to determine whether investigations or conciliations were carried out in good faith. Nevertheless, some courts have used criteria similar to that specified in the QCP to assess investigation and conciliation efforts. In Mach Mining, however, the Seventh Circuit refused to look into the specifics of conciliation efforts and held that failure to conciliate is not an affirmative defense in Title VII suits. The case involves claims of a pattern or practice of sex discrimination in hiring practices, putting it into one of the categories that the SEP recognizes as a top priority.

II. EEOC v. MACH MINING: FAILURE TO CONCILIATE IS NOT AN AFFIRMATIVE DEFENSE

Brooke Petkas was truly a coal miner’s daughter; her father, grandfathers, great-grandfathers were all coal miners. Petkas had worked in mines in Southern Illinois, Indiana and Pennsylvania since 2003. In 2006, she applied to work for Mach Mining when the company began operations near her hometown in Illinois. Petkas stated that she sent several resumes to Mach Mining but never got an interview.

In 2008, Petkas filed a complaint with the EEOC, alleging that Mach Mining failed to hire her because of her sex. The mine employed 130 miners, all men. Although the mine was newly constructed, it had neither bathrooms nor changing facilities for women. After Petkas filed with the EEOC, the Commission found that at least sixty women had experiences similar to that of Petkas. The EEOC found there was reasonable cause to believe that Mach Mining had discriminated against female job applicants at its mine near Johnston City, Illinois. The EEOC began informal conciliation in 2010, but in September of 2011, it informed Mach Mining that the conciliation efforts were unsuccessful. The EEOC filed suit on behalf of Petkas and a class of female job applicants. Mach Mining maintained that the suit should be dismissed because the agency failed to conciliate in good faith before filing suit. The EEOC moved for summary judgment on the failure to conciliate claim.

The Court of Appeals for the Seventh Circuit granted summary judgment for the EEOC, finding that an alleged failure to conciliate is not an affirmative defense to the merits of a discrimination suit. The court found that the language of the statute, the lack of a meaningful standard for courts to apply, and the overall statutory scheme weighed against allowing the affirmative defense. According to the court, allowing the defense would encourage employers to avoid liability for unlawful discrimination through “protracted and ultimately pointless litigation over whether the EEOC tried hard enough to settle.”

The court first considered the text of Title VII. Not only did the court find no express language in the statute to support an affirmative defense, but also it found that language in the statute clearly demonstrates deference to the agency’s decision-making powers. The court noted that the statute instructs the EEOC to “endeavor to eliminate’ discriminatory practices ‘by informal methods’” and that the conciliation agreement had to be “acceptable to the Commission.” According to the court, “[i]t would be difficult for Congress to have packed more deference to agency decision-making into so few lines of text.”

The court also found that the statute provided no workable legal standard for judicial review of the conciliation process, further supporting its position that the process is a matter of agency discretion. The court rejected Mach Mining’s argument that it should use a good faith
analysis similar to that employed under the National Labor Relations Act (NLRA). The court noted that the NLRA’s requirement that employers and unions negotiate in good faith is an “explicit statutory command,” while Title VII contains no similar requirement. Furthermore, the court noted that courts that have recognized an implied affirmative defense for failure to conciliate in good faith have attempted to distinguish between the conciliation process and the substance of the conciliation. The court found that a meaningful review of the process would necessarily involve information about the substance of the parties’ positions, including the reasonableness of offers and the use of confidential and inadmissible evidence. Such review would necessarily undermine the EEOC’s discretion in choosing whether or not to settle the case.

The court found that the lack of a workable standard of review was akin to agency decisions under the Administrative Procedure Act (APA). The court referred to Supreme Court decisions finding that there is no judicial review “if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” The court found that “the statutory directive to attempt conciliation is so similar to those open-ended grants of authority that courts have found committed to agency discretion by law and thus not subject to judicial review under the APA.”

The court also found that recognizing an affirmative defense for failure to conciliate would undermine the conciliation process anticipated by Title VII, turning the informal process required by the statute into “endless disputes over whether the EEOC did enough before going to court.” This result, according to the court, would conflict with the Supreme Court’s interpretation that Congress intended “voluntary compliance [to] be the preferred means of achieving the objectives of Title VII.” The court stated that in some cases, especially those in which the underlying claim of discrimination is strong, an employer may build its case around the EEOC’s alleged failure to conciliate to escape liability, rather than engage in meaningful settlement discussions.

The court found no merit to Mach Mining’s contention that “judges must police the EEOC, lest it either abandon conciliation altogether or misuse it by advancing unrealistic and even extortionate settlement demands.” The court cited statistical evidence to indicate that the EEOC uses its limited resources to bring suit in only a small percentage of cases. The court noted that in 2012, the EEOC “attempted conciliation in 4207 cases, was unsuccessful in 2616, yet filed suit on the merits in just 122.”

The court noted that the effect of an affirmative defense for failure to conciliate is more likely to encourage employers to strategically avoid settlement with the hope that the case will be dismissed altogether. Furthermore, the defense does little to deter EEOC misconduct, according to the court, while potentially allowing meritorious cases of discrimination to go unaddressed. In short, the court found that dismissal of the case for “insufficient process” is “too final and drastic a remedy.”

III. JUDICIAL REVIEW OF THE DUTY TO CONCiliate: IS THERE A WORKABLE STANDARD?

The Seventh Circuit’s decision is bold in contrast to approaches taken by other courts. The Seventh Circuit asserted, “[i]f the EEOC has pled on the face of its complaint that it has complied with all procedures required under Title VII and the relevant documents are facially sufficient, our review of those procedures is satisfied.” The Seventh Circuit’s consideration of
whether or not conciliation attempts should be subject to review is unique, as the specific issue has not been raised in other circuits. Courts considering the EEOC’s duty to conciliate have, however, implied that some level of judicial review is appropriate. In reviewing conciliation efforts, courts have also not identified the lack of a workable standard of review which the Seventh Circuit found to be problematic.

Circuit courts of appeal that have reviewed the defense of failure to conciliate have taken one of two approaches. Three circuits have held that the EEOC must demonstrate a good faith effort to conciliate. This standard of review has been labeled the deferential standard of review. The Ninth Circuit has not yet adopted a view, but one district court within the circuit has indicated that it leans toward the deferential standard. Three circuits follow a more stringent approach which uses a three-part inquiry to determine whether the EEOC acted in a reasonable manner in attempting to conciliate the charge. In applying either variation of a good faith standard, courts within these circuits have recognized the importance of the conciliation process as the means of achieving the statute’s goal of “voluntary compliance,” while also recognizing that Congress gave the EEOC broad deference in how it goes about the process. The following sections consider the various standards employed by courts in reviewing conciliation efforts.

A. The Deferential Standard

The Fourth, Sixth and Tenth Circuits require that the EEOC’s efforts meet a minimal level of good faith effort. Courts do not provide any specifics on how to determine whether the EEOC fulfilled its duties in good faith, but it appears that under this standard there is no scrutiny of how the process was conducted. For example, in EEOC v. Radiator Specialty Company, the Court of Appeals for the Fourth Circuit found that the law requires “no more than a good faith attempt at conciliation.” The court found that attempt was satisfied when the EEOC sent a reasonable cause determination letter with an invitation to conciliate, discussed charges during a tour of the employer’s plant, and suggested a meeting to discuss an agreement. Similarly, in EEOC v. Keco Industries, Inc., the Court of Appeals for the Sixth Circuit held that “the EEOC must make a good faith effort to conciliate the claim. However, once the employer rejects the conciliation attempts, the EEOC is free to file suit under Title VII.” The district court had dismissed the suit on the grounds that the investigation was incomplete and the employer did not have a meaningful opportunity to conciliate. Failure to conciliate was based on a magistrate’s report indicating that “the EEOC conciliation attempts consisted solely of ‘placing . . . boilerplate language regarding the class discrimination claim into the conciliation agreement.’” The Sixth Circuit emphasized that the court “should only determine whether the EEOC made an attempt at conciliation” and that the “form and substance of those conciliations is within the discretion of the EEOC.” In EEOC v. Cintas Corp., a more recent decision, the Sixth Circuit reaffirmed its holding in Keco, stating that “the nature and extent of an EEOC investigation... is a matter of discretion of the agency.” The court found that when an employer rejects the EEOC’s offer to conciliate and proposed conciliation agreement, the “EEOC is under no duty to attempt further conciliation.”
The Court of Appeals for the Tenth Circuit, in *EEOC v. Zia Company*, also held that the EEOC had a duty to conciliate in good faith. Because the law states that the EEOC “‘shall’ seek conciliation,” the court stated that “it is inconceivable to us that good faith efforts are not required.” In *Zia*, the alleged lack of good faith on the EEOC’s part was based on the fact that the EEOC litigation officials, knowing that a conciliation agreement was imminent, acted improperly in not giving the parties more time to complete the agreement. The court found that the parties should be given more time to reach an agreement.

The approach taken by these courts is not unlike the approach the Seventh Circuit took in *Mach Mining*. Although these decisions do not go as far as the Seventh Circuit by expressly rejecting failure to conciliate as an affirmative defense, they steer clear of engaging in an inquiry into the substance of the negotiations. The courts in *Radiator Specialty Company* and *Keco* were satisfied that some attempt to conciliate took place, leaving them close to the Seventh Circuit’s approach which requires only that the EEOC’s documents be “facially sufficient.” In *Zia*, although the court found that the EEOC did not exercise good faith, the court directed the parties to resume conciliation. This remedy is consistent with the Seventh Circuit’s suggestion that a procedural wrong can be cured by “a short stay to allow the parties to pursue conciliation further.”

**B. The More Stringent Standard**

A second standard of review among the circuit courts of appeal has been identified as the “more stringent standard.” The Second, Fifth and Eleventh Circuits have reviewed conciliation efforts under a good faith standard, aided by a three-part inquiry. The three-part inquiry was established by the Fifth Circuit in *Marshall v. Sun Oil Company*, a case involving age discrimination under the Age Discrimination in Employment Act (ADEA), which, like Title VII, requires efforts to conciliate before filing suit. The inquiry asks whether the government agency: (1) outlined to the employer its cause for believing the statute has been violated, (2) gave the employer a chance to comply voluntarily, and (3) responded in a reasonable and flexible manner. Courts in the Second, Fifth, and Eleventh Circuits have used this framework in various kinds of discrimination cases. Interestingly, the three-part inquiry corresponds closely to the internal guidelines of the EEOC’s QCP. The third component of the inquiry, the requirement that the EEOC respond reasonably and flexibly to the employer, has raised considerable problems for the EEOC. In *Mach Mining*, the Seventh Circuit specifically rejected this approach because it entails inquiry into not only the process of conciliation but also into the substance of the negotiations, undermining both the EEOC’s discretion and the statute’s requirement of confidentiality of the conciliation process. As the following cases demonstrate, courts that review conciliation efforts under the more stringent standard are not hesitant to delve into the specifics of the substance of the negotiations and the parties’ conduct.

In *EEOC v. Klingler Electric Corporation*, the Fifth Circuit stated that it is “appropriate [] to inquire into the adequacy of the EEOC’s efforts to conciliate.” Adapting the three-part inquiry to Title VII, the court stated that “the fundamental question is the reasonableness and responsiveness of the EEOC’s conduct under all the circumstances.” The court found that in this case it was necessary to make a “thorough inquiry into [the] relevant facts of the conciliation negotiations.” The employer attempted to show that it had signed a conciliation agreement, but it had filled in a portion of the agreement that the EEOC and the charging party objected to,
leading to renewed negotiations.\textsuperscript{104} The court found that the EEOC had acted reasonably and fulfilled its conciliation duties.\textsuperscript{105}

In \textit{EEOC v. Agro Distribution, LLC}, however, the Fifth Circuit found that the EEOC did not attempt conciliation in good faith because it failed to respond in a reasonable and flexible manner to the reasonable attitudes of the employer.\textsuperscript{106} In \textit{Agro}, the court looked closely at the behavior of the negotiating parties. It found that the EEOC did not attempt conciliation in good faith because it “abandoned its role as a neutral investigator,” and made “an insupportable demand for compensatory damages as a weapon to force settlement.”\textsuperscript{107} The court noted that the claimant’s own deposition indicated that no violation of the Americans with Disabilities Act had occurred and no reasonable jury could conclude that the employer had denied the employee reasonable accommodation.\textsuperscript{108} The Fifth Circuit found that dismissal and an award of attorney’s fees were appropriate in cases such as this where the EEOC failed to act in good faith.\textsuperscript{109}

In \textit{EEOC v. Asplundh Tree Expert Company}, the Court of Appeals for the Eleventh Circuit upheld dismissal of a claim of racial discrimination because it found that the EEOC had failed to conciliate in good faith.\textsuperscript{110} The EEOC investigated a claim of racial harassment and retaliation, as well as pay disparity for nearly three years and concluded that there was reasonable cause to believe the allegations were true.\textsuperscript{111} The EEOC sent a conciliation agreement to the employer’s general counsel giving the company twelve days to reply. The company’s general counsel retained local counsel who contacted the EEOC, requesting additional time to conciliate. The EEOC did not respond and informed the employer that “further conciliation efforts would be futile or non-productive.”\textsuperscript{112} The court employed the same three-part test as the Fifth Circuit did in \textit{Klingler}, emphasizing “the reasonableness and responsiveness of the EEOC’s conduct under all the circumstances.”\textsuperscript{113} The court found that the EEOC did not act in good faith and that its conduct “smacks more of coercion than of conciliation.”\textsuperscript{114} The court noted that the EEOC did not provide the employer with notice of its theory on which it could be held liable, as the racial comments were made by an employee of another company; that the EEOC unreasonably denied a request to extend the conciliation period; and that the EEOC’s proposed remedy was “impossible to perform.”\textsuperscript{115} Finding that the EEOC did not fulfill its statutory duty to attempt conciliation in good faith, the Eleventh Circuit upheld the district court’s dismissal of the case and an award of attorneys’ fees.\textsuperscript{116}

The Court of Appeals for the Second Circuit also employs the three-part inquiry to assess good faith attempts to conciliate. In \textit{EEOC v. Johnson & Higgins}, the Court of Appeals for the Second Circuit decided an age discrimination claim brought by the EEOC regarding a mandatory retirement requirement for employees serving as directors.\textsuperscript{117} Johnson & Higgins maintained that the EEOC did not satisfy its duty to conciliate before filing suit.\textsuperscript{118} The Second Circuit found that it was “entirely appropriate” for the EEOC to end conciliation efforts when the employer refused to provide the EEOC with information regarding salaries in order to negotiate damages.\textsuperscript{119}

Despite the different levels of scrutiny applied under the “discretionary” and “more stringent” standards, some general rules common to both approaches emerge. Under both standards, courts have found that the EEOC does not act in good faith if it prematurely ends conciliation efforts.\textsuperscript{120} Also under both standards, courts have found that if the employer refuses to conciliate or to cooperate with requests from the EEOC, the EEOC does not need to do more to satisfy its conciliation duty prior to filing suit.\textsuperscript{121}
Amongst the circuits that use the more stringent inquiry, however, there is room for great variance. The Seventh Circuit rejected the approach used by the Second, Fifth, and Eleventh Circuits, finding that it necessarily required inquiry into the substantive nature of the EEOC’s negotiations and consequently interfered with the confidentiality requirements of Title VII as well as the agency’s discretion to accept or reject settlements. Cases in the federal district courts demonstrate that the more stringent standard of review opens the door to several problems highlighted by the Seventh Circuit in Mach Mining.

Recent decisions in which courts have used the three-part inquiry in assessing conciliation efforts demonstrate that outcomes vary depending upon a court’s assessment of the reasonableness of the requests and responses made during the process. In Mach Mining, the Seventh Circuit warned that when courts review conciliation efforts, they become enmeshed in trying to distinguish between the process and substance of the conciliation, interfering not only with the informality that the statute presumes but also with the confidentiality it mandates. Unlike the Seventh Circuit, however, some courts have embraced a full inquiry into the parties’ behavior and the details of their negotiations. Two recent federal district court cases from within the Second and Fifth Circuits demonstrate the difficulties associated with the more stringent standard of review.

In a series of recent decisions from within the Second Circuit, the United States Federal District Court for the Southern District of New York dealt with charges brought by the EEOC against Bloomberg L.P., asserting claims of sex and pregnancy discrimination as well as retaliation under Title VII. In considering the claims related to sex and pregnancy discrimination, the court found that the EEOC had fulfilled its duty to conciliate. Applying the Second Circuit’s rule articulated in Johnson & Higgins, the court found that where a defendant refuses the agency’s invitation to conciliate, the EEOC may proceed to litigation. The court noted that “when the parties’ proposals and discussions are so divergent as to seem irreconcilable, the courts will not require the EEOC to conduct Sisyphean negotiations to meet its statutory mandate to conciliate.”

In the same decision, however, the court found that EEOC failed to conciliate the retaliation claims in good faith. During the course of negotiations, Bloomberg informed the EEOC that it looked forward to working with the agency to “achieve a resolution” while at the same time noting that it was “not in a position” to offer monetary relief. While the EEOC held out for a “reasonable” response on the monetary proposals, Bloomberg repeatedly sought more information regarding the claims in order to formulate a counterproposal. After five months of correspondence and an unproductive meeting, the EEOC sent a letter stating that the conciliation efforts were unsuccessful. At this point, one might assume that the EEOC had fulfilled its conciliation obligations. But the court found that the EEOC failed to “respond in a reasonable and flexible manner to the employer in conciliation.” The court noted that the EEOC’s proposal totaled over $41 million and that Bloomberg’s requests for more information about the charges and the basis for the agency’s determination were reasonable. According to the court, the EEOC “stonewalled” Bloomberg’s reasonable requests for information. The court found that the EEOC’s failure to conciliate the retaliation claims should result in a dismissal rather than a stay of proceedings in light of the EEOC’s “non-effort” and the futility of further attempts.

In EEOC v. Bass Pro Outdoor World, LLC, a federal district court within the Fifth Circuit considered a situation similar to that in Bloomberg, but reached a different conclusion. Like the parties in Bloomberg, the parties in Bass Pro engaged in months of discussions but were millions
of dollars apart during conciliation. Also similar to the facts in *Bloomberg*, the employer sought information that the EEOC did not provide. As part of the three-part inquiry, the court considered whether the EEOC responded reasonably and flexibly to the employer’s reasonable requests. The court noted that “conciliation requires outlining the basis of the charge” but this showing of evidence need not be the equivalent of a minitrial, and the EEOC need not reveal all of its evidence. Unlike the court in *Bloomberg*, the court refused to dismiss the case, finding that a stay to allow for additional negotiations was a more appropriate remedy.

The *Bass Pro* court stated at the outset of its decision that it was “uneasy” with its role in evaluating whether the EEOC, an agency “armed with enormous discretion . . . undertook settlement discussions in good faith.” Furthermore, the court was clearly impressed by the reasoning of the Seventh Circuit in *Mach Mining*, finding that the decision offered “valuable insights,” even though it was “clearly somewhat at odds with binding Fifth Circuit precedent.” The court agreed with the Seventh Circuit’s fears that employers may strategically seek dismissal by asserting failure to conciliate as a defense while the risks of the EEOC abandoning or abusing the conciliation process are low. The district court expressed its belief that the courts should “keep the bar for dismissal high,” so that claimants would not be prejudiced by the EEOC’s failings. Dismissal, the court noted, should be reserved for “only the truly egregious case,” where the EEOC’s conduct was grossly arbitrary and unreasonable.

The outcomes in *Bloomberg* and *Bass Pro* were different even though the facts were similar and both courts use the more stringent standard of review. These cases demonstrate that a standard based on the reasonableness and flexibility of the EEOC’s responses is highly subjective. More importantly, courts finding that the EEOC did not act reasonably may take the drastic measure of dismissing claims, rather than allowing additional time for conciliation.

### IV. THE SCOPE OF CONCILIATION

The standard of review that courts employ has repercussions for determining the scope of suits involving systemic discrimination. Systemic discrimination cases may be brought under either Section 706 or Section 707 of Title VII. Under Section 707, the EEOC brings a claim alleging a pattern or practice of systemic discrimination based largely on statistical information. The EEOC does not need to identify specific members of the class aggrieved by discriminatory practices and only injunctive remedies are allowed. Section 706(f)(1) of Title VII authorizes the EEOC to seek relief on behalf of a class of individuals. In *General Telephone Company of the Northwest, Inc. v. EEOC*, the Supreme Court made it clear that this class of aggrieved individuals is not subject to Federal Rule of Civil Procedure 23, which contains strict rules about whether or not parties may proceed as a class. Concluding that Rule 23 has no impact on such suits pursued by the EEOC, the Court stated that “the EEOC is not merely a proxy for the victims of discrimination” but acts “to vindicate the public interest in preventing employment discrimination.”

Class cases brought under Section 706 may begin with one or more individual complainants and may grow to include other “similarly situated” employees. In such cases, employers are concerned with finding out who is in the “class” of aggrieved individuals, how large the class might be, and the amount of damages each individual might be seeking. One of the most hotly contested issues among the circuits is whether the scope of the litigation must match the scope of the investigation and conciliation. Employers have asserted a failure to conciliate defense when the EEOC has not identified specific aggrieved individuals until after it
has filed suit. Courts disagree on how this problem should be resolved. Some courts, such as the Eighth Circuit in *EEOC v. CRST Van Expedited, Inc.*, have found that the EEOC must conciliate the claims of each aggrieved individual before filing suit. Other courts, following the reasoning of the dissent in *CRST*, have accorded broader discretion to the EEOC, finding that rule the majority formulated in *CRST* puts too much of a burden on the EEOC, and that additional time for conciliation is a more appropriate remedy than dismissal.

Under *Mach Mining*, courts presumably could not review the EEOC’s investigation or conciliation efforts and, therefore, could not limit the scope of a subsequent suit. A case decided within the Seventh Circuit shortly before the *Mach Mining* decision suggests as much. In *EEOC v. Source One Staffing*, the court found that an employer “cannot delve into the sufficiency of the EEOC’s pre-suit investigation.” The court relied on *EEOC v. Caterpillar*, in which the Seventh Circuit held that courts may not review whether or not the EEOC had probable cause to sue. In reaching this determination, the Seventh Circuit rejected the Eighth Circuit’s decision in *EEOC v. CRST Van Expedited Inc.*, which held that the EEOC must identify aggrieved individuals during its investigation and give the employer an opportunity to conciliate the charges of each aggrieved individual.

The Court of Appeals for the Sixth Circuit, in *EEOC v. Cintas*, also indicated that the EEOC has substantial discretion in determining the scope of a class-wide claim. Using the deferential good faith standard it articulated in *Kecko*, the court found that the EEOC had provided adequate notice to the employer that it was investigating discrimination on a class-wide basis because it requested relief for “similarly situated qualified female applicants.” The facts in *Cintas* were similar to those in *CRST*—but the courts reached very different conclusions.

In *EEOC v. CRST Van Expedited, Inc.*, the Court of Appeals for the Eighth Circuit concluded that the EEOC did not fulfill its pre-suit obligations because it failed to attempt conciliation regarding each victim subsequently named in its lawsuit. Female drivers complained of severe and pervasive sexual harassment in CRST’s New Driver Training Program. The EEOC notified CRST that it had found reasonable cause to believe that a class of female employees had suffered sexual harassment and offered to conciliate; CRST replied that conciliation on a class basis would be futile. After the EEOC filed suit in its own name, seeking relief for the charging party “and a class of similarly situated female employees,” the district court and the employer repeatedly asked the EEOC to identify the names of the other aggrieved women. When the EEOC identified the individuals, CRST sought to dismiss sixty-seven women from the suit because the EEOC had not identified these women during its investigation and had not sought to conciliate the charges with regard to these particular women.

Emphasizing that Title VII seeks administrative rather than judicial resolution of disputes, the court found that the EEOC deprived the employer of a meaningful opportunity to conciliate because it did not provide the names of all class members and could not estimate the size of the class prior to filing suit. The court drew a distinction between facts gathered during the EEOC’s pre-suit investigation and those gathered during the discovery phase of a subsequently filed lawsuit. According to the court, the EEOC may not use the discovery process “as a fishing expedition to uncover more violations.” Finding that “the EEOC wholly failed to satisfy its statutory pre-suit obligations as to these 67 women,” the court upheld the district court’s dismissal of the EEOC’s suit.
In a strong dissent, one judge found that requiring the EEOC to complete its pre-suit duties for each individual alleged victim of discrimination when pursuing a class claim was not only a new requirement, putting “unprecedented obligations on the EEOC,” but also one that “rewards [the defendant employer] for withholding information from the Commission.” According to the dissent, the EEOC had put the employer on notice that it was investigating a class of women and had requested the company’s help in identifying class members. The EEOC proceeded with suit, according to the dissent, because it was unable to secure the employer’s cooperation during the conciliation. The dissent stated that the Eighth Circuit has required the EEOC to conciliate for each type of Title VII violation alleged by the complainant, but not to conciliate regarding each individual in a class claim.

The majority’s position, according to the dissent, is inconsistent with cases in other circuit courts that have held that the “nature and extent” of the EEOC’s investigation is beyond the scope of judicial review. The dissent also concluded that the majority’s position is inconsistent with the purpose of Title VII and that it frustrates the goal of the 1972 amendments to strengthen the EEOC’s enforcement powers. The dissent noted that the employer ended the conciliation process and that the EEOC had made substantial efforts to investigate and conciliate prior to filing suit. According to the dissent, the court should have stayed the case for further conciliation rather than dismiss it.

The district courts are divided over whether the EEOC must conciliate as to each aggrieved individual before filing suit and whether such failure necessitates dismissal of those claims. A few courts have agreed with the majority’s reasoning in CRST; others have agreed generally, without going so far as the Eighth Circuit did. Other courts agree with the dissent in CRST, finding that the majority’s position is too harsh.

In EEOC v. Bloomberg (Bloomberg IV), the United District Court for the Southern District of New York specifically adopted the court’s reasoning in CRST. The court held that when the EEOC gave Bloomberg notice that it was pursuing claims on a class-wide basis, this notice was not sufficient to satisfy its duty to conciliate each individual claim. The court recognized that dismissal was a harsh remedy and that some of the meritorious claims would “never see the inside of a courtroom.” Nevertheless, the court found that in failing to conciliate the individual claims, the EEOC had “completely abdicate[d] its role in the administrative process.”

Decisions within the Ninth Circuit demonstrate the different approaches that courts take to this difficult issue. Within the Ninth Circuit, courts have steered clear of a strict rule requiring the EEOC to identify all aggrieved individuals before filing suit. But they have still reviewed the pre-suit investigation and conciliation process to determine whether or not the employer had notice of the scope of the claims, the number of potential class members, and the scope of anticipated damages. Thus, in EEOC v. Dillard’s Inc., the court recognized that the EEOC “is not required to identify every potential class member” but found that the EEOC must give the employer reasonable notice of the scope of its claim. The court held that the EEOC did not give the employer sufficient notice and opportunity to conciliate on claims related to a nationwide class alleging discrimination based on disability. The court found that the EEOC’s inquiries during the pre-suit process gave the employer sufficient notice to anticipate a suit encompassing a regional class but not a nationwide class. Consequently, the court limited the EEOC’s claims to employees of the same store in which the identified parties worked.
In *EEOC v. Evans Fruit*, the court recognized that in *Dillard’s* the court did not go as far as the Eighth Circuit did in *CRST*.¹⁸³ Unlike the rule in *CRST*, the *Dillard’s* court did not create a rule “that all class members have to be specifically identified and their claims conciliated before suit can be filed on their behalf.”¹⁸⁴ In *Evans Fruit*, the court stated that it doubted the Ninth Circuit would require the EEOC to “specifically identify, investigate and conciliate each alleged victim of discrimination before filing suit.”¹⁸⁵ In this case, neither the specific identities nor the number of class members were ascertained until after suit was filed, but the court found that the employer had sufficient notice of claims based on a local class.¹⁸⁶ The court recognized that aggrieved individuals may “piggyback” on to charges filed by a claimant as long as the employer has sufficient notice that the EEOC intends to seek remedies for similarly situated employees.¹⁸⁷

At least two courts within the Ninth Circuit have come close to adopting the rule articulated in *CRST*. In *EEOC v. The Geo Group*, the court dismissed fifteen aggrieved individuals from the EEOC’s suit on the grounds that the EEOC did not fulfill its pre-suit conciliation duties.¹⁸⁸ The EEOC alleged that male managers sexually harassed numerous female employees at its prison facilities. Although the parties engaged in extensive negotiations, the court found that the employer did not have a meaningful opportunity to engage in conciliation with regard to these fifteen women because the EEOC did not identify them or provide information on damages they might have suffered.¹⁸⁹ The court stated that “[i]nformation on who the aggrieved individuals are and the amount of damages being sought on their behalf is precisely what a reasonable conciliation effort should provide.”¹⁹⁰ This decision has been appealed to the Ninth Circuit.¹⁹¹

In *EEOC v. Swissport*, the district court also agreed substantially with the *CRST* rule. The court conceded that several courts within the Ninth Circuit have held that the EEOC is not required to identify all aggrieved individuals before filing suit.¹⁹² Nevertheless, the court stated that “[c]onciliation is . . . a flexible and responsive process which necessarily differs from case to case.”¹⁹³ The court concluded that the EEOC could not seek monetary relief for individuals not identified during the conciliation process.¹⁹⁴ The court found that the employer did not have a meaningful opportunity to conciliate because it did not have sufficient information about the individuals seeking relief.¹⁹⁵ The court found that the EEOC’s inability to specifically identify the aggrieved individuals left the employer to face “a moving target of liability throughout the conciliation process.”¹⁹⁶ The court chose to dismiss the claims of individuals who were identified after the EEOC filed suit, reasoning that granting a stay for additional conciliation would “improperly reward the EEOC for using the discovery phase of the litigation to engage in prohibited ‘fishing’ to solicit more claimants.”¹⁹⁷

In *EEOC v. American Samoa Government*,¹⁹⁸ the court also agreed with the *CRST* conclusion that the EEOC “may not use discovery in the resulting lawsuit as a fishing expedition to uncover more violations.”¹⁹⁹ The case involved age discrimination in the American Samoa Government’s (ASG) Department of Human Resources (DHR). While the investigation and conciliation focused on age discrimination against two individuals in the DHR, after filing suit, the EEOC sought to expand its discovery to include all ASG employees across thirty-three departments.²⁰⁰ The court stated that “[t]he EEOC may seek relief on behalf of individuals beyond the charging parties and for alleged wrongdoing beyond those originally charged; however, the EEOC must discover such individuals and wrongdoing *during the course of its investigation.*”²⁰¹ According to the court, the employer must be allowed an opportunity to resolve all charges through conciliation. The court recognized that in some fact-specific cases,
courts have allowed the EEOC to expand the scope of its suit to include a broader class. Nevertheless, the court found that expanding the case to a successor facility that included an overlap in personnel was substantially different from trying to expand an investigation from one government department to all government departments. In EEOC v. The Original Honeybaked Ham Company, the court agreed in general that the EEOC can bring an enforcement action only with regard to unlawful conduct that was discovered and disclosed in the pre-litigation process. Because the EEOC’s investigation and conciliation attempts focused on the harassing behavior of only one manager, the court found that the EEOC could not add claims alleging harassment by other managers or supervisors after filing suit. The court, however, was less concerned that the EEOC identify aggrieved individuals than that it disclose the alleged unlawful conduct. The court stated that “[t]he greater the specificity in describing the alleged unlawful conduct, the less important it becomes to specifically identify aggrieved persons.” The court found that the employer had sufficient notice of the potential aggrieved individuals in this case because the EEOC had provided sufficient detail about the conduct, the alleged perpetrator, and the specific location of the unlawful conduct. Thus, the court rejected “a categorical interpretation of CRST.”

The court in EEOC v. Bass Pro Outdoor World went further in rejecting the CRST majority’s analysis, finding that the dissent had the better argument. Like the court in Honeybaked Ham, the Bass Pro court was more concerned that the employer have information about the claims it faced than identification of specific individuals. The court found that the EEOC need not conciliate each individual claim because the number of individual claims would unduly tax the agency’s resources. The Bass Pro court noted that it joined “the growing ranks of those that disagree” with the CRST rule that the EEOC “must specifically identify, investigate and conciliate each alleged victim of discrimination before bringing suit.”

The court avoided setting out requirements that the EEOC must always meet, finding such a “per se rule” approach arbitrary and inflexible compared to a case-by-case approach. Nonetheless, the court found that the EEOC should have provided more information to Bass Pro so that it would know “how the class was comprised” and have a chance to trim the class by deleting those who had been hired or whose claims were not timely. The court was reluctant to tell the EEOC how to do it, but it indicated that more information should have been forthcoming. The Bass Pro court emphasized that a stay was the proper remedy rather than dismissal of the lawsuit because it did not find that the EEOC’s premature termination of conciliation was in bad faith. The court distinguished CRST on the basis that, unlike the EEOC’s egregious abdication of duty in CRST, any failure on the EEOC’s part in Bass Pro related only to the conciliation stage and even there, by the midpoint in conciliation, the employer was given an outline so as to roughly estimate the class size and it had notice of the nature of the Section 706 claim as a failure-to-hire. In Bass Pro, the court noted that the facts in its case were similar to those in Bloomberg III. In both cases, the EEOC announced that conciliation had failed one day after the employer requested information about potential claimants. The Bass Pro court disagreed with the result in Bloomberg—dismissal of the claims—stating that it “likely would have reached a different result.”

In Bass Pro, the court did, however, dismiss parties who were added after the EEOC issued its letter of determination, parties who had not yet even applied to work at Bass Pro. According to the court, allowing such parties to be part of the class would disrupt the sequential pre-suit process specified in Title VII.
V. ADVANTAGES OF THE MACH MINING APPROACH

Perhaps one of the strongest arguments that the Seventh Circuit makes in Mach Mining is that judicial review of conciliation efforts undermines voluntary compliance and the goals of Title VII. Not only does the informal process envisioned by Congress give way to “endless disputes over whether the EEOC did enough before going to court,” but the goal of eradicating discriminatory practices is overlooked.

As the Seventh Circuit observes, employers, especially those who face potentially large and costly claims of discrimination, risk little and gain much in seeking dismissal based on a failure to conciliate. Even when the EEOC could clearly have done more to advance negotiations by giving more information to the employer, to punish such behavior by dismissing claims, does nothing to advance the goals of Title VII. The Bloomberg case illustrates this point. In the long-running case, the court dismissed claims because it found that the EEOC had failed to conciliate in good faith. The court acknowledged that some of the claims dismissed might be “meritorious” but “now will never see the inside of a courtroom.” Nevertheless, the court found dismissal appropriate because it could not “promote litigation in contravention of Title VII’s emphasis on voluntary proceedings and informal conciliation.” The court’s conclusions in Bloomberg are curious as they elevate adherence to unspecified procedures over the goal of addressing unlawful discrimination. Furthermore, the court’s fear of promoting litigation ignores the fact that Title VII authorizes the EEOC to bring civil actions precisely because Congress realized that voluntary compliance was frequently unsuccessful. Thus, courts like Bloomberg that would dismiss claims because of a failure to conciliate ignore not only the discretion invested in the EEOC in the conciliation process, but its authority to bring suit, and most importantly, the overarching goals of Title VII.

The Supreme Court, in a related context, addressed the importance of keeping the ultimate goals of Title VII in mind when dealing with EEOC procedural issues. In EEOC v. Shell Oil, the Supreme Court considered how specific the information in a charge of discrimination must be before the EEOC can seek judicial enforcement of an administrative subpoena. The employer refused to disclose certain records and data requested by the EEOC unless the EEOC gave it more information on the basis of the charges. When the EEOC issued a subpoena, the employer tried to quash it arguing that the EEOC had not complied with Section 706(b) because it had not given sufficient facts to the employer. The facts in Shell Oil are similar to those in many cases alleging failure to conciliate – as employers seek information from the EEOC about specific individuals or the basis for monetary damages.

In considering the statutory requirements, the Supreme Court stated in Shell Oil, “we must keep in view the more general objectives of Title VII as a whole. The dominant purpose of the Title, of course, is to root out discrimination in employment.” The Court also noted that Congress had been “overly optimistic” about the EEOC’s ability to achieve voluntary compliance when it first fashioned Title VII and “the recalcitrance of many employers compelled Congress in 1972 to strengthen the EEOC’s investigatory and enforcement powers.” The court rejected a reading of the statute and agency regulations that would “limit the ability of the Commission to investigate allegations of systemic discrimination. . . .”

The Court stated that “[a]ny marginal advantage, in terms of facilitating voluntary compliance by well-intentioned employers . . . would be more than offset by the concomitant impairment of the ability of the EEOC to identify and eliminate systemic employment discrimination.” In Mach Mining, the Seventh Circuit makes an even more compelling case.
First, there is nothing in the statute to determine what constitutes failure to conciliate. Second, dismissing claims for failure to conciliate may discourage voluntary compliance. And third, dismissing claims for failure to conciliate ignores Title VII’s mission to root out discrimination.

VI. RECOMMENDATIONS AND CONCLUSION

Judicial review of the conciliation process does little to ensure the integrity of the pre-suit process or to advance the goals of Title VII. The process is better left to the discretion of the EEOC. That said, the EEOC could avoid failure to conciliate charges by adhering to its own internal guidance on conducting a “quality conciliation.” Because the EEOC chooses to litigate only a small number of cases, it would be well served to develop more specific checklists regarding its conciliation efforts – not only to avoid assertions of failure to conciliate, but also to achieve voluntary compliance. The case law provides information to the EEOC of the kind of behavior that courts are least likely to tolerate. For example, courts have indicated that the EEOC should not arbitrarily impose short periods of response or abruptly terminate conciliation, especially if an employer indicates a willingness to negotiate. Courts have also been critical of high settlement demands without information that substantiates the amount. To avoid judicial review of failure to conciliate, the EEOC should consider formalizing an internal review process.

The Office of the General Counsel could provide uniform oversight to ensure that conciliation is complete, using the agency’s own criteria from its Quality Control Plan: seeking targeted equitable relief, informing the respondent of proposed categories of relief and how the monetary terms were reached; and responding appropriately to reasonable offers made by the parties.

The EEOC might consider adding additional, more specific criteria based on decisions that have gone against the EEOC.

As the EEOC pursues cases involving systemic discrimination, it is likely that employers will continue to raise the affirmative defense of failure to conciliate, in hopes of having the claims dismissed. In rejecting the defense, the Seventh Circuit has refused to evaluate the behavior and tactics of the EEOC and employers during the conciliation process. The court’s approach prevents pointless delays in litigating the efforts or non-efforts of the EEOC, while preserving the rights of the EEOC and private parties to resolve discrimination claims on the merits.


3 See General Telephone Co. of the Northwest v. EEOC, 446 U.S. 318, 325-26 (1980)(discussing Title VII’s initial enactment in 1964 limiting EEOC to “informal methods of conference, conciliation and persuasion” and 1972 amendments to §706 creating meaningful enforcement powers with EEOC right of action against private employers).


5 42 U.S.C. § 2000e-6(e) (2012). The Supreme Court has explained that the private right of action was retained so that individuals could escape from the administrative action if it was taking too long. See Occidental Life, 432 U.S.
at 362-63. The EEOC may also file suit on behalf of an individual who chooses not to file charges due to fear of retaliation. See EEOC v. Shell Oil Co., 466 U.S. 54, 62 (1984).


8 Id.

9 Id. (“Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both.”).


12 Id.

13 See discussion infra at Part III.

14 See discussion infra at Part IV.

15 See EEOC v. Peoplemark, Inc., 732 F. 3d 584 (6th Cir. 2013); EEOC v. CRST Van Expedited, Inc., 679 F.3d 657 (8th Cir. 2012); EEOC v. Agro Distribution, LLC, 555 F.3d 462 (5th Cir. 2009); EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256 (11th Cir. 2003); EEOC v. The Original Honeybaked Ham, 918 F. Supp. 2d 117 (D. Colo. 2013); EEOC v. Bloomberg L.P. (Bloomberg III), 778 F. Supp. 458 (2011). Seyfarth Shaw maintains that the EEOC has become increasingly aggressive in its efforts. “Especially troubling,” according to Shaw, “are instances where the EEOC has rushed to file high-profile lawsuits that splash allegations of systemic discrimination across headlines, only to have its claims dismissed altogether or whittled down to a single claimant.” Christopher J. Degroff, Reema Kamur, & Gerald A. Maatman, Seyfarth Shaw, The Top 5 Most Intriguing Decisions in EEOC Cases of 2013 (12/31/2013); http://www.seyfarth.com/publications/3794.


17 See U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan, FY 2013-2016, http://www.eeoc.gov/eeoc/plan/sep.cfm. The agency sets priority charge handling procedures and devotes greater resources and focuses attention on the areas set as meritorious priority matters in the SEP. Id. at 4. The EEOC’s national priorities under its SEP include: 1. Eliminating Barriers in Recruitment and Hiring (regarding class-based practices that adversely impact protected groups). 2. Protecting Immigrant, Migrant and Other Vulnerable Workers (from disparate pay, job segregation, harassment, etc.). 3. Addressing Emerging and Developing Issues (noting aging of workforce and other trends or events that impact employment practices such as disability accommodation, including pregnancy-related disability discrimination, and coverage of LGBT discrimination under Title VII sex discrimination). 4. Enforcing Equal Pay Laws (targeting compensation systems and practices that discriminate based upon gender through directed investigations and Commissioner charges). 5. Preserving Access to the System (targeting policies and practices that inhibit exercise of rights or impede EEOC investigative and enforcement efforts including retaliation, overly broad waivers, settlement procedures that bar filing EEOC charges or providing information to EEOC and failure to retain records). 6. Preventing Harassment Through Systemic Enforcement and Targeted Outreach (targeting systemic enforcement and outreach to educate against future violations). Id. at 5-6.
Discriminatory barriers in recruitment and hiring; discriminatorily restricted access to management trainee programs and to high level jobs; exclusion of qualified women from traditionally male dominated fields of work; disability discrimination such as unlawful pre-employment inquiries; age discrimination in reductions in force and retirement benefits; and compliance with customer preferences that result in discriminatory placement or assignments.

Mach Mining, 738 F.3d at 179. Mach Mining, the employer argued that “judges must police the EEOC, lest it either abandon conciliation altogether or misuse it by advancing unrealistic and even extortionate settlement demands.” Id.


42 U.S.C. 2000e-5((f)(1) (“If . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against . . . .); Alexander v. Gardner-Davis, 415 U.S. 36, 44 (1974) (“Cooperation and voluntary compliance were selected as the preferred means for achieving [Title VII’s] goal.”); see also Ricci v. DeStefano, 557 U.S. 557, 581 (2009)(stating “we have recognized Congress’ intent that ‘voluntary compliance’ be ‘the preferred means of achieving the objectives of Title VII’”)(citing Firefighters v. Cleveland, 478 U.S. 501, 515 (1986).


Id. at 228.


Id. at 359.

Occidental Life, 432 U.S. at 368.

See U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan, FY 2013-2016, at 8, available at http://www.eeoc.gov/eeoc/plan/sep.cfm. Authority to negotiate settlements and conciliation agreements, issue no cause findings, and make determinations regarding reasonable cause in most cases are delegated to district directors under the agency’s regulations. See id. at 12 (citing 29 C.F.R. §1601). The General Counsel retains significant authority to commence or intervene in litigation with some oversight by the Commission in cases where there is a significant expenditure or public controversy. The General Counsel may delegate cases to regional attorneys for the purpose of litigation. Id. See also Kevin P. McGowan, EEOC Officials, Attorneys Discuss Priorities Under Agency’s Strategic Enforcement Plan, Daily Lab. Rep. (BNA), No. 11, at C-1, C-2 (Jan. 16, 2014)(discussing EEOC’s SEP and EEOC General Counsel P. David Lopez noting EEOC’s SEP priority of eliminating discriminatory barriers to employment and the issue of affirmative defense regarding pre-suit obligations that Lopez predicted will remain important despite the Seventh Circuit’s decision in Mach Mining).


33 Id. at 1.

34 Id.

35 See discussion infra at Part III.B.


37 Id.

38 Id.

39 Id.

40 Id.

41 Id.

42 Id.

43 Id.

44 EEOC v. Mach Min., LLC, 738 F.3d 171, 173 (7th Cir. 2013).

45 Id.

46 Id.

47 Id. at 172.

48 Id.

49 Id.

50 Id.

51 Id.

52 Id. at 174-75.

53 Id. at 174.

54 Id.

55 Id.

56 Id. at 175-78.
The NLRA outlines specific violations of the Act such that it is an unfair labor practice if either employers or unions fail to bargain in good faith. See 29 U.S.C. §158 (2012) (outlining employer and union unfair labor practices and the duty to bargain in good faith under section 8 of the Act).


*Mach Mining*, 738 F.3d at 177.

*Id.*

*Id.*

*Mach Mining*, 738 F.3d at 177.

*Mach Mining*, 738 F.3d at 178.

The court found that even though there is a presumption of judicial review, its conclusion was consistent with Supreme Court decisions that recognized the “presumption favoring judicial review of administrative action is just that – a presumption.” *Id.* at 178 (quoting Block v. Community Nutrition Inst., 467 U.S. 340, 349 (1984), cited in Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 673 (1986) and Traynor v. Turnage, 485 U.S. 535, 542 (1988)). The presumption may be overcome “whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme.” *Mach Mining*, 738 F.3d at 178 (quoting Block, 467 U.S. at 351). Title VII, the court stated, provides no standards to indicate that Congress intended judicial review of the conciliation process. *Mach Mining*, 738 F.3d at 178.

*Mach Mining*, 738 F.3d at 177.

*Id.* at 179.

*Id.* at 178 (quoting Ricci v. DeStefano, 557 U.S. 557, 581 (2009)).

*Mach Mining*, 738 F.3d at 179.

*Id.*

*Id.* at 180.


*Id.* at 183-84.

*Id.* at 184.

*Id.*

*Id.* at 184 (internal citation omitted).

*See id.* at 182 (“Our decision makes us the first circuit to reject explicitly the implied affirmative defense of failure to conciliate.”).

*See, e.g.*, EEOC v. Radiator Specialty Co., 610 F.2d 178, 183 (4th Cir. 1981 ); EEOC v. Keco Indus., Inc., 748 F.2d 1097, 1101-02 (6th Cir. 1984); EEOC v. Zia Co., 582 F.2d 527, 532-34 (10th Cir. 1978).

In *EEOC v. Alia Corp.*, the court stated that “district courts in this circuit have generally tilted toward the approach taken by the Sixth and Tenth circuits, affording the EEOC wide deference in discharging its duty to conciliate.” 824 F. Supp. 2d 1243, 1255 (E.D. Cal. 2012). In *EEOC v. Swissport*, the court stated that review of the EEOC’s effort to fulfill its statutory duties is appropriate. 916 F. Supp. 2d 1005, 1025 (D. Ariz. 2013) (citing EEOC v. Pierce Packing Co., 609 F.2d 605, 608 (9th Cir. 1982). The court found that “the EEOC’s investigatory and conciliatory obligations, standing alone, may be immune from judicial review” but that “the Ninth Circuit has held that once the EEOC begins litigation, its investigation, determination and conciliation are subject to judicial review as ‘jurisdictional conditions precedent to suit.’” Id. at 1035 (citing Pierce Packing, 609 F.2d at 608). In *Swissport*, the court took note of the circuit split on standards to evaluate conciliation efforts but did not adopt either standard, finding that the EEOC had not met its pre-suit obligations under either standard. Id. at 1037.


*EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978).

610 F.2d 178, 183 (4th Cir. 1979).

Id.

Id.

748 F.2d 1097, 1102 (2d Cir. 1984).

See id. at 1099.

See id. at 1101.

Id.

*EEOC v. Cintas Corp.*, 699 F.3d 884, 904-05 (6th Cir. 2012)(citing EEOC v. Keco, 748 F.2d at 1101-02)). The court noted that the company’s three year silence after the EEOC’s proposal “can reasonably be interpreted as rejection” and thus “the EEOC satisfied its administrative prerequisites to suit.” Id.

582 F.2d 527 (10th Cir. 1978).

Id.

Id. at 534. The case involved unique circumstances. Zia, the private employer, was willing to sign a conciliation agreement with the EEOC, but, because a contractual agreement required the Atomic Energy Commission to satisfy any back pay agreements, Zia needed the AEC’s approval. Id. at 530.

Id.

*Zia*, 582 F.2d 527, 533 (10th Cir. 1978). The court noted that it retained jurisdiction to make findings and orders without retrial and without creating statute of limitations problems on individual claims if further conciliation efforts failed.
The ADEA requires that before filing suit the Secretary seek voluntary compliance “through informal methods of conciliation, conference, and persuasion.” 29 U.S.C. § 626(b). Sun Oil moved for summary judgment on the ground that the Secretary of Labor’s attempts to conciliate charges of age discrimination were inadequate. Sun Oil, 605 F.2d at 1332.


See supra notes 32 and 33 and accompanying text.
119 Id.

120 See Asplundh, 340 F.3d 1256 (11th Cir. 2003); Zia, 582 F.2d 527 (10th Cir. 1978).

121 See Johnson & Higgins, 91 F.3d 1529 (2nd Cir. 1996); Keco, 748 F.2d 1097, 1100-01 (6th Cir. 1984); and Radiator Specialty Company, 610 F.2d 178, 183 (4th Cir. 1979).

122 Mach Mining, 738 F.3d at 183.

123 Id. at 184.


125 Bloomberg II, 751 F. Supp. at 639 (citing Johnson & Higgins, 91 F.3d 1529, 1535 (2nd Cir. 1996)).


127 Id.

128 Id. at 641.

129 Id.

130 Id.

131 Id.


133 Id. at 643.


135 Id. at *4, 7 (citing EEOC v. Klingler Elec. Corp., 636 F.2d 104, 107 (5th Cir. 1981); EEOC v. Agro Distribution, LLC, 555 F.3d 462, 468).

136 Id. at *4.

137 Id.

138 Id. at *1.

139 Id. at *19 (citing 738 F.3d 171 (7th Cir. 2013)).


141 Id. at *20.

142 Id.

143 Id. at *22.


446 U.S. at 326. Rule 23 states, in pertinent part:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

General Telephone, 446 U.S. at 327.


EEOC v. CRST Van Expedited, Inc., 679 F.3d 657, 677 (8th Cir. 2012).

CRST, 679 F.3d at 697(Murphy, C.J., concurring in part & dissenting in part).


Id. (citing Caterpillar, 409 F.3d 831 (7th Cir. 2005).

Source One Staffing, 2013 U.S. Dist. LEXIS 361, at *13 (finding that CRST, 679 F.3d 657 (8th Cir. 2012) is not binding precedent).

699 F.3d 884, 904 (6th Cir. 2012).

Id. (citing Keco, 748 F.2d at 1100 for the proposition that “the nature and extent of an EEOC investigation claim is a matter within the discretion of the agency”).

679 F.3d 657 (8th Cir. 2012).

Id. at 665.

Id. at 667-68.

See id. at 668.

See id. at 669 (noting that for nearly two years after the EEOC filed suit it “did not identify the women comprising the putative class despite the district court’s and CRST’s repeated requests to do so”).

See id. at 674.

Id. at 676.
165 Id. at 675.

166 Id. at 676 (citing Dillard’s Inc., 2011 WL 2784516, at *7).

167 Id. at 677.

168 Id. at 695 (Murphy, C. J., concurring in part and dissenting in part).

169 Id. at 696.

170 Id.

171 Id. (citing EEOC v. Delight Wholesale Co., 973 F.2d 664, 668-69 (8th Cir. 1992)).

172 Id. (citing EEOC v. Keco Indus., Inc. 748 F.2d 1097, 1100-01 (6th Cir. 1984); EEOC v. Rhone-Poulenc, Inc., 876 F.2d 16, 17 (3d Cir. 1989) (noting in ADEA case that EEOC need not conciliate individual class members); Dinkins v. Charoen Pokphand USA, Inc., 133 F. Supp. 2d 1237, 1245-46 (M.D. Ala. 2001) (noting that “[w]hat matters is that the EEOC served [the employer] notice that it was investigating possible discrimination against a class of women” and that the EEOC need not “conciliate each individual’s Title VII claim separately”).

173 EEOC v. CRST Van Expedited, 679 F.3d at 697 (Murphy, J., concurring in part and dissenting in part) (citing Gen. Tel. Co. of the Nw., Inc. v. EEOC, 446 U.S. 318, 325 (1980)).

174 EEOC v. CRST Van Expedited, 679 F.3d at 697.

175 Id.


177 Id.

178 Id. at 816.


180 Id. at *6.

181 Id. at *8.

182 Id.


184 Id.

185 Id. at 1111.

186 Id.

187 Id. at 1112.

The court granted a stay allowing additional time for conciliation regarding five individuals because the plaintiffs “may have had these individuals in mind during the conciliation process.” Id. at 15. The case settled with regard to the claims of some of the women shortly after trial began. Press Release, EEOC, GEO Group to Pay $140,000 to Settle Sexual Harassment Suit Filed by EEOC and ACRD (Apr. 29, 2013) available at http://www.eeoc.gov/eeoc/newsroom/release/4-29-13.cfm.

See EEOC v. Geo Grp., Inc., appeal docketed, No. 13-16292 (9th Cir.).

Swissport, 916 F. Supp. 2d at 1038 (quoting EEOC v. Prudential Fed. Sav. & Loan Ass’n, 763 F.2d 1166, 11169 (10th Cir. 1985)).


The court referred to its decision in Lucky Stores v. EEOC, 714 F.2d 911 (9th Cir. 2013). In Lucky Stores, the court found that the employer received adequate notice of a lawsuit encompassing multiple locations even though the administrative process focused on only one location. The court emphasized that the locations were geographically close to each other; there was significant overlap in personnel matters between the locations; and there was overlap in the discrimination between the different locations. Id. In American Samoa Government, however, the court found that it was too much of a stretch to find that an investigation into discrimination in one department gave the government sufficient notice that the EEOC would expand to a government-wide investigation. American Samoa Government, 2012 U.S. Dist. LEXIS 144324, at *32.


210 Id. at *18.

211 Id. at *14.

212 Id. (citing EEOC v. Evans Fruit Co., Inc., 872 F. Supp. 2d 1107, 1111(E.D. Wash. 2012)).

213 Id.

214 Id. at *16.

215 Id.

216 Id.

217 Id. at *18.

218 Id.

219 Id. at *18 (citing Bloomberg III, 967 F. Supp. 2d at __, 2013 WL 4799150, at *10).

220 Id. at 21.

221 Id.

222 Mach Mining, 738 F.3d at 178-80.

223 Id. at 179.

224 Id.


226 Id.


228 Id. at 58.

229 Id. at 59.

230 Id. at 77.

231 Id. at 78.

232 Id. at 81.

233 See supra note 33 and accompanying text.

234 See Asplundh, 340 F.3d 1256 (11th Cir. 2003); Zia, 582 F.2d 527 (10th Cir. 1978).