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Notes

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On June 30, 2014, the Supreme Court granted certiorari in Mach Mining, LLC v. Equal Employment Opportunity Commission *("EEOC"). The issue before the Court is "[w]hether and to what extent [a court may] enforce the EEOC's mandatory duty to conciliate discrimination claims before filing suit." The Court's decision will likely resolve a three-way circuit split on how the EEOC's conciliation efforts may be reviewed: currently, the Second, Fifth, and Eleventh Circuits require the EEOC to meet a searching three-step test, while the Fourth, Sixth, and Tenth Circuits apply a more deferential "good faith" standard. The Seventh Circuit created the third split with its decision in* Mach Mining*. It stands alone in holding that the failure to conciliate is not an implied affirmative defense and there is no judicial review of conciliation. This Note argues that the Supreme Court should resolve the circuit split in favor of the good faith standard, adopting a procedural rather than substantive form of review.*

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INTRODUCTION

In 2006, over the span of seven months, three female employees of Bloomberg L.P. ("Bloomberg") filed charges with the Equal Employment Opportunity Commission ("EEOC" or "Commission" or "agency"), alleging that Bloomberg had discriminated against them based on sex.[1] Based on those allegations, the EEOC, the federal agency tasked with enforcing laws regarding employment discrimination,[2] filed suit against Bloomberg in 2007.[3] Seven years later, the Southern District of New York dismissed the EEOC's last remaining claim against the company, effectively ending the case at the district court level.[4] Ironically, what likely caused—or at least complicated—seven years of litigation in *Bloomberg* was the very process designed to prevent litigation in the first place: conciliation.

1. *See* Equal Employment Opportunity Commission's Statement of Material Disputed Facts in Opposition to Defendant's Motion for Summary Judgment as to Time-Barred Claims at 3–4, EEOC v. Bloomberg (*Bloomberg I*), 751 F. Supp. 2d 628 (S.D.N.Y. 2010) (No. 07-CV-8383).

2. *See* 42 U.S.C. § 2000e-5 (2015). *See generally* Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 INDUS. REL. L.J. 1 (1977) (tracing the development of the Equal Employment Opportunity Commission).

3. *See* Complaint at 1, *Bloomberg I*, 751 F. Supp. 2d 628 (No. 07-CV-8383).

4. EEOC v. Bloomberg L.P., No. 07-CV-8383, 2014 WL 2112038, at *24 (S.D.N.Y. Apr. 28, 2014).

Under Title VII, the EEOC's governing statute, the Commission must investigate each charge it receives and decide whether "there is reasonable cause to believe that the charge is true."[5] If it finds cause for the charge, the Commission must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[6] Conciliation—essentially a settlement discussion—is a pre-suit requirement. Before the EEOC can take employers to court to enforce antidiscrimination laws, it must have been "unable to secure from the respondent a conciliation agreement acceptable to the Commission."[7]

On June 27, 2007, after it had investigated the employees' claims, the EEOC provided Bloomberg with a letter describing the charges and the results of its investigation, and a proposed conciliation agreement.[8] Among other things, the proposed agreement asked Bloomberg to establish a $7.5 million claim fund for class members; pay roughly $23.4-million total to the three claimants for back pay, front pay, and compensatory damages; and agree to injunctive relief.[9] The EEOC requested a counterproposal from Bloomberg by July 11, 2007, but it repeatedly granted extensions upon Bloomberg's request.[10] The Commission also held three in-person conferences with Bloomberg and allowed defense counsel to meet the three charging parties.[11] However, in its eventual counterproposal, Bloomberg dismissed "even the idea of a [c]laim [f]und," offered each of the three charging parties less than one percent of their proposed monetary relief, and rejected the EEOC's proposals for injunctive relief.[12] The EEOC concluded that further conciliation attempts would be futile,[13] and filed suit against Bloomberg on September 27, 2007.[14]

In August 2008, as the parties engaged in extensive discovery,[15] the EEOC identified new charges of retaliation and sent Bloomberg another proposed conciliation agreement concerning those claims.[16] Bloomberg responded fairly quickly, asking for time to internally investigate the

5. 42 U.S.C. § 2000e-5(b).
6. *Id.*
7. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 359–60 (1977); 42 U.S.C. § 2000e-5(f)(1).
8. *See Bloomberg I*, 751 F. Supp. 2d at 632.
9. *Id.* at 633.
10. *See* Employment Opportunity Commission's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment on Plaintiff's Failure to Conciliate at 2, *Bloomberg I*, 751 F. Supp. 2d 628 (No. 07-CV-8383).
11. *Id.*
12. *Id.* at 2–3.
13. *Id.* at 3.
14. *See* Complaint, *supra* note 3, at 1.
15. *Bloomberg I*, 751 F. Supp. 2d at 642.
16. *Id.* at 640.

claims and for more information about the EEOC's determinations.[17] This time, Bloomberg's counteroffer accepted many of the EEOC's proposals, but the company requested continued discussion on other proposals and stated that it would await further information about the EEOC's determinations before responding to the proposal for monetary relief.[18] In response, the EEOC said that further information would not be helpful, and was thus unnecessary, but offered to discuss the counterproposal if Bloomberg responded to the EEOC's monetary proposal first.[19] An intense exchange of letters followed for nearly five months, with Bloomberg refusing to make a monetary offer unless it received more information and the EEOC refusing to respond to the company's counterproposal until Bloomberg made a reasonable monetary offer.[20] In February 2009, the EEOC again determined that conciliation efforts were futile,[21] and the Commission added the retaliation claims via a second amended complaint filed on March 31, 2009.[22]

Bloomberg filed a motion for summary judgment nearly three years after the suit began,[23] arguing that because the EEOC failed to meet its statutory duty to conciliate, the discrimination and retaliation claims should be dismissed.[24] On October 25, 2010, the district court issued its opinion on the motion for summary judgment and another pending motion.[25] In a twenty-three page decision, Chief Judge Loretta A. Preska dedicated eight pages to the conciliation issue, reciting each party's efforts over the years in exhaustive detail.[26] Following Second Circuit precedent, she evaluated whether the EEOC had met its obligation to conciliate based on whether it had: (1) outlined the reasonable cause for its belief that Bloomberg had discriminated and retaliated; (2) offered the company the opportunity to voluntarily comply; and (3) responded in a reasonable and flexible manner.[27] This three-part test focuses on the EEOC's actions rather than the employer's, but if the *employer* acts unreasonably, courts will generally find the EEOC's decision to file suit to be reasonable given that further conciliation would be futile.[28]

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17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 640–41.
21. *Id.* at 641.
22. *Id.* at 635.
23. *See* Defendant Bloomberg L.P.'s Notice of Motion for Summary Judgment on Plaintiff's Failure to Conciliate at 2, *Bloomberg I*, 751 F. Supp. 2d 628 (No. 07-CV-8383).
24. *Bloomberg I*, 751 F. Supp. 2d at 631.
25. *Id.*
26. *See id.* at 636–43 (discussing the parties' conduct in great detail).
27. *Id.* at 637; *see also* EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1534 (2d Cir. 1996).
28. *See Johnson & Higgins*, 91 F.3d at 1535 (holding that the EEOC satisfied its duty to conciliate under the three-part test "in the face of [employer's] insistence that its policy was not unlawful" and after employer refused to provide information related to the charge).

Ultimately, Chief Judge Preska held that although the EEOC had satisfied its duty to conciliate with regard to the initial discrimination claim, the Commission had failed to properly conciliate the retaliation claim because it did not "respond [to Bloomberg] in a reasonable and flexible manner."[29] The court noted that the ordinary remedy for failure to conciliate is a stay to permit the conciliation to take place.[30] However, citing the impracticality of ordering a stay in a suit where the parties' attitudes had "soured" and the fact that the case was well advanced, Chief Judge Preska dismissed the retaliation claims entirely.[31] In a clarifying decision issued on September 9, 2013, she said of the dismissal:

> The Court does not impose this severe sanction lightly and recognizes that certain . . . claims may be meritorious but now will never see the inside of a courtroom. However, the Court finds that allowing the EEOC to revisit conciliation at this stage of the case—after shirking its pre-litigation investigation responsibilities and spurning Bloomberg's offer of conciliation and instead engaging in extensive discovery to develop . . . claims—already has and would further prejudice Bloomberg. Moreover, if such a sanction were not imposed, the Court, in turn, would be sanctioning a course of action that promotes litigation in contravention of Title VII's emphasis on voluntary proceedings and informal conciliation.[32]

Chief Judge Preska's thorough review—and subsequent dismissal—of certain claims due to inadequate conciliation is not uncommon, but it is not the only approach to judicial review of the conciliation process: There is a three-circuit split regarding the appropriate standard of review.[33] The Second Circuit joins the Fifth and Eleventh Circuits in requiring a searching three-step test,[34] but the Fourth, Sixth, and Tenth Circuits apply a more deferential "good faith" standard of review.[35] Meanwhile, the Seventh Circuit stands alone in holding that employers may not use "failure to conciliate" as an affirmative defense and that the EEOC's conciliation efforts are not reviewable at all.[36]

On June 30, 2014, the Supreme Court granted certiorari in *EEOC v. Mach Mining, LLC*, ostensibly to resolve the split.[37] The issue before the

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29. *Bloomberg I*, 751 F. Supp. 2d at 641.

30. *Id.* at 643.

31. *Id.*

32. EEOC v. Bloomberg L.P. (*Bloomberg II*), 967 F. Supp. 2d 802, 816 (S.D.N.Y. 2013).

33. *See* EEOC v. Mach Mining, LLC, 738 F.3d 171, 182 (7th Cir. 2013), *cert. granted*, 82 U.S.L.W. 3746 (U.S. June 30, 2014) (No. 13-1019).

34. *See* EEOC v. Asplundh Tree Co., 340 F.3d 1256, 1259–61 (11th Cir. 2003); EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1534–35 (2d Cir. 1996) (applying the standard in the context of Age Discrimination in Employment Act of 1964); EEOC v. Klingler Elec. Corp., 636 F.2d 104, 106–07 (5th Cir. Unit A Feb. 1981).

35. *See* EEOC v. Keco Indus., Inc., 748 F.2d 1097, 1101–02 (6th Cir. 1984); EEOC v. Radiator Specialty Co., 610 F.2d 178, 183 (4th Cir. 1979); EEOC v. Zia Co., 582 F.2d 527, 532–34 (10th Cir. 1978).

36. *Mach Mining*, 738 F.3d at 184.

37. Mach Mining, LLC v. EEOC, 134 S. Ct. 2872, 2872 (2014).

Court is "[w]hether and to what extent may a court enforce the EEOC's mandatory duty to conciliate discrimination claims before filing suit."[38] This Note argues that the Supreme Court should adopt the good faith standard of review. Under this standard, courts *would* review the EEOC's conciliation efforts, but such review would be procedural rather than substantive. Thus, courts would not review the minutiae of offers and counteroffers or seek to impose their own judgments on what a proper conciliation agreement should provide; instead, they would reserve judgment on the "form and substance" of conciliation agreements to the EEOC, and simply ensure that the EEOC had made some attempt to conciliate in good faith.[39]

There have been instances where the EEOC has not engaged in conciliation in good faith;[40] the danger that the Commission may abuse its discretion in the future is obvious.[41] Some form of judicial review is therefore necessary. However, the good faith standard of review is preferable to any other standard because it eliminates the time and expense incurred in prolonged litigation over an alleged "failure to conciliate" defense and yet still protects employers from extreme abuses of discretion.

Part I of this Note discusses the three standards of review, including the lack of any judicial analysis or explication in the early cases dealing with conciliation. Part II discusses how a textual reading of the EEOC's governing statute, the legislative history of the Civil Rights Act, and the Act's 1972 amendment support a deferential standard of review. Part III provides a background on persuasive principles of administrative law that also support deferential review. Finally, Part IV discusses elements of public policy that the Supreme Court should consider in establishing a single standard.

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38. Petition for Writ of Certiorari at i, Mach Mining, LLC v. EEOC, 2014 WL 709677 (Feb. 25, 2014) (No. 13-1019).

39. *See, e.g.*, EEOC v. Zia Co., 582 F.2d 527, 533 (10th Cir. 1978); EEOC v. Keco Indus., Inc., 748 F.2d 1097, 1102 (6th Cir. 1984).

40. *See generally* EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256 (11th Cir. 2003) (finding that the EEOC failed to conciliate in good faith). In *Asplundh*, the EEOC sent a single proposed conciliation agreement to the employer after conducting a thirty-two month long investigation. *Id.* at 1258. Three weeks later, the employer's newly retained counsel requested an extension of time to respond to the proposal. *Id.* The EEOC did not acknowledge the letter in any way. *Id.* Instead, the very next day, the agency declared that conciliation had been unsuccessful and further attempts would be futile. *Id.* at 1258–59. Two weeks later, it filed a complaint against Asplundh. *Id.* at 1259.

41. *See generally* Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1304 (1999) ("The basic substantive concern . . . is that agencies and agency personnel will use the relatively unfettered authority they enjoy . . . in order to coerce compliance from regulated entities with substantive rules and interpretations which are of their own creation and are inconsistent with the norms laid out by the legislature or the courts.").

I. The Circuit Splits

A. The Second, Fifth, and Eleventh Circuits: A Searching Inquiry

In one of the earliest cases to establish a searching review of conciliation, *EEOC v. Klingler*, the Fifth Circuit held that the EEOC *could* meet its burden to conciliate if it had (1) outlined the reasonable basis for its investigation to the employer; (2) given the employer the opportunity to voluntarily comply with the law; and (3) flexibly responded to the reasonable attitudes of the employer.[42] In creating these guidelines, the Fifth Circuit relied on the reasoning of *Marshall v. Sun Oil Company*.[43] In *Marshall*, the Fifth Circuit held that the key to determining whether the EEOC's conciliation efforts were adequate was the reasonableness of the agency's conduct.[44] Following *Marshall*, the *Klingler* court similarly emphasized the reasonableness and the responsiveness of the EEOC in reviewing its efforts at conciliation.[45] However, the *Klingler* court also held that the lower court had erred in failing to look beyond the face of the proposed conciliation agreement, and that it was in fact required to make a more searching inquiry into the relevant facts of the conciliation negotiations.[46] Later decisions in the Second, Fifth, and Eleventh Circuits transformed the guiding language of *Marshall* and *Klingler* (the EEOC "*may* fulfill [its] statutorily required duty of conciliation")[47] into the mandatory three-part test used in *EEOC v. Bloomberg L.P.*[48] From the Eleventh Circuit's decision in *EEOC v. Asplundh Tree Expert Company*, for example:

> To satisfy the statutory requirement of conciliation, the EEOC *must* (1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer.[49]

In *Asplundh*, the Eleventh Circuit noted repeatedly that "the duty to conciliate is at the heart of Title VII" and stated that the EEOC's governing statute clearly echoed congressional intent to settle Title VII violations out of court.[50] Thus, the Eleventh Circuit held, the EEOC must make "nothing less" than a reasonable effort to resolve alleged

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42. EEOC v. Klingler Elec. Corp., 636 F.2d 104, 107 (5th Cir. Unit A Feb. 1981).

43. *Id.*

44. Marshall v. Sun Oil Co. (Del.), 605 F.2d 1331, 1337, 1339 (5th Cir. 1979).

45. *Klingler*, 636 F.2d. at 107.

46. *Id.*

47. *Marshall*, 605 F.2d at 1339 (emphasis added).

48. *See* EEOC v. Asplundh Tree Expert Co., 340 F.3d 1256, 1259 (11th Cir. 2003) (holding that a three-part test applies to review of EEOC's conciliation attempts); EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1534 (2d Cir. 1996); *Klingler*, 636 F.2d. at 107.

49. *Asplundh*, 340 F.3d at 1259 (emphasis added).

50. *Id.* at 1260.

unlawful discrimination practices with the employer, and, at a minimum, must make clear the basis for the charges against the employer.[51] In addition to pursuing conciliation in good faith, the Eleventh Circuit emphasized that the EEOC has a statutory duty to "reserve judicial action as a last resort."[52]

Importantly, in establishing the fairly rigorous standard for reviewing EEOC conciliation efforts, neither the *Marshall* nor *Klingler* courts explained why it was appropriate to review the Commission's efforts in the first place, or why review must be in the form of this three-step test.[53] In the earliest case, *Marshall*, the court reviewed the EEOC's conciliation efforts using three steps somewhat similar to the test later adopted by *Klingler*—evaluating (1) whether the Commission "present[ed] a reasonable showing of discrimination"; (2) how the employer responded; and (3) how the EEOC responded—but called it merely a "heuristic device," and appeared to simply assume that detailed judicial review was proper.[54] The three-part test appeared for the first time in *Klingler* as a *permissive* way for the EEOC to meet the conciliation requirement, and the court also declined to offer any justification for such a standard.[55] The other courts that adopted the three-part test from *Marshall* or *Klingler*—including the Eleventh Circuit in *Asplundh*—are likewise silent on the overall rationale of the scheme; they simply recite the test, cite to the cases, and move on.[56]

Without a clear rationale for the existence of the three-part test, it is somewhat difficult to justify why it should be adopted as the overall standard of review for conciliation. In contrast to the Second, Fifth, and Eleven Circuits, however, the Tenth Circuit took a more reasoned approach when it established the good faith standard.[57]

B. The Fourth, Sixth, and Tenth Circuits: Deferential "Good Faith"

In *EEOC v. Zia Company*, the Tenth Circuit looked to the EEOC's governing statute, the legislative history, and case law in deciding that the EEOC must be held to a good faith standard.[58] From the statutory language and existing case law, the court reasoned, "it has generally been held that a showing of some effort is a precondition of bringing suit."[59]

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51. *Id.*

52. *Id.* at 1261.

53. *See generally Asplundh*, 340 F.3d 1256; *Klingler*, 636 F.2d. 104; Marshall v. Sun Oil Co. (Del.), 605 F.2d 1331 (5th Cir. 1979).

54. *Marshall*, 605 F.2d at 1335–36.

55. *See Klingler*, 636 F.2d. at 107.

56. *See* EEOC v. Agro Distrib., LLC, 555 F.3d 462, 467–69 (5th Cir. 2009); *Asplundh*, 340 F.3d at 1259–61; EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1533–35 (2d Cir. 1996).

57. *See generally* EEOC v. Zia Co., 582 F.2d 527 (10th Cir. 1978).

58. *Id.* at 533.

59. *Id.* at 532.

The *Zia* court found *Brennan v. Ace Hardware Corporation*, an Eighth Circuit case dealing with the Secretary of Labor's conciliation efforts under the Age Discrimination in Employment Act of 1967 ("ADEA"), to have applicable reasoning.[60] In *Ace Hardware*, the Eighth Circuit held that the Secretary did not fulfill his obligation to conciliate when his office had two personal meetings and a telephone call with a defendant employer but did not give the employer a chance to respond.[61] That court emphasized that voluntary compliance was an integral part of the ADEA, and the legislative history of the act "strongly indicate[d]" that the Secretary must essentially make near-exhaustive efforts to obtain voluntary compliance before bringing suit.[62] Similarly, the *Zia* court held, the legislative history of the EEOC's governing statute indicates that the Commission should make "every effort to conciliate" before bringing suit.[63] And, the court held, because the EEOC's governing statute itself states that the agency "shall" seek conciliation, "it is inconceivable to us that good faith efforts [on the part of the Commission] are not required."[64] However, the *Zia* court also held that while the EEOC is required to act in good faith while pursuing its conciliation efforts, courts should *not* closely review the details of offers and counteroffers between the parties or seek to impose their own judgment on what a proper conciliation agreement should provide.[65]

In *EEOC v. Radiator Specialty Company*, the Fourth Circuit adopted *Zia*, holding, "[t]he law requires . . . no more than a good faith attempt at conciliation."[66] The Fourth Circuit also emphasized that the EEOC's duty to conciliate is "one of its most essential functions," and a precondition for suit.[67] Nevertheless, citing *Zia*'s standard, the Fourth Circuit dismissed the employer's claim that the EEOC had not made a good faith effort in a few sentences, citing the employer's refusal to meet with the EEOC despite being given several opportunities to do so.[68]

Similarly, in *EEOC v. Keco Industries*, the Sixth Circuit—citing *Radiator*—also held that the EEOC must make a good faith effort to conciliate. In contrast to *Zia* and *Radiator*, however, the Sixth Circuit took an even more hands-off approach. The court held that in the underlying case, the district court had applied the wrong standard of

60. *Id.* at 533 (citing Brennan v. Ace Hardware Corp., 495 F.2d 368 (8th Cir. 1974)).

61. *See Ace Hardware*, 495 F.2d at 374.

62. *Id.*

63. *Zia*, 582 F.2d at 533 (quoting 118 CONG. REC. H1861 (Mar. 8, 1972), *reprinted in* SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUB. WELFARE, 92ND CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1856).

64. *Id.*

65. *Id.*

66. EEOC v. Radiator Specialty Co., 610 F.2d 178, 183 (4th Cir. 1979).

67. *Id.*

68. *Id.*

review regarding conciliation.[69] Rather than judging the efficacy of the EEOC's approach, the court held, "[t]he district court should only determine whether the EEOC made an attempt at conciliation."[70] The "form and substance of those conciliations," the Sixth Circuit held, is specifically reserved to the discretion of the EEOC, "beyond judicial review."[71]

The good faith standard and the more rigorous three-part test have the same goal: to ensure the EEOC actually conciliates, and thereby prevent abuses of discretion by the agency. In comparison to the good faith standard, however, the three-part test accomplishes this goal by requiring courts to closely examine the substance of the parties' efforts. This leads to inefficient *Bloomberg*-esque situations, in which both the courts and the parties expend a great deal of time and effort investigating and explaining their conduct. On the other hand, courts following the good faith standard look to whether the EEOC has made a good faith attempt at conciliation based on largely procedural considerations, reserving judgment on the "form and substance" of conciliation agreements to the EEOC.[72] Such an approach makes sense in the context of a statutory scheme that requires the EEOC to have been "'unable to secure from the respondent a conciliation agreement *acceptable to the Commission*'" before it files suit.[73] A procedurally based, more deferential standard also means courts will likely spend much less time adjudicating whether the EEOC actually conciliated.

In contrast to courts that have adopted the three-part test, the Fourth, Sixth, and Tenth Circuits explicitly examined the language of the EEOC's governing statute, legislative history, and case law. The Seventh Circuit did the same, but came to a radically different conclusion: no review.

C. The Seventh Circuit: No Review

In *EEOC v. Mach Mining, LLC*, a mining company accused of discriminating against women sought to dismiss the EEOC's case against it on the grounds the Commission had failed to meet the conciliation requirement before filing suit.[74] On appeal, the Seventh Circuit held that the EEOC's alleged failure to conciliate was not an affirmative defense to a suit for unlawful discrimination, and any judicial review of conciliation would undermine its very purpose.[75] In support of its holding, the court

69. EEOC v. Keco Indus., Inc., 748 F.2d 1097, 1102 (6th Cir. 1984).
70. *Id.*
71. *Id.*
72. *Id.*
73. 42 U.S.C. § 2000e-5(f)(1) (2015) (emphasis added).
74. EEOC v. Mach Mining, LLC, 738 F.3d 171, 172 (7th Cir. 2013).
75. *Id.* at 172, 178–79.

noted that Title VII contains no express provision for an affirmative defense based on a failure to conciliate.[76] Instead, the express language of Title VII clearly placed the informal, confidential process of conciliation solely within the purview of the EEOC's judgment, using deferential language that requires the Commission to "endeavor to eliminate" unlawful discrimination by "informal methods," and allowing the agency to sue if it cannot reach an agreement "acceptable to the Commission."[77] The court also noted that an implied affirmative defense based on the failure to conciliate would conflict directly with the statutorily imposed requirement to keep the conciliation process confidential.[78] Instead of implying both an affirmative defense and an exception to the confidentiality provision that would allow courts to evaluate conciliation, the Seventh Circuit reasoned, "[t]he better reading is to avoid the conflict, stick to the text, and reject both."[79]

The Seventh Circuit also found that its holding was consistent with principles of the Administrative Procedure Act ("APA"), which ordinarily governs how federal courts may review agency decisions.[80] The court noted that the lack of a workable standard for courts to review conciliation made the process "look very much like an action 'committed to agency discretion by law,'" which is exempt from the APA's general presumption of judicial review.[81]

According to the Seventh Circuit, any judicial review of conciliation would also undermine the process itself.[82] In requiring the EEOC to conciliate before initiating suit, Congress intended to maintain a preference for employers' voluntary compliance with the law.[83] However, the Seventh Circuit reasoned, allowing an alleged "failure to conciliate" to be used as an affirmative defense against litigation would let employers argue for the dismissal or at least the delay of cases against them.[84] Rather than encouraging voluntary compliance or even settlement discussions in general, such a defense encourages employers to use litigation to simply "stockpile exhibits for the coming court battle."[85] The Seventh Circuit also rejected the respondent's argument that judges must police the EEOC because the agency will otherwise abandon or abuse the conciliation process.[86] The court noted that the EEOC is constrained

76. *See id.*
77. *Id.* at 174.
78. *Id.* at 174–75.
79. *Id.* at 175.
80. *Id.* at 177.
81. *Id.* (quoting 5 U.S.C § 701(a)(2) (2013)).
82. *Id.* at 178–79.
83. *Id.*
84. *Id.* at 179.
85. *Id.*
86. *See id.*

by the practical limits of its budget and personnel in terms of choosing how many charges it can pursue in court,[87] and it is checked by the two other branches of government.[88]

However, the Seventh Circuit's holding that there is absolutely *no* review of the conciliation process is untenable when viewed in light of three issues: First, the statutory construction of Title VII and its legislative history, taken together, indicate that at least procedural review is contemplated. Second, principles of administrative law, while not determinative, also support a deferential standard of review. Finally, policy considerations—and the fact that abuses of discretion have occurred—advance the argument for judicial review generally.

II. TITLE VII: THE EEOC'S GOVERNING STATUTE

A. STATUTORY CONSTRUCTION

As both the "good faith" circuits and the Seventh Circuit determined, both the statutory construction and the legislative history of Title VII support a deferential standard of review. The EEOC was created under Title VII of the Civil Rights Act of 1964 ("Act" or "1972 Act").[89] At its inception, the EEOC *only* had the power to conciliate.[90] In 1972, however, Congress gave the EEOC the authority to sue nongovernmental respondents, such as employers, unions, and employment agencies, in federal court to enforce laws regarding employment discrimination.[91] The Act empowers the EEOC to decide whether to pursue or dismiss charges of discrimination.[92] If the Commission finds reasonable cause to pursue a charge,

> the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. 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.[93]

Additionally, the EEOC must have been "unable to secure from the respondent a conciliation agreement acceptable to the Commission"

87. *Id.* at 180.
88. *Id.*
89. *See generally* Hill, *supra* note 2.
90. *ID.* at 51–52.
91. *See id.*; 42 U.S.C. § 2000e(a)–(c) (2015).
92. *ID.* § 2000e-5(b).
93. *ID.*

before it files suit.[94] Although the statute requires the EEOC to serve notice of the charge on the employer, it allows the agency to determine the form and substance of said notice.[95]

At first glance, the language of the Act seems to indicate that no review is proper: it is exceptionally deferential to the EEOC, and the confidentiality provision poses obvious problems for judicial review. For example: the statute expressly reserves the discretion to decide when a conciliation agreement is acceptable to the *Commission*—not to the courts or any other body.[96] And with phrases like "[i]f the Commission determines," "endeavor to eliminate," and "informal methods," as the Seventh Circuit held, "[i]t would be difficult for Congress to have packed more deference to agency decision-making into so few lines of text."[97] The Act also provides no guidance as to what standard courts should use to review conciliation—in fact, it does not mention judicial review at all.[98] Additionally, even if review were proper, the confidentiality provision would force courts wishing to evaluate the substance of the conciliation process to do so blindly, without evidence, unless both parties agree to disclose information from the conciliation proceedings.[99]

However, when examined in the context of the legislative history of the Act, general principles of administrative law, and public policy considerations, it is apparent that the statutory language merely implies that the EEOC is owed substantive discretion, not *procedural* discretion. Thus, although courts should not review the substantive aspects of conciliation—for example, the details of offers and counteroffers made—courts should ensure that the EEOC has met its procedural requirement to conciliate before it files suit. Under this regime, the EEOC could meet this procedural check by simply showing that it provided the respondent with the appropriate notices, as required by the Act, and attempted to communicate with them. Absent the respondent offering some evidence that the EEOC did not in fact attempt to communicate with them, or that the agency's effort was made in such egregious bad faith that it would not even qualify as an attempt, the EEOC will have met its procedural burden.

The Seventh Circuit argues that a court that attempts to make the distinction between substantive and procedural review in this context will "almost inevitably find itself engaged in a prohibited inquiry into the substantive reasonableness of particular offers—not to mention using confidential and inadmissible materials as evidence—unless its review

94. *Id.* § 2000e-5(f)(1); *see* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 359–60 (1977).
95. *Id.* § 2000e-5(f)(1).
96. *Id.*
97. *Id.* § 2000e-5; EEOC v. Mach Mining, LLC, 738 F.3d 171, 174 (7th Cir. 2013).
98. *See generally* 42 U.S.C. § 2000e; *Mach Mining*, 738 F.3d at 175.
99. *Mach Mining*, 738 F.3d at 177.

were so cursory as to be meaningless."[100] Admittedly, the standard discussed here would lend itself to only cursory review. But given that the Act itself states that the Commission need only "endeavor" to eliminate discrimination through conciliation, and that any conciliation agreement must only be acceptable to the Commission,[101] it is an appropriate standard. Congress has vested the EEOC with significant decisionmaking capabilities, and courts should not interfere with such an expression of congressional intent absent a finding of bad faith on the part of the agency. A deferential good faith standard is therefore appropriate.

B. Legislative History

The legislative history of Title VII also supports a deferential standard of review. When the EEOC moved from enforcing the Civil Rights Act through voluntary conciliation to enforcing it through litigation with the passage of the 1972 Act,[102] the Senate debated making conciliation agreements reviewable in court.[103] An early version of the act proposed: "If the Commission determines . . . that it is unable to secure from the respondent a conciliation agreement acceptable to the Commission, [that] determination shall not be reviewable in any court."[104] Senators James Browning Allen of Alabama and Sam J. Ervin Jr. of North Carolina proposed an amendment eliminating the words "which determination shall not be reviewable in any court."[105] Senator Ervin argued that disallowing judicial review would subject employers to the "whims and caprices" of "five men who are not elected by anybody to do anything, and who are not responsible to anybody for anything they do, and whose actions cannot be effectively reviewed by courts of justice."[106] In essence, he said, "if a man is perfectly willing to comply with the law, he ought to be able to show the court that he was willing to make an agreement in compliance with the law but that the Commission demanded more; and, therefore, he ought never have been brought to court."[107] However, in a debate with Senator Ervin, Senator Harrison A. Williams of New Jersey pointed out the difficulties of creating an objective record for a judge to be able to review the conciliation process,

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100. 42 U.S.C. § 2000e-5; *Mach Mining*, 738 F.3d at 175.

101. 42 U.S.C. § 2000e-5(f)(1).

102. *See* Hill, *supra* note 2, at 51–52.

103. *See* 118 Cong. Rec. 3802–07 (daily ed. Feb. 14, 1972), *reprinted in* Subcomm. on Labor of the Comm. on Labor and Pub. Welfare, 92nd Cong., Legislative History of the Equal Employment Opportunity Act of 1972, at 1455–79 (1972).

104. *Id.* at 3799.

105. *Id.* at 3803.

106. *Id.* at 3799–3800 (statement of Sen. Ervin).

107. *Id.* at 3806.

saying, "I would not want to burden any judge with a review of anything that imprecise."[108] The Allen-Ervin amendment to allow for judicial review of conciliation was defeated by a vote of forty-nine to fourteen.[109]

Ultimately, for reasons that are not clear from the legislative history, the final bill omitted any mention of judicial review at all.[110] When introducing the conference report of the bill in the House, however, Representative Carl D. Perkins of Kentucky—acknowledging "there were some very deeply felt differences"—stated, "The conferees contemplate that the Commission will continue to make every effort to conciliate as is required by existing law. Only if conciliation proves to be impossible do we expect the Commission to bring action in Federal district court to seek enforcement."[111] Even considering Representative Perkins's statement, however, the legislative history as a whole supports a good faith standard of review, as opposed to a heightened level of review or no review at all.

The good faith standard addresses both Senator Ervin and Senator Williams' concerns: it allows courts to ensure that the EEOC has conciliated in good faith while at the same time avoiding a searching inquiry that could prove troublesome to apply. Additionally, although Representative Perkins used strong language regarding conciliation in introducing the conference report, both the report's section-by-section analysis of the bill *and* the language that eventually became law gave the EEOC complete discretion to decide when a conciliation agreement is acceptable.[112] This indicates a congressional preference for deferring to the agency within the realm of conciliation agreements. Thus, while the legislative history of the 1972 Act indicates that some level of judicial review over conciliation is proper, it should be deferential to the agency.

III. Principles of Administrative Law

The good faith standard of review is also supported by principles of administrative law. As the Seventh Circuit noted, some arguments for judicial review of the conciliation process "rel[y] heavily on the . . . 'presumption of judicial review' that is so central to American law in general and the APA in particular."[113] Principles of administrative law

108. *Id.* (statement of Sen. Williams).

109. *Id.* at 3807.

110. *See generally* 42 U.S.C. § 2000e-5 (2015).

111. 118 Cong. Rec. 7563 (daily ed. Mar. 8, 1972) (statement of Rep. Perkins), *reprinted in* Subcomm. on Labor of the Comm. on Labor and Pub. Welfare, 92nd Cong., Legislative History of the Equal Employment Opportunity Act of 1972, at 1855–56 (1972).

112. *Id.*; H. Rep. No. 92-899, at 1 (1972), *reprinted in* Subcomm. on Labor of the Comm. on Labor and Pub. Welfare, 92nd Cong., Legislative History of the Equal Employment Opportunity Act of 1972, at 1822 (1972); 42 U.S.C. § 2000e-5(f)(1).

113. EEOC v. Mach Mining, LLC, 738 F.3d 171, 177 (7th Cir. 2013) (citations omitted).

are therefore helpful in providing background and in examining whether and what kind of judicial review should apply to the conciliation process.

A. Final Action and the Reviewability Exception Under the APA

Under the APA, whether conciliation would be judicially reviewable depends on whether it is a final agency action and whether the reviewability exception applies. Under section 704 of the APA, "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."[114] However, the APA exempts "agency action . . . *committed to agency discretion by law*" from judicial review.[115] Although the discretion exception is "very narrow,"[116] it applies "if a careful analysis of the statutory language, statutory structure, legislative history, and the nature of the agency action requires it."[117] According to the legislative history of the APA, the exception is "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"[118]

The Supreme Court has applied the discretion exception in two relevant cases: *Heckler v. Chaney*[119] and *Webster v. Doe*.[120] In *Heckler*, the Court held the discretion exception barred review of the Food and Drug Administration's ("FDA") decision not to take enforcement action against states that administered capital punishment by the lethal injection of drugs not approved for that particular use.[121] As the Court later explained in *Webster*, since the statute, which conferred power on the FDA to forbid the misbranding or misuse of drugs, did not provide a substantive standard upon which a court could base its review, the agency's enforcement actions were committed to its own discretion.[122]

Similarly, in *Webster*, the Court found that the Central Intelligence Agency's ("CIA") decision to fire an employee was committed to the discretion of the Director of the CIA.[123] The Court reasoned that the governing statute, which provided that the Director had the power to terminate the employment of CIA employees whenever she "'shall deem such termination necessary or advisable in the interests of the United

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114. 5 U.S.C. § 704 (2015).

115. *Id.* § 701(a)(2) (emphasis added).

116. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

117. Home Builders Ass'n of Greater Chi. v. U.S. Army Corps of Eng'rs, 335 F.3d 607, 615 (7th Cir. 2003).

118. *Overton Park*, 401 U.S. at 410 (quoting S. Rep. No. 79-752, at 26 (1945)).

119. 470 U.S. 821 (1985).

120. 486 U.S. 592 (1988).

121. *Heckler*, 470 U.S. at 837–38.

122. *Webster*, 486 U.S. at 600.

123. *Id.* at 601.

States,'"[124] was so vague that it did not supply courts with law to apply in order to determine whether the Director's decision was within statutory bounds.[125]

Just as the statutes governing the FDA[126] and the CIA[127] provided no substantive standard for review, the 1972 Act governing the EEOC provides no substantive standard by which courts could review conciliation.[128] As discussed above, the 1972 Act grants the EEOC discretion over, among other things, when to investigate or dismiss charges and when to accept or reject a conciliation agreement.[129] It provides no guidelines as to how a court should review its conciliation efforts, and in fact contains a confidentiality provision that essentially prevents courts from looking into the substance of conciliation discussions without the consent of both parties.[130] As the Seventh Circuit reasoned, "[this] reasoning is consistent with the APA [discretion] exception because 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."[131]

Although the reviewability exception would seem to support the Seventh Circuit's view that any judicial review of conciliation is not proper, given the need to protect against abuses of EEOC discretion, this guiding—not controlling—background to the APA serves to show that review of the EEOC's conciliation efforts should be deferential, not strict.

B. Judicial Review of Agency Action Generally

Continuing with the APA thought experiment: if conciliation *were* considered a final agency action, or not exempt from the APA, the next step would be to determine what kind of judicial review should apply. This depends at least in part on whether the agency determination is a question of fact or a question of law.[132] Courts review facts rather than law when they "review agency conclusions *about* the world, rather than about the agency's legal authority to act in the world."[133] Generally

124. *Id.* at 600 (quoting 50 U.S.C. § 403(c) (1988)).
125. Webster v. Doe, 486 U.S. 592, 600 (1988).
126. *See id.*
127. *See id.*
128. *See generally* 42 U.S.C. § 2000e-5 (2015).
129. *Id.* § 2000e-5(f).
130. *Id.* § 2000e-5(b).
131. EEOC v. Mach Mining, LLC, 738 F.3d 171, 177 (7th Cir. 2013).
132. David Zaring, *Reasonable Agencies*, 96 Va. L. Rev. 135, 143 (2010).
133. *Id.* at 147 (emphasis added).

speaking, however, in either case, judicial review of agency action is permeated by deference.

Agency interpretations of law are generally reviewable under "the deferential *Chevron* standard [or] the less deferential *Skidmore* standard."[134] Agency findings of fact are generally reviewed under the "substantial evidence" standard if the findings are made on the record, or under the "arbitrary and capricious" standard if they are made informally.[135] Thus, courts overrule agency findings of fact under the former standard if "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'"[136] is not present, or under the latter standard if the fact-finding was done in an arbitrary or capricious manner.[137] Compared to, say, de novo review, these standards "give[] the agency the benefit of the doubt."[138]

Here, then, the general approach to judicial review of agency action is most consistent with the good faith standard. The good faith standard gives the EEOC at least "the benefit of the doubt" as to whether it has properly conciliated, but still allows courts to review the agency's actions in order to protect against abuse.

IV. Policy Considerations

General policy considerations regarding conciliation also favor a deferential standard of review. One of the primary rationales for adopting the heightened scrutiny standard is the fear that the EEOC will abuse its discretion, as the court found it did in the *Asplundh* case. In *Asplundh*, the EEOC investigated a racial discrimination charge for thirty-two months, and, after determining it had reasonable cause, sent the defendant a proposed conciliation agreement and requested a response within twelve business days.[139] Although an individual *not* employed by Asplundh had committed the discriminatory action, the EEOC did not provide any theory of liability in its proposed conciliation agreement.[140] The agreement instead required that the employee in question be reinstated, even though the project on which he had worked ended three years earlier; that he be paid front pay; and that Asplundh create a nationwide antidiscrimination program for its employees.[141] Asplundh responded with a request for an extension of time to prepare a

134. *Id.* at 143–44.

135. *Id.* at 148–49.

136. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

137. Zaring, *supra* note 132, at 149.

138. Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 377 (1998).

139. EEOC v. Asplundh Tree Co., 340 F.3d 1256, 1257–58 (11th Cir. 2003).

140. *See id.*

141. *Id.* at 1258.

response, but the next day the EEOC terminated conciliation and announced its intent to sue.[142] The agency filed suit thirteen days later.[143]

Ultimately, the Eleventh Circuit applied the heightened three-step standard and held that the EEOC did not meet its conciliation obligations. It also held that in light of the agency's "fail[ure] to fulfill its statutory duty to act in good faith to achieve conciliation," dismissal and an award of attorney's fees in favor of Asplundh was not an unreasonable remedy.[144] *Asplundh* and cases like it demonstrate that, contrary to the Seventh Circuit's holding, at least some level of review is necessary to ensure that the EEOC actually conciliates. However, as described below, the need for a heightened standard of review is unfounded because, coupled with the good faith standard of review, the EEOC has a number of safeguards that would protect against abuse of discretion.

A. Checks on EEOC's Power

"[P]unishment is expensive; persuasion is cheap."[145] It is far easier and more efficient for the EEOC to resolve charges through conciliation rather than litigation. Even if the EEOC fails to properly conciliate, with a good faith standard of judicial review, that failing can be corrected at trial with a stay in the proceedings. The employer would still have the opportunity to settle at any time during trial, and in fact, "district courts have many tools available to encourage reasonable settlements."[146] Additionally, due to its limited budget, the EEOC is motivated to settle before or during litigation.[147] In the 2013 fiscal year, the Commission investigated over 90,000 charges of discrimination.[148] Of the 3,515 cases it deemed to have reasonable cause, 1,437 were successfully conciliated.[149] Of the 2,078 unsuccessfully conciliated claims,[150] the EEOC only filed 148 suits, the fewest it has filed in sixteen years.[151] The EEOC's ability to pursue its charges of discrimination in court is constrained by limitations on budget and personnel.[152] Therefore, it is in the agency's best interest

142. *Id.* at 1260.

143. *Id.*

144. *Id.* at 1261.

145. Ian Ayres & John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate 26 (1992).

146. EEOC v. Mach Mining, LLC, 738 F.3d 171, 181 (7th Cir. 2013).

147. *Id.* at 181–82.

148. *Enforcement and Litigation Statistics: All Statutes FY 1997–FY 2013*, Equal Emp't Opportunity Comm'n, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (last visited Apr. 4, 2015).

149. *Id.*

150. *Id.*

151. *Enforcement and Litigation Statistics: EEOC Litigation Statistics, FY 1997 Through FY 2013*, Equal Emp't Opportunity Comm'n, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited Apr. 4, 2015).

152. Brief for the Respondent at 12, Mach Mining, LLC v. EEOC, 2014 WL 2201045 (May 27, 2014) (No. 13-1019).

to fulfill its statutory duties by conciliating claims rather than engaging in long, protracted litigation with one party at a time.

B. Intent and Purpose of Title VII

As the Seventh Circuit explained, heightened judicial review of conciliation "invites employers to use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute."[153] Subjecting what was intended to be an informal conference to substantive judicial review allows employers to turn the conciliation process into a forum for gathering ammunition for the coming dispute. Intense judicial review of conciliation rarely leads to a positive outcome; rather, it "protracts and complicates" the litigation process.[154] The intent and purpose of Title VII—to prevent discrimination on the basis of race, color, religion, sex, or national origin[155]—is not met by allowing a standard of judicial review for conciliation that results in cases akin to *Bloomberg*. In *Bloomberg*, the parties engaged in combative litigation over conciliation that protracted and embittered the case.[156] This behavior resulted in the dismissal of potentially meritorious claims.[157] This is not a just result, nor one contemplated by Title VII. Indeed, the possibility that an employer can discriminate and later avoid liability by arguing that the EEOC did not meet its burden to conciliate only serves to create a system with poor incentives. Rather than encouraging settlement and voluntary compliance with the law, it rewards employers who use conciliation to simply collect evidence of the agency's "bad faith" as a defense to the ensuing litigation.

Conclusion

The Supreme Court should adopt the procedural "good faith" standard in reviewing the EEOC's attempts to conciliate. Statutory interpretation, the legislative history of Title VII, principles of administrative law, and public policy considerations all support the adoption of such a standard. The EEOC is in the best position to know when further attempts at conciliation would be futile, and the agency already has the statutory discretion to decide whether a conciliation agreement is acceptable.[158] Even if allowing courts to use a form of heightened scrutiny to probe the conciliation process would not

153. EEOC v. Mach Mining, LLC, 738 F.3d 171, 180 (7th Cir. 2013).

154. *Id.* at 179.

155. 42 U.S.C. § 2000e-2(a)(1) (2015).

156. *See Bloomberg II*, 967 F. Supp. 2d 802, 816 (S.D.N.Y. 2013).

157. *Id.* (dismissing case while acknowledging that discrimination claims that may be meritorious "now will never see the inside of a courtroom").

158. 42 U.S.C. § 2000e-2(f)(1).

contradict the statutorily imposed requirement to keep the conciliation process confidential,[159] closely examining the parties' behavior under the heightened standard only slows down the litigation process and encourages employers to engage in pointless infighting. Requiring a procedural showing of a good faith attempt by the EEOC, and applying such a standard in a deferential manner, protects against abuses of power but stays true to the spirit of Title VII by encouraging voluntary conciliation.

159. EEOC v. Mach Mining, LLC, 738 F.3d 171, 174–75 (7th Cir. 2013).

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