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Irreconcilable Differences: Conflicting Court Approaches to Assessing the Duty to Conciliate

Gregory Tsonis

INTRODUCTION

The Equal Employment Opportunity Commission (EEOC), while exercising its duty to eliminate unlawful discriminatory employment practices, must engage in voluntary settlements with employers prior to bringing civil suits against them. This duty to conciliate is the primary method by which the EEOC effectuates its goals. While courts agree that the EEOC must exercise its duty to conciliate, they agree on little else.

Circuit courts have long been divided as to how the EEOC’s conciliation efforts should be reviewed, but a recent Seventh Circuit opinion has significantly widened the split. For decades, circuit courts agreed that conciliation required “good faith” on the part of the EEOC. The split among these circuits centered on what standard to use in assessing whether the EEOC acted with “good faith” effort. The Fourth, Sixth, and Tenth circuits have adopted an approach that is quite deferential to the EEOC and does not inquire into the negotiations between the employer and the EEOC. The Second, Fifth, and Eleventh circuits have adopted a three-part test that they use to assess the

reasonableness of the EEOC’s conciliation efforts. In 2013, the Seventh Circuit widened the circuit split, holding that the EEOC’s conciliation efforts were not subject to a “good faith” standard and were not judicially reviewable at all. This groundbreaking decision widened the divide amongst the Circuits and, with seven Circuits now divided between three approaches, increased the need for the United States Supreme Court to resolve the issue.

This Comment argues that conciliation efforts should be subject to judicial review and that the three-part reasonableness test is superior to the deferential standard. Part I of this Comment examines the EEOC’s inception, statutory mandate to eliminate discrimination, and court interpretations of the EEOC’s duty to conciliate. The arguments presented in the Seventh Circuit’s Mach Mining decision are comprehensively analyzed in Part II. Finally, Part III examines “good faith” in the collective bargaining context to advocate for the adoption of the reasonableness test. By drawing a comparison to collective bargaining, this Comment demonstrates that the reasonableness standard creates the correct incentives for the EEOC to reach voluntary agreements, promotes information sharing between the employer and EEOC, and maximizes the potential for successful conciliation agreements. For these reasons, the reasonableness test better effectuates the primary method that the EEOC uses to eliminate discrimination—voluntary compliance.

I. THE DUTY TO CONCILIATE

Congress enacted Title VII of the Civil Rights Act of 1964 “to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin.” To help achieve this end, Congress created the EEOC to enforce Title VII by

4 Mach Mining, 738 F3d at 172-73.
5 A resolution to this issue may arrive shortly. The Supreme Court granted a petition for writ of certiorari in the Mach Mining case on June 30, 2014. Mach Mining, LLC v Equal Employment Opportunity Commission, 134 S Ct 2872 (2014).
6 42 USC § 2000(e).
7 HR Rep No 914, 88th Cong, 1st Sess, 26 (1963). See also 110 Cong Rec 13079-13080 (1964) (remarks of Senator Clark).
preventing and resolving discriminatory employment practices.\textsuperscript{8} Presently, the EEOC enforces several federal statutes that address discrimination by employers, unions, or government agencies.\textsuperscript{9}

As originally enacted under Title VII, the EEOC lacked the key enforcement mechanism that it has today—the federal courts. Initially, Title VII only empowered the EEOC to work with employers to voluntarily cure discriminatory practices.\textsuperscript{10} This system proved largely ineffective, as the EEOC reached voluntary agreements in fewer than half of its cases.\textsuperscript{11} Congress then passed the Equal Opportunity Employment Act of 1972, which gave the EEOC the authority to enforce Title VII through litigation.\textsuperscript{12}

The power to ultimately institute civil actions did not eliminate the focus on voluntary compliance for either Title VII or the EEOC. Instead, the 1972 amendments to Title VII provided an “integrated, multistep enforcement procedure culminating in the EEOC’s authority to bring a civil action in a federal court.”\textsuperscript{13}

Under this framework, a complainant files a charge with the EEOC alleging a discriminatory, unlawful employment practice.\textsuperscript{14} The EEOC must notify the employer of the charge within ten days.\textsuperscript{15} The EEOC then investigates the charge and

\textsuperscript{8} See 42 USC § 2000e-5.
\textsuperscript{10} Equal Employment Opportunity Commission v Alexander v Gardner-Denver Co, 415 US 36, 44 (1974) (“Cooperation and voluntary compliance were selected as the preferred means for eliminating discriminatory practices.”).
\textsuperscript{11} See H Rep No 92-238, 92d Cong, 1st Sess 2139-40 (1971) (“Of the 35,445 charges that were recommended for investigation [since the formation of the EEOC], [evidence of discrimination] was found in over 63% of the cases, but in less than half of these cases was the Commission able to achieve a totally or even partially successful conciliation.”). While no measure of success existed, it seems plain that Congress found the EEOC’s results insufficient enough to substantially increase enforcement powers.
\textsuperscript{12} 42 USC § 2000e-5(f).
\textsuperscript{14} Id (“That procedure begins when a charge is filed with the EEOC alleging that an employer has engaged in an unlawful employment practice.”).
\textsuperscript{15} 42 USC § 2000e-5(b).
determines if there is reasonable cause to believe it is true.\textsuperscript{16} If there is reasonable cause, the EEOC “shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”\textsuperscript{17} Generally, the employer is provided with written notice commencing the conciliation process—commonly referred to as a Conciliation Notice—with the ultimate goal of reducing a voluntary agreement to a signed writing.\textsuperscript{18} If the EEOC fails to reach a satisfactory agreement with the employer and terminates the conciliation process, the EEOC will send the employer a notice that further attempts at conciliation “would be futile or nonproductive.”\textsuperscript{19} At any time after thirty days from when the charge was filed, if the EEOC is “unable to secure from the respondent a conciliation agreement acceptable to the [EEOC], [it] may bring a civil action.”\textsuperscript{20}

Prior to a Seventh Circuit ruling in December 2013, courts had uniformly stated that the EEOC must act in good faith.\textsuperscript{21} For decades, the predominant issue that divided federal circuits was the standard by which to evaluate the EEOC’s good faith effort.\textsuperscript{22} Some circuits require that the EEOC’s conciliation efforts be reasonable.\textsuperscript{23} Others differ markedly and afford more deference to the EEOC’s actions during the conciliation process.\textsuperscript{24} The Seventh Circuit recently held that conciliation is solely under the EEOC’s authority and not subject to judicial review.\textsuperscript{25} Finally, in circuits that have not definitively addressed

\begin{itemize}
  \item \textsuperscript{16} Occidental Life, 432 US at 359.
  \item \textsuperscript{17} 42 USC § 2000e-5(b).
  \item \textsuperscript{18} See 29 CFR § 1601.24. This is commonly referred to as a Conciliation Notice.
  \item \textsuperscript{19} 29 CFR § 1601.25. This is commonly called a Failure to Conciliate Notice.
  \item \textsuperscript{20} 42 USC s 2000e-5(f)(1).
  \item \textsuperscript{21} See Equal Employment Opportunity Commission v KECO Industries, 748 F2d 1097, 1102 (6th Cir 1984) (stating that the EEOC “must make a good faith effort to conciliate”); Equal Employment Opportunity Commission v Zia Co, 582 F2d 527, 533 (10th Cir 1978); Equal Employment Opportunity Commission v Radiator Specialty Co, 610 F2d 178, 183 (4th Cir 1979).
  \item \textsuperscript{22} There is a split as to whether the EEOC’s pre-suit statutory duties are “jurisdictional prerequisites” or “conditions precedent.” See, for example, Zia, 582 F2d at 532-33 (describing the various approaches courts use). While that distinction may have an effect on a case’s ultimate disposition, it is irrelevant to this Comment’s conciliation discussion.
  \item \textsuperscript{23} See, for example, Klinger Electric, 636 F2d at 107.
  \item \textsuperscript{24} See, for example, KECO Industries, 748 F2d at 1102.
  \item \textsuperscript{25} Mach Mining, 738 F3d at 172–73.
\end{itemize}
the issue, district courts have taken a variety of approaches in analyzing the EEOC’s duty to conciliate.26

A. The Reasonableness Test

The Second, Fifth, and Eleventh Circuits have adopted a three-part standard with which to review EEOC conciliation attempts (referred to here as the “reasonableness test”).27 This standard is not satisfied by merely any attempt to conciliate. The reasonableness test’s goal is to facilitate meaningful conciliation between both parties and protect against “take-it-or-leave-it” demands by the EEOC.28

In *Equal Employment Opportunity Commission v Klinger Electric Co.*,29 the Fifth Circuit rejected the rationale that any good faith attempt would satisfy the EEOC’s statutory duty to conciliate. After the EEOC found evidence of employment discrimination, it mailed a Conciliation Notice to Klinger with a request for information. Klinger signed and returned the proposed conciliation agreement and information to the EEOC.30 Finding the agreement unacceptable in light of the new figures, the EEOC revised and sent an updated Conciliation Notice to Klinger.31 Klinger did not respond to the proposal, and the EEOC shortly thereafter filed suit.32 The district court dismissed the case relying, in part, on the EEOC’s failure to adequately conciliate in light of the agreement Klinger had previously signed.33 While the Fifth Circuit noted that it was appropriate for the district court to inquire into the sufficiency of the EEOC’s conciliation attempts, it reversed the district court and outlined specific steps the EEOC must take to satisfy its statutory duty.

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29 636 F2d 104 (5th Cir 1981).
30 Id at 106.
31 Id.
32 Id.
33 *Klinger Electric*, 636 F2d at 106–07.
to conciliate before filing suit. The “fundamental question,” according to the court, “is the reasonableness and responsiveness of the EEOC’s conduct under all the circumstances.”35 According to the court, EEOC successfully satisfies its statutory burden to attempt conciliation when it (1) “outlines to the employer the reasonable cause for [the EEOC’s] belief that Title VII has been violated,” (2) “offers an opportunity for voluntary compliance,” and (3) “responds in a reasonable and flexible manner to the reasonable attitudes of the employer.”36

The Eleventh Circuit endorsed this approach when it found bad faith in Equal Employment Opportunity Commission v Asplundh Tree Expert Co.37 An Asplundh employee filed a charge of racial discrimination after an incident with an employee of another company that worked on the same job site.38 The third-party employee told “offensive racial jokes” and allegedly displayed a noose made from rope.39 The EEOC’s investigation also included “disparate pay, racial harassment, and retaliation.”40 Thirty-two months after the investigation began, the EEOC sent a reasonable cause determination and, one week later, a proposed conciliation agreement to the employer.41 The conciliation agreement provided twelve business days for a response, and upon the employer’s retention of local counsel and request for an extension, the EEOC sent a letter concluding that conciliation attempts had failed.42 The Eleventh Circuit cited the three-part test outlined in Klinger Electric and upheld the district court’s ruling that the “grossly arbitrary manner” of attempted conciliation and the “unreasonable conduct” of the EEOC justified a finding of bad faith.43 The court found that the limited time to consider the proposal and the refusal to extend it, in light of the length of the investigation,

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34 Id.
35 Id at 107.
36 Id, citing Marshall v Sun Oil Company (Delaware), 605 F2d 1331, 1335–39 (5th Cir 1979).
37 340 F3d 1256 (11th Cir 2003).
38 Id at 1257.
39 Id.
40 Id at 1257–58.
41 Asplundh Tree Expert Co, 340 F3d at 1258.
42 Id at 1258–59.
43 Id at 1259.
Deprived Asplundh of a "meaningful conciliation opportunity." Importantly, the court discussed that the proposed conciliation agreement contained "no theory of liability ... demanded a remedy ... national in scope, and [was, in part] ... impossible to perform." In light of these factors, "such an 'all or nothing' approach on the part of a government agency, one of whose most essential functions is to attempt conciliation with the private party, will not do."46

The Second Circuit has also explicitly adopted the reasonableness test in assessing the EEOC's statutory duty to conciliate. In Equal Employment Opportunity Commission v Johnson & Higgins Inc,47 the court used the three-part test outlined in Klinger Electric to assess a claim of age discrimination under the Age Discrimination in Employment Act of 1967 (ADEA).48 The court reasoned that the employer fundamentally disagreed that its practices were unlawful and noted the employer refused to supply information to the EEOC to calculate damages. As such, the court held that the EEOC's conciliation attempts were reasonable and in good faith.49

B. The Deferential Standard

The Fourth, Sixth, and Tenth Circuits evaluate conciliation through an approach that is more deferential to the EEOC (referred to as the "deferential standard").51 Using this standard, a court largely looks at whether the EEOC attempted conciliation but largely does not consider the quality of the offer or the process. Under this standard, any good faith attempt at conciliation by the EEOC satisfies its statutory obligation to conciliate.

The Fourth Circuit describes the statutory duty to conciliate in minimal terms. In one case, an employer charged with

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44 Id at 1260-61.
45 Asplundh Tree Expert Co, 340 F3d at 1260.
47 91 F3d 1529 (2d Cir 1996).
48 Id at 1533.
49 Id at 1535.
50 Id.
51 See generally Radiator Specialty Co, 640 F2d 178; KECO Industries, 748 F2d 1097; Zia, 582 F2d 527.
discrimination under Title VII for its hiring and promotion policies of minority employees challenged the sufficiency of the EEOC’s conciliation efforts. During the investigation of the claim, the EEOC toured the employer’s plant and suggested a meeting to discuss a settlement agreement. The employer declined, and shortly afterwards the EEOC relayed that the refusal to meet would result in a failure to conciliate. The court held that the EEOC gave the employer “several opportunities to participate in conciliation discussions,” but the court’s holding did not rest solely on the level of effort expended by the EEOC.

Recognizing the importance of conciliation, the court explained that “[a]ttempted conciliation is a condition of the Commission’s power to sue.” The court explained that “the law requires no more than a good faith attempt at conciliation,” and concluded that the EEOC “made such an attempt.”

In Equal Employment Opportunity Commission v KECO Industries, the Sixth Circuit considered whether the EEOC had satisfied its duty to conciliate in a class-action sex discrimination claim. The EEOC brought suit under Title VII alleging discrimination against female employees by “maintaining sex segregated job classifications, paying women lower wages than men, assigning women to lower paid clerical positions, and refusing to promote them.” The district court dismissed the suit in part because the EEOC had not conducted “meaningful conciliation.” The Sixth Circuit reversed on the grounds that the employer had indicated that it did not wish to settle the suit and thus the EEOC had conciliated in good faith. Noting that employer dissatisfaction with the attempted conciliation is an inappropriate basis for reviewing the statutory

52 Radiator Specialty Co, 610 F2d at 181.
53 Id at 183.
54 Id.
55 Id.
56 Radiator Specialty Co, 610 F2d at 181.
57 Id.
58 748 F2d 1097 (6th Cir 1984).
59 Id at 1098.
60 Id.
61 Id at 1099.
62 KECO Industries, 748 F2d at 1101 ("[T]he EEOC sought to conciliate the class-based claim with KECO on a good faith basis. Conciliation efforts broke down only after KECO rejected the EEOC’s overtures.").
duty to conciliate, the court concluded that the proper standard is whether "the EEOC made an attempt at conciliation."\textsuperscript{63} In so holding, the court explicitly stated that the "form and substance of those conciliations is within the discretion of the EEOC . . . and is beyond judicial review."\textsuperscript{64}

The Tenth Circuit has not explicitly endorsed the Sixth Circuit’s approach, but it is clear that it employs a similar deferential standard.\textsuperscript{65} In \textit{Equal Employment Opportunity Commission v Zia Co},\textsuperscript{66} the court stated, in considering conciliation attempts made by the EEOC under the ADEA, that "a court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the agreement should provide."\textsuperscript{67} The court elaborated in a subsequent case that "[b]ecause conciliation involves at least two parties, we must evaluate one party’s efforts with an eye to the conduct of the other party."\textsuperscript{68} Noting that conciliation is "a flexible and responsive process which necessarily differs from case to case," the court held that only a "sincere and reasonable effort to negotiate by providing the defendant ‘an adequate opportunity to respond to all charges and negotiate possible settlements’ was necessary."\textsuperscript{69} It is important to note that under the court’s interpretation, the EEOC’s “reasonable effort” seems to mandate only that the opportunity for settlement must be present after the employer understands what charges it faces.

\textsuperscript{63} \textit{KECO Industries}, 748 F2d at 1102.
\textsuperscript{64} Id.
\textsuperscript{65} See \textit{Equal Employment Opportunity Commission v California Teachers Association}, 534 F Supp 209, 212 (ND Cal 1982) (outlining the two basic good faith approaches and citing the Tenth Circuit’s decision in \textit{Zia} for the deferential approach); see also \textit{Equal Employment Opportunity Commission v Hometown Buffet, Inc}, 481 F Supp 2d 1110, 1113 (SD Cal 2007) ("The other view, expressed by the Sixth and Tenth Circuits, instructs that the district court should not consider the details of the parties’ negotiations, but rather should focus on whether the EEOC provided the employer an opportunity to confront all the issues.").
\textsuperscript{66} 582 F2d 527 (10th Cir 1978).
\textsuperscript{67} Id at 533.
C. Circuits in Which the Conciliation Standard is an Open Question

Some Circuit Courts of Appeals have not definitively ruled on the issue of good faith conciliation. District court decisions within one circuit have generally trended toward the deferential approach. In another circuit, interpretation of an analogous state statute provided dicta in support of the deferential approach as well.

The Ninth Circuit Court of Appeals has not weighed in on the appropriate standard for reviewing the EEOC’s conciliation efforts. Though district courts under its jurisdiction continue to confront the issue and generally apply the deferential standard, some district courts have applied a hybrid standard that combines the deferential standard and the reasonableness test. In one exemplary case applying the deferential approach, the EEOC informed an employer that it has reasonable cause to believe that at least two employees were subjected to sexual harassment and sex-based discrimination. The EEOC’s only attempt at conciliation included a demand for the maximum statutory fine of $300,000 per employee and back pay. While the court stated that the evidence provided to the employer was “conclusory and unidentified” and that the EEOC’s “rigid and preemptive attitude . . . did not serve as an effective conciliation technique,” it nonetheless found that the EEOC afforded an opportunity for the employer to “confront the issues” and quoted the Sixth Circuit’s decision in KECO Industries in holding that the “EEOC minimally complied with its conciliation obligations.”

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70 Compare Equal Employment Opportunity Commission v Alia Corporation, 842 F Supp 2d 1243, 1256 (ED Cal 2012) (stating that there was “no reason to depart from the deferential approach taken by the district courts in the Ninth Circuit,” the court only assessed whether an attempt at conciliation was made), with Equal Opportunity Employment Commission v California Psychiatric Transitions, Inc, 725 F Supp 1100, 1114–15 (ED Cal 2010) (“[T]he law requires no more than a good faith attempt at conciliation by the EEOC, in doing so, the EEOC must outline the basis for its determination of discrimination, offer an opportunity for voluntary compliance, and respond flexibly to the reasonable attitudes of the employer.”).

71 Hometown Buffet, 481 F Supp 2d at 1111.

72 Id at 1111–12.

73 Id at 1114–15.

74 Id at 1115.
Similarly to the Ninth Circuit, the First Circuit has not decided on which standard to utilize when assessing EEOC conciliation. A recent district court ruling analyzed the circuit split while assessing a Maine statute with a conciliation provision analogous to that of Title VII. Comparing the reasonableness test with the deferential approach, the court approvingly characterized the deferential standard as “less interventional” and stated that it “seems wise.”

**D. The Seventh Circuit: A New Approach**

A recent, landmark decision in the Seventh Circuit adopted a third approach in the already existing circuit split on the issue of EEOC conciliation. In *Equal Employment Opportunity Commission v Mach Mining, LLC*, the EEOC filed suit against an employer for alleged sex discrimination against a class of female applicants for coal mining jobs. After the employer challenged whether the EEOC engaged in good faith conciliation, the EEOC filed a motion for summary judgment claiming that the sufficiency of conciliation could be determined from the face of the complaint. The motion was denied, but the district court certified the motion for interlocutory appeal as to “whether an alleged failure-to-conciliate is subject to judicial review in the form of an implied affirmative defense.” The Seventh Circuit Court of Appeals subsequently held that “[t]he language of the statute, the lack of a meaningful standard for courts to apply, and the overall statutory scheme convince us that an alleged failure-to-conciliate is not an affirmative defense to the merits of a discrimination suit.” In other words, the court stated that no standard of review is appropriate because employers cannot challenge the sufficiency of EEOC conciliation attempts. The court acknowledged that its opinion “complicate[s] a circuit split more than it creates one” because it

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76 Id at 405.
77 738 F3d 171 (7th Cir 2013).
78 Id at 173.
79 Id at 172.
80 Id.
81 *Mach Mining, LLC*, 738 F3d at 172.
creates a third prong in an already existing circuit split. Due to the Mach Mining, LLC opinion's first-in-kind nature, its relative youth, and the fact that it is irreconcilable with all other court opinions that have addressed the issue, this Comment will analyze it in great detail.

II. THE APPLICABILITY OF JUDICIAL REVIEW TO CONCILIATION

The Seventh Circuit held that the EEOC's conciliation process is not subject to judicial review for three reasons. First, the text of the statute implies deference to the EEOC, not an affirmative defense for failure-to-conciliate. Second, a failure-to-conciliate defense requires a meaningful standard for review, which does not exist. Third, judicial review of conciliation undermines the statutory goal of Title VII by inhibiting effective conciliation. This Comment contends that each of these arguments is either incorrect or better supports the application of a good faith standard of review.

A. The Statutory Text Argument

One critical consideration is whether the statute, as written, imposes a good faith obligation on the EEOC or subjects conciliation efforts to judicial review. As is often the case, the court began its analysis with the text of the statute. The statute at issue states, “If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods.

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82 Id at 182.
83 While the decision was from a panel of the court, the opinion was “circulated [ ] among all judges of [the] court in regular active service . . . [and] [n]o judge favored a rehearing en banc on the question of rejecting the implied affirmative defense for failure-to-conciliate.” Id at 182 n 3.
84 Id at 172, 174. The court’s opinion listed five total considerations to its holding. The fourth consideration was that its decision conformed with previous Seventh Circuit precedent. Since the Seventh Circuit had not previously addressed the issue, and due to this Comment’s examination of the issue on a national level, the Seventh Circuit’s precedent is not particularly relevant. The fifth consideration was a rejection of the rationales used by all other circuits for the previous reasons the decision listed.
85 Mach Mining, LLC, 738 F3d at 174–75.
86 Id at 175–78.
87 Id at 178–80.
of conference, conciliation, and persuasion.”88 The EEOC cannot sue until it “has been unable to secure from the respondent a conciliation agreement acceptable to the Commission.”89 The court analyzed the phrases “endeavor to eliminate,” “informal methods,” and “acceptable to the Commission” and concluded that Congress’s intent was to defer to the EEOC’s decision-making, and not courts’, for the entire process. This conclusion is supplemented by a correlative provision relating to conciliation confidentiality:

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.90

Concluding that the judicial review is inapposite with the confidentiality of conciliation, the court considered it is best to “avoid the conflict, stick to the text, and reject both the non-statutory affirmative defense and the non-statutory exceptions to confidentiality.”91

While straightforward, the statutory arguments presented by the court are incomplete. Clearly the statute does not contain an express statement of a “good faith” standard. However the court’s attention to the words “endeavor to eliminate” ignore the key word that precedes them: “shall.”92 By using the word “shall,” the statute creates a duty to pursue conciliation. As the Tenth Circuit explained, “[t]he law declares that the Commission ‘shall’ seek conciliation; it is inconceivable to us that good faith efforts are not required.”93 All courts confronted with the issue of the EEOC’s conciliation attempts have, either explicitly or implicitly, applied a good faith standard. While the Seventh Circuit would rely on Congressional oversight or

88 42 USC § 2000e-5(b).
90 42 USC § 2000e-6(b).
91 Mach Mining, LLC, 738 F3d at 175.
92 Id at 174.
93 Zia, 582 F2d at 527.
presidential appointments to cure issues with conciliation, these tools are simply not practical or effective ways to resolve issues arising out of conciliation on a case-by-case basis. To put it another way, the mandate is meaningless if there is no way for it to be enforced; this construction of the statute should be avoided.

The legislative history of Title VII, while limited in applicability to this issue, supports such a reading. In an earlier Senate version of Title VII’s 1972 amendments, the text included a specific provision concerning the judicial reviewability of EEOC reasonable cause determinations. The initial provision read as follows:

If the Commission determines after attempting to secure voluntary compliance under subsection (b) that it is unable to secure from the respondent a conciliation agreement acceptable to the Commission and to the person aggrieved, which determination shall not be reviewable in any court, the Commission shall issue and cause to be served upon the respondent a complaint.

The phrase concerning judicial review was ultimately removed and did not make it into the final version of the law. This suggests that Congress deliberated as to whether to remove some or all of the EEOC’s pre-suit obligations from judicial review and ultimately chose not to. Additionally, Congress has passed several statutes since the passage of the Civil Rights Act that mirror the conciliation provision passed in Title VII. If

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94 Mach Mining, LLC, 738 F3d at 180 ("Congress can exert its influence on the EEOC through oversight hearings, adjustments to appropriations, and statutory amendments. In addition, the commissioners who head the agency are appointed by the President with the advice and consent of the Senate.").

95 117 Cong Rec 31712 (1971) (emphasis added).


97 See, for example, the statutes cited in note 9.
Congress intended for the statutory scheme of Title VII to preclude judicial review of conciliation, they had ample time and opportunity to clarify.

Lastly, the court acknowledges that two potential solutions exist regarding the confidentiality provision. First, parties can potentially file information from conciliation settlements under seal to prevent the information from being “public.” While case law is “inconsistent” on the applicability of this provision, it exists as a potential solution that would prevent judicial review from violating the statute. Second, if an interpretation of the statute includes judicial review, a contingent exception to the confidentiality provision similar to Federal Rule of Evidence 408(b) could also apply. In either scenario, the existence of the confidentiality provision simply requires an implicit exception that would be contingent on an implicit standard of review.

B. The Standard of Review Argument

The court’s second rationale for limiting a failure-to-conciliate defense was “the lack of a meaningful standard of review to apply.” While the court acknowledged that there is a basic presumption of judicial review that is “central to American law,” it concluded that “Congress’s failure to provide even the outlines of such a standard tends to show that it did not intend for judicial review of conciliation through an implied affirmative defense.”

Without specific statutory instructions, other circuits have applied a good faith requirement that, at least in theory, analyzes the process that the EEOC went through during conciliation and not the substance of its proposals. This standard is similar to the explicit good faith requirement in the National Labor Relations Act (NLRA). The Mach Mining, LLC court ultimately considered this an inappropriate standard in part because “the distinction between process and substance

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42 USC § 2000e–b(5).
Mach Mining, LLC, 738 F3d at 175.
Id. Rule 408(b) involves the use of settlement negotiations as evidence in a collateral proceeding. Id.
Id.
Id at 177–78.
Mach Mining, LLC, 738 F3d at 176–77. See also Zia, 582 F2d at 533.
Mach Mining, LLC, 738 F3d at 177.
in this context is unlikely to survive the adversarial crucible of litigation."\textsuperscript{105} Any court would “inevitably find itself engaged in a prohibited inquiry into the substantive reasonableness of particular offers . . . unless its review were so cursory as to be meaningless.”\textsuperscript{106} However by examining the approach taken by other courts, a workable good faith standard emerges that focuses on the process undertaken during conciliation.

Undoubtedly there are instances in which courts have inappropriately delved into the substance of EEOC proposals to evaluate good faith. Yet this fact does not make the good faith standard entirely unworkable. A court’s failure to restrict its analysis to process is no doubt problematic. Overreach on the part of some courts only evinces the need for clear, process-based inquiries for a court to use when applying a good faith standard. Confusion by some courts does not prove that process—described at times as the form of negotiations—is inextricably intertwined with substance. One early Fifth Circuit case dealing with conciliation explained what a process-oriented examination entails and demonstrates that a good faith framework, when properly applied, can exclude substance-based inquiries.

In \textit{Marshall v Sun Oil Co (Delaware)},\textsuperscript{107} the court explained its three-step process to evaluate the process of conciliation. First, the court should examine “what the [EEOC] did.”\textsuperscript{108} This would generally include outlining the reason the EEOC believes Title VII has been violated and offering an opportunity for voluntary compliance—the first two prongs of the reasonableness test. Second, the court would examine how the employer responded.\textsuperscript{109} This examination would include assessing whether the employer “attempt[ed] to challenge or rebut the evidence” and whether the employer was either “passive” or “intransigent.”\textsuperscript{110} Third, the court would assess how the EEOC “respond[ed] to the action or inaction” of the employer and whether the EEOC “seize[d] the opportunity to go forward” or “refuse[d] to address counter-evidence.”\textsuperscript{111} This framework,

\begin{itemize}
\item \textsuperscript{105} Id.
\item \textsuperscript{106} Id.
\item \textsuperscript{107} 605 F2d 1331 (5th Cir 1979).
\item \textsuperscript{108} Sun Oil, 605 F2d at 1335.
\item \textsuperscript{109} Id at 1335–36.
\item \textsuperscript{110} Id at 1336.
\item \textsuperscript{111} Id.
\end{itemize}
when properly applied, avoids examining substance—whether
the EEOC should have accepted a settlement offer or whether
the EEOC demanded too much, for example. It is simply an
analysis of the conduct of both parties and whether they “act in
a reasonable and responsive manner.”\textsuperscript{112} \textit{Sun Oil} demonstrates
that, contrary to the Seventh Circuit’s belief, process-based
inquiries into good faith can be both workable and meaningful.

C. The Effect of Judicial Review on Title VII’s Policy Goals

The Seventh Circuit’s third reason for concluding in \textit{Mach
Mining, LLC} that the EEOC conciliation process is not subject
to judicial review was that a failure-to-conciliate defense “does not
fit well with the broader statutory scheme” and undermines
Title VII’s goal of voluntary compliance.\textsuperscript{113} Essentially, the court
concluded that allowing employers to challenge the sufficiency of
the EEOC’s conciliation attempts would reduce the number of
voluntary agreements reached.\textsuperscript{114} To reach this conclusion, the
court analyzed the incentives for both employers and the
EEOC to reach an agreement when an affirmative defense exists. For
employers, the court reasoned that allowing such a defense
would transform the conciliation process into a potent weapon to
seek dismissal after the EEOC files suit.\textsuperscript{115} According to the
court, employers face low costs and large potential benefits in
attempting to gain dismissal through failure-to-conciliate
defenses.\textsuperscript{116} With regard to the EEOC, the court found that the
prospects of the EEOC “abandon[ing] conciliation altogether or
misuse[ing] it by advancing unrealistic and even extortionate
settlement demands” to be “[i]m[]plausible.”\textsuperscript{117}

The court is correct that employers, since the 1972
amendments that gave the EEOC access to federal courts,
litigate failure-to-conciliate claims. But lack of judicial review
presents two problems. First, these insufficiently conciliated
claims would proceed to discovery, without challenge, if courts
cannot assess conciliation efforts. Modern estimates

\textsuperscript{112} \textit{Sun Oil}, 605 F.2d at 1336.
\textsuperscript{113} \textit{Mach Mining, LLC}, 738 F.3d at 178.
\textsuperscript{114} See id at 179.
\textsuperscript{115} Id at 178.
\textsuperscript{116} Id at 179.
\textsuperscript{117} \textit{Mach Mining, LLC}, 738 F.3d at 179.
demonstrate that discovery costs, on average, account for half of total litigation costs in any given case.\textsuperscript{118} Discovery is the single most costly part of a lawsuit and should not be viewed as a de minimis cost even when compared to potential dismissal.\textsuperscript{119} Secondly, when courts do find insufficient conciliation attempts, the usual consequence is a stay in proceedings to allow for the appropriate conciliation to take place.\textsuperscript{120} Dismissal is an uncommon remedy.\textsuperscript{121} As such, the Seventh Circuit's contention that, for an employer, the "potential gains of escaping liability" far exceed the "risks of not engaging in serious attempts at conciliation" seems flawed.\textsuperscript{122} Judicial review resulting in a stay of proceedings to resume conciliation—or a dismissal in cases of extreme dereliction of the duty to conciliate—would reduce costs and reduce the incentive for employers to leverage the conciliation process solely as a potential defense.

Additionally, the court provides no evidence that either good faith standard—the deferential standard or reasonableness test—has substantially burdened the EEOC's conciliation process. While the court uses EEOC statistics to show how important conciliation is to the EEOC and how few cases are litigated,\textsuperscript{123} it neglects to acknowledge that those statistics are the result of over forty years of judicial review assessing EEOC conciliation attempts. The good faith standards used by courts to this point provide the backdrop to the successful conciliations reached by the EEOC. A more detailed analysis of incentives in the conciliation process is presented in Section III.

Finally, the court considered the potential for mistakes, abuse or misconduct by the EEOC.\textsuperscript{124} Anecdotal case evidence

\begin{footnotes}
\item[119] Id at 549–50.
\item[120] Equal Employment Opportunity Commission v New Cherokee Corp, 829 F Supp 73, 81 (SDNY 1993) (“Even if the EEOC is found not to have fulfilled its statutory duty to conciliate, the preferred remedy is not dismissal but instead a stay of the action to permit such conciliation. Where the EEOC has made absolutely no efforts dismissal is appropriate.”).
\item[121] See Equal Employment Opportunity Commission v Bloomberg LP, 751 F Supp 2d 628, 643 (SDNY 2010) (“Ordinarily, when the EEOC has failed to meet its duty to conciliate, the preferred remedy is not dismissal but instead a stay of the action to permit such conciliation.”) (internal quotations omitted).
\item[122] Mach Mining, LLC, 738 F3d at 179.
\item[123] Id (“In fiscal year 2012, the agency attempted conciliation in 4207 cases, was unsuccessful in 2616, yet filed suit on the merits in just 122.”).
\item[124] Id at 179–80.
\end{footnotes}
demonstrates that the EEOC has indeed engaged in these tactics. During conciliation the EEOC has, for example, required remedies that are impossible to perform,\textsuperscript{125} requested tens of millions of dollars in settlement without providing information as to class size or damage calculations,\textsuperscript{126} and demanded large payouts to satisfy “outside groups.”\textsuperscript{127} This is not meant to suggest that these cases typify the EEOC’s attempts at conciliation. However the EEOC’s conciliation tactics sometimes employ these forms and are exactly the reason that judicial review and a good faith standard are necessary. While heavy-handed tactics or abuse are not “plausible” to the court,\textsuperscript{128} they have happened. A good faith standard of review would provide a judicial check on the EEOC during the conciliation process.

III. COURTS SHOULD ADOPT THE REASONABLENESS STANDARD

Comparing the various options employed by courts—deferential approach, the reasonableness approach, and the lack of judicial review—the reasonableness standard is best suited to effectuate the goals of the EEOC and federal discrimination statutes. Section II provided an in-depth analysis and argument in support of the validity of judicial review and correlative failure-to-conciliate defense. This section contrasts the reasonableness test with the deferential approach to determine which standard is best suited to gauge “good faith” conciliation. It is undisputed that the EEOC’s purpose is to prevent and resolve discriminatory employment practices primarily through voluntary means. The reasonableness test is better than the deferential standard because it provides the right incentives during settlement discussions and maximizes the potential for information sharing. By analyzing the duty to collectively bargain and comparing it to the duty to conciliate, this Comment will argue that the reasonableness test is superior in effectuating the policy goals of the EEOC.

Comparison between the duty to conciliate and the duty to collectively bargain is appropriate for multiple reasons. The

\textsuperscript{125} See Asplundh Tree Expert Co, 340 F3d at 1260.

\textsuperscript{126} See Bloomberg LP, 751 F Supp 2d 628, 632 (SDNY 2010).

\textsuperscript{127} Equal Employment Opportunity Commission v Sears, Roebuck & Co, 839 F2d 302, 358 (7th Cir 1988) (stating that as a result, the EEOC had “badly abused” the conciliation process).

\textsuperscript{128} Mach Mining, LLC, 738 F3d at 179.
collective bargaining process, like conciliation, is an adversarial process between an employer and another party. The NLRA largely governs labor law in the United States. While the employer faces a private party—the union—in collective bargaining and the government in conciliation, the incentives present in the adversarial proceedings of conciliation and collective bargaining are closely analogous. Secondly, courts have also compared the two processes. In Zia, the court explained that “a court should not examine the details of the offers and counteroffers between the parties, nor impose its notions of what the agreement should provide, any more than it would if dealing with labor contract negotiations under the Labor Management Relations Act.” Other courts have also compared Title VII and the NLRA in various contexts. Similar statutory mandates are yet a third reason to compare collective bargaining with conciliation. Title VII mandates that the EEOC attempt conciliation, but does not require the Commission to come to an agreement with an employer. Likewise, the NLRA only mandates that employers and representative unions meet and collectively bargain, however no proposal must be agreed to nor must any concessions be made. Lastly, the public policy underlying both collective bargaining and conciliation is a primarily voluntary enforcement mechanism. Since the common focus is on voluntary agreements between parties, the incentives and obstacles to reaching these agreements are similar in important ways.

130 Zia, 582 F2d at 533. The Seventh Circuit’s decision also compared a potential implicit “good faith” standard in conciliation to the NLRA’s “good faith” standard. Mach Mining, LLC, 738 F3d at 176.
131 See, for example, Doe u Oberweis Dairy, 456 F3d 704, 711 (7th Cir 2006) (comparing a “good faith” standard of exhaustion under Title VII to “good faith” under the National Labor Relations Act).
133 29 USC § 158(d).
134 Compare Alexander u Gardner-Denver Co, 415 US 36, 44 (1974) (explaining that voluntary agreements are the primary way to address discriminatory practices under Title VII), with National Labor Relations Board v American National Insurance Co, 343 US 395, 401-02 (1952) (“The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers.”).
A. The Duty to Collectively Bargain

The NLRA provides rights for employees to organize and collectively bargain with their employer. Section 8(a)(5) imposes a statutory duty on employers to collectively bargain with the representing union. An analogous provision creates the same duty for the union to collectively bargain with an employer. Failure to bargain collectively is an unfair labor practice and a grievance can be filed with the National Labor Relations Board (“NLRB”), the administrative agency charged with executing the NLRA.

Soon after the NLRA’s passage and implementation, Congress sought to clarify the duty to bargain. The Labor Management Relations Act (LMRA) was passed in 1947 and, among other changes, added Section 8(d) to the NLRA. Section 8(d) explains that the duty to collectively bargain consists of “[meeting] at reasonable times and [conferring] in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.” The categories of “wages, hours, and other terms and conditions of employment” are known as mandatory subjects of bargaining; the refusal to bargain on these topics is an unfair labor practice. Other topics are considered permissive and, generally speaking, will not result in unfair labor practice charges if not negotiated over.

Employers and unions must bargain over mandatory subjects, but they often do not reach agreements on these subjects. Thus the duty to bargain over a mandatory subject extends until impasse has been reached. Impasse has no

135 29 USC § 158(a)(5).
136 29 USC § 158(b)(3).
137 29 USC § 158(d).
139 29 USC § 158(d).
140 Id.
141 National Labor Relations Board v Wooster Division of Borg-Warner Corporation, 356 US 342, 349-50 (1958) (endorsing the “mandatory” and “permissive” categories created by the NLRB).
142 Id.
uniform definition, but one typical definition is the point at which “whether, in view of all the circumstances of the bargaining, further discussions would be futile.”\footnote{Gulf States Manufacturing, Inc v National Labor Relations Board, 704 F2d 1390, 1398 (5th Cir 1983).} Employers and unions can deploy certain economic weapons only when discussions reach impasse.\footnote{Michael L. Wachter and George M. Cohen, The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation, 136 U Pa L Rev 1349, 1372 (1988) (stating that, after reaching impasse on mandatory bargaining subjects, employers can lock out workers and employees can strike). The use of other economic weapons during negotiations is entirely consistent with good faith bargaining. See National Labor Relations Board v Insurance Agents’ International Union, AFL-CIO, 361 US 477, 490–91 (1960).} Importantly, the employer can unilaterally adopt changes contemplated during negotiations on mandatory subjects of bargaining only after reaching impasse.\footnote{Insurance Agents’ International Union, AFL-CIO, 361 US at 489 (“The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.”).} The union can continue to work without a contract, and both employer and union can use additional economic weapons. Ultimately, impasse is not a permanent solution; the availability of unilateral implementation and economic weapons on both sides is meant to facilitate agreement, yet through disruptive means.

B. Incentives and Impasse in Collective Bargaining

An examination of economic analyses of collective bargaining is useful in understanding the incentives present for both employer and union. The duty to bargain, the mandatory and permissive categories, and the doctrine of impasse are bargaining rules that apply to both parties. These rules “exist to restrict the parties’ ability to act strategically.”\footnote{Wachter and Cohen, 136 U Pa L Rev at 1372 (cited in note 145).} Because each side has economic weapons that can impose costs on the other, “both sides have an incentive not to behave strategically.”\footnote{Id.} Bargaining rules are thus “the keystone of labor laws” and, coupled with economic weapons, can that lead to “a harmonious long-term contracting relationship.”\footnote{Id at 1372–73.}

The impasse doctrine is critical because it eliminates the incentive for employer abuse. Professor Keith N. Hylton of
Boston University School of Law, who conducted an economic analysis of collective bargaining, succinctly described problems that arise without a proper impasse doctrine:

If the employer could make an offer that she is sure the employees would reject and then declare impasse when the rejection occurred, bargaining law would discourage honest dealing by the employer. Employers who lied to their employees would be free to act unilaterally after declaring impasse, while those who dealt honestly would find themselves obligated to engage in lengthy bargaining sessions. The doctrine avoids creating such incentives by requiring courts to look behind the employer’s declaration that impasse has been reached to see whether there is evidence that the parties could not reach agreement after good faith negotiations.\(^{150}\)

On the union side, incentives for union abuse do not increase in the absence of an impasse doctrine. Only the employer can unilaterally act after impasse. Thus the union would be forced to rely on economic weapons symmetrical to the employer’s—a strike for a lockout, for example—that would confer no particular advantage to the union. Impasse doctrine is a critical component in the bargaining scheme that prevents employers from acting strategically.

C. Applying the Incentive Analysis of Collective Bargaining to Conciliation

Applying these concepts to the conciliation process illustrates why the reasonableness test is best suited to provide optimal incentives. While the duty to bargain applies to both employers and unions in the collective bargaining context, the statutory duty to conciliate implicates only the EEOC. Employers are not required to participate in conciliation after the EEOC issues a reasonable cause notice.\(^{151}\) Additionally,


\(^{151}\) In Fiscal Year 2012, 4,207 reasonable cause determinations were made by the EEOC. Of those, 37.8 percent (1,591) resulted in successful conciliation and 62.2 percent (2,616) resulted in unsuccessful conciliation. Equal Employment Opportunity Commission, *Enforcement & Litigation Statistics*, online at http://eeoc.gov/eeoc/statistics/enforcement/all.cfm (visited Oct 18, 2014).
employers do not have economic weapons to equalize bargaining power with the EEOC. The EEOC’s “weapon” in this context is the power to institute a federal cause of action against the employer. The employer has no recourse; if it disagrees with the EEOC’s determination or conciliation efforts, its only recourse is to respond in the lawsuit brought against it. While the EEOC lacks the same financial motivation as an employer in the collective bargaining context, it often imposes significant fines in conciliation agreements and litigation in a dual effort to provide remedies for the aggrieved and deter discrimination in other employers. Since employers are not required to negotiate and do not have tools to effectively negotiate during conciliation, the EEOC lacks incentive to refrain from acting strategically. While motives for the EEOC to act strategically could vary widely, the EEOC might decide, for example, that litigation and the accompanying publicity would result in a more favorable outcome.

Additionally, analogizing impasse doctrine to conciliation also demonstrates why the reasonableness test is preferable to the deferential standard. The EEOC must attempt to conciliate before bringing a federal lawsuit against an employer. The point at which the EEOC deems conciliation a failure can be considered analogous to impasse in collective bargaining—“that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless.” Therefore, the good faith standard that minimizes strategic behavior is most desirable since it will also maximize the potential for reaching an agreement.

The deferential test would do little to eliminate the EEOC’s incentive for strategic behavior. Judicial review limited to “an attempt at conciliation” does not alter the incentives during the conciliation process. Applying Professor Hylton’s hypothetical example to conciliation illustrates the point. The EEOC could make a conciliation offer that it knew would be rejected, declare conciliation a failure after making one attempt, and unilaterally bring suit against the employer. This was, in fact, the fact

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154 KECO Industries, 748 F2d at 1102.
pattern of the previously mentioned Ninth Circuit case Equal Employment Opportunity Commission v Hometown Buffet, Inc. Using the deferential standard, the court upheld the EEOC’s actions. Using the reasonableness test, a court would evaluate whether the EEOC “respond[ed] in a reasonable and flexible manner to the reasonable attitudes of the employer.”\textsuperscript{157} Considering Professor Hylton’s reasoning, the reasonableness standard would thus avoid creating incentives for insincere negotiations by looking beyond the EEOC’s declaration that conciliation has failed. Such a check on the EEOC’s determination should not be a difficult bar to surmount and would help balance the incentives towards voluntary settlements.

D. Information Sharing in Collective Bargaining

The role of information sharing in collective bargaining also supports the argument that it should be a primary focus in the conciliation process. In National Labor Relations Board v Jacobs Manufacturing Co,\textsuperscript{158} an employer refused to share information proving its claim that it could not afford the union’s monetary demands.\textsuperscript{159} The question, according to the court, was whether the employer must furnish “such statistical and other information as will substantiate [the employer’s] position in bargaining with the Union.”\textsuperscript{160} The court, in assessing whether this included the disclosure of pertinent information, held that Section 8(d) of the NLRA required “cooperation in the give and take of personal conferences with a willingness to let ultimate decision follow a fair opportunity for the presentation of pertinent facts and arguments.”\textsuperscript{161} The court reasoned that “the bare assertion of a conclusion made upon facts undisclosed and unavailable to the union . . . was not acceptable without a presentation of sufficient underlying facts to show, at least, that the conclusion was reached in good faith.”\textsuperscript{162}

\textsuperscript{155} 481 F Supp 2d 1110 (SD Cal 2007).
\textsuperscript{156} Id at 1115.
\textsuperscript{157} Klinger Electric, 636 F2d at 107.
\textsuperscript{158} 196 F2d 680 (2d Cir 1952).
\textsuperscript{159} Id at 682.
\textsuperscript{160} Id at 683.
\textsuperscript{161} Id.
\textsuperscript{162} Jacobs Manufacturing Co, 196 F2d at 683.
The Supreme Court echoed this reasoning in *National Labor Relations Board v Truitt Manufacturing Co.* The employer claimed that a wage increase of ten cents per hour would “put it out of business,” but it refused to provide financial records to substantiate this claim. The Supreme Court held that the refusal to provide information, specifically financial information, could be evidence of bad faith. Reasoning that “[w]hile Congress did not compel agreement . . . it did require collective bargaining in the hope that agreements would result,” the Court concluded that “[i]f such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.” However, the Court did not make the absence of disclosure of information a per se violation of good faith collective bargaining, stating that disclosure is only an element for consideration on a case-by-case basis. Courts thus believe that information sharing leads to a greater likelihood of reaching voluntary agreements in the context of collective bargaining. In fact, both employers and unions have a duty to share information in the critical areas of “individual earnings, job rates and classifications, merit increases, pension data, time-study data, incentive earnings, piece rates, and the operation of the incentive system.”

E. Information Sharing in Collective Bargaining Applied to Conciliation

Application of the reasoning behind information sharing in the collective bargaining context to the conciliation context provides a persuasive basis to adopt the reasonableness test. Before explaining information sharing’s critical role in conciliation, it is important to understand just how important conciliation is to the EEOC. Conciliation is so central to the EEOC’s purpose that it is seen as the primary means of effectuating the EEOC’s goal of eliminating discriminatory
practices. Courts have consistently recognized the critical role conciliation plays in the Title VII framework that Congress enacted. While Congress gave the EEOC access to federal courts in order to increase its enforcement ability, federal courts are not the primary tool to eliminate discriminatory practices. In fact, the United States Supreme Court has stated that Title VII aims to keep cases that can be settled voluntarily out of federal court. Additionally, even after Title VII was amended in 1972, the conciliation requirement preceded the ability to bring a cause of action in a federal court. These elements strongly suggest that Congress intended the conciliation process—voluntary agreements—to subordinate the remedial nature of Title VII, at least for a limited period of time. Given the importance of conciliation to enforcement of Title VII, courts should adopt standards that maximize the likelihood of conciliation outcomes.

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See Alexander v Gardner-Denver Co, 415 US 36, 44 (1974) (stating that "[c]ooperation and voluntary compliance were selected as the preferred means for eliminating discriminatory practices under Title VII"); Occidental Life Insurance Co of California v Equal Employment Opportunity Commission, 432 US 355, 368 (1977) (describing the EEOC as "a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion").

Occidental Life, 432 US at 368 ("[T]he EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties.").

Equal Employment Opportunity Commission v Liberty Trucking Co, 695 F2d 1038, 1042 (7th Cir 1982) ("Even after the 1972 amendments, conciliation remains the most important function of the EEOC"); Equal Employment Opportunity Commission v Raymond Metal Products Co, 530 F2d 590, 596 (4th Cir 1976) (The commission’s statutory duty to attempt conciliation is among its most essential functions.").

General Telephone Company of the Northwest, Inc v Equal Employment Opportunity Commission, 446 US 318, 325 (1980) (characterizing the purpose of the 1972 amendments to Title VII as "providing the EEOC with enforcement authority" after it was unable to secure voluntary compliance).

Oscar Mayer & Co v Evans, 441 US 750, 755 (1979), citing 110 Cong Rec 12725 (1964) (remarks of Senator Humphrey) ("Congress intended through § 706(c) [of the Civil Rights Act] to screen from the federal courts those problems of civil rights that could be settled to the satisfaction of the grievant in ‘a voluntary and localized manner.").

The EEOC cannot initiate a civil action prior to attempting to conciliate. 42 USC § 2000e-5(b).

One hundred and eighty days after the filing of a claim, if the EEOC has not initiated an action an individual can request a Right to Sue letter from the EEOC and sue on their own behalf. 42 USC § 2000e-5(f)(1). This indicates that Congress wanted an opportunity for the EEOC to investigate and conciliate claims before individuals could exercise their right to go to federal court. See also Liberty Trucking Co, 695 F2d at 1042 (7th Cir 1982) ("Conciliation is so important to the statutory scheme that the EEOC may not commence legal action until it has attempted to negotiate voluntary compliance.").
that parties will reach agreements. Remember that in collective bargaining regarding mandatory subjects, courts have required information sharing because of the belief that it is necessary for meaningful negotiations that result in agreements.\textsuperscript{176} Courts, either implicitly or explicitly, look for information sharing in the conciliation process between the EEOC and employer. When courts assess the conciliation efforts of the EEOC, they often look for evidence that the EEOC, at a minimum, informed the employer of the identity of the discriminated parties, the discrimination that occurred, and the remedy requested.\textsuperscript{177} For employers, courts look for dialogue with the EEOC either requesting information or providing meaningful counteroffers.\textsuperscript{178} This suggests that courts prioritize information sharing in conciliation, likely for the same reason that they do so in collective bargaining—to ensure a dialogue ensues that maximizes the likelihood of reaching an agreement. Conciliation should thus prioritize information sharing regarding critical components of discrimination claims.

Additionally, the reasonableness test maximizes information sharing to a greater degree than the deferential standard. When the employer and EEOC share information, the chances of reaching agreement are maximized and the potential for abuse by the EEOC is minimized. Abuse in this context is not only a court finding of “bad faith” in the EEOC’s conciliation attempts, but a lack of good faith that impedes meaningful conciliation attempts. When the EEOC lacks good faith attempts at conciliation, under several standards of review, it is often the result of the failure to share information about (1) the scope of the charge,\textsuperscript{179} (2) the size of the potential class affected,\textsuperscript{180} (3) the

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\item \textsuperscript{176} See Truitt Manufacturing Co, 351 US at 152.
\item \textsuperscript{177} See, for example, Prudential Federal Savings and Loan, 763 F2d at 1169 (“In this case the EEOC informed Prudential of the identity of the charging parties, the specific allegations of misconduct, and the remedy sought by each party.”).
\item \textsuperscript{178} See, for example, Sun Oil, 605 F2d at 1338 (stating that simply “dismissing the [EEOC’s] statistical analysis as irrelevant and denying without evidence [] discriminatory intent” did not rebut a showing of discrimination or constitute meaningful conciliation on the employer’s part).
\item \textsuperscript{179} See, for example, Equal Employment Opportunity Commission v Original Honeybaked Ham Co of Georgia, Inc, 918 F Supp 2d 1171, 1177–78 (D Colo 2013) (refusing to extend the scope of harassment and retaliation claims from one supervisor to eight others because the EEOC is required to “give notice . . . of [] newly discovered conduct and provide an opportunity toconciliate”).
\item \textsuperscript{180} See, for example, Equal Employment Opportunity Commission v CRST Van Expedited, Inc, 679 F3d 657, 676 (8th Cir 2012) (holding that the failure of the EEOC to
calculation of damages, or (4) some combination of the previous factors. The EEOC should share information about these critical categories with employers while negotiating voluntary agreements to maximize chances of an agreement.

Using the reasonableness test will incentivize the EEOC to provide the information to employers more than the deferential standard. The deferential standard provides little incentive for the EEOC to provide employers with the information that allows the formation of meaningful counteroffers because their efforts, regardless of adequacy, will likely satisfy the test. Consequently, the EEOC can use the threat of protracted litigation to force settlement from the employer.

(Equal Employment Opportunity Commission v Bloomberg LP, in which the EEOC's initial conciliation agreement requested more than $24 million to settle a discrimination claim, illustrates the result of a failure to share information. The employer requested information about the size of the class and the way damages were determined in order to calculate a counteroffer. The EEOC refused to provide this information, and the court stated that this refusal, and the subsequent termination of conciliation, "reeks of using the proposed agreement as a weapon to force settlement." Under the deferential standard, where only an attempt at conciliation is required by the EEOC, these efforts could be found to be statutorily sufficient. Remember that in the collective bargaining context, courts concluded that information sharing regarding certain mandatory bargaining categories was conducive to achieving agreements. A similar situation presents

investigate and inform the employer of the potential size of the class indicated a lack of good faith).

See, for example, Equal Employment Opportunity Commission v First Midwest Bank, NA, 14 F Supp 2d 1028, 1032-33 (ND Ill 1998) (citing the EEOC's failure to inform the employer how it calculated damages or subsequently quadrupled them in finding a lack of good faith in EEOC's conciliation attempts).

See, for example, Equal Employment Opportunity Commission v Evans Fruit Co, 872 F Supp 1107, 1114 (ED Wash 2012) (holding that good faith conciliation required the EEOC to be "more forthcoming regarding the type of damages sought ... some justification for the amount of damages sought, potential size of the class, general temporal scope of the allegations, and the potential number of individuals ... alleged to be involved in the harassment").

751 F Supp 2d 628 (SDNY 2010).

Id at 632.

Id at 632–33.

Id at 642 (internal citations omitted).
itself here; by sharing information regarding the scope of the charge, the size of the class, and calculation of damages, settlement agreements will materialize at a greater rate and better promote the elimination of discriminatory practices.

Three important points must be clarified. First, information sharing should not be measured by the amount of correspondence exchanged between the EEOC and employer. Even one correspondence should be sufficient if it contains the required elements, and this is consistent with good faith in the duty to collectively bargain as well.\textsuperscript{187} Second, there are situations in which the EEOC requests information from the employer regarding the size of a class of employees or information to help calculate appropriate damages. Employers could potentially want clarifying information on what employee class the EEOC is investigating before taking the time and associated expense of retrieving the information. Under the deferential standard, the EEOC could make substantial and costly information requests of the employer. The reasonableness standard would require the EEOC to reasonably respond to the reasonable employer requests clarifying the scope of affected individuals.\textsuperscript{188} Thus even when roles are reversed, the reasonableness standard is better than the deferential standard at minimizing the potential for EEOC abuse. Third, courts should not look at the substance of the EEOC's offer or consider whether they are fair or reasonable requests. Even in the collective bargaining context, courts are careful about scrutinizing the substance of proposals and counterproposals.\textsuperscript{189} Looking too closely could affect the actual bargain that employers and unions would make and is beyond the role of judicial review.\textsuperscript{190} Rather, courts assessing the third prong of the reasonableness test—that the EEOC “responds in a reasonable and flexible manner to the reasonable attitudes of the

\textsuperscript{187} American National Insurance Co, 343 US at 404 ("[T]he [NLRA] does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position.").

\textsuperscript{188} Unreasonable requests for information would not be found to satisfy the third prong of the reasonableness standard.

\textsuperscript{189} See, for example, Zia, 582 F2d at 533.

\textsuperscript{190} See Hylton, 83 Georgetown L J at 24 n 16 (cited in note 150) ("If the [NLRB] examines tactics at the bargaining table too closely, then it will eventually find itself forcing an employer to make concessions to a union that is too weak to gain the concessions on its own.").
employer"—should examine whether the EEOC has shared information that allows employers to provide meaningful counteroffers to the EEOC. This information sharing is necessarily dependent on what the employer requests and needs in order to significantly participate in conciliation. If the employer possesses the necessary information or unreasonably requests excessive information, then the court should conclude that the EEOC satisfied its statutory duty to conciliate.

IV. CONCLUSION

Conciliation is the primary method that the EEOC uses to achieve its goal of eliminating discriminatory practices. The courts are split as to whether the EEOC’s conciliation efforts are subject to judicial review and, if so, whether the reasonableness test or the deferential standard is better suited to assess good faith conciliation. Conciliation should be subject to judicial review because it is consistent with the statute and better effectuates the primary goal of Title VII in securing voluntary agreements.

In addition, the reasonableness test is superior to the deferential standard. Parties engaged in either collective bargaining or conciliation share similar incentives to negotiate. The reasonableness test is superior to the deferential standard in allocating appropriate incentives to negotiate honestly and forthrightly. Additionally, the impasse doctrine from collective bargaining illustrates that the deferential standard incentivizes the EEOC to act strategically and declare conciliation efforts futile.

Analysis of information sharing in collective bargaining confirms that in the conciliation context, information sharing is also important to reaching voluntary agreements. The

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181 Klinger Electric, 636 F2d at 107.

192 Compare Bloomberg, LP, 751 F Supp 2d at 641 (concluding that the EEOC failed the third prong of the reasonableness test because “[t]he EEOC consistently stonewalled in the face of plainly reasonable requests from Bloomberg to obtain more information about the claims to formulate a counterproposal”) (internal quotations omitted), with Equal Employment Opportunity Commission v Hibbing Taconite Co, 266 FRD 260, 274 (D Minn 2009) (“[T]he conciliation requirement does not necessitate that the EEOC disclose all of the underlying evidence or information to the employer. Rather, the conciliation process requires that the EEOC provide the employer with sufficient information to assure that the employer knows the basis of the charge, and is able to participate in the conciliation process fully.”).
reasonableness standard is best suited to promote information sharing in conciliation setting. Lastly, information sharing should focus on the basis for the charge, the size of the potential class, and the calculation of damages because these areas allow employers to meaningfully participate in the conciliation process. By communicating this information, the EEOC can minimize potential for abuse and maximize the ability to reach voluntary settlements, thus freeing up additional resources.

Though the EEOC was formed fifty years ago, its goals remain critical today. Discrimination still exists and the EEOC's enforcement of Title VII remains one of the most effective tools in promoting equality in the workplace. With conciliation so central to the enforcement of Title VII, courts should adopt standards that will continue to maximize EEOC effectiveness and minimize discriminatory employment practices. Adopting the reasonableness standard would protect the benefits that good faith conciliation is meant to provide.