

# THE BEST OFFENSE IS A GOOD DEFENSE: EXAMINING FAILURE TO CONCILIATE AS AN AFFIRMATIVE DEFENSE IN EMPLOYMENT DISCRIMINATION CASES BROUGHT BY THE EEOC

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## I. INTRODUCTION

In *EEOC v. Asplundh Tree Expert Co.*, an employer, through its counsel, attempted to discuss and negotiate an employment discrimination claim with the Equal Employment Opportunity Commission (“Commission”).<sup>1</sup> Instead of responding to the employer, the Commission declared that efforts to conciliate were unsuccessful and filed suit against the employer in the United States Court of Appeals for the Eleventh Circuit.<sup>2</sup> This is just one instance where the Commission has demonstrated it does not always participate in good faith in the required conciliation process.<sup>3</sup> A minimal review of conciliation efforts is necessary, and Congress should amend Title VII of the Civil Rights Act of 1964 (“Title VII”) to provide courts the power to sanction the Commission or an employer that does not engage in good faith in conciliation.

The purpose of conciliation is for opposing parties to avoid the court system by encouraging out-of-court settlements.<sup>4</sup> Employers in the majority of circuits can argue failure to conciliate as an affirmative defense when employers feel the Commission has failed its duty to conciliate.<sup>5</sup> However, the United States Court of Appeals for the Seventh Circuit recently held that

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1. 340 F.3d 1256, 1258 (11th Cir. 2003).

2. *Id.* at 1258–59.

3. See *EEOC v. Agro Distrib., L.L.C.*, 555 F.3d 462 (5th Cir. 2003) (holding that the Commission failed to participate in good faith conciliation when it did not respond to an employer’s requests for ten months).

4. *Asplundh Tree Expert Co.*, 340 F.3d at 1260.

5. See *Agro Distrib., L.L.C.*, 555 F.3d 462; *Asplundh Tree Expert Co.*, 340 F.3d 1256; *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996); *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988); *EEOC v. Keco Indus.*, 748 F.2d 1097 (6th Cir. 1984); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178 (4th Cir. 1979); *EEOC v. Zia Co.*, 582 F.2d 527 (10th Cir. 1978).

conciliation efforts are not judicially reviewable and as such cannot be raised as an affirmative defense.<sup>6</sup>

This Comment will discuss the background and policy of conciliation, specifically, using failure to conciliate as an affirmative defense. This Comment will discuss the three conciliation methods currently in use, followed by a discussion of what Title VII provides regarding judicial review of the Commission's conciliation efforts. This Comment will further discuss the precedent that exists for judicial review in labor disputes under the National Labor Relations Act (NLRA). Finally, this Comment will argue that a minimal review of conciliation efforts is necessary and suggest that a statutory amendment is needed to encourage both the Commission and an employer to participate in good faith in the conciliation process.

## II. LEGAL BACKGROUND

In 1972, Congress amended Title VII to give the Commission litigation authority. The Equal Employment Opportunity Act of 1972<sup>7</sup> authorizes the Commission to bring suit against employers who engage in unlawful discrimination practices.<sup>8</sup> The Commission must follow specific procedural requirements to bring suit on behalf of an employee.<sup>9</sup> After receiving a complaint of an alleged unlawful employment practice, the Commission must investigate the potential claim to determine its truthfulness.<sup>10</sup> When there is reasonable cause that an unlawful employment practice occurred, the Commission must issue a letter of determination notifying the employer.<sup>11</sup> The Commission “shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and

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6. See *EEOC v. Mach Mining, L.L.C.*, 738 F.3d 171 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2872 (2014).

7. Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e-2000e-17 (2013).

8. *Id.* § 2000e-5(f)(1) (“It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.”).

9. *Id.* (“[I]f within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action . . .”).

10. *Id.* § 2000e-5(b).

11. 29 C.F.R. § 1601.21(a)-(b) (2013).

persuasion.”<sup>12</sup> The duty to conciliate is a condition precedent to the Commission’s right to sue on behalf of an employee.<sup>13</sup>

Through conciliation, the Commission “shall attempt” to achieve an equitable resolution of violations and secure an agreement that eliminates the alleged unlawful discrimination and provides relief for the employee.<sup>14</sup> Conciliation offers an employer the possibility of voluntary compliance prior to the filing of a formal claim by the Commission.<sup>15</sup> “[N]othing that is said or done during and as part of the informal endeavors of the Commission to eliminate unlawful employment practices by informal methods . . . may be made a matter of public information . . . or used as evidence in a subsequent proceeding . . . .”<sup>16</sup> The Commission must attempt conciliation prior to bringing suit against an employer. Where conciliation attempts are successful, the terms of the agreement must be reduced to writing and signed by the parties and the Commission.<sup>17</sup> However, when the Commission determines it cannot reach a conciliation agreement, it must notify the employer in writing.<sup>18</sup> The Commission may file suit after it determines an impasse has been reached.<sup>19</sup>

The legislative history of the Equal Employment Opportunity Act<sup>20</sup> shows that Congress believed the duty to conciliate was of the utmost importance. Congress stated, “Only if conciliation proves to be impossible do we expect the Commission to bring an action in federal district court to seek enforcement.”<sup>21</sup> Thus, the purpose of conciliation is to avoid the court system by encouraging out-of-court settlements.<sup>22</sup> Conciliation enables the Commission and an employer to negotiate in an attempt to determine how the employer may alter its practices to comply with the law and establish any damages the employer may pay.<sup>23</sup> As the United States Court of Appeals for the Tenth Circuit observed, “Since the Act states that the Commission ‘shall’ endeavor to eliminate alleged unlawful employment practices by conciliation, and sue only if it is unable to secure a conciliation agreement, it has generally been held that a showing of some effort is a precondition of bringing suit.”<sup>24</sup> The Supreme Court has also recognized the importance of

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12. 42 U.S.C. § 2000e-5(b).

13. *Id.* § 2000e-5(f)(1).

14. 29 C.F.R. § 1601.24.

15. *Resolving a Charge*, EEOC, <http://www.eeoc.gov/employers/resolving.cfm> (last visited Apr. 13, 2015).

16. 29 C.F.R. § 1601.26.

17. *Id.* § 1601.24.

18. *Id.* § 1601.25.

19. 42 U.S.C. § 2000e-5(f)(1) (2013).

20. 42 U.S.C. §§ 2000e-2000e-17.

21. 118 CONG. REC. 7563 (1972).

22. *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003).

23. *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1535 (2d Cir. 1996).

24. *EEOC v. Zia Co.*, 582 F.2d 527, 532 (10th Cir. 1978).

resolving employment discrimination claims by informal means.<sup>25</sup> Congress determined voluntary compliance was the “preferred means for achieving the goal of equality of employment opportunities.”<sup>26</sup>

However, the statutory provisions raise a question regarding the Commission’s obligations as a prerequisite to bringing suit. Employers in the majority of circuits can argue failure to conciliate as an affirmative defense when employers feel the Commission has failed its duty to conciliate.<sup>27</sup> Courts will review the Commission’s conciliation procedure, and in cases where the Commission has not met its duty to conciliate, courts have either dismissed the complaint<sup>28</sup> or have infrequently awarded summary judgment for the defendant.<sup>29</sup> However, the Seventh Circuit recently held that conciliation efforts are not judicially reviewable and as such cannot be raised as an affirmative defense.<sup>30</sup>

#### A. Survey of Court Cases

As a result of the Seventh Circuit’s decision, there are now three different stances taken by the federal circuits regarding conciliation.<sup>31</sup> The United States Court of Appeals for the Fourth, Sixth, and Tenth Circuits engage in a minimal level of review to determine whether conciliation was attempted in good faith.<sup>32</sup> The United States Court of Appeals for the Second, Fifth, and Eleventh Circuits employ a more exacting three-part inquiry to determine whether conciliation was in good faith.<sup>33</sup> The Seventh Circuit will no longer review the Commission’s conciliation efforts.<sup>34</sup>

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25. *See Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 368 (1977) (“[T]he EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion.”) (emphasis added).

26. *Id.* at 367–68 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)).

27. *See EEOC v. Agro Distrib., L.L.C.*, 555 F.3d 462 (5th Cir. 2009); *Asplundh Tree Expert Co.*, 340 F.3d 1256; *Johnson & Higgins, Inc.*, 91 F.3d 1529; *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988); *EEOC v. Keco Indus.*, 748 F.2d 1097 (6th Cir. 1984); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178 (4th Cir. 1979); *Zia Co.*, 582 F.2d 527.

28. *See Sears, Roebuck & Co.*, 650 F.2d at 19; *EEOC v. Magnolia Elec. Power Assn.*, 635 F.2d 375, 378–79 (5th Cir. 1981).

29. *See EEOC v. Int’l Bhd. of Elec. Workers*, 476 F. Supp. 341 (Mass. D. 1979).

30. *See EEOC v. Mach Mining, L.L.C.*, 738 F.3d 171 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2872 (2014).

31. *See id.*; *Asplundh Tree Expert Co.*, 340 F.3d 1256; *Keco Indus.*, 748 F.2d 1097.

32. *See Keco Indus.*, 748 F.2d 1097; *Radiator Specialty Co.*, 610 F.2d 178; *Zia Co.*, 582 F.2d 527.

33. *See EEOC v. Agro Distrib., L.L.C.*, 555 F.3d 462 (5th Cir. 2009); *Asplundh Tree Expert Co.*, 340 F.3d 1256; *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996).

34. *See Mach Mining*, 738 F.2d 171.

### 1. *Minimal Review for Good Faith*

The Sixth Circuit requires the Commission engage in a good faith effort to conciliate and will allow judicial review to determine if this standard was met. In *EEOC v. Keco Industries, Inc.*, the Sixth Circuit reviewed the Commission's efforts and held that a good faith effort requires only an attempt at conciliation.<sup>35</sup> The form and substance of conciliation is within the discretion of the Commission and is beyond judicial review.<sup>36</sup> Therefore, a court's subjective beliefs regarding the content of the Commission's conciliation agreement should not be considered, and only an attempt to conciliate matters.<sup>37</sup>

In *Keco Industries*, the Commission found reasonable cause that the employer discriminated against female employees.<sup>38</sup> The Commission offered a settlement that addressed its findings of sex discrimination.<sup>39</sup> When the employer rejected the proposed conciliation agreement, the Commission filed a discrimination claim against the employer.<sup>40</sup> The court rejected the employer's failure to conciliate defense and found the Commission made a good faith effort by attempting to conciliate the claim.<sup>41</sup> The court held that the Commission must only make a good faith effort to conciliate, and once the employer rejects the offer, the Commission may file a lawsuit.<sup>42</sup> The court criticized the district court's review of the Commission's conciliation efforts, finding that "an apparent dissatisfaction with the [Commission's] conciliation attempt" is not the correct standard of review.<sup>43</sup>

The Fourth and Tenth Circuits used the same minimal level of review to examine whether the Commission made a good faith effort in conciliation.<sup>44</sup> In *EEOC v. Radiator Specialty Co.*, the Commission filed an employment discrimination claim in district court after the defendant expressed that a meeting regarding a settlement would be futile.<sup>45</sup> The Fourth Circuit emphasized that conciliation is required and is one of the Commission's most essential functions.<sup>46</sup> Here, the court found the Commission made a good faith attempt at conciliation by informing the employer that there was a reasonable cause determination and attempting to

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35. *Keco Indus.*, 748 F.2d at 1102.

36. *Id.*

37. *Id.*

38. *Id.* at 1098.

39. *Id.* at 1101.

40. *Id.* at 1098.

41. *Id.* at 1101–02.

42. *Id.* at 1102.

43. *Id.*

44. See *EEOC v. Radiator Specialty Co.*, 610 F.2d 178 (4th Cir. 1979); *EEOC v. Zia Co.*, 582 F.2d 527 (10th Cir. 1978).

45. *Radiator Specialty Co.*, 610 F.2d at 183.

46. *Id.*

resolve the claim through conciliation.<sup>47</sup> The employer's refusal to engage in conciliation was of no fault by the Commission, and therefore, the Commission was not precluded from bringing suit.<sup>48</sup>

In *EEOC v. Zia Co.*, the Tenth Circuit established that, because the Commission must attempt conciliation before it can bring suit, a good faith effort is required.<sup>49</sup> The court stated that, "The inquiry into the duty of 'good faith' on the part of the [Commission] is relevant to whether the court should entertain the claim, or stay the proceedings for further conciliation efforts . . . ."<sup>50</sup> As the Tenth Circuit viewed it, judicial review for a good faith effort does not require a court to examine the specifics of the proceedings between the Commission and the employer; however, nor does judicial review allow courts to impose their own beliefs regarding the content of a conciliation agreement.<sup>51</sup> The court held that the Commission engaged in good faith efforts in the conciliation process by participating in various negotiations with the defendants.<sup>52</sup>

This approach of judicial review is deferential to the Commission's decisions while also making sure the Commission meets its obligation to conciliate. Following a failed attempt at voluntary compliance through conciliation, the Commission may pursue litigation. The Second, Fifth, and Eleventh Circuits agree that judicial review of the Commission's conciliation efforts is necessary, but these circuits use a more stringent test than minimal review.

## 2. *Three-Part Inquiry*

In *EEOC v. Asplundh Tree Expert Co.*, an employer raised the Commission's failure to conciliate as an affirmative defense in an attempt to have the lawsuit dismissed.<sup>53</sup> The Eleventh Circuit applied a three-part test to determine whether the Commission engaged in conciliation and whether the case should be dismissed.<sup>54</sup> To satisfy its conciliation obligation, the Eleventh Circuit determined the Commission must: "(1) outline to the employer the reasonable cause for 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."<sup>55</sup>

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47. *Id.*

48. *Id.*

49. 582 F.2d 527, 533 (10th Cir. 1978).

50. *Id.*

51. *Id.*

52. *Id.*

53. 340 F.3d 1256 (11th Cir. 2003).

54. *Id.* at 1259.

55. *Id.* (citing *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981)).

In *Asplundh*, the Commission found reasonable cause to believe charges of harassment and retaliation were true and issued a Letter of Determination to the employer on March 31, 1999.<sup>56</sup> On April 7, 1999, the Commission sent a proposed conciliation agreement that included a nationwide provision requiring the employer to notify all employees of the alleged discrimination.<sup>57</sup> The agreement gave the employer twelve days to accept or respond.<sup>58</sup> Upon receipt of the proposed agreement, the employer hired local counsel to investigate the potential liability.<sup>59</sup> Local counsel requested a phone call with an investigator to discuss the case and the Commission's determination; however, the Commission never responded and sent a letter the following day declaring that efforts to conciliate were unsuccessful.<sup>60</sup> The district court held that the Commission failed its duty to conciliate and dismissed the case with sanctions.<sup>61</sup>

Using the three-part criteria, the court determined that the Commission did not act in good faith and instead used an "all or nothing approach" that was intolerable.<sup>62</sup> The conciliation proposal did not include a theory of liability, nor was the agreement proposed even possible.<sup>63</sup> The court concluded that the Commission must use "nothing less than a reasonable effort to resolve with the employer the issues raised by the complainant . . ." and when the Commission does not clearly state the charges against the employer, there has not been "meaningful conciliation."<sup>64</sup> Due to the Commission's failure to conciliate, the appellate court affirmed the case's dismissal and the sanction of attorney's fees.<sup>65</sup>

The Second and Fifth Circuits also used the same three-step approach to determine whether conciliation was in good faith.<sup>66</sup> In *EEOC v. Argo Distribution, L.L.C.*, the Fifth Circuit determined that the Commission did not participate in good faith conciliation because it continuously failed to communicate with the employer and did not respond in a reasonable and flexible manner to the employer's position.<sup>67</sup> In that case, the employer requested clarification regarding the Commission's policy and offered a

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56. *Id.* at 1258.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 1259.

62. *Id.* at 1260.

63. *Id.* The Commission's proposed conciliation agreement sought reinstatement for the employee and front pay, which was impossible because the employment project at issue ended three years prior to the suit. *Id.* at 1258.

64. *Id.* at 1260.

65. *Id.* at 1261.

66. See *EEOC v. Agro Distrib. L.L.C.*, 555 F.3d 462 (5th Cir. 2009); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996).

67. *Argo Distrib.*, 555 F.3d at 468.

settlement, but the Commission failed to respond for ten months.<sup>68</sup> Applying the three-part test, the Fifth Circuit concluded that the Commission violated its role as a neutral investigator by failing to participate in good faith conciliation and respond to the employer in a reasonable and flexible manner.<sup>69</sup> Furthermore, the Fifth Circuit explained that conciliation is not a jurisdictional prerequisite but rather a precondition to a suit.<sup>70</sup> Thus, courts may impose a stay to encourage the Commission to continue conciliation efforts prior to filing suit, or the case may be dismissed if it seems the appropriate remedy.<sup>71</sup>

Similarly, the Second Circuit used the three-part inquiry to examine the Commission's conciliation efforts in *EEOC v. Johnson & Higgins, Inc.*<sup>72</sup> In *Johnson & Higgins*, however, the court determined good faith conciliation was met because the Commission outlined the reasonable cause of the employer's discrimination and attempted to engage in an out-of-court settlement.<sup>73</sup>

The circuits that employ the three-part inquiry of judicial review take a stringent look at the Commission's conciliation efforts by examining both the form and substance of conciliation. The circuits that employ a minimal review are deferential to the Commission's decisions and do not examine the substance of conciliation agreements. The Seventh Circuit now opposes judicial review of conciliation agreements altogether.<sup>74</sup>

### 3. Conciliation Efforts Are Not Reviewable

The Seventh Circuit "ha[d] not specifically addressed the standard to be used by district courts facing allegations of deficient conciliation,"<sup>75</sup> prior to its decision in *EEOC v. Mach Mining, L.L.C.*<sup>76</sup> However, that court had previously found, in *EEOC v. Elgin Teachers Ass'n*, that the Commission had a right to bring a claim against an employer because it failed to get what it asked for in its bargaining agreement.<sup>77</sup> The court acknowledged that the

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68. *Id.* at 467.

69. *Id.* at 468. See also *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981) ("In evaluating whether the EEOC has adequately fulfilled this statutory requirement, the fundamental question is the reasonableness and responsiveness of the EEOC's conduct under all the circumstances.").

70. *Agro Distrib.*, 555 F.3d at 469.

71. *Id.*

72. 91 F.3d 1529, 1534 (2d Cir. 1996) (explaining that although the Commission brought this claim under the Age Discrimination in Employment Act, the court's discussion regarding conciliation efforts is relevant to the discussion of the conciliation requirements under the Equal Employment Opportunity Act).

73. *Id.* at 1535.

74. *EEOC v. Mach Mining, L.L.C.*, 738 F.3d 171 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2872 (2014).

75. *EEOC v. United Rd. Towing, Inc.*, No. 10C6259, 2012 WL 1830099, at \*4 (N.D. Ill. May 11, 2012).

76. *Mach Mining*, 738 F.3d 171.

77. 27 F.3d 292, 294 (7th Cir. 1994).



Commission must pursue conciliation.<sup>78</sup> Furthermore, the Seventh Circuit evaluated the sufficiency of the Commission's "statutorily mandated pre suit conciliation" efforts generally in *EEOC v. Sears, Roebuck & Co.*<sup>79</sup> In *Sears, Roebuck & Co.*, the court held that the Commission abused its conciliation requirements, among other things, prior to filing suit by refusing to discuss any of their claims against the employer and by making large monetary demands strictly to satisfy outside interest groups.<sup>80</sup>

However, in *EEOC v. Mach Mining L.L.C.*, the Seventh Circuit reversed its view and held that the failure to conciliate is not an affirmative defense to a discrimination suit.<sup>81</sup> The court stated, "If the [Commission] has pled on the face of its complaint that it has complied with all procedures required under Title VII and the relevant documents are facially sufficient [the court's] review of those procedures is satisfied."<sup>82</sup> In reaching this decision, the court evaluated the statutory language, whether there is a workable standard for such a defense, whether the defense might fit into the broader statutory scheme, and other relevant case law to determine that no affirmative defense exists for failure to conciliate.<sup>83</sup>

The court reasoned that there is no express provision in the text of Title VII to warrant an affirmative defense based on the Commission's failure to conciliate.<sup>84</sup> The statute gives the Commission deference regarding the methods of conciliation and whether a conciliation agreement is acceptable.<sup>85</sup> The court believed an affirmative defense did not make sense in light of the Commission's sole power to decide whether to accept an agreement.<sup>86</sup> Furthermore, an affirmative defense for failure to conciliate would conflict with the confidentiality provision<sup>87</sup> required for the conciliation process.<sup>88</sup> "[Because] Title VII contains no exception allowing such information to be admitted for a collateral purpose, such as to satisfy a court that the EEOC's efforts to conciliate were sufficient," courts would have to decide whether conciliation was performed correctly without having evidence to review.<sup>89</sup>

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78. *Id.*

79. *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988).

80. *Id.* at 358.

81. *Mach Mining*, 738 F.3d at 172.

82. *Id.* at 184.

83. *Id.* at 174.

84. *Id.*

85. *Id.*

86. *Id.*

87. See 42 U.S.C. § 2000e-5(b) (2013) ("Nothing said or done during and as 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.").

88. *Mach Mining*, 738 F.3d at 175.

89. *Id.*

The Seventh Circuit further noted that an affirmative defense undermines conciliation by allowing employers to attack the Commission's procedures instead of using the process to resolve a dispute.<sup>90</sup> Specifically, the court was concerned that no bright line rule existed for how many offers or conferences would satisfy the Commission's duty to conciliate and avoid judicial review.<sup>91</sup> The Seventh Circuit explained, "Simply put, the conciliation defense tempts employers to turn what was meant to be an informal negotiation into the subject of endless disputes over whether the EEOC did enough before going to court."<sup>92</sup>

The court did not believe the Commission would engage in bad faith conciliation because it processes and investigates approximately 100,000 charges of discrimination per year but only files suit in several hundred cases.<sup>93</sup> The court reasoned that judicial review of conciliation is unnecessary because a trial on the merits protects employers from any bad faith attempts at conciliation the Commission may make.<sup>94</sup> Furthermore, the Commission and an employer can continue settlement talks after litigation has been filed, so there is no reason to review conciliation attempts.<sup>95</sup>

Finally, the court did not feel the remedies provided by judicial review of conciliation encouraged voluntary compliance by employers.<sup>96</sup> Dismissal on the merits hinders conciliation efforts because an employer will not resume conciliation efforts following a dismissal.<sup>97</sup> In this way, employers who have participated in actual employment discrimination may avoid liability based on a procedural technicality.<sup>98</sup> Furthermore, the statute does not explicitly mention judicial review of conciliation, and dismissal on the merits for the Commission's failure to conciliate could serve to excuse an employer's unlawful discrimination.<sup>99</sup> Thus, the Seventh Circuit will not review conciliation attempts where the Commission has pled on the face of its complaint that it has complied with all procedures required under Title VII and all the relevant documents are facially sufficient.<sup>100</sup>

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90. *Id.* at 178.

91. *Id.* at 175.

92. *Id.* at 178-79.

93. *Id.* at 180 (citing *All Statutes FY 1997-2013*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm> (last visited Apr. 13, 2015)). In 2012, the Commission engaged in conciliation in 4207 cases, was unsuccessful in 2616 cases, but filed suit in only 122 cases. *Id.* (citing *All Statutes FY 1997-2013*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm> (last visited Apr. 13, 2015)).

94. *Id.* at 181.

95. *Id.*

96. *Id.* at 183.

97. *Id.* at 183-84.

98. *Id.* at 184.

99. *Id.* at 183-84.

100. *Id.*

The court criticized other circuits' approaches to judicial review of the Commission's conciliation efforts. The court felt it was unnecessary to hold the Commission to a requirement of good faith<sup>101</sup> in the conciliation process because of its informal and confidential nature, and also, the statute does not explicitly require good faith.<sup>102</sup> The court specifically criticized the three-step requirement<sup>103</sup> as open-ended and requiring courts to make unnecessary assessments into the fairness and reasonableness of the Commission's decisions, which is not mandated by the statute.<sup>104</sup> The court reasoned that departure from these methods of judicial review made sense, because each method conflicts with the Commission's discretion to accept or reject a conciliation agreement as well as the confidentiality provision of the statute.<sup>105</sup>

By rejecting judicial review of the Commission's conciliation efforts, the Seventh Circuit shows complete trust in the Commission to engage in the appropriate method of conciliation. However, the majority of circuits believe that judicial review of conciliation efforts is necessary to ensure good faith attempts. Judicial review of agency bargaining procedures is also common in the realm of labor law.

#### B. There is Precedent for Judicial Review in Labor and Employment Law Cases

Although Title VII does not explicitly allow for judicial review of the Commission's conciliation efforts, it also does not speak against it.<sup>106</sup> Judicial review of agency bargaining procedures is common in the realm of labor and employment law. For example, the NLRA<sup>107</sup> provides for employers and unions to engage in good faith collective bargaining to resolve labor disputes.<sup>108</sup> An employer engages in an unfair labor practice by "refus[ing] to bargain collectively with the representatives of his employees."<sup>109</sup> Unions have an identical obligation towards employers.<sup>110</sup>

The NLRA grants the National Labor Relations Board ("NLRB") the power to review collective bargaining procedures, if necessary, to make certain that an unfair labor practice, such as a failure to participate in good

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101. See *EEOC v. Keco Indus. Inc.*, 748 F.2d 1097 (6th Cir. 1984).

102. *Mach Mining*, 738 F.3d at 183.

103. See *EEOC v. Agro Distrib. L.L.C.*, 555 F.3d 462 (5th Cir. 2009).

104. *Mach Mining*, 738 F.3d at 183.

105. *Id.*

106. See 42 U.S.C. § 2000e-5 (2013).

107. National Labor Relations Act, 29 U.S.C. §§ 151-161 (2013). The NLRA was enacted to "eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred . . ." *Id.* § 151.

108. *Id.* §§ 157, 158(d).

109. *Id.* § 158(a)(5).

110. *Id.* § 158(b)(3).

faith in a collective bargaining agreement, does not occur.<sup>111</sup> The NLRB may appoint another agent such as an administrative law judge to preside over a hearing to determine whether an unfair labor practice was committed.<sup>112</sup> The NLRB may review an opinion and, upon a finding that an unfair labor practice was committed, the NLRB “shall state its findings of fact and shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . .”<sup>113</sup>

To enforce the duty of collective bargaining, both the administrative law judges and the NLRB have authority similar to federal courts to impose sanctions for parties not complying with the statutory provisions in place.<sup>114</sup> Most often, the NLRB will issue a bargaining order accompanied by a cease and desist order to force an employer or union to engage in good faith collective bargaining.<sup>115</sup> However, in a 1995 decision, the NLRB stated, “[Where] a respondent’s substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies, an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted . . . .”<sup>116</sup>

For example, in 2011, a healthcare union alleged that a nursing home employer engaged in an unfair labor practice by refusing to bargain collectively and in good faith.<sup>117</sup> The NLRB affirmed the decision of the administrative law judge and held that the employer had engaged in unfair labor practices by reneging from tentative agreements, forcing the union to renegotiate multiple times, refusing to provide information to the union, and refusing to accept documents from the union.<sup>118</sup> Based on this “aggravated misconduct” the court ordered the employer to reimburse the union and its general counsel for “their costs and expenses incurred in the investigation, preparation, and litigation of the cases” before an administrative law judge and the board.<sup>119</sup> The collective bargaining approach taken by the NLRA and enforced by the NLRB provides a model for judicial review of

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111. *See id.* § 160(a). *See also Employer/Union Rights and Obligations*, NLRB, <http://www.nlr.gov/rights-we-protect/employerunion-rights-and-obligations> (last visited Apr. 13, 2015) (explaining good faith is assessed by examining the “history of negotiations and understandings of both parties” to determine whether a true impasse has been reached).

112. 29 U.S.C. § 160(b).

113. *Id.* § 160(c).

114. *See Camelot Terrace*, 357 N.L.R.B. 161 (2011) (“Indeed, in light of the Act’s express grant of power to the Board to conduct trials, it cannot be gainsaid that the authority to preserve the integrity of those trials is ‘necessarily implied’ in the grant.”).

115. *Unbelievable, Inc.*, 318 N.L.R.B. 857, 859 (1995).

116. *Id.* at 859.

117. *Camelot Terrace*, 357 N.L.R.B. 161.

118. *Id.*

119. *Id.*

conciliation proceedings. The statutory authority granted to the NLRB by which it reviews bargaining agreements for good faith would work well for courts evaluating conciliation procedures.

### III. ANALYSIS

Judicial review of conciliation is necessary. The Commission has a duty to conciliate, which is required by Title VII and emphasized in the legislative history. The Seventh Circuit's decision rejecting failure to conciliate as an affirmative defense was incorrect. The minimal review approach is the proper standard of judicial review to ensure that the Commission engaged in good faith efforts of conciliation. The approach used by the NLRB should serve as a model for judicial review of conciliation. Furthermore, Congress should amend Title VII to provide courts the power to sanction the Commission or an employer that does not engage in a good faith conciliation process.

#### A. The Seventh Circuit's Decision Is Inconsistent with the Purpose of Conciliation

The Seventh Circuit's recent decision does not make sense in light of the legislative history and the majority of jurisdictions' determinations that the statute requires conciliation. The Seventh Circuit stated that judicial review of conciliation is unnecessary because the Commission has deference to accept or reject a conciliation agreement;<sup>120</sup> however, this argument gives too much deference to the Commission and does not encourage voluntary compliance through out-of-court settlements. Without the availability of an affirmative defense for failure to conciliate, there is no way to ensure the Commission engages in good faith conciliation. If the Commission can bypass the conciliation requirement without any retribution from the judicial branch, the duty to conciliate becomes almost unenforceable.

Judicial review is one of the fundamental aspects of our legal system,<sup>121</sup> and it does not make sense to hold that judicial review does not exist in this instance. Judicial review is necessary to ensure Congress' goal is realized that employers voluntarily comply with Title VII through out-of-court settlements. The legislative history of Title VII is clear about the requirement of conciliation as stated in a 1972 Conference Committee Report, "The conferees contemplate that the Commission will continue to make every effort to conciliate as is required by existing law. Only if conciliation proves

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120. *EEOC v. Mach Mining, L.L.C.*, 738 F.3d 171, 174 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2872 (2014).

121. *See generally* *Marbury v. Madison*, 5 U.S. 137 (1803) (holding legislative and executive actions are judicially reviewable by the Supreme Court).

to be impossible do we expect the Commission to bring an action in federal district court to seek enforcement.”<sup>122</sup> Thus, it was Congress’ intent that the Commission engage in good faith conciliation and ensure compliance with Title VII by reaching out-of-court settlements with an employer. Some courts have criticized the Commission for using a “shoot first, aim later” technique.<sup>123</sup> Judicial review of conciliation efforts will prevent the Commission from engaging in unauthentic conciliation procedures and filing hasty claims against employers without providing the opportunity for voluntary compliance.<sup>124</sup> Judicial review provides a check on the Commission’s behavior and ensures that there is dedication to obtaining out of court settlements.

Furthermore, the Seventh Circuit’s argument that judicial review of conciliation should not exist because it conflicts with the confidentiality provision is unsound. The confidentiality provision states “Nothing said or done during and as part of [the conciliation process] 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.”<sup>125</sup> The Seventh Circuit argued that judicial review of conciliation forces courts to determine the sufficiency of conciliation efforts without having evidence to review.<sup>126</sup>

The “subsequent proceeding” language is similar to Rule 408 of the Federal Rules of Evidence, which prohibits using compromise offers and negotiations to “prove or disprove the validity or amount of a disputed claim,” but allows the evidence to prove “a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”<sup>127</sup> Similarly, the confidentiality provision seems to mean that anything said in a conciliation procedure cannot be used to prove or disprove a party’s fault, not that it prohibits a court from reviewing whether conciliation procedures conformed with the requirements. Like Rule 408, the confidentiality provision should only prohibit revealing the content of negotiations when the dispute is taken to trial to determine

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122. 118 CONG. REC. 7563 (1972).

123. See *EEOC v. Peplemark, Inc.*, 732 F.3d 584 (6th Cir. 2013) (awarding attorneys fees to the employer when the Commission pursued a claim that was unreasonable as it was based on a nonexistent companywide policy and the Commission continued to pursue the claim after knowing the alleged policy did not exist).

124. See, e.g., Elizabeth Dunn, *No Longer a Paper Tiger: The EEOC and Its Statutory Duty to Conciliate*, 63 EMORY L.J. 455, 458 (2013) (“[A]s the agency increases the number of systemic discrimination cases it chooses to litigate, the potential for the agency to abuse its statutory duty to conciliate increases.”).

125. 42 U.S.C. § 2000e-5(b) (2013).

126. *EEOC v. Mach Mining, L.L.C.*, 738 F.3d 171, 175 (7th Cir. 2013), cert. granted, 134 S. Ct. 2872 (2014).

127. FED. R. EVID. 408.

whether the employer actually engaged in the alleged employment discrimination. Furthermore, confidential information is regularly reviewed by courts without a problem, and court records can be sealed and kept confidential.<sup>128</sup> Thus, judicial review of the Commission's conciliation efforts should not fail simply because the information to be reviewed is confidential to the public.

The Seventh Circuit's reasoning for rejecting the approaches taken by other circuits is insufficient. The court argued that minimal review of the Commission's conciliation efforts was unnecessary because good faith conciliation is not required by the statute.<sup>129</sup> However, it is common to imply a good faith requirement in both contracts and negotiations.<sup>130</sup> Furthermore, in the labor law context, the NLRA requires an employer and union to act in good faith when engaging in collective bargaining.<sup>131</sup> It does not make sense for Title VII to require conciliation as a prerequisite to filing suit, but not require parties to act in good faith. If parties were not required to act in good faith, Congress' goal of achieving voluntary compliance through out of court statements would never be met.

Finally, the Seventh Circuit's argument that there is no express provision regarding judicial review of conciliation efforts in Title VII is not persuasive because there is no provision rejecting judicial review of conciliation.<sup>132</sup> The majority of circuits' policy of allowing judicial review to determine whether the Commission engaged in its duty to conciliate should not be eliminated simply because it is not expressly stated in the statute.

It seems the main reason why the Seventh Circuit no longer allows judicial review of the Commission's conciliation efforts is because, the court argued, it provides a way for employers to get off the hook through a procedural technicality.<sup>133</sup> However, the statute allows for judges to stay proceedings for further conciliation efforts.<sup>134</sup> This provision provides a method by which a court can order the parties to reopen conciliation procedures. This provision implies that some level of judicial involvement is expected in the conciliation process because without insight into the

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128. See, e.g., ROBERT TIMOTHY REAGAN, *SEALING COURT RECORDS AND PROCEEDINGS: A POCKET GUIDE 1* (2010) ("Courts will keep confidential classified information, ongoing investigations, trade secrets, and the identities of minors, for example.").

129. *Mach Mining*, 738 F.3d at 183.

130. See U.C.C. § 1-304 (2001) ("Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.").

131. See 29 U.S.C. § 160(a) (2013).

132. See 42 U.S.C. § 2000e-5 (2013).

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

134. 42 U.S.C. § 2000e-5(f)(1) ("Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.").

conciliation proceedings, a court would not know when to grant a stay in proceedings.

#### B. A Minimal Review for a Good Faith Attempt at Conciliation Is the Best Method of Judicial Review

A minimal review of the Commission's conciliation efforts is the proper standard because it balances the equities of each approach by both encouraging the Commission to resolve conflicts with employers out-of-court and by preventing an employer from getting off the hook due to a procedural technicality.

First, minimal review of the Commission's conciliation efforts is the proper standard because it encourages the Commission to resolve claims against employers through out-of-court settlements. The circuits employing a more exacting review seem concerned that the Commission may engage in bad faith conciliation efforts and simply avoid participating in out-of-court settlements.<sup>135</sup> However, minimal review of the Commission's conciliation efforts encourages out-of-court settlements by allowing the Commission to use its expertise in determining whether an agreement is acceptable. The Commission does not have to be concerned that judges will impose their own beliefs regarding the content of a conciliation agreement. However, the requirement of good faith provides guidance to the Commission and employers of the appropriate level of effort needed when attempting voluntary compliance with Title VII through conciliation.

The three-part method is not the proper standard of judicial review because it restricts the power granted to the Commission in Title VII. Specifically, the statute states, "[If] the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent . . ."<sup>136</sup> The use of the terms "acceptable to the Commission" suggests that Congress intended to grant the Commission with the power to determine whether it has truly reached an impasse with an employer, which may only be resolved through litigation. As stated by the Sixth Circuit, "[t]he form and substance of those conciliations is within the discretion of the EEOC as the agency created to administer and enforce our employment discrimination laws and is beyond judicial review."<sup>137</sup> Therefore, minimal review is appropriate because the Commission has the power to determine

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135. *See, e.g.*, *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003) (holding that the Commission failed its duty to conciliate by using an "all or nothing approach" and "nothing less than a 'reasonable' effort to resolve with the employer the issues raised by the complainant" is required to engage in good faith conciliation).

136. 42 U.S.C. § 2000e-5(f)(1).

137. *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984).



the form and substance of a conciliation agreement, but judicial review is allowed to ensure that good faith was used in the Commission's conciliation attempts.

This grant of power to accept or reject an agreement should be supported by the Supreme Court, which has taken a plain meaning approach when evaluating the meaning of statutes.<sup>138</sup> This approach requires that “unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”<sup>139</sup> The plain language of Title VII shows deference to the Commission through the use of the phrase “acceptable to the Commission.”<sup>140</sup> A minimal level of judicial review aligns perfectly with the deference granted to the Commission because it leaves the form and substance of conciliation to the discretion of the Commission and looks only at whether there was a good faith attempt to conciliate matters.<sup>141</sup> Although this minimal review provides a check on the Commission's conciliation efforts, a court may not insert its own views regarding the terms of the conciliation agreement and must only determine whether the Commission engaged in a good faith effort to conciliate.<sup>142</sup> This level of deference is not found in the three-step approach, which takes a less trusting and harsher view towards the Commission's efforts by examining the content and process of conciliation.<sup>143</sup> Congress clearly did not intend for the judiciary to distrust the Commission when it expressly granted authority.

Further, minimal review of the Commission's conciliation efforts will prevent an employer from getting off the hook due to a procedural technicality. Because a minimal review does not allow courts to find the Commission engaged in bad faith conciliation when a judge personally disagrees with a conciliation offer, employers will no longer be able to use this defense when it believes the Commission offered them a demanding deal. An employer will be encouraged to attempt voluntary compliance with the Commission rather than waste time and resources challenging the content of a conciliation offer. In this way, both the employer and the Commission will be encouraged to act in good faith.

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138. See, e.g., *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014) (using the plain meaning approach to define the term “clothes” in a statute). See generally Robert J. Gregory, *Overcoming Text in an Age of Textualism: A Practitioner's Guide to Arguing Cases of Statutory Interpretation*, 35 AKRON L. REV. 451, 453 (2002) (“Arguments rooted in non-textual considerations, if not totally eviscerated, are not held in favor by the courts.”).

139. *Sandifer*, 134 S. Ct. at 877 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

140. 42 U.S.C. § 2000e-5(f)(1).

141. *Keco Indus.*, 748 F.2d at 1102.

142. See *id.* at 1102.

143. See, e.g., *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003) (deciding whether the Commission engaged in good faith conciliation, the court looked at the content of the proposed conciliation agreement).

The Seventh Circuit argued that the remedies available for failure to conciliate do not encourage employers' voluntary compliance.<sup>144</sup> To address these concerns, the statute should be amended to provide courts with the power to impose sanctions against both the Commission or an employer when either fails to participate in a good faith effort of conciliation. Amending the statute will provide the courts with the requisite power to enforce the conciliation requirement, ensuring that both the Commission and employers engage in good faith efforts to resolve disputes out of court.

### C. Proposal: Congress Should Allow Courts to Sanction a Party that Does Not Participate in Good Faith in Conciliation

Judicial review of conciliation efforts is necessary to encourage voluntary compliance through out-of-court negotiations and settlements. It is imperative that both the employer and the Commission engage in good faith efforts to conciliate to provide the voluntary compliance that Congress intended. The use of a "failure to conciliate" affirmative defense should not provide the opportunity for employers to get off the hook for potential discriminatory actions. Rather, the defense should provide a remedy that encourages compliance with conciliation procedures for both the Commission and the employer. The NLRA's approach to collective bargaining, through which the NLRB may review collective bargaining procedures to determine whether good faith was used, should provide a model for Congress to establish an appropriate remedy.<sup>145</sup>

The NLRB's ability to review collective bargaining procedures is similar to judicial review of conciliation because it examines whether good faith was used.<sup>146</sup> It is crucial that the NLRB is statutorily authorized to impose sanctions on both employers and unions who do not engage in good faith collective bargaining procedures, as it does not allow for either party to get off the hook when the other does not engage in good faith conciliation. The statutory authorization provides guidance to the NLRB regarding what sanctions are allowed as well as encouragement to unions and employers to engage in good faith collective bargaining. Knowing that the actions are reviewable and having notice of possible sanctions makes collective bargaining procedures meaningful because the parties will want to voluntarily comply without the NLRB's involvement, instead of wasting

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144. *EEOC v. Mach Mining, L.L.C.*, 738 F.3d 171, 183 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2872 (2014).

145. *See* 29 U.S.C. § 160(a) (2013). *See also Employer/Union Rights and Obligations*, NLRB, <http://www.nlr.gov/rights-we-protect/employerunion-rights-and-obligations> (last visited Apr. 13, 2015) (explaining how the NLRB reviews good faith by determining whether a true impasse has been reached based on "the history of negotiations and understandings of both parties").

146. *See* 29 U.S.C. § 158(d).

time, money, and resources. Furthermore, the parties cannot avoid their problem by arguing that the other party did not engage in the statutory good faith requirement because the court will just require them to return to the bargaining table.

Congress should amend the statute to provide a remedy similar to that given to the NLRB. Without a prescribed remedy, judicial review of conciliation seems almost meaningless. It is clear that Congress did not intend for employers to get off the hook for discriminatory practices. Instead, by requiring the Commission to attempt conciliation prior to bringing a claim against an employer, Congress meant for employers to voluntarily comply with Title VII by eradicating any discriminatory practices. Reaching this goal requires the participation of both the employer and the Commission, which is why an approach similar to the NLRB's is necessary. If the court can review and sanction both the employer and the Commission, each party will be compelled to engage in good faith in the conciliation process from the beginning. Judicial review is necessary, but without an enforcement mechanism it becomes a way to prolong litigation without reaching voluntary compliance. Therefore, Congress should amend § 2000e-5 of the Equal Employment Opportunity Act of 1972 to provide a remedy when the Commission engages in conciliation with an employer, and either party is found to have failed their duty to engage in good faith conciliation.

The remedy should be placed in 42 U.S.C. § 2000e-5(f) because, among other things, this section contains the preconditions and the procedure for the Commission to file suit. Using the NLRA's language for guidance,<sup>147</sup> the statute could provide:

If upon the preponderance of the testimony taken, a court shall be of the opinion that any party named in the complaint has failed to engage in a good faith attempt at conciliation, then the Court shall state its findings of fact and shall issue an order for the conciliation process to be resumed and any other action as will effectuate the policies of this Act.

It also makes sense for Congress to add a possible remedy similar to the NLRB's additional sanction of reimbursing the charging party for negotiating expenses.<sup>148</sup> The statute could provide "Where a party

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147. *See id.* § 160(c) ("If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as well as effectuate the policies of this Act . . .").

148. *See Unbelievable, Inc.*, 318 N.L.R.B. 857, 859 (1995) ("[Where] a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies, an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted . . .").

participates in bad faith in the conciliation process to such an extent that the effects cannot be eliminated by the application of traditional remedies, an order requiring the respondent to reimburse the charging party for conciliation expenses, including attorney's fees, is warranted."

This is an appropriate action because it clearly states the repercussions of not participating in good faith in conciliation procedures. It would work well because both the Commission and an employer could pursue this remedy if either feels the other party is not sincerely participating in the process. If the Commission acts in haste and does not participate in good faith in the conciliation process, the employer is not off the hook. Rather, the conciliation process will be reopened and revisited. Furthermore, the additional sanction of having to pay the other party's conciliation expenses and attorney's fees for wasting time and resources emphasizes the importance of conciliation. These remedies encourage all parties to participate fully in conciliation procedures to reach voluntary compliance because, if a court finds the party did not participate in good faith, the procedures will be reopened.

Although voluntary compliance with Title VII is the goal, it will not always be possible. The Commission may file suit when an employer maintains it has not engaged in the alleged discriminatory practice. At this point, a court's judgment will be necessary to determine the rights and responsibilities of the parties.

#### IV. CONCLUSION

Both the Commission and employers have engaged in bad faith conciliation procedures in the past. However, employers have used the Commission's mistakes to their advantage to avoid litigation. It is imperative that the failure to conciliate continues as an affirmative defense to encourage parties to engage in good faith conciliation procedures and ensure Congress' goal of encouraging out of court negotiations and settlements is met. This defense should be available to both parties when either believes the other party has not engaged in good faith endeavors at conciliation. A minimal review of conciliation efforts is the proper standard because it provides the Commission with deference to determine the appropriate conciliation agreement in the circumstances, but also provides an incentive for the parties to conciliate properly the first time.

Furthermore, Congress should amend 42 U.S.C. § 2000e-5(f) to provide that a party who has engaged in bad faith conciliation may have to pay the other party's attorney's fees or negotiation costs. Although Congress granted the Commission with the power to bring suit against an employer it believes has engaged in unlawful discrimination, the Commission must follow the

conciliation procedures in place. A minimal review of conciliation procedures and a statutory amendment are the best way to ensure the statutory requirements are meaningfully followed.

