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# Special Report for HR Professionals

January 17, 2014  
Number 560

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## EMPLOYERS CANNOT CHALLENGE EEOC CONCILIATION

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"Employers cannot challenge - and courts cannot review - the adequacy of the U.S. Equal Employment Opportunity Commission's (EEOC) informal pre-litigation efforts to bring employers into compliance with federal anti-discrimination laws." This is the finding in a unanimous decision of the U.S. Court of Appeals for the Seventh Circuit.

The Court stated that Title VII of the *1964 Civil Rights Act* gives complete discretion to the EEOC to engage in these "conciliation" efforts. As a result, according to the Court, employers cannot seek to dismiss EEOC lawsuits by arguing that the Commission inadequately "conciliated" before filing its lawsuit.

The decision stems from the EEOC's lawsuit against *Mach Mining, LLC*, which is headquartered in Marion, Ill. The Commission had sued Mach Mining in September 2011, alleging that the company violated Title VII by failing to hire any female miners since beginning operations in 2006 in spite of receiving applications from many highly qualified women.

Mach Mining chose to defend against these allegations in part by criticizing the EEOC for inadequately conciliating the matter before suing. The EEOC moved for partial summary judgment with respect to Mach Mining's so-called "affirmative defense" that the Commission had failed to properly conciliate before filing its complaint in court.

While the Court denied the EEOC's motion for partial summary judgment, it did allow the EEOC to take an interlocutory appeal. This is because while Title VII does require the EEOC to "endeavor to eliminate . . . alleged unlawful employment practice[s] by informal methods of conference, conciliation, and persuasion," the statute allows the Commission to sue the employer for discrimination if it "has been unable to secure from the respondent a conciliation agreement acceptable to the Commission."

The Appellate Court pointed to this clear statutory language in ruling that employers cannot seek to dismiss EEOC lawsuits by alleging the EEOC's conciliation efforts were lacking. "It would be difficult for Congress to have packed more deference to agency decision-making into so few lines of text," the Seventh Circuit stated. Also, the Court reasoned, the law provides absolutely no guidelines enabling courts to judge whether the Commission's conciliation attempts were adequate, stating that "we are not tempted to send district courts down such a dimly lighted path."

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## NEW EEOC REPORT EXAMINES OBSTACLES FACING WOMEN IN FEDERAL WORK FORCE

In December 2013 the EEOC presented a report detailing many of the issues or obstacles that are facing women in the federal workforce. Many of these present barriers that can impact the ability or likelihood of women with respect to promotions and ultimately achieving higher level leadership. Because many of these obstacles are not unique to government employment, we thought that a summary would be appropriate to share with our readers.

The report was prepared by an internal agency work group and is based on research consultations with key stakeholder groups representing working women, as well as other "dialogue partners." The stakeholders who participated included:

- Federally Employed Women
- The Women's Bar Association of the District of Columbia
- Federal EEO Directors and Federal Special Emphasis Program Managers
- The Equal Justice Society
- Workplace Flexibility 2010
- The Equal Rights Center
- Blacks in Government (BIG)
- African-American Federal Executives Association (AAFEA)

The findings of the report identified the following six areas/obstacles that women often face in the federal workplace.

1. Inflexible workplace policies create challenges for women with caregiver obligations in the federal workforce.
2. Higher-level and management positions remain harder to obtain for women.
3. Women are underrepresented in the science, technology, engineering and mathematics fields in the federal workforce.
4. Women and men do not earn the same average salary in the federal government.
5. Unconscious gender biases and stereotypical perceptions about women still play an important role in employment decisions in the federal sector.
6. There is a perception that federal agencies lack commitment to achieving equal opportunities for women in the federal workplace.

It is surprising that after nearly 50 years of increasing effort to create diversity in the workforce many of these issues continue to endure. And this is in spite of the fact that some (#1, for example) could be addressed by moderately simple and creative policy changes.

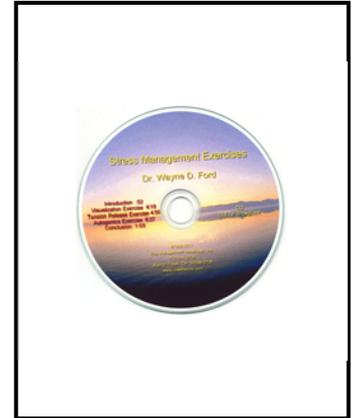
Others issues identified can be much more complex--even if they appear clear-cut on the surface. Representation in higher-level management may not simply be a factor of an employer's selection processes but may be partly due to the proportion and availability of qualified women who compete for the positions. Simply earning the same average pay, as has been demonstrated through many contractor compensation analyses, is not necessarily the ideal goal. Rather, pay should be roughly equal when individuals share equal responsibilities, have similar performance, and possess similar qualifications. While stereotypes still exist at all levels of society, often these have become more subtle and are therefore more difficult to spot and address.

In summary, while we have made a lot of progress, this report suggests that we have a long way to go to achieve our goal of fairness and equality of opportunity. It also provides some possible steps that can be taken to help move us further along the journey. The report is available at:

<http://www.dol.gov/opa/media/press/ofccp/OFCCP20131725.htm>

## Stress Management Exercises

Stress is an issue for many people these days. Managing the stress can be effectively done with the help of exercises on this CD. You will find that it is easier to move through your life once you have mastered these techniques.



<http://www.management-advantage.com/products/stressdisc.htm>

## POTPOURRI

### ■ McDonald's Restaurants of California, Inc. Settles EEOC Religious Discrimination Lawsuit

McDonald's Restaurants of California, Inc. agreed to pay \$50,000 and furnish other relief to settle a religious discrimination lawsuit by the U.S. Equal Employment Opportunity Commission (EEOC), the agency announced today. The EEOC had charged that a restaurant formerly owned by McDonald's in Fresno refused a request from a Muslim employee to grow a beard for religious reasons which lead to his constructive discharge in September 2005.

Title VII of the *Civil Rights Act of 1964* requires that employers make reasonable accommodations to the sincerely held religious beliefs of employees and applicants as long as this causes no harm to the business.

Source: <http://www.eeoc.gov/eeoc/newsroom/release/12-18-13.cfm>\*

### ■ EEOC Sues Guardsmark for Retaliation

The lawsuit alleges that Guardsmark terminated Christopher Smith in retaliation for his role in a woman's sexual harassment complaint. According to the lawsuit, another security guard used security cameras to zoom in on women's private parts. Smith told the security guard to stop, but the guard continued to engage in the behavior. Smith told a woman about the guard's actions, and the woman filed a sexual harassment complaint with the contractor for whom she worked. Guardsmark responded by firing Smith.

The agency seeks to recover monetary compensation for Smith, including back pay and compensatory damages for emotional distress, as well as punitive damages.

Source : <http://www.eeoc.gov/eeoc/newsroom/release/12-24-13a.cfm>



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The Court also found that any "implied affirmative defense" for failure to conciliate would undermine the law enforcement goals of the anti-discrimination statutes. It would "tempt 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" - disputes which impose significant costs on both sides, as well as on courts. Furthermore, if courts were empowered to dismiss EEOC lawsuits on this basis, the result would be that victims of discrimination would be left without a remedy - something Congress could not have intended.

Gregory Gochanour, the EEOC supervisory trial attorney for the Chicago District Office, which developed the litigation, added, "As a result of a few unfortunate decisions, litigation of our conciliation efforts in discrimination cases have become big distractions which waste the resources of employers, the courts, and the EEOC. This decision will put an end to that in this jurisdiction and will compel all parties to focus on the issue of whether or not there actually was employment discrimination. It will serve the interests of both employees and employers - and the national interest."

Excerpted from: <http://www.eeoc.gov/eeoc/newsroom/release/12-20-13b.cfm>

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