

SUPREME COURT (SORT OF) ALLOWS COURTS TO REVIEW EEOC MEDIATION EFFORTS

Insights
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Today, the Supreme Court unanimously held that the Equal Employment Opportunity Commission's statutory duty to conciliate to remedy a Title VII violation prior to filing a lawsuit on the violation is subject to some level of judicial review. *Mach Mining v. EEOC*.

The Court overturned the decision of U.S. Court of Appeals for the 7th Circuit, which had held courts have absolutely no authority to review the EEOC's conciliation efforts. Unfortunately for employers, the Court imposed a very limited scope of oversight that will provide little comfort to employers who have at times been faced with unreasonable demands made by the EEOC in the conciliation process.

The History of the Issue

As originally enacted, Title VII did not provide the EEOC authority to sue employers to enforce the law. In 1972, Congress amended Title VII to provide this power. But many in Congress were skeptical of the EEOC. As such, the amended law included a requirement that, if the EEOC found a Title VII violation, the agency was obligated to attempt to remedy the violation through the informal methods of conciliation before filing suit.

The conciliation process was made confidential and was noted to be the preferred method of resolving Title VII complaints. At one point during the drafting and redrafting of the amendments, the bill included language expressly prohibiting judicial review of the EEOC's conciliation efforts. This version of the amendment was not adopted and the

Related People



Edward F. Harold
Regional Managing Partner

504.592.3801

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final version was silent on judicial review of the EEOC's conciliation efforts. With regard to the conciliation obligation, the law provides:

[T]he Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." The Commission may bring a civil action only if "the Commission has been unable to secure from the respondent a conciliation agreement."

For the last 40 years, federal courts have consistently held that engaging in the conciliation process was a prerequisite to an EEOC lawsuit and reviewed the EEOC's conciliation efforts to ensure the EEOC had complied. Many times courts concluded that the EEOC had engaged in unreasonable or arbitrary conduct during its conciliation efforts that constituted a failure to fulfill its obligation to conciliate. For example, in a recent decision by the Court of Appeals for the 5th Circuit, (*EEOC v. Agro Dist., LLC*), the court stated, "The EEOC abandoned its role as a neutral investigator and compounded its arbitrary assessment that Agro violated the ADA with an insupportable demand for compensatory damages as a weapon to force settlement."

In other cases, unreasonable conduct by the EEOC has included making demands on behalf of an entire class of employees without providing the employer with any information about the makeup of the class, declaring that conciliation had failed without any conversations with the employer, and attempting to mediate matters that were not even within the scope of the finding of discrimination.

Until the 7th Circuit's decision in *Mach Mining*, all the Courts of Appeals agreed that the courts had some level of ability to review the EEOC statutory obligation to conciliate. But the scope of that ability varied widely among circuits. For example, in some circuits the only relief the employer could

obtain was a stay of the litigation pending further conciliation efforts. In others, the EEOC's case could be dismissed with prejudice if a court found that it had engaged in bad faith in the conciliation process.

Likewise, the deference given to the EEOC and the parameters under which they were reviewed differed widely. Citing this morass and the lack of coherent standards for reviewing the EEOC's efforts, the 7th Circuit held courts had no right to review the EEOC's conciliation efforts at all.

The Supreme Court granted review of the 7th Circuit's decision to decide the question, "Whether and to what extent may a court enforce the EEOC's mandatory duty to conciliate discrimination claims before filing suit?"

The EEOC took the position that the 7th Circuit was correct. It argued that their practice was to invite an employer to conciliate only after it issued a reasonable-cause determination and to send a notice to the employer only once conciliation failed. If challenged in court, the EEOC said that it would provide those two documents (which preserve the confidentiality of the conciliation process) to show that it fulfilled its statutory duty. It concluded: "The court of appeals correctly recognized that nothing more is required."

Mach Mining took the position that while judicial review of agency action should be deferential, it should be more rigorous than simply asking whether or not the EEOC had written two letters. Particularly, its brief suggested five aspects on which the EEOC's conciliation efforts should be judged: 1) to attempt conciliation with each defendant regarding every claim and claimant; 2) to inform the defendant what steps it believes are necessary to eliminate the alleged unlawful employment practices; 3) to provide the defendant with the basic information about the commission's claims and demands that the defendant needs in order to evaluate any settlement proposal; 4) to provide the employer a reasonable amount of time to review and respond to a conciliation offer; and 5) to accept and consider counteroffers.

The Decision

The Supreme Court rejected both parties' positions and took a compromise position. It noted that there exists in the law a presumption that Congress intended to allow judicial review of agency conduct. Overcoming that presumption entailed a

heavy burden of showing Congress intended the agency to police itself. The Court held that Title VII did not contain evidence of Congressional intent to shield the EEOC's conduct in the conciliation process from judicial review and on that basis, concluded that the 7th Circuit's decision precluding any sort of judicial review was wrong.

But the Court swiftly concluded that Mach Mining's position for a comprehensive review of the EEOC's conduct was inconsistent with the discretion given to the agency. It noted that under Title VII, the EEOC has the right to make the determination whether an employer will agree to a conciliation proposal "acceptable to it." It further noted that Mach Mining's proposed review was inconsistent with Title VII's requirement that all proceedings of the conciliation process be confidential and not used in later court proceedings.

The Court set out the parameters for the review of the EEOC's fulfillment of its statutory duty to conciliate prior to litigating. It noted the obligation to conciliate necessarily involved "communication between the parties, including the exchange of information and views." More specifically, it held, "[T]he EEOC, to meet the statutory condition [to conciliate], must tell the employer about the claim – essentially, what practice has harmed what person or class – and must provide the employer with the opportunity to discuss the matter in an effort to achieve voluntary compliance."

It instructed that the law requires courts reviewing the EEOC's conciliation efforts to review whether the EEOC complied with these obligations "and goes no further." The EEOC may now ordinarily prove such compliance with the submission of an affidavit. If an employer controverts the EEOC's affidavit, then a court will hold an evidentiary hearing on those issues; if it finds the EEOC has failed to comply, the court can delay the litigation to allow the EEOC to fulfill the statutory prerequisite. "[S]uch review can occur consistent with the statute's non-disclosure provision, because a court looks only to whether the EEOC attempted to confer about a charge, and not to what happened (i.e., statements made or positions taken) during those discussions."

The Court refused to allow review of many of the EEOC's settlement tactics that some complain have been used to

bully employers. "Congress left to the EEOC such strategic decisions as whether to make a bare minimum offer, to lay all its cards on the table, or to respond to each of an employer's counter-offers, however far afield. So too Congress granted the EEOC discretion over the pace and duration of conciliation efforts, the plasticity or firmness of its negotiating positions, and the content of its demands for relief." Thus, take it or leave it offers, demands for monetary damages far exceeding the actual damages, and refusals to provide any underlying factual information about the claim beyond who was harmed and how, are now unreviewable.

What This Means for Employers

Unfortunately, although the position staked out by the Supreme Court was a compromise approach, it does not reach a "middle ground" between the positions of the employer and the EEOC. It is significantly closer to the minimalist review requested by the EEOC. Additionally, by limiting the remedy for a violation to sending the matter back to the EEOC for further conciliation efforts, the decision rendered the relief available to employers largely worthless.

Ultimately, the decision frees the EEOC to continue its use of inflexible and frequently unreasonable demands accompanied by the threat of the EEOC's aggressive litigation tactics and tremendous resources to force employers into settling claims. Employers will now only obtain relief against these tactics by taking cases to judgment and seeking attorneys' fees, a costly and hardly palatable proposition.

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