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## Supreme Court Confirms EEOC Conciliation Efforts are Subject to Judicial Review

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On April 29, 2015, in a unanimous decision, the U.S. Supreme Court resolved a circuit split in holding that the Equal Employment Opportunity Commission's (EEOC) attempts to conciliate a discrimination charge prior to filing a lawsuit are judicially reviewable. In *Mach Mining, LLC v. EEOC*,<sup>1</sup> the Supreme Court vacated a decision by the U.S. Court of Appeals for the Seventh Circuit that had held the EEOC's conciliation effort during the administrative charge process was not judicially reviewable and not an affirmative defense to be used against the agency.<sup>2</sup> Although Title VII provides the EEOC with "wide latitude" to choose which informal conciliation methods to employ, the Supreme Court found the statute also provides "concrete standards" for what the conciliation process must entail.

Specifically, the Court held that, to comply with its statutory conciliation obligations, the EEOC must inform the employer about the specific discrimination allegation(s) and such notice must describe what the employer has done and which employees (or class of employees) have suffered. The Court further held the EEOC must try to engage the employer in a discussion in order to give the employer a chance to remedy the allegedly discriminatory practice. However, while the Court held that judicial review of these requirements is appropriate, the scope of that judicial review is "narrow." A court will merely conduct a "barebones review" of the conciliation process and the EEOC will have "expansive discretion" to decide "how to conduct conciliation efforts" and "when to end them."

Significantly, a court is not to examine positions taken by the agency during the conciliation process. The Court noted that while a sworn affidavit from the EEOC stating that it has performed these obligations would generally suffice to show that it has met the conciliation requirement, where an employer presents concrete evidence that the EEOC did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim, a reviewing court will be tasked with conducting "the fact-finding necessary to resolve that limited dispute." Ultimately, the Court held, where a court finds for an employer on the issue of the EEOC's failure to conciliate, the appropriate remedy is to order the EEOC to undertake the mandated conciliation efforts. While some courts in the past have imposed the remedy of dismissal of a lawsuit based on failing to meet its conciliation obligation, that drastic measure appears to have been eliminated based on the Court's decision.

1 No. 13-1019, 2015 WL 1913911 (Apr. 29, 2015).

2 *Mach Mining v. EEOC*, 2013 U.S. App. LEXIS 25454 (7th Cir. Dec. 20, 2013).

## Procedural History

In 2011, the EEOC filed a lawsuit against Mach Mining, alleging it had discriminated against women in its hiring practices. Mach Mining denied the allegations and asserted the affirmative defense that the EEOC did not conciliate in good faith prior to bringing suit. The EEOC moved for partial summary judgment on this affirmative defense and argued that, based on the Seventh Circuit's decision in *EEOC v. Caterpillar, Inc.*,<sup>3</sup> the conciliation process was not subject to judicial review. The district court denied the EEOC's motion, relying on decisions from other circuits permitting an employer to challenge the EEOC's conciliation efforts, holding that "the EEOC's conciliation process is subject to at least some level of judicial review and that review would involve at least a cursory review of the parties' conciliation." Based on the importance of the issue, the district court certified an interlocutory appeal of the court's order to the Seventh Circuit.

In December 2013, the Seventh Circuit held the sufficiency of the EEOC's conciliation efforts were not judicially reviewable, becoming the first federal circuit to foreclose an employer's ability to use the implied affirmative defense that the EEOC failed to conciliate prior to bringing suit.<sup>4</sup> The Supreme Court agreed to review this case, and consider whether and to what extent a court may enforce the EEOC's mandatory duty to conciliate discrimination claims before filing suit.

## The Supreme Court's Analysis

In reversing the Seventh Circuit's decision, the Supreme Court held "a court may review whether the EEOC satisfied its statutory obligation to attempt conciliation before filing suit" but "the scope of that review is narrow, thus recognizing the EEOC's extensive discretion to determine the kind and amount of communication with an employer appropriate in any given case."<sup>5</sup>

The Supreme Court noted that it applies a "strong presumption" favoring judicial review of administrative action, and that absent judicial review, the EEOC's compliance with the law would rest in the EEOC's hands alone despite the fact that legal lapses and violations occur, especially so when they would have no consequence.

The Supreme Court also set forth the standard for the scope of judicial review of the EEOC's conciliation efforts. Because Title VII requires the EEOC to afford the employer a chance to discuss and rectify a specified discriminatory practice, the EEOC must inform the employer about the specific discrimination allegation. Such notice must describe what the employer has done and which employees (or class of employees) have suffered. Then, the EEOC must try to engage the employer in a discussion in order to give the employer a chance to remedy the allegedly discriminatory practice. Previously, different circuits used different standards in reviewing the EEOC's conciliation efforts.<sup>6</sup> The scope of judicial review set forth by the Court allows the EEOC to exercise the expansive discretion Title VII gives it to decide how to conduct conciliation efforts and when to end them. The Court held that a sworn affidavit from the EEOC stating that it has performed its conciliation obligations should suffice to show that it has met the conciliation requirement. "If, however, the employer provides credible evidence of its own, in the form of an affidavit or otherwise, indicating that the EEOC did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim, a court must conduct the factfinding necessary to decide that limited dispute."<sup>7</sup>

In adopting this as the proper scope of judicial review, the Supreme Court rejected the proposed standards of review advocated by both the EEOC and Mach Mining. The EEOC had argued for the most minimalist form of review of its conciliation efforts imaginable, asserting that the two letters it sent to the company established that it had met its obligation to attempt conciliation. The EEOC sent its first letter to Mach Mining after it issued its reasonable cause determination and notified the company that "[a] representative of this office will be in contact with each party in the near future to begin the conciliation process."<sup>8</sup> The EEOC sent a second letter about a year later, stating that the legally mandated conciliation attempt had "occurred" and failed. The Supreme Court rejected the EEOC's argument, noting that these "bookend letters" failed to prove that conciliation efforts actually took place in the interim and that to treat these letters as sufficient would be "simply to accept the EEOC's say-so that it complied with the law." More is required for appropriate judicial review.

3 409 F.3d 831 (7th Cir. 2005).

4 2013 U.S. App. LEXIS 25454 (7th Cir. Dec. 20, 2013).

5 2015 WL 1913911 at \*3.

6 See *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1249 (11th Cir. 2003) (holding that the EEOC must, among other things, "respond in a reasonable and flexible manner to the reasonable attitudes of the employer"); *EEOC v. Keco Industries, Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984) (holding that the EEOC must "make a good faith effort to conciliate").

7 2015 WL 1913911 at \*6.

8 *Id.* at \*7.

Mach Mining, in turn, argued that the Court should do a deep dive into the conciliation process and suggested that the Court adopt the “negotiated in good faith” standard set out in the National Labor Relations Act (NLRA). Under this approach, the EEOC would have to notify the employer in every case of the minimum it would take to resolve the claim; lay out the factual and legal basis for all its positions, including the calculations underlying any monetary request; and refrain from making “take-it-or-leave-it” offers. The Court, however, rejected the analogy between the NLRA and Title VII, and noted that Mach Mining’s proposed standard conflicts with the latitude Title VII gives the EEOC to pursue voluntary compliance with the law’s commands. Furthermore, the Court noted that Mach Mining’s suggested approach would impinge on Title VII’s protection of the confidentiality of conciliation efforts, as it would necessitate the disclosure and use of evidence of such efforts in a later Title VII suit. The Court held that allowing disclosure of the efforts taken during the conciliation process would undermine the conciliation process itself, because confidentiality promotes candor in discussions and thus enhances the possibility for agreement.

Finally, the Supreme Court also set forth the remedy in the event a reviewing court determines the EEOC failed to conciliate. Specifically, if the reviewing court determines the EEOC failed to meet its statutory obligations (*i.e.*, provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim), the court should order the EEOC to undertake the mandated efforts to obtain voluntary compliance, and stay the litigation while this occurs.

## What This Means for Employers

Based on the Supreme Court’s holding, the EEOC’s conciliation efforts are subject to judicial review and employers can raise the EEOC’s failure to conciliate as an affirmative defense. However, there is a relatively minimal burden on the EEOC to establish it has met its duty to conciliate. Moving forward, according to the Court, only a “barebones review” of conciliation efforts will be required, leaving the EEOC with “expansive discretion” to decide “how to conduct conciliation efforts” and “when to end them.” Employers thus face the potential risk that the EEOC will make extreme settlement demands during the conciliation process, with the potential threat of litigation, particularly when employers are faced with reasonable cause findings based on the agency’s systemic investigation. Moving forward, a court will only look “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.” Moreover, in the event of a subsequent EEOC lawsuit, the remedy if the employer successfully raises the “failure to conciliate” defense is not dismissal. Rather, the EEOC merely will be required to undertake the mandated conciliation efforts. Despite these concerns, it remains in the best interest of both the employer and the EEOC to engage in good-faith conciliation efforts at the charge phase prior to any potential litigation between the parties.

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