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Mach Mining for Defense in EEOC Actions

By Phillip C. Bauknicht

Last month, in *Mach Mining, LLC v. Equal Employment Opportunity Commission*, 135 S.Ct. 1645 (2015), the United States Supreme Court addressed whether the Equal Employment Opportunity Commission's ("EEOC") statutorily required pre-suit conciliation efforts are subject to judicial review. In an unanimous decision delivered by Justice Kagan, the Supreme Court held that courts may review whether the EEOC has satisfied its statutory obligation to attempt conciliation with an employer -- essentially creating a new defense in EEOC actions.

Factual Background

This action resulted from a sexual discrimination claim filed by a woman against Mach Mining, alleging that she was not hired as a coal miner because of her sex, in violation of Title VII. The EEOC investigated the allegation and found reasonable cause to believe that Mach Mining discriminated against the complainant, along with a class of women who also applied for mining jobs. The EEOC submitted a letter to Mach Mining, which invited both the complainant and Mach Mining to participate in pre-suit conciliation and advised that an EEOC representative would be in contact to begin the conciliation process. A year later, the EEOC sent Mach Mining a second letter stating that the conciliation efforts occurred and were unsuccessful.

The EEOC then sued Mach Mining in District Court alleging sexual discrimination in hiring. The complaint stated that all conditions precedent to filing a lawsuit, "including an attempt to end the challenged practice through conciliation," had been satisfied. Mach Mining filed its answer and asserted that the EEOC had not attempted to conciliate in good faith prior to filing suit. The EEOC subsequently moved for summary judgment and argued that its conciliation

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efforts were not subject to judicial review.

The District Court ruled that the EEOC's pre-suit conciliation efforts were subject to judicial review, but granted the EEOC leave to appeal immediately. The Seventh Circuit reversed, holding that the EEOC's pre-suit conciliation efforts are not subject to judicial review. The Seventh Circuit also found that the letters to Mach Mining were "facially sufficient" to show conciliation occurred.

The United States Supreme Court granted certiorari.

The Supreme Court's Decision

The Supreme Court began its analysis by confirming that Title VII statutorily "imposes a duty on the EEOC to attempt conciliation of a discrimination charge prior to filing a lawsuit" and the duty serves as a "necessary precondition" to filing suit. Nonetheless, the EEOC argued that, because Title VII provides no standards to evaluate the EEOC's performance of its statutory duty, Title VII granted the EEOC broad discretion and deprived courts of any judicial review over the EEOC's conciliation efforts. Rather, representations by the EEOC that such efforts occurred should be accepted without review.

The Supreme Court disagreed and stated that there is a strong presumption favoring judicial review of administrative decisions, such as the EEOC's conciliation efforts. The Supreme Court further stated that, while Title VII provides the EEOC with wide latitude over the conciliation process, Title VII still establishes unambiguous conciliation requirements that must be satisfied before filing suit. Thus, while the Court did not doubt the EEOC's trustworthiness, it held that compliance with the law cannot rest in the EEOC's hands alone and the EEOC's pre-suit conciliation efforts are subject to judicial review.

The Supreme Court next addressed the proper scope of judicial review. After considering the reasons behind the enactment of Title VII, the Court held that the appropriate scope of review enforces the conciliation requirements of Title VII -- that the EEOC must afford the employer a chance to discuss and rectify the alleged discriminatory practice -- but goes no further. To that end, the Supreme Court held that the EEOC must inform the employer about the specific discrimination allegation and such notice must describe what the employer has done and which employees (or class of employees) have suffered as a result. The EEOC must also attempt to engage the employer in a discussion and provide the employer with an opportunity to remedy the alleged discriminatory behavior. Judicial review of conformance with these requirements (and nothing else) ensures that the EEOC complies with Title VII, but still "allows the EEOC to exercise all of the expansive discretion Title VII gives it to decide how to conduct conciliation efforts and when to end them."

The Supreme Court also held that a sworn affidavit from the EEOC stating that it performed the pre-suit conciliation obligations, but that its efforts failed, will suffice to establish that the conciliation requirement was met. Such an affidavit, however, can be rebutted by an employer affidavit indicating that the EEOC did not provide the requisite information about the charge or attempt to engage in discussions about conciliation. Should the employer submit a rebuttal affidavit, the court must conduct the fact-finding necessary to decide this limited issue. Should the court find in favor of the employer, the appropriate remedy is to order the EEOC to perform the mandated conciliation efforts.

Impact on Employers

This decision is significant for employers because it requires the EEOC to engage in meaningful and documented conciliation efforts before suit can be filed. Moreover, the decision reminds employers that the EEOC's ability to bring lawsuits is not absolute. The EEOC cannot bypass the conciliation process and fast track litigation without apprehension of judicial review. Additionally, the presence of judicial review over the conciliation process may allow more employers to informally resolve discrimination charges prior to a complaint being filed.

We recommend that employers keep explicit records of all efforts made by the EEOC, or lack thereof, regarding pre-suit conciliation and retain all documents provided by the EEOC, from receipt of the notice, to a complaint being filed. As asserted by the Supreme Court, this phase is critical to the EEOC's ability to file a claim and may provide a basis to dismiss the claim if the EEOC repeatedly fails to comply with the conciliation requirement set forth by Title VII.

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