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EEOC WHAT MAY BE CHANGING

By Vito A. Gagliardi, Jr., Esq.

For any employer subject to an investigation by the U.S. Equal Employment Opportunity Commission, a potentially game-changing case is presently pending before the United States Supreme Court. The Supreme Court's ruling next year will determine how employers should respond to efforts by the EEOC to resolve pending complaints and how those efforts at resolution should be documented and addressed by the employer.

Title VII requires that, once the EEOC has investigated and found reasonable cause that unlawful discrimination has occurred, the EEOC must try to "eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion" and that the EEOC can only move forward with litigation against the employer if it is unable to reach an "acceptable" conciliation agreement. In a recent case involving employer Mach Mining LLC, the employer challenged the extent to which EEOC met its conciliation obligation, essentially putting the "good faith" of the EEOC at issue. The Seventh Circuit ruled that allowing employers to dispute the legitimacy of the EEOC conciliation effort added an "unwarranted mechanism" that employers could use to avoid being held accountable for unlawful discrimination. In seeking review from the United States Supreme Court, Mach Mining argued that the Seventh Circuit was acting contrary to rulings in eight other circuits when it found that courts could not review the EEOC's statutorily-required effort to resolve complaints before litigation ensued.

Now that the Supreme Court has chosen to hear the case, employers are hopeful that the Seventh Circuit ruling will be reversed so that employers have a potent arrow in their quivers when dealing with the formidable enforcement power of the federal government. Certainly, while the case is pending, it is recommended that employers clearly and specifically reduce their positions to writing during the conciliation stage, as this documentation may prove crucial if the conciliation process can be examined as part of a litigation should the conciliation efforts fail.

In a final word of caution, however, this does not mean that employers should resist the benefits of settlement during the conciliation phase. While it is true that settlements with the EEOC have been and can be negotiated during the litigation phase, it is an entirely different process. The EEOC insists that settlements during the litigation phase be resolved only by way of a consent decree. Therefore, the public nature of the resolution, and the control exerted by the EEOC over how the settlement reads, are entirely different in the litigation phase.

The take away, then, is not that a ruling in favor of Mach Mining should reduce the possibility of settlement during the conciliation phase; rather the message is that, should the Supreme Court rule in favor of the employer, the conciliation phase should be very carefully documented and may serve as a significant defense if efforts at conciliation fail and litigation with the EEOC ensues.

Mach Mining will be argued before the United States Supreme Court on January 13, 2015.
