

Supreme Court Holds that EEOC's Pre-Discrimination Suit Obligations Subject to Ltd. Judicial Review

By Jessica Summers

On April 29, 2015, in the case of *Mach Mining, LLC v. Equal Employment Opportunity Commission* (EEOC), the Supreme Court resolved the question of whether the EEOC's pre-discrimination suit actions, specifically the statutory requirement that the EEOC attempt conciliation before filing suit, are subject to judicial review. In a unanimous decision authored by Justice Kagan, the Court held that, while the EEOC does have broad discretion as to how it pursues conciliation, courts do have the authority to review and enforce the EEOC's statutory obligations to engage in this process.

Title VII of the Civil Rights Act requires that, before suing an employer for discrimination under the Act, the EEOC must "endeavor to eliminate unlawful employment practices by informal methods of conference, conciliation, and persuasion." That is, the EEOC must attempt to get the employer to agree to take one or more steps to remedy and eliminate the discrimination before it sues the employer. In order to facilitate conciliation, the statute further includes a confidentiality provision providing that nothing said or done during the conciliation process can be used as evidence in a subsequent proceeding.

In the *Mach Mining* case, the EEOC found reasonable cause to believe that Mach Mining was engaged in sex discrimination by refusing to hire female applicants to work as coal miners. The EEOC sent a letter to Mach Mining inviting it to participate in conciliation without offering any suggested remedial steps it was asking the company to take and notifying the company that the EEOC would be in contact to begin the conciliation process. Approximately one year later, the EEOC sent Mach Mining another letter stating that conciliation had failed and proceeded to file suit. What occurred in the interim between the two letters was not addressed in the judicial record. In answer to the EEOC's complaint, Mach Mining asserted that the EEOC had failed to meet its pre-filing requirement to "conciliate in good faith." The EEOC moved for summary judgment on the issue asserting that the EEOC's mandatory conciliation is not subject to judicial review. While the District Court held that the conciliation is subject to judicial review, the Seventh Circuit reversed on the EEOC's appeal, holding that it is not.

In overruling the Seventh Circuit, the Supreme Court emphasized the strong presumption in favor of allowing judicial review of administrative actions. The Court concluded that there is nothing in Title VII to indicate that Congress intended the conciliation process to be exempt from judicial review.

In finding that the EEOC's conciliation obligation is subject to judicial review, the Court recognized that Title VII does give the EEOC "wide latitude over the conciliation process." As such, the Court held that judicial review of conciliation must be limited to enforcing the statutory obligation. In other words, a court may review whether the EEOC actually tried to conciliate, but not scrutinize the conciliation process itself. In setting forth this limitation, the Court rejected Mach Mining's assertion that a court's inquiry should include a factual look at the conciliation process. The Court concluded that allowing broad judicial review of this nature would conflict with both the significant discretion that the Title VII gives the EEOC in how to proceed with conciliation as well as the related confidentiality provision.

In concluding its decision, the Supreme Court noted that generally an affidavit from the EEOC is sufficient to establish that the conciliation requirement has been met. However, in the event that the employer responds with evidence to the contrary, a court may engage in a factual investigation to determine whether conciliation actually occurred. In the event that the court finds that conciliation has not occurred, the remedy in such a situation is for the EEOC to be ordered to make appropriate conciliation efforts.

Lesson for Employers: The Supreme Court has made it clear that courts can oversee and enforce the EEOC's obligation to engage in conciliation before filing suit under Title VII. Thus, it is now clear that employers have a remedy and defense in the event that the EEOC in fact proceeds to file suit without engaging in conciliation. However, it is important to remember that, pursuant to the Supreme Court's decision, the court may only consider whether there was conciliation and does not have the authority to weigh in on the nature of that conciliation. At the end of the day, absent the EEOC's complete failure to

engage in some dialogue or correspondence with the employer, this newly enunciated standard will not be one which the EEOC will have any difficulty satisfying and will not likely offer much solace to an employer dealing with an intransigent agency position during the conciliation process.