

May 6, 2015



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Supreme Court Rejects EEOC Bid for Unreviewable Conciliation Efforts

By Matthew J. Feery

Before the EEOC can sue an employer, it is required by statute to engage in informal settlement talks with the alleged offending company - a process called conciliation. But how much effort (if any) must the EEOC put into conciliation, and what ability (if any) does a court have to review those efforts? For years, depending on the jurisdiction, the answer could vary greatly. Last week, however, the Supreme Court in a unanimous decision put the issue to rest - for now.

In [*Mach Mining, LLC v. Equal Employment Opportunity Commission*](#), the EEOC investigated a complaint by a former applicant and, during the course of that investigation, came to the conclusion that Mach Mining was discriminating against a class of women applying for mining jobs. In a letter to the company, the EEOC informed Mach Mining of this determination, invited the company to participate in conciliation, and stated the EEOC would be in touch soon. A year later, the EEOC sent the company a letter stating that conciliation had been unsuccessful. The EEOC then filed suit under Title VII. One of the defenses Mach Mining asserted was that the EEOC failed to conciliate in good faith prior to filing the lawsuit. The litigation over that defense in the lower courts centered on what ability a court has to review the EEOC's conciliation efforts, with the Seventh Circuit eventually holding that a court could not perform any review. The Supreme Court then took the case to settle

a federal court split on the issue.

The EEOC argued that because Title VII provides the EEOC such leeway in determining which informal methods to use to obtain pre-suit resolution of a matter, Congress necessarily deprived courts of any manageable criteria on which to judge the EEOC's efforts. Thus, according to the EEOC, courts should essentially defer to its expert judgment on what efforts were and were not necessarily in conciliation in a particular matter. The Supreme Court roundly rejected this position, noting the "strong presumption" of judicial review of administrative agency actions and the EEOC's inability to overcome the "substantial burden" in proving that Congress intended its actions to go without judicial review. As the Court noted, "legal lapses and violations occur, and especially so when they have no consequence."

But the rejection of the EEOC position necessarily raised a second question: What is the proper scope of review for courts? Mach Mining argued for the courts to perform a substantive review of the conciliation process - a "deep dive" as the Court put it - to determine whether the EEOC engaged in "good faith" negotiations. Yet this, too, was roundly rejected by the Court, for "Title VII ultimately cares about substantive results, while eschewing any reciprocal duties of good faith negotiation" that may be imposed by other statutes. "Every aspect of Title VII's conciliation provision smacks of flexibility," and thus Congress provided the EEOC with great discretion in what strategic decisions to make during negotiations. Substantive second-guessing by courts would therefore be inappropriate.

Ultimately, the Court opted for a middle ground, albeit one with minimal review. The EEOC "must inform the employer about the specific allegation" it is facing, as it "typically does" in its letter to an employer announcing a reasonable cause determination. This notice "properly describes both what the employer has done and which employees (or what class of employees) have suffered as a result." The EEOC must then "try to engage the employer in some form of discussion" to give the employer the opportunity to resolve the alleged discriminatory practice. "Judicial review of those requirements (and nothing else) ensures that the [EEOC] complies with" its Title VII duties.

According to the Court, a sworn affidavit from the EEOC stating that it has complied with these obligations, but was unsuccessful in its effort, will suffice to meet the conciliation requirement. If an employer presents evidence, such as its own affidavit, indicating that the EEOC failed to provide the requisite information or engage in a conciliation discussion, then a court "must conduct the factfinding necessary to decide that limited dispute." The "appropriate remedy" for the EEOC failing to comply with its obligations is an order

requiring the EEOC to undertake the efforts it previously failed to undertake.

For employers, the immediate impact of *Mach Mining*, beyond perhaps the satisfaction of seeing the Supreme Court reject EEOC overreach, may prove minimal. Although the Court rejected the EEOC's attempt at unfettered (in)action in the conciliation context, the Court made clear that judicial review is minimal. For employers who successfully prove that the EEOC failed to adhere to these requirements, the reward is simply the opportunity to engage in efforts the EEOC has already decided (regardless of its level of effort) were unsuccessful.

Where the decision may prove most impactful is in other contexts. In the Second Circuit case *EEOC v. Sterling Jewelers, Inc.*, the EEOC is currently appealing the district court's dismissal of its nationwide class action, which the district court dismissed on the basis that the EEOC failed to comply with its statutory pre-suit investigation duties by not conducting a nationwide investigation before filing a nationwide suit against Sterling Jewelers. The case involves a different statutory duty than does *Mach Mining* - the duty to investigate as opposed to the duty to attempt conciliation - but the parties are already arguing, and the Second Circuit is considering, whether *Mach Mining* applies in that context as well. The EEOC, as would be expected, is arguing that the Court's circumscribing of judicial review in the conciliation context should apply in other pre-suit contexts as well. For employers, time will tell whether *Mach Mining* proves to be one step forward and two steps back.

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