

EEOC's Conciliation Efforts Subject to Limited Judicial Review

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The Equal Employment Opportunity Commission (EEOC) has a statutory obligation to attempt to conciliate in good faith a cause finding as a condition precedent to filing litigation. In its unanimous opinion in *Mach Mining, LLC v. EEOC*, the U.S. Supreme Court has resolved a circuit split by ruling that the EEOC's conciliation efforts, or lack thereof, are in fact subject to judicial review. The high court cautioned, however, that this judicial review is to be narrowly construed in light of the EEOC's "extensive discretion" in determining the method and extent of its actual conciliation efforts.

While substantive communications during the conciliation process are generally subject to Title VII's non-disclosure provisions, employers interested in the conciliation process should document efforts to engage in that process, as well as the EEOC's responses, or lack of response, to those efforts in order to rebut the EEOC's position that it met its obligation when, like in *Mach Mining*, it made virtually no effort to conciliate.

In *Mach Mining*, the EEOC issued a reasonable cause finding on a charge of sex discrimination followed by a letter to the parties inviting them to engage in the dispute resolution process, further indicating that the agency would be in contact soon "to begin the conciliation process." A year later, instead of sending its promised "invitation to conciliate," the EEOC sent a second letter stating the conciliation efforts occurred and were unsuccessful. The Commission then filed a sex discrimination lawsuit against Mach Mining, to which the employer responded that no conciliation efforts had actually taken place, and therefore, the EEOC failed to satisfy a statutorily required condition precedent to bringing litigation.

The Supreme Court decided two issues in *Mach Mining*: (1) are the Commission's conciliation efforts subject to judicial review, and (2) if so, what is the proper scope of that review? After ruling that the EEOC's conciliation efforts are in fact subject to judicial review, the Court rejected both the agency's and employer's proposed scope of that review. The Commission argued that its production of the two referenced "bookend letters" stating first that it would conciliate, and second, that it had conciliated, satisfied its burden to demonstrate it engaged in good faith conciliation. The Court rejected this "[because we] say-so" position. The Court also rejected the employer's position that the EEOC should be required in conciliation to disclose its minimally acceptable remedial award, the factual and legal basis for all positions, calculations of all monetary requests and engage in multiple back and forth negotiations.

Recognizing the EEOC does not need to "devote a set amount of time or resources" to its conciliation efforts, the Court held the agency need only (1) notify the employer about the "specific allegation, as the Commission typically does in a letter announcing its determination of 'reasonable cause,'" (2) inform the employer which employees or class of employees have suffered as a result, and (3) try to engage the employer in "an opportunity to remedy the alleged discriminatory practice." The Court further ruled that the EEOC will usually be able to show it conciliated in good faith by submitting a sworn affidavit "stating that it has performed the obligations noted above but that its efforts have failed." If an employer successfully challenges the EEOC's conciliation efforts, the appropriate remedy is not a dismissal of the underlying litigation, but an order requiring the Commission to engage in good faith conciliation.

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