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Supreme Court Victory For Employers Today In *Mach Mining v. EEOC*

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On April 29, 2015, the U.S. Supreme Court issued its long-awaited decision in *Mach Mining, LLC v. EEOC*, No. 13-1019 (U.S. 2015), and concluded, in a unanimous *opinion* authored by Justice Kagan, that federal courts have the authority to review the EEOC's conciliation efforts. In language that is sure to be repeated back to the EEOC for years to come, the Supreme Court held that "[a]bsent such review, the Commission's compliance with the law would rest in the Commission's hands alone." This, the Supreme Court said, would be contrary to "the Court's strong presumption in favor of judicial review of administrative action."

While the Supreme Court did not rule that the intensive review that Mach Mining argued for was required, the case nevertheless represents a significant win for employers and a resounding defeat for the EEOC. The EEOC will no longer be able to file suit against employers after paying mere lip-service to its conciliation efforts, and to give them the back of the hand in response to requests for fulsome information about liability and exposure in a threatened lawsuit. And employers will as a result be in a better position to settle meritorious claims on reasonable terms before the EEOC files suit, thus saving employers from unnecessary litigation expense.

Case Background

This ruling is a big case for employers and for government enforcement litigation. In a game-changing decision in December 2013, the U.S. Court of Appeals for the Seventh Circuit ruled that an alleged failure to conciliate is not an affirmative defense to the merits of an employment discrimination suit brought by the EEOC. That decision had far-reaching, real world significance to the employment community because it meant that the EEOC was virtually immune from review in terms of the settlement positions it takes – often: "pay millions or we will sue and announce it in a media release."

We have kept our blog readers up to date on this litigation as it wound through the lower courts and progressed at the Supreme Court. Readers can find the previous posts [here](#), [here](#), [here](#), [here](#), [here](#), [here](#), and [here](#). In addition, Seyfarth filed an *amicus* brief supporting Mach Mining's position, a copy of which can be found [here](#). In essence, the Seventh Circuit determined that the EEOC's pre-lawsuit conduct in the context of conciliation activities was immune from judicial review, and the Supreme Court granted *certiorari* to determine whether that was correct and, if not, what standard federal courts should use to review the EEOC's conciliation efforts.

The Supreme Court's Ruling

The Supreme Court unanimously rejected the Commission's position that its conciliation activities are beyond judicial review. It began by discussing the fact that Title VII of the Civil Rights Act requires the EEOC to "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Mach Mining*, No. 13-1019, at 2 (quoting 42 U.S.C. § 2000e-5(b)). The Supreme Court observed that "Congress rarely intends to prevent courts from enforcing its directives to federal agencies," and for that reason, the Supreme Court would "appl[y] a strong presumption favoring judicial review of administrative action." *Id.* at 4.

The Supreme Court reasoned that "[c]ourts routinely enforce . . . compulsory prerequisites to suit in Title VII litigation." *Id.* at 5. As an example, the Supreme Court pointed to the fact that courts routinely dismiss discrimination complaints of parties that failed to file a timely charge of discrimination with the EEOC. *Id.* The Supreme Court found that this supported judicial review of the EEOC's compliance with the conciliation requirement. *Id.* at 6.

The Supreme Court also rejected the EEOC's argument that "Title VII provides no standards by which to judge the EEOC's performance of its statutory duty," thus showing that "Congress demonstrated its intent to preclude judicial review." *Id.* at 6. The Supreme Court concluded that the EEOC's position was incorrect because, while the lack of a standard might indicate Congress's intent to give the EEOC wide latitude in conducting the conciliation process, it did not give the EEOC the authority to ignore the conciliation process. *Id.* at 6-7. Specifically, the Supreme Court opined that, if the Commission's position were correct, the EEOC could file suit without any attempt at conciliation, and federal courts could do nothing to remedy the failure to engage in conciliation. *Id.*

The Supreme Court then addressed the proper scope of judicial review to determine whether the EEOC had met its conciliation obligation. The Supreme Court declined to adopt the standard offered by Mach Mining as well as the Commission. The Supreme Court started with the plain language of the statute, noting that Title VII describes the statutory obligation as requiring "conference, conciliation, and persuasion." *Id.* at 7. Those specified methods must therefore involve communication between the parties, including an exchange of information and views about the alleged unlawful employment practice. In sum, the EEOC must "tell the employer about the claim – essentially, what practice has harmed which person or class – and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance." *Id.*

In defining the scope of judicial review, the Supreme Court threaded a line between the EEOC's position and the position of the defense. The EEOC argued for the most minimal review possible – facial examination of documents prepared and submitted by the agency itself. In this case, the EEOC argued that the Supreme Court should be satisfied with two letters sent from the Commission to Mach Mining: (1) the reasonable cause letter, which informed the company that the EEOC would contact the party to initiate the conciliation process; and (2) a second, later letter, which simply stated that the conciliation process had occurred and failed. *Id.* at 8. The Supreme Court rejected the EEOC's proposed level of review, holding that it simply fails to prove what the government claims, namely, whether the agency actually did what it said it did.

Mach Mining argued for a more searching review. In its briefs, the company had argued that a federal court should satisfy itself that the EEOC had negotiated conciliation in good faith. Working off of a standard set forth in the National Labor Relations Act ("NLRA"), the company argued for some minimum prerequisites as to what "good faith" negotiation would look like, including setting forth the factual and legal basis for its positions and refraining from making "take-it-or-leave-it"

offers. *Id.* at 9-10. The Supreme Court rejected that approach, holding that the NLRA is directed toward the process of negotiation itself. The law's purpose is to create a sphere of bargaining to address labor disputes. *Id.* at 10. Title VII, on the other hand, is about compliance with the law. While the law favors cooperation and voluntary compliance, it gives the EEOC wide latitude to pursue that goal, holding that "Congress left to the EEOC such strategic decisions as whether to make a bare minimum offer, to lay all its cards on the table, or to respond to each of an employer's counter-offers, however far afield."

Id. at 11. Critically, the Supreme Court also held that the company's proposed standard of review would fall afoul of Title VII's protection of the confidentiality of the conciliation process. A detailed review of that process would necessitate public disclosure of information in violation of the statute's non-disclosure obligations. *Id.* at 11-12.

The Supreme Court concluded by adumbrating the future of litigation over this issue. The Supreme Court held that a sworn affidavit from the EEOC stating that it has performed its obligations often should be enough to show that it met its conciliation efforts. *Id.* at 13-14. But if employers counter with a credible affidavit of their own or other evidence that demonstrates that the EEOC "did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim," then a federal court must conduct the fact-finding necessary to decide that dispute. *Id.* at 14. If the EEOC's efforts were inadequate, the federal court must then order the agency to undertake the necessary efforts to ensure that it has satisfied its conciliation obligations. *Id.*

Implications For Employers

The implications for employers as a result of this decision cannot be overstated. The EEOC has been arguing for years in courts across the country that its conciliation efforts – and other pre-suit obligations – are entrusted solely to its discretion and therefore are immune to any form of judicial review. That position has been squarely defeated. While the scope of review articulated in the Supreme Court's decision is a narrow one, the Supreme Court vigorously upheld the fundamental principle that judicial review of administrative action is the norm in our legal system. Given the often breathtaking scope of authority that the Commission seeks to carve out for itself, any reaffirmation of that principle comes as a welcome check on the EEOC's activities. Further, the EEOC now has to present its position in a federal court, and its litigation strategies are apt to be very different when it must justify and show the basis for its conciliation positions before a neutral fact-finder. We will have to wait and see exactly how this issue is litigated in the lower federal courts. Suffice it to say, employers' defense of "failure-to-conciliate" is still alive and well, and the EEOC's litigation strategies are now likely to be in need of rebooting.

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