

PUBLICATION

Courts May Review the EEOC's Conciliation Efforts – Well, Sort Of

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Title VII is clear: if the EEOC finds discrimination, it is supposed to "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). If those conciliation efforts fail, the EEOC may then bring a federal lawsuit known as an enforcement action. Yesterday, the Supreme Court answered two questions: 1) what does the EEOC have to do to satisfy its duty to conciliate, and 2) can an employer challenge the EEOC's conciliation efforts (or lack thereof) in court? In its ruling, the United States Supreme Court spelled out the bare minimum the EEOC must do to conciliate and unanimously held that the courts have the authority to remand a case back to the EEOC for additional conciliation in limited circumstances. The case is *Mach Mining, LLC v. EEOC*, No. 13-1019.

How the High Court Got There

The Supreme Court held that to engage in conciliation, 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." The Court noted the EEOC's conciliation "attempt need not involve any specific steps or measures; rather, the Commission may use in each case whatever 'informal' means of 'conference, conciliation, and persuasion' it deem appropriate." As such, the EEOC does not have to entertain a certain number of counteroffers or set a particular duration for the conciliation process. The EEOC simply has to notify the employer of the claim and provide an opportunity to discuss a possible resolution. The EEOC makes the determination when to end conciliation efforts and commence litigation.

As such, the Supreme Court held that a court's authority to review conciliation is extremely limited: "the point of judicial review is instead to verify the EEOC's say-so – that is, to determine that the EEOC actually, and not just purportedly, tried to conciliate a discrimination charge." Judicial review is limited to a determination as to whether the EEOC informed the employer about the specific allegation (which the Court noted is typically satisfied in the EEOC's "for cause" determination letter) and whether the EEOC engaged the employer in "some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice."

Importantly, the Supreme Court noted that a sworn affidavit from the EEOC that it has met the above obligations will usually be sufficient. If an employer can provide credible evidence to the contrary, the court may "conduct the fact finding necessary to decide that limited dispute" and order the EEOC to go back to the proverbial drawing board to attempt to obtain the employer's "voluntary compliance."

What Does this Mean for Employers?

While the Supreme Court has recognized a limited judicial review, the EEOC still holds all the cards when it comes to conciliation after a "for cause" determination. Additionally, even after a limited judicial review, the only relief will be additional conciliation with the EEOC (instead of a case dismissal as urged by many employers). As such, it is imperative that employers avoid a "for cause" determination, and we suggest employers do the following to accomplish just that:

1. Adopt, implement and post anti-discrimination and retaliation policies, which include multiple mechanisms for reporting;
2. Train all supervisors on their responsibilities for abiding by, and enforcing, those policies;
3. Train all employees on the policies and the mechanisms for reporting;
4. Investigate and take prompt remedial action upon receiving a report of discrimination, harassment or retaliation; and
5. Treat all charges of discrimination as if a "for cause" determination will be issued:

Engage legal counsel for assistance;

Investigate the charge, which can include interviewing witnesses, obtaining statements and reviewing any surveillance videos;

Timely respond to the charge, and provide a thorough and accurate position statement with copies of all policies and documents the EEOC investigator needs to resolve the charge;

Timely respond to telephone calls and letters from the EEOC investigator; and

Consider participating in mediation before a determination is issued.