U.S. SUPREME COURT TO RULE ON THE EEOC'S DUTY TO CONCILIATE IN MACH MINING

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On January 13, 2015, the U.S. Supreme Court heard arguments in *Mach Mining L.L.C. v. E.E.O.C.* As we reported previously, this case raises fundamental questions concerning the EEOC's duty to seek to resolve discrimination charges "by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). Above all, the case calls on the court to decide what role, if any, the judiciary should play in making sure that the agency lives up to this obligation. From the EEOC's perspective, only the agency can decide which cases to settle or to prosecute, and the courts have no business second guessing its discretion over such sensitive matters. Employers, however, point to the unique structure of Title VII and other federal statutes, which Congress enacted with the express intent that voluntary compliance be the preferred means of eradicating workplace discrimination. *Ricci v. DeStefano*, 557 U.S. 557, 581 (2009). So, judicial oversight is necessary to ensure that the agency adheres to its mission and engages in litigation only as a last resort after exhausting less coercive means.

Whatever the court's ultimate ruling, it is all but certain to have a significant impact on the EEOC's enforcement efforts. The EEOC claims that employers will unfairly exploit more stringent conciliation requirements to drag out cases, thus diverting limited agency resource from more important functions. But, if the court sets a low standard of review, employers fear the agency will be encouraged to use heavy handed litigation tactics. As Justice Scalia remarked, "there is a considerable incentive on the EEOC to fail in conciliation so that it can bring a big deal lawsuit and get a lot of press and put a lot of pressure" on the employer.

During oral argument, the justices struggled with how a court could review whether the agency had made sufficient efforts to resolve a matter before litigating. Unlike the Seventh Circuit, which had sided with EEOC, they did not appear receptive to the agency's position that its actions are all but unreviewable. As Justice Roberts put it, "I am very troubled by the idea that the government can do something, and we can't even look at whether they've complied with the law." But the justices likewise seemed unsatisfied with Mach Mining's efforts to define a meaningful standard for assessing the sufficiency of agency's conciliation efforts. Justice Kennedy thus complained, "…all you're doing is referring us to a body of law in both labor and contracts for good faith bargaining. And that is a morass."

Further complicating argument was an extraordinarily barebones factual record, consisting of little more than two letters from the EEOC, one inviting Mach Mining to engage in conciliation and a second one approximately one year later advising it that the process had failed. Indeed, the EEOC threatened Mach Mining's counsel with sanctions if they sought to introduce evidence from the conciliation process, given a requirement in Title VII that "nothing said or done during and as part of such informal endeavors may be…used as evidence in a subsequent proceeding without the written consent of the persons involved." While the EEOC insisted that this provision eliminated the possibility of meaningful judicial review, Mach Mining suggested that this clause applied only to subsequent proceedings deciding the merits, not those considering procedural prerequisites.

In the end, the court may very well overrule the Seventh Circuit and hold the EEOC's conciliation efforts to be judicially reviewable. But whether the court will impose a standard with real teeth that would obligate the agency to engage in meaningful negotiations before moving on to litigation, as employers would prefer, remains to be seen.