

*Mach Mining, LLC v. Equal Employment Opportunity Commission*, No. 13–1019

Title VII of the Civil Rights Act of 1964 requires the Equal Employment Opportunity Commission to try to negotiate an end to an employer's unlawful employment practices before suing the employer. See 42 U.S.C. § 2000e-5(b), (f). Title VII also requires that anything said or done during conciliation be kept confidential. See 42 U.S.C. § 2000e-5(b). Today, in *Mach Mining, LLC v. Equal Employment Opportunity Commission*, No. 13-1019, the Supreme Court held that courts have a duty to review whether the EEOC has fulfilled its obligation to attempt conciliation but that the scope of review is narrow, focusing solely on whether EEOC complied with its statutory obligation without probing deeply into the substance of the conciliation efforts.

In this case, the EEOC sued petitioner Mach Mining, LLC, for sex discrimination in hiring. Mach Mining raised as an affirmative defense that the EEOC had failed to fulfill in good faith its statutory obligation to conciliate before filing the lawsuit. The EEOC subsequently moved for partial summary judgment on the failure-to-conciliate defense, arguing that the conciliation process is not subject to judicial review. The district court denied the motion, but the Seventh Circuit reversed.

Prior to the decision below, every circuit to have considered the issue had held that an employer may raise the EEOC's failure to conciliate as an affirmative defense, but those courts had adopted varying standards for evaluating the EEOC's conciliation efforts. For example, the Second, Fifth, and Eleventh Circuits had directed lower courts to apply a searching three-part inquiry, while the Fourth, Sixth, and Tenth Circuits had adopted a more deferential "good faith" standard. In its decision in this case (738 F.3d 171), the Seventh Circuit expressly parted ways with all of those circuits, becoming "the first circuit to reject explicitly the implied affirmative defense of failure to conciliate" (*id.* at 181).

A unanimous Supreme Court vacated the Seventh Circuit's judgment. In an opinion written by Justice Kagan, the Court explained that there is "a strong presumption favoring judicial review of administrative action" that can be overcome only "when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." Nothing in Title VII overcomes that presumption, the Court explained, noting that courts routinely review and enforce other prerequisites to suit under Title VII—such as an employee's obligations to file a timely charge with the EEOC and to obtain a right-to-sue letter. The Court also rejected the Government's position that there are no judicially manageable criteria with which to review the EEOC's efforts. The Court pointed out that courts could readily find a violation if the EEOC failed to engage in any conciliation efforts at all. Moreover, the Court explained that Title VII does provide some direction as to the nature of the conciliation efforts: namely, that the EEOC, "to meet the statutory condition, 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 then turned to "the proper scope of judicial review of the EEOC's conciliation activities." Rejecting both the Government's "minimalist" position that courts should rely solely on facial examination of certain EEOC documents and Mach Mining's position that courts should "do a deep dive into the conciliation process," the Court adopted a middle ground. Specifically, the Court endorsed a "relatively barebones review" that looks at (i) whether the EEOC has notified the employer about the specific allegation, explaining what the employer is alleged to have done and which employees or class of employees have suffered as a result; and (ii) whether the EEOC has tried "to engage 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." The Court noted that such review is consistent with Title VII's confidentiality protections, because a court looks only to whether the EEOC attempted to confer about a charge and not to what happened during those discussions.

Finally, the Court observed that a sworn affidavit from the EEOC stating that it has discharged these obligations is likely to suffice in most cases. But if the employer provides credible evidence to the contrary, "a court must conduct the factfinding necessary to decide that limited dispute." Should a court find in favor of the employer, it should stay the case and order the EEOC to undertake the mandated conciliation efforts.

The Supreme Court's decision is of great interest to all employers because it determines (i) that the target of an EEOC discrimination suit may raise the EEOC's failure to conciliate as an affirmative defense; but (ii) that the EEOC has extensive discretion to determine the kind and amount of communication with an employer that is appropriate in any given case. Both the availability of the failure-to-conciliate affirmative defense and the standard under which courts must evaluate that defense are of substantial practical importance whenever the EEOC sues an employer for alleged violations of Title VII.

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