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EMPLOYMENT LAWSCENE ALERT: SUPREME COURT HEARS ORAL ARGUMENTS ON THE EEOC'S DUTY TO CONCILIATE

On Tuesday, January 13, 2015, the United States Supreme Court heard oral arguments in *Mach Mining LLC v. EEOC*, 13-1019, the outcome of which will have a significant effect on the EEOC conciliation process and a case we have posted on this blog previously. The dispute revolves around whether — and to what extent — courts can enforce the EEOC's obligation under Title VII to conciliate before filing a lawsuit.

The EEOC initially filed a Title VII gender discrimination complaint against Mach Mining in 2011 for allegedly failing to hire or refusing to hire women because of their gender. The EEOC claims that it filed suit after trying to reach a prelitigation settlement through its conciliation process. Mach Mining disagreed and asserted as an affirmative defense in its answer to the complaint that the EEOC had failed to conciliate in good faith as required by the statute.

The Seventh Circuit Court of Appeals created a circuit split when it ruled that employers cannot allege as a defense that the EEOC didn't work hard enough to reconcile disputes before filing suit. All other circuit courts have held that the adequacy of conciliation is subject to court review, although the standard of review varies between courts. According to the Seventh Circuit, the failure-to-conciliate defense went against the statutory prohibition on using what was said and done in conciliation as evidence in future proceedings.

During oral arguments, Mach Mining's attorney suggested that courts be able to conduct a "modest inquiry" into whether the EEOC attempted to resolve a claim of discrimination through conciliation and, if determined that the EEOC had not done so, to require it to conciliate. The EEOC, on the other hand, does not want the courts to have any ability to review its pre-suit conciliation efforts. Chief Justice Roberts, however, voiced his concern that he was "troubled by the idea that the government can do something that [the courts] can't even look at whether they've complied with the law." Justice Beyer echoed Chief Justice Roberts' concerns by saying that "everything just about" is subject to judicial review. Justice Scalia called the EEOC's request that its conciliation efforts be exempted from judicial review as "extraordinary."

The main concern over any judicial inquiry into the EEOC's pre-suit conciliation efforts is the level of inquiry a court should undertake. This is where the appellate circuit courts differ. The Second, Fifth, and Eleventh Circuits evaluate conciliation under a three-part inquiry whereas the Fourth, Sixth, and Tenth Circuits require instead that the EEOC's efforts meet a minimal level of good faith.

Justices Kagan and Ginsberg's questions seemed to belie a belief that Congress has not put an onerous requirement on what was required of the EEOC in conciliation. Justice Sotomayor stated that she didn't "know how you make something that's designated by Congress as informal into a formal proceeding." Justice Kennedy stated that Title VII's requirement that the EEOC try to eliminate allegedly unlawful employment practices "by informal methods of conference, conciliation, and persuasion" were "very difficult words" for Mach Mining's position. Mach Mining responded by stating that "informal" did not mean that the EEOC could do whatever it wanted.

Although the Court continued to ask the parties to give them a rule that would be acceptable to them, neither came up with an answer the Justices seemed satisfied with. The EEOC initially argued that it should only be required to show that an attempt to conciliate had been made. Justice Scalia, however, honed in on the fact that the EEOC is obligated to try to obtain an agreement that is acceptable to it but, in order to try to obtain an agreement, you have to tell the other side what you want. Similarly, Chief Justice Roberts did not like the "just trust us" approach. The EEOC eventually conceded that the Court could require it to say that it informed the employer of what it objected to and that they had communicated about the issue.

Mach Mining argued that the Court should require that the EEOC reach out to the employer and, if the employer responded that it wanted to conciliate, that the EEOC should have to tell the employer what would be an acceptable offer, which they could legally obtain in court, and how they had arrived at that number. Justice Kennedy stated that this would be akin to enforcing the good faith bargaining of contracts and labor law, which he referred to as "a morass." Justice Kagan called this inquiry "intrusive."

The decision in this case will have a large impact on how the EEOC conciliates cases prior to litigation and how employers will need to approach such conciliation efforts. If the Court rules in the EEOC's favor, it would likely mean that the EEOC could become even more aggressive with its charge to the courthouse with high profile cases, as a lack of good faith or reasonableness would not create a barrier to the EEOC's efforts to litigate a case that an employer might be more than willing to conciliate on fair and reasonable terms — if only given an opportunity.