

## CLIENT ALERT

### Supreme Court Rejects EEOC's Position on Conciliation Obligations

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The Supreme Court today issued important guidance concerning the statutory obligation of the Equal Employment Opportunity Commission (EEOC) to attempt to resolve an employment discrimination claim informally, before proceeding to federal court litigation. In *Mach Mining LLC v. EEOC*, the Court unanimously reversed a Seventh Circuit decision that held courts could not review the adequacy of the agency's informal pre-suit conciliation efforts. The Court articulated a new test for determining "how much" conciliation effort is required by the EEOC.

*Mach Mining* has been viewed as an opportunity for the Court to interpret, for the first time, language in Title VII requiring the EEOC, in cases in which the agency has found probable cause of a violation after investigation, to "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. §2000e5(b). The Court's opinion rejected the positions advanced by both the EEOC and the employer.

Justice Kagan's analysis begins with a reassertion of the principle that there is a strong rebuttal presumption of judicial review of administrative agency determinations. The Court observed that conciliation efforts are a "key component" of Title VII's enforcement scheme. Justice Kagan then noted that courts routinely enforce other procedural prerequisites to suit set forth in Title VII. The Court concluded that there was no basis for the EEOC to contend that its pre-suit conciliation efforts are not appropriate for judicial review.

The Court easily dispatched the reasoning and contrary holding of the Seventh Circuit. On the specific facts, the Court concluded that the agency's minimal efforts to conciliate, which apparently consisted of nothing more than two "bookend" letters written to the employer at the beginning and the end of the conciliation process, were insufficient. The Court rejected the EEOC's argument that it would be sufficient for a court to simply review documents submitted by the EEOC. While acknowledging that EEOC should have wide latitude in deciding how to proceed in a particular case, Justice Kagan rejected the government's position as an unsupportable argument for "the most minimalist form of review imaginable."

The Court likewise rejected the employer's principal argument that the EEOC should be held to a standard analogous to the duty to bargain in good faith imposed by the National Labor Relations Act. Instead, Justice Kagan's opinion articulated a test for the proper scope of judicial review that "matches the terms of Title VII's conciliation provision." Specifically, the Court held that:

[T]he EEOC must inform the employer about the specific allegation, as the Commission typically does in a letter announcing its determination of "reasonable cause." *Ibid.* Such notice properly describes both what the employer has done and which employees (or what class of employees) have suffered as a result. And the EEOC must try 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.

Employers will have to wait and see whether the Court's rebuke of the EEOC in *Mach Mining* will result in a significant change in procedure at the agency. There are several anecdotal examples of the EEOC's seeming refusal to make serious conciliation efforts after a finding of probable cause, especially in cases where the EEOC seems more interested in making points through public litigation than consensual resolution of underlying compliance issues.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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