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EMPLOYER NEWSLETTER
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SUPREME COURT DECISION LIMITS JUDICIAL OVERSIGHT OVER EEOC MEDIATION EFFORTS

In 1964, Congress passed Title VII of the Civil Right Act ("Title VII") which prohibits employment discrimination because of a person's race, color, religion, sex or national origin. One of Title VII's central objectives was to promote voluntary compliance and efficient resolution of disputes. As a result, the Equal Employment Opportunity Commission ("EEOC") was created to investigate allegations of employment discrimination and to resolve disputes with employers through informal methods of conciliation (or mediation). Title VII requires the EEOC to attempt conciliation before filing lawsuits against employers.

Recently, the U.S. Supreme Court clarified how hard the EEOC must try to resolve a dispute with an employer before filing suit. *Mach Mining, LLC v. EEOC*, 575 US _____ (2015). The simple answer is "not very" – as explained below in more detail.

CASE BACKGROUND

A woman filed a discrimination charge with the EEOC alleging that Mach Mining refused to hire her as a coalminer because she was female. The EEOC investigated and found "reasonable cause to believe" that Mach Mining had discriminated against her and an entire class of female job applicants. The EEOC then sent Mach Mining a letter with its determination and said that an EEOC representative would contact the company to begin the conciliation process. Approximately one year later, the EEOC sent Mach Mining a second letter stating that conciliation efforts required by law occurred, were unsuccessful, and that any further efforts would be futile. The EEOC then sued Mach Mining in federal court alleging sex discrimination in hiring.

In its answer to the EEOC's lawsuit, Mach Mining alleged that the EEOC failed to conciliate in good faith or in a reasonable matter. The EEOC countered that its conciliation efforts were not subject to judicial review. The EEOC argued that the language of Title VII gave it wide discretion to decide how and for how long it must conciliate with an employer before filing suit. The trial court agreed with Mach Mining and dismissed the EEOC's lawsuit. However, the 7th Circuit Court of Appeals disagreed and ruled for the EEOC. The U.S. Supreme Court heard argument in the case in January 2015.

SUPREME COURT'S RULING

In essence, the Supreme Court split the baby. Mach Mining did not prevail because the Court was concerned that frequent judicial review of conciliation efforts would undermine the entire informal settlement process. Without assurances of strict confidentiality, the parties might hesitate to evaluate their cases candidly or negotiate settlement terms. The Supreme Court also did not agree with the EEOC's position that its conciliation efforts are not subject to any judicial review. On that point, the Court rejected the EEOC's argument that its two letters to Mach Mining proved that it engaged in meaningful conciliation efforts. Rather, the Supreme Court held that courts may review the EEOC's conciliation efforts, but that review should go no farther than to verify that conciliation efforts were in fact attempted.

Thus, when a case begins, the EEOC may submit a sworn affidavit stating that it engaged in conciliation with the employer as required by Title VII. If the employer disputes that assertion, and submits an affidavit and credible evidence to the contrary, then the trial court will conduct a hearing or hear evidence to make a ruling on that limited dispute. If the court finds in favor of the employer, it will order the EEOC to undertake conciliation before the case can proceed.

WHAT THIS MEANS TO EMPLOYERS

The *Mach Mining* decision is both good news and bad news for employers. It is good because judicial review of the EEOC's conciliation efforts is now clearly established. But, it is also bad news because it requires that the EEOC do very little to fulfil its statutory obligation to engage in conciliation. *Mach Mining* offers employers only a fig leaf of protection from strong-arm tactics frequently used by the EEOC to extract large settlements or face potentially ruinous litigation. Unlike employers who must pay tens of thousands to defend employment discrimination lawsuits, the EEOC has a team of government trial attorneys whose job it is to obtain large damage awards and penalties.

Thus, the best strategy is to avoid getting sued by the EEOC in the first place. This means employers should (1) adopt legally sound anti-discrimination policies; (2) conduct EEO training for employees and managers at least annually; (3) investigate promptly and seek to resolve properly internal complaints of discrimination, harassment or unfair treatment; and (4) take seriously EEOC charges of discrimination if/when they are received.

For more information on EEOC Charges, please read our February 2015 Newsletter entitled "*Responding to an EEOC Charge of Discrimination: What you should do when an employee alleges harassment or discrimination*" which we would be happy to email to you or you can find on our website.