

Supreme Court Justices Ponder Setting Standards for EEOC Conciliation Efforts

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Whether and to what extent a court may enforce the Equal Employment Opportunity Commission's mandatory duty to conciliate discrimination claims before filing suit under Title VII of the Civil Rights Act is the subject of oral arguments at the U.S. Supreme Court on January 13, 2015. *Mach Mining, LLC v. EEOC*, No. 13-1019.

The employer had appealed to the Supreme Court after the U.S. Court of Appeals for the Seventh Circuit, in Chicago, ruled that there is no affirmative defense under Title VII based on the EEOC's failure to engage in appropriate conciliation efforts. *Mach Mining, LLC v. EEOC*, 738 F.3d 171 (7th Cir. 2013). (See our articles, [Employer Urges Supreme Court to Settle Federal Court Split over Judicial Review of EEOC's Conciliation](#) and [Seventh Circuit Agrees with EEOC There Is No Affirmative Defense for the EEOC's Failure to Conciliate.](#))

Seventh Circuit Ruling at Issue

Title VII requires the EEOC to endeavor to conciliate a dispute with an employer after it finds reasonable cause to believe discrimination occurred and before the Commission files a lawsuit.

The Seventh Circuit held that a court's review of the EEOC's conciliation efforts should go no further than the EEOC's complaint filed in federal court and the facial sufficiency of EEOC-generated documents. In *Mach Mining's* case, the Seventh Circuit found the Commission had satisfied its conciliation obligations by producing the agency's letter inviting *Mach Mining* to conciliation and a second letter to *Mach Mining* stating the agency had determined that conciliation efforts were unsuccessful. The other federal courts of appeal to have addressed the issue have found the EEOC's actions during conciliation are subject to judicial review.

Oral Arguments

A majority of the Supreme Court justices' questions indicated the justices were contemplating requiring some level of judicial review beyond the "two letter" sufficiency standard of the Seventh Circuit. Several justices asked the government's attorney what guidance she could give on such a standard for review beyond "two letter" sufficiency. From their questions, several of the justices appeared frustrated by the government's failure to provide any meaningful alternative.

The Supreme Court justices during argument seemed to give greater credence to the possibility that the EEOC might fail to conciliate properly than was contemplated by the Seventh Circuit's Mach Mining ruling. The Seventh Circuit's premise was that the Commission has every incentive to conciliate properly, while allowing employers to contest these efforts in court would incentivize them to avoid good faith conciliation, turning it into the subject of endless disputes once a lawsuit is filed. Chief Justice John Roberts asked the government why courts should "just trust you?" When the government's attorney stated there were incentives on the EEOC to conciliate, Justice Antonin Scalia returned that "there is 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 this employer and on other employers."

Looking Forward

Justice Ruth Bader Ginsburg's questions indicated she had no reservations with the EEOC's position. Justice Stephen Breyer stated that "in [his] mind, of course, there should be judicial review," but then indicated perhaps review should be a little more than the Seventh Circuit's "two letter" standard. Justice Scalia offered an option other than having the Court setting standards for conciliation. "[S]uppose we just decide it's judicially reviewable and remand for the agency to issue rules" about the conciliation process, he suggested.

The lively debate at oral argument highlights the fact that in many cases, EEOC conciliations are high-stakes matters for employers. This will remain true regardless of how the Supreme Court rules.

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National Law Review, Volumess V, Number 16

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