Supreme Court Holds that EEOC Conciliation Efforts in Title VII Claims Are Subject to Limited Judicial Review

BY NEAL MOLLEN & SEAN SMITH

Before the Equal Employment Opportunity Commission (“EEOC”) can bring suit against an employer, Title VII of the Civil Rights Act of 1964 requires that the agency to “confer[,] mediat[e] or conciliat[e]” over the matter with the parties in an attempt to reach “a conciliation agreement acceptable to the Commission.” The EEOC has long argued that those efforts are entirely insulated from judicial review, and that the nature and extent of conciliation is entirely at its discretion.

On April 29, 2015, the U.S. Supreme Court unanimously rejected that view, saying that the mandatory obligation imposed by the statute is enforceable by the courts. It cautioned, however, that the courts’ role is limited. Mach Mining, LLC v. Equal Employment Opportunity Commission, No. 13–1019 (April 29, 2015). The statute requires only that the “EEOC communicate in some way (through ‘conference, conciliation, and persuasion’) about an ‘alleged unlawful employment practice’ in an ‘endeavor’ to achieve an employer’s voluntary compliance.” Once the court has ensured that this has occurred, it has exhausted its role in the matter.

Background

Title VII charges the EEOC with responsibility for investigating and enforcing employment discrimination claims. The EEOC’s enforcement process begins when the agency receives a charge of discrimination from an aggrieved employee or a Commission member. The agency then must notify the employer of the nature of the allegations made against it and investigate the claim to determine whether reasonable cause exists to support the allegations. If the agency finds that no “reasonable cause” exists to support the allegations, it dismisses the charge and the aggrieved individual can bring suit on her own.

If the agency finds cause, however, it may bring suit, but only after first attempting to achieve voluntary compliance “through conference, conciliation, and persuasion” with the parties. The statute’s only express substantive limitation on the agency’s discretion during this process is a time limit: the EEOC cannot sue until 30 days have elapsed since the charge was filed.

This case involved a charge of gender discrimination filed with the EEOC by a woman who had applied unsuccessfully for work with Mach Mining. The agency investigated, concluded that reasonable cause existed, and sent a letter to the charging party and Mach Mining inviting them to “participate in
‘informal methods’ of dispute resolution” to settle the matter. A year later, the agency sent a second letter to Mach Mining declaring that the EEOC’s “conciliation efforts . . . have been unsuccessful and that further efforts would be futile.” The agency then brought suit.

In its answer to the complaint, Mach Mining claimed that the EEOC had failed to conciliate the matter “in good faith.” In response, the EEOC moved for partial summary judgment on the issue, claiming that its conciliation efforts were not subject to judicial review. The district court denied the motion, holding that courts should evaluate conciliation to the extent needed to determine whether the EEOC made a sincere and reasonable effort to negotiate. In doing so, the court followed decisions in other circuits holding that judicial review of conciliation is appropriate when the issue is raised as an affirmative defense.

On appeal, the Seventh Circuit held that an employer may not assert the affirmative defense of failure to conciliate. The court of appeals concluded that no workable, judicially administrable standard existed for assessing the adequacy of EEOC conciliation efforts. The Seventh Circuit’s decision created a split with a number of other circuits and the Supreme Court granted review to resolve that split.

**Some Judicial Review Is Available**

In a unanimous decision, the Court vacated the Seventh Circuit decision. Writing for the Court, Justice Kagan observed that the EEOC’s duty to conciliate arises from the mandatory language of Title VII: the Commission “shall endeavor to eliminate [an] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion” (emphasis added). This mandatory statutory obligation implicated the “strong presumption” that judicial review was available, which can be overcome only by evidence in the language of the statute or its structure demonstrating that Congress wanted the EEOC to police its own conduct.

According to the Court, no such evidence exists with respect to the duty to conciliate. Compulsory preconditions to suit, the Court explained, are routinely enforced by the courts in Title VII litigation—including, for example, the requirement that a plaintiff file a timely charge with the EEOC, and obtain a right-to-sue letter. Accordingly, the Court concluded, "[j]udicial review of administrative action is the norm in our legal system, and nothing in Title VII withdraws the courts’ authority to determine whether the EEOC has fulfilled its duty to attempt conciliation of claims.”

Although the EEOC argued that Title VII provided no standards by which judicial review could be conducted, the Court pointed out that the statute’s mandate necessarily involves communication about the alleged unlawful employment practice. Thus a reviewing court may determine whether EEOC has done what the statute requires: informed the employer about the claim—"essentially, what practice has harmed which person or class”—and provided the employer with an opportunity to discuss the claim with the agency in an effort to achieve voluntary compliance.

**The Limits of Judicial Review**

Having found that some review of the EEOC’s conciliation efforts is permissible, the Court turned to the question of the proper standard for such review. Mach Mining argued that the reviewing court should conduct a searching review of the sincerity of the EEOC’s conciliation efforts. The Court rejected that suggestion as well. Title VII gives the EEOC wide latitude to pursue voluntary compliance, it noted, and "[e]very aspect of Title VII’s conciliation provision smacks of flexibility.” Although simple assertions by the EEOC that conciliation had taken place do not suffice, neither does the statute contemplate a detailed inquiry into the *bona fides* of the agency’s efforts; indeed, the
Court noted, Title VII actually prohibits the EEOC from disclosing anything said or done in the conciliation process, and no party can use such evidence in the absence of mutual consent of the employer and the complainant.

Instead, the statute requires that

the EEOC . . . inform the employer about the specific allegation, as the Commission typically does in a letter announcing its determination of ‘reasonable cause.’ 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 . . . so as to give the employer an opportunity to remedy the allegedly discriminatory practice. Judicial review of those requirements (and nothing else) ensures that the Commission complies with the statute. At the same time, that relatively barebones review allows the EEOC to exercise all the expansive discretion Title VII gives it to decide how to conduct conciliation efforts and when to end them.

(internal citations omitted). Thus, it may suffice if the EEOC files an affidavit stating that it has performed these specific obligations (notice and an opportunity for a dialogue) but that conciliation efforts failed. However, if an employer provides credible evidence to the contrary, the reviewing court must engage in limited fact-finding to decide that dispute. A court that finds that the EEOC did not meet its conciliation obligations should "order the EEOC to undertake the mandated efforts to obtain voluntary compliance."

Practical Implications

The decision was a clear repudiation of the EEOC’s long-held view that its internal processes were beyond review. The EEOC can no longer claim that conciliation means what the EEOC says it means and nothing more. The Court’s opinion makes clear that the Commission must, at a minimum, communicate to an employer the substance of its allegations—the practice alleged to be discriminatory and the employees alleged to have been discriminated against—and permit the employer a chance to remedy that alleged discrimination. Further, a reviewing court is required to evaluate an employer’s evidence that the EEOC did not engage in conciliation efforts, and resolve any factual dispute on that issue without presuming that the EEOC is correct.

That does not mean, however, that the decision is a dramatic victory for employers. If the decision is interpreted such that the content of the “conference” required by the statute is beyond judicial review, forcing the agency to the table could have limited practical significance. Under that interpretation, the agency could be required by a reviewing court to have a conversation, but the conversation could be a short one indeed if the agency takes unreasonable positions and the employer does not agree to what the agency considers to be full relief. That is one interpretation of the import of the Court’s holding that courts cannot make a “deep dive” into whether the EEOC entered into conciliation efforts in “good faith,” and its emphasis on the provisions of Title VII that protect the confidentiality of conciliation proceedings.

There is, however, some ambiguity on this issue. In discussing the EEOC’s duty to utilize “conference, conciliation, and persuasion,” the Court emphasized the statute’s explicit requirement that the agency actually "endeavor" to achieve an agreement, and "endeavor," the Court said, means "an attempt to ‘reconcile’ different positions, and a ‘means of argument, reasoning, or entreaty.’" One might—and some employer surely will—argue that this language implies that some sort of inquiry is warranted when the facts suggest that the EEOC has not really “endeavored” to achieve voluntary compliance,
but has merely gone through the motions. The EEOC, of course, will unquestionably argue that no such ambiguity remains—that any inquiry into the contents of the agency’s conciliation efforts would be expressly foreclosed by *Mach Mining*.

Pending further developments along these lines, and in the wake of *Mach Mining*, employers should:

- Seek as much detail as possible from the EEOC with respect to the nature of any alleged discrimination, such as specific discriminatory acts and actors, specific victims of such alleged discriminatory acts, dates, locations, and the like. *Mach Mining* may make the EEOC more inclined to divulge such information, and the information will likely be helpful in preparing a response to the charge.

- Document any and all communications with the EEOC, so that, if necessary and appropriate, credible evidence may be introduced that the conciliation requirement was not met.

- Rely on *Mach Mining* to resist attempts by the EEOC to expand the scope of litigation beyond the specific alleged discriminatory acts, actors and victims disclosed by the EEOC in conciliation.

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

**Atlanta**
Leslie Dent  
1.404.815.2233  
lesliedent@paulhastings.com

**Chicago**
Kenneth W. Gage  
1.312.499.6046  
kennethgage@paulhastings.com

**Los Angeles**
Maria Audero  
1.213.683.6307  
mariaaudero@paulhastings.com

**New York**
Stephen Sonnenberg  
1.212.318.6414  
stephensonnenberg@paulhastings.com

**Orange County**
Stephen L. Berry  
1.714.668.6246  
stephenberry@paulhastings.com

**San Diego**
Mary C. Dollarhide  
1.858.458.3019  
marydollarhide@paulhastings.com

**San Francisco**
Jeffrey D. Wohl  
1.415.856.7255  
jeffwohl@paulhastings.com

**Washington, D.C.**
Neal D. Mollen  
1.202.551.1738  
nealmollen@paulhastings.com

Kenneth M. Willner  
1.202.551.1727  
kenwillner@paulhastings.com

---

*Paul Hastings LLP*
Stay Current is published solely for the interests of friends and clients of Paul Hastings LLP and should in no way be relied upon or construed as legal advice. The views expressed in this publication reflect those of the authors and not necessarily the views of Paul Hastings. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought. These materials may be considered ATTORNEY ADVERTISING in some jurisdictions. Paul Hastings is a limited liability partnership. Copyright © 2015 Paul Hastings LLP.