EMPLOYMENT LAW COMMENTARY

Volume 27, Issue 6
June 2015

QUESTIONS LINGER ABOUT THE SCOPE OF COURT REVIEW OF EEOC PRE-CONCILIATION EFFORTS

By Amber Shubin

In January, in *Mach Mining, LLC v. E.E.O.C.*, the Supreme Court determined that courts do have the power to review whether or not the Equal Employment Opportunity Commission (EEOC) has "satisfied its statutory obligation to attempt conciliation before filing suit." 135 S. Ct. 1645, 1649 (2015). The Court further stated that "the scope of that review is narrow" and that the EEOC retains "extensive discretion to determine the kind and amount of communication with an employer appropriate in any given case." *Id.*

continued on page 2

Questions remain, however, about the scope of permissible review and the EEOC's degree of discretion. Just this past week, the parties in *Mach Mining* filed briefs with the Seventh Circuit Court of Appeals attempting to persuade the Seventh Circuit what course the litigation should take. The EEOC quoted extensively from the Supreme Court ruling to support its position that it had complied with its statutory requirements and asked the Seventh Circuit to grant its request for partial summary judgment on Mach Mining's failure-to-conciliate affirmative defense. Mach Mining, on the other hand, requested that the Seventh Circuit remand the matter so that the district court could engage in fact-finding to determine if the EEOC had indeed met its statutory obligations.

It remains to be seen what the Seventh Circuit will decide to do with the case. What is clear is that both the EEOC and employers have claimed a partial victory coming out of the Supreme Court's ruling, the EEOC focusing on the extremely deferential standard of review seemingly proscribed by the Court and employers focusing on the fact that courts now have review powers. The remainder of this article will explore the landscape leading up to the *Mach Mining* decision, the *Mach Mining* case and decision, and potential implications for employers moving forward.

EEOC Background and the Conciliation Requirement

The EEOC is empowered, through Title VII of the Civil Rights Act of 1964, to "prevent unlawful employment practices." 42 U.S.C.A. § 2000e-5(a). There are a number of ways the EEOC may enforce the prevention of unlawful employment practices, up to and including filing a lawsuit. Title VII requires the EEOC, however, to engage in informal methods to attempt to eliminate the allegedly unlawful employment practice or practices prior to bringing a civil action. These informal methods need to include conciliation efforts, as the EEOC cannot bring suit unless it has failed to secure an "acceptable" conciliation agreement from the employer. 42 U.S.C.A. § 2000e-5(f)(1).

Prior to the Supreme Court's decision in *Mach Mining*, the circuits were split as to the level of scrutiny, if any, courts should apply in considering whether the EEOC had complied with its statutory

EU: Travelling time can count as working time

By Caroline Stakim

The Advocate General (AG) has given his opinion that workers who have no fixed place of work and who, instead, travel to and from customers' premises should be able to count time spent travelling from home to their first customer and from their last customer to their home as "working time" under the EU Working Time Directive (No. 2003/88) (Directive).

This case originated in Spain where a group of workers complained that their employer was in breach of the working time rules. The workers were employed to install and maintain security systems at customers' premises at various locations all over Spain. Although they were assigned to the company's central office in Madrid, in practice they each travelled every day from their homes to their customers' locations to carry out their work on behalf of the company.

Their employer's policy was that no time spent making either the first or the last journey of the day counted as working time. The workers brought a claim in the Spanish court claiming that this was in breach of the Directive. The Spanish court referred the case to the European Court of Justice (ECJ).

In the AG's view, this travel time should be counted as working time. In reaching his conclusion, the AG considered the three criteria that must be met for time to be considered working time under the Directive:

1. The worker must be at his place of work;
2. The worker must be at the employer's disposal; and
3. The worker must be carrying out his activities or duties.

continued on page 3

obligation to conciliate. The Fourth, Sixth, and Tenth Circuits applied a "minimal good faith standard, requiring only that the EEOC make a genuine effort to conciliate before filing suit." Laura E. Carlisle, *Rules of the Game: The EEOC's Pre-Suit Conciliation Obligations and the Scope of Judicial Review*, Fed. Law., March 2015, at 22. This standard was "modest, the idea being that courts should not be prying (too far) into what is designed to be an informal, confidential process." *Id.* In contrast, the Second, Fifth, and Eleventh Circuits apply a "more searching, three-part inquiry." *Id.* Those circuits said that a "good faith attempt at conciliation requires that the EEOC: (1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer." *E.E.O.C. v. Agro Distribution, LLC*, 555 F.3d 462, 468 (5th Cir. 2009).

This was the backdrop against which the EEOC brought suit against Mach Mining in the Southern District of Illinois in September 2011.

The EEOC Brings Suit Against Mach Mining, LLC

In its suit against Mach Mining, LLC, the EEOC alleged that the company "fail[ed] or refus[ed] to hire females into mining and related (non-office) positions because of their sex." Complaint in *E.E.O.C. v. Mach Min., LLC*, No. 3:11-cv-00879, at ¶ 7 (S.D. Ill. Sept. 2011). The EEOC had investigated the original charge of discrimination brought to it by a woman whom Mach Mining had declined to hire and "determined there was reasonable cause to believe Mach Mining had discriminated against a class of female job applicants at its mine near Johnston City, Illinois." *E.E.O.C. v. Mach Min., LLC*, 738 F.3d 171, 173 (7th Cir. 2013) *cert. granted sub nom.; Mach Mining, LLC v. E.E.O.C.*, 134 S. Ct. 2872, 189 L. Ed. 2d 831 (2014) and *vacated and remanded sub nom.; Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645 (2015). Mach Mining and the EEOC "discussed possible resolution but did not reach agreement . . . and the EEOC told Mach Mining that it had determined the conciliation process had been unsuccessful and that further efforts would be futile." *Id.* The EEOC then filed suit.

In the AG's view, these criteria were met. The travel to and from customers' premises was an integral part of the work the individuals undertook. The employer's services could not be delivered without it. As such, travel formed part of the workers' activities and duties, and their working time should not be limited to only time spent at customers' premises. In addition, the workers were following instructions from their employer regarding which specific customers and locations to travel to, and so they could be said to be at their employer's disposal.

The Directive itself is silent on whether travel to and from a place of work should count as working time. And, to date, there has been very little guidance on this point. The AG's opinion, therefore, will be of interest, in particular to employers with large travelling workforces. Although the AG's opinion is not binding, it is often followed by the ECJ, and the ECJ's judgement is expected later this year.

Case Reference: *Federación de Servicios Privados del sindicato Comisiones Obreras v Tyco Integrated Security SL and another C-266/14*

continued on page 4

In its answer, Mach Mining asserted an affirmative defense alleging that the EEOC had failed to conciliate in good faith. *Id*. After two years of "sparring over whether this is a sufficient ground for dismissing the discrimination case," the EEOC "moved for summary judgment solely on the issue of whether, as a matter of law, an alleged failure to conciliate is an affirmative defense to its suit for unlawful discrimination." *Id*. The EEOC argued that its conciliatory efforts were not reviewable, and made no arguments regarding its efforts in this particular matter. *Id*. The district court denied summary judgment, following "decisions of other circuit courts holding (and sometimes simply assuming) that judicial review of conciliation is appropriate in the form of an affirmative defense." *Id*. At the same time, the district court certified the question for interlocutory appeal to determine "whether and to what extent conciliation is judicially reviewable through an implied affirmative defense." *Id*.

The Seventh Circuit reversed the denial of summary judgment, holding that "[t]he language of the statute, the lack of a meaningful standard for courts to apply, and the overall statutory scheme convince us that an alleged failure to conciliate is not an affirmative defense to the merits of a discrimination suit." *Id*. at 172. According to the Seventh Circuit, Congress instructed the EEOC "to try, by whatever methods of persuasion it chooses short of litigation, to secure an agreement that the agency in its sole discretion finds acceptable." *Id*. at 174. The court said that "[i] t would be difficult for Congress to have packed more deference to agency decision-making into so few lines of text." *Id*. Moreover, the statute's confidentiality provision was found to directly conflict with a failure to conciliate affirmative defense. *Id*. at 175.

The Seventh Circuit additionally supported its decision by citing to the statute's failure to include within it a meaningful standard of review. Instead, the statute gave the agency "complete discretion to accept or reject an employer's offer for any reason." *Id*. at 175. The Seventh Circuit thus declined to follow its sister circuits' application of any level of review because "[a] court reviewing whether the agency negotiated in good faith would almost inevitably find itself engaged in a prohibited inquiry into the substantive reasonableness of particular offers—not to mention using confidential and inadmissible materials as evidence—unless its review were so cursory as to be meaningless." *Id*. at 177, 183.

Finally, the Seventh Circuit argued that an affirmative defense for failure to conciliate did not "fit well with the broader statutory scheme of Title VII," as offering such a defense "invite[d] employers to use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve a dispute." *Id*. at 178. The goal behind such a defense, according to the Seventh Circuit, was to "protract and complicate Title VII litigation" or to win "dismissal of the case, or at least its delay." *Id*. at 179 (citation omitted). The Seventh Circuit dismissed out of hand Mach Mining's argument that, by not allowing judicial review of conciliation efforts, the EEOC might very well "abandon conciliation altogether or misuse it by advancing unrealistic and even extortionate settlement demands." *Id*.

The Seventh Circuit recognized that it was either creating or complicating a circuit split by making the decision it did, but elected to do so anyway for the reasons previously explored. *Id*. at 182.

The Supreme Court's Ruling in *Mach Mining*

Following the Seventh Circuit's ruling, Mach Mining requested the Supreme Court to review the decision, arguing that it went against three decades of decisions in eight circuits finding that at least some level of judicial review was appropriate. The EEOC, while stating that it agreed with the Seventh Circuit's ruling, nevertheless agreed that the Supreme Court should review the case in order to add some clarity to the conciliatory efforts that were needed prior to bringing a lawsuit to prevent dismissal of that suit. The Supreme Court granted certiorari and heard the case in January 2015.

In a unanimous decision, the Supreme Court vacated the Seventh Circuit's judgment and remanded the case. The Court concluded that courts can indeed "review whether the EEOC satisfied its statutory obligation to attempt conciliation before filing suit" but that "the scope of that review is narrow" in

continued on page 5

recognition of "the EEOC's extensive discretion to determine the kind and amount of communication with an employer appropriate in any given case." *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1649 (2015). The Court began by observing that "Congress rarely intends to prevent courts from enforcing its directives to federal judges," meaning that "this Court applies a 'strong presumption' favoring judicial review of administrative action." *Id.* at 1651 (citation omitted). While the EEOC argued that, by not providing any standards by which to judge the EEOC's performance of its statutory obligation, Congress intended to preclude judicial review, the Court said that this argument took the "observation about discretion too far." *Id.* at 1652. The Court observed that, while "the statute provides the EEOC with wide latitude over the conciliatory process," Congress "has not left *everything* to the [EEOC]" due to the fact that the statute mandates attempts at conciliation. *Id.* (emphasis original).

The Supreme Court further observed that, contrary to the assertions of the Seventh Circuit, the statute does provide "certain concrete standards pertaining to" what the conciliation efforts must involve: "communication between parties, including the exchange of information and views." *Id.* The Court concluded that "the EEOC, to meet the statutory condition, must tell the employer about the claim—essentially, what practice has harmed which person or class—and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance." *Id.* By insisting the EEOC comply with such requirements, "as the statutory language directs, a court applies a manageable standard," absent which the EEOC's "compliance with the law would rest in the [EEOC's] hands alone." *Id.*

The Court then turned to the appropriate level of judicial review. It noted that the EEOC proposed that "courts rely solely on facial examination of EEOC documents," while Mach Mining wanted "far more intrusive review." *Id.* at 1653. The Court declined to adopt either of the proposed options. Instead, the Court held that a reviewing court need only make a "relatively barebones review" to ensure that the EEOC has met the statutory demands that the agency 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." *Id.* at 1655 (quoting 42 U.S.C.A. § 2000e-5(b)).

According to the Court, the EEOC "must inform the employer about the specific allegation" in a notice that "properly describes both what the employer has done and which employees (or what class of employees) have suffered as a result" and then 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." *Id.* at 1655-56. This level of review preserves the "flexibility" of the statute's conciliation provision and also remains true to the statute's non-disclosure provision. *Id.* at 1654, 1656.

The Court concluded by observing that "a sworn affidavit from the EEOC stating that it has performed the obligations noted above but its efforts have failed will usually suffice to show that it has met the conciliation requirement." *Id.* at 1656. But if the employer provides credible evidence of its own showing that the conciliatory efforts were not properly made, that is when the court should engage in fact-finding. *Id.* Even if the court finds in favor of the employer, however, the proper remedy is not a dismissal, but a stay to allow for the EEOC to make efforts to obtain voluntary compliance. *Id.*

Implications for Employers Moving Forward

The Court's decision in *Mach Mining*, while not giving the expansive judicial review employers might have wanted, certainly has some positive implications for employers going forward. While the Court certainly advocated a deferential level of review, its decision also means that employers continue to have a failure-to-conciliate defense. The EEOC still has concrete obligations it has to meet, albeit with a failure to meet those obligations resulting in a stay rather than outright dismissal. Best practices for employers continue to dictate keeping detailed written documentation of any conciliation efforts by the EEOC and the employer's responses. A clear paper trail will be incredibly important in assisting a court with any fact-finding that might be needed

continued on page 6

down the road. Making a true effort at conciliation also remains recommended, as it can be a way to save litigation costs while still allowing a result the employer is comfortable with.

The full implications of *Mach Mining* will play out in cases to come as courts actually attempt to apply the standards espoused by the Supreme Court. It is clear, however, that the case is not a loss for employers, as it ensures that the EEOC cannot proceed in any way it chooses without review. Requirements, though few, do exist and failure to comply with them opens the doors of the defense for employers.

Ms. Shubin is an associate in our Los Angeles office and can be reached at ashubin@mofo.com or (213) 892-5285.

To view prior issues of the ELC, click here.