

The Seventh Circuit Blessed the EEOC's "Sue First, Negotiate Later" Approach—But Will the Supreme Court Do the Same?

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In what was disappointing news to employers in Illinois, Wisconsin, and Indiana, the Seventh Circuit Court of Appeals ruled in December 2013 that the Equal Employment Opportunity Commission's ("EEOC") failure to engage in good-faith conciliation efforts with an employer prior to filing a lawsuit alleging the employer engaged in unlawful discrimination or harassment is not a viable affirmative defense requiring the dismissal of such a lawsuit.

According to the employer's petition to the Supreme Court, the *Mach Mining* case began with a single EEOC charge from one individual alleging sex discrimination. In the EEOC's hands, that charge grew to a claim of discrimination affecting "a class of female applicants." Exactly how the individual charge grew to a "class" claim is a mystery. Prior to filing suit, the EEOC gave Mach Mining no specifics in terms of the evidence underlying the class allegations, the identities of the purported class members (other than the charging party, herself), or even the actual number of purported class members. Employers that have never been sued by the EEOC should realize that the EEOC's conduct in *Mach Mining* is not unusual.

Title VII expressly requires the EEOC, prior to filing a lawsuit against a targeted employer, to engage in conciliation efforts with the employer. According to Mach Mining, the EEOC's conciliation efforts included, in total, one vague verbal demand and a subsequent notice that conciliation had failed and further discussions would be futile.

Understandably, Mach Mining's position is that the EEOC ignored its statutory conciliation duty, and the employer asked the court to dismiss the EEOC's lawsuit for that reason. The Seventh Circuit ruled against Mach Mining and, in deciding that the failure to conciliate cannot be the basis for dismissing an EEOC-filed lawsuit, the court acknowledged its departure from decisions by other federal circuits that had addressed the issue.

Mach Mining asked the Supreme Court to review the decision and—interestingly—the EEOC joined Mach Mining’s request so that the Court could resolve the conflicts among the nation’s lower courts, and thereby allow the EEOC to implement a uniform, nationwide conciliation policy.

As frequent readers of the Labor & Employment Law Update know, it is impossible to predict how the Supreme Court will rule. It is also impossible to predict exactly when the ruling will come, and it is possible that the ruling may be a full year away.

In the meantime, and regardless of the ultimate disposition of this lawsuit, employers that have received a reasonable cause determination from the EEOC (or a charge filed by the Commissioner of the EEOC, as opposed to an aggrieved individual) should press the EEOC, through documented, written correspondence, for the specific facts at issue in the EEOC’s claims—including facts that will allow the employer to identify potential class members and calculate the employer’s potential exposure to damages. Until the Supreme Court rules, employers nationwide will be waiting and watching—hoping for a decision that puts reasonable restrictions on the EEOC’s litigation tactics.

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