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TRACKING DEVELOPMENTS IN EMPLOYMENT LAW

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## US Supreme Court to Address EEOC Discrimination Negotiations

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In 2015, the Supreme Court will resolve whether a failure to reach a pre-suit settlement may be used as an affirmative defense in subsequent litigation. The Supreme Court granted certiorari in the Seventh Circuit case *Mach Mining v. E.E.O.C.*, and the Court's decision in that case will resolve a longstanding circuit split regarding discrimination pre-suit negotiations.<sup>1</sup>

Under Title VII of the federal Civil Rights Act, the Equal Employment Opportunity Commission ("EEOC") must investigate complaints of employment discrimination before a lawsuit can be filed. This preliminary investigation determines whether there is reasonable cause for the complaint, and in doing so the EEOC "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion".<sup>2</sup> The statute does not specifically state whether a failure to reach conciliation is an affirmative defense in the subsequent lawsuit.

In the absence of a statutory requirement, the courts established myriad standards to review the EEOC conciliation process. The Sixth, Fourth, and Tenth Circuits have ruled that a court may review the EEOC's conciliation process to determine whether it was conducted in good faith. For example, in *E.E.O.C. v. Peplemark*, the Sixth Circuit determined that the EEOC must make a good faith effort to conciliate, but also that a failure to conciliate based on employer settlement rejection is not an affirmative defense.<sup>3</sup>

The Fourth Circuit expands judicial discretion, holding that courts should dismiss lawsuits brought by the EEOC when the conciliation process fails because of the importance of cooperation and voluntary compliance.<sup>4</sup> Conversely, in the Tenth Circuit, a court should stay the proceedings for further conciliation if there is a failure to make good faith efforts.<sup>5</sup> The Fifth and Eleventh Circuits apply a three-part test to analyze an EEOC conciliation process, and the Eight Circuit permits judicial review but has not adopted a standard.<sup>6</sup>

### SECRET WARDLE NOTES:

The Supreme Court's decision will clarify whether failure to conciliate is available as an affirmative defense in Title VII employment discrimination lawsuits. If it is, the EEOC will be encouraged to settle cases out of court and increase judicial efficiency. If not, employment discrimination cases will lead to more lawsuits and less amicable outcomes.

<sup>1</sup>*E.E.O.C. v. Mach Mining, LLC*, 2013 U.S. Dist. LEXIS 71172, 118 (S.D. Ill. May 20, 2013).

<sup>2</sup>42 U.S.C. § 2000e-5.

<sup>3</sup>*E.E.O.C. v. Peplemark, Inc.*, 732 F.3d 584, 628 (6th Cir. 2013).

<sup>4</sup>*E.E.O.C. v. Henry Beck Co.*, 729 F.2d 301, 304 (4th Cir. 1984); *See also Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976).

<sup>5</sup>*E.E.O.C. v. Zia Co.*, 582 F.2d 527 (10th Cir. 1978).

<sup>6</sup>*E.E.O.C. v. Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003); *E.E.O.C. v. Agro Distrib. LLC*, 555 F.3d 462, 468 (5th Cir. 2009); *E.E.O.C. v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012).

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These differences led to the Supreme Court granting certiorari in *Mach Mining*. In that case, a class of women challenged a mining company's history of only hiring men for a coal mining position.<sup>7</sup> When Mach Mining denied a female applicant a job, the EEOC began the conciliation process. Mach Mining rejected the settlement offer and the EEOC later brought an employment discrimination lawsuit against the company.

Mach Mining asserted an affirmative defense that the EEOC failed to conciliate in good faith. In essence, Mach Mining argued that the EEOC wanted to litigate and it intentionally did not conduct the conciliation in good faith. The EEOC responded that the conciliation process is not subject to judicial scrutiny and, if Title VII was intended to require a good faith effort on conciliation, it would explicitly state that. The EEOC filed a motion for summary judgment based on those arguments and the trial court denied it. On appeal, the Seventh Circuit reversed. The court held that failure to conciliate cannot form the basis of an affirmative defense because Title VII does not explicitly require it.

The Supreme Court's decision in *Mach Mining* will shift the balance of pre-suit Title VII settlement negotiations. If the Supreme Court rejects judicial review of conciliation, it will lead to fewer settlements and more litigation. The EEOC will be less flexible with settlement demands and it could reduce judicial efficiency with increased, protracted litigation.

The purpose of Title VII is to encourage cooperation between the EEOC and employers.<sup>8</sup> If the Supreme Court holds that conciliation failure is an affirmative defense, it may pressure the EEOC to behave more reasonably in settlement negotiations and to disclose information that it typically would not. In effect, this could reduce overall employment discrimination because it will lead to amicable settlements and voluntary compliance with Title VII.

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<sup>7</sup>*Mach Mining, supra.*

<sup>8</sup>*Henry Beck, supra.*

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