

EMPLOYER LAW BLOG

EEOC Must Try to Conciliate

AUTHOR: SANDBERG PHOENIX

By Courtney Cox

Before suing an employer, the EEOC must first endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation and persuasion. 42 U.S.C. 2000e-5. The EEOC may only file suit after determining that attempts to conciliate have failed.

In a recent 7th Circuit case, Mach Mining was the subject of an EEOC charge of discrimination. The EEOC investigated the charge and determined that reasonable cause existed to believe that the company had engaged in an unlawful employment practice. The EEOC sent a letter to the company inviting it to participate in an informal conciliation proceeding. About a year later, the EEOC sent the company a letter stating that it had determined that conciliation efforts had been unsuccessful and then sued Mach Mining in federal court.

Mach Mining responded to the suit by arguing the EEOC could not sue it in federal court because the EEOC had not attempted to conciliate the charge in good faith. The EEOC responded by making two arguments – 1) whether it had or had not engaged in conciliation was not subject to review by the court, and 2) the two letters it had sent to the company was adequate proof it had fulfilled its duty to attempt to conciliate.

The District Court found it had the authority to review the issue of whether the EEOC had engaged in conciliation. The Court of Appeals reversed that decision, holding that issue is not reviewable by the court. The United States Supreme Court agreed with Mach Mining, finding they had authority to review whether the EEOC had fulfilled its duty to attempt conciliation of the charge. The purpose of judicial review is to determine whether the EEOC actually tried to conciliate the charge. In order to provide such proof, the EEOC must show 1) that it informed the employer about the specific discrimination allegation, 2) describe what the employer has done, and 3) describe which employees (or class of employees) have suffered. Next, the EEOC must try to engage the employer in a discussion to give the employer a chance to remedy the alleged discrimination.

A sworn affidavit to this effect from the EEOC should suffice to demonstrate these steps were taken. However, if the employer presents concrete proof that the EEOC did not take these required steps, the court must conduct the fact finding necessary to determine this dispute. If the court determines the EEOC did not attempt conciliation, the court should order the EEOC to do so.

The Supreme Court then sent the case back to the District Court to determine whether the EEOC fulfilled its duty to attempt to conciliate. The court noted that the first letter only said the process would start soon and the EEOC would make contact (which it did not do), and the second letter said only that the process had concluded. The point of judicial review is to verify that the EEOC actually did what it says it did and that it fulfilled its statutory duty.

Mach Mining, LLC v. EEOC, No. 13-1019 (U.S. Apr. 29, 2015)