

EEOC PROCEDURE

Q&A: *Mach Mining* Could Impact EEOC's 'Unlawful' Settlement Demands

(Reuters) – Identifying the winner of a U.S. Supreme Court case is typically pretty simple, but its ruling in April that courts have only limited authority to review the Equal Employment Opportunity Commission's efforts to settle discrimination claims had the agency and employer-side attorneys both claiming victory.



"I could foresee under *Mach Mining*, where conciliation reached an impasse over an unlawful demand, the court requiring the commission to go back and make a lawful proposal," attorney Don Livingston said.

Don Livingston of Akin Gump Strauss Hauer & Feld, a former EEOC general counsel who represents employers, told Reuters the ruling in *Mach Mining LLC v. Equal Employment Opportunity Commission*, 135 S. Ct. 1645 (Apr. 29, 2015), was a win for the commission, but also opened the door to courts scrutinizing what he said are routinely unreasonable or unlawful demands during the so-called conciliation process.

In *Mach Mining*, Justice Elena Kagan wrote for the unanimous court that Title VII of the Civil Rights Act of 1964 vests broad discretion in the EEOC to decide when to settle. To ensure the commission meets its obligation under Title VII to attempt to conciliate, Justice Kagan wrote, it need only submit an affidavit stating that its efforts failed.

In an interview with Reuters days after the decision, Livingston, who was the EEOC's top attorney from 1991 to 1993, said employers could challenge those affidavits with claims that the EEOC's demands were a non-starter. The commission routinely makes demands during conciliation that would never hold up in court, such as seeking damages that exceed statutory limits, he said.

Questions and answers have been edited for clarity and brevity.

REUTERS: The court threaded the needle here and came up with a standard that goes further than EEOC wanted but not nearly as far as *Mach Mining* had urged. Who won?

LIVINGSTON: Title VII has a conciliatory spirit and was enacted with requirements that EEOC conduct outreach and seek to bring voluntary compliance. The agency through its litigation program has whittled away at that, but *Mach Mining* says the spirit is not dead. But it provides a lesser standard of judicial review than those prevailing in many of the federal courts, so it is clearly a win for the EEOC.

REUTERS: How will this play out in court when employers claim the EEOC failed to conciliate?

LIVINGSTON: I could foresee under *Mach Mining*, where conciliation reached an impasse over an unlawful demand, the court requiring the commission to go back and make a lawful proposal. The court would stay the suit for 60 days and order the parties to try to resolve the case.

REUTERS: What types of unlawful demands?

LIVINGSTON: I have several firsthand examples from my files, not hypotheticals. EEOC has demanded \$1 million in damages for a single charging party when the amount allowed by law was less than one-third of that. EEOC has demanded remedies dating back to 2003 or even 1964 on



a charge filed in 2013. The agency has demanded back pay for more than two years preceding the charge, which is not allowed by Title VII. And more recently it has demanded that employers waive the confidentiality of the conciliation process.

REUTERS: *Could Mach Mining then prompt the commission to be proactive and stop making these demands?*

LIVINGSTON: No. Right now, the arrogance that permeates the agency will prevent that and I believe the agency will force companies to test the limits of *Mach Mining* in court.

REUTERS: Is there an open question about how far judges can go in asking for those details, given the confidentiality of conciliation?

LIVINGSTON: I don't believe the details of unlawful proposals are protected by Title VII confidentiality. For example, there could be a case where EEOC is conciliating a wrongful termination charge by a disabled employee. The agency seeks \$100,000 in damages, and then another \$250,000 because it decides the employer also did not engage in the interactive process (required by the Americans with Disabilities Act). But there is no ADA charge, the EEOC never investigated it and could never bring it in court.

Under *Mach Mining*, you could see how a court might say that if EEOC is insisting the company pay for a claim it can never bring, conciliation has not really occurred (and so confidentiality doesn't apply).

(Reporting by Daniel Wiessner)

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