LAW360

Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Challenging EEOC Conciliation Charges

Law360, New York (December 21, 2015, 1:57 PM ET) --

Patrick J. Lamparello

Under Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission must conciliate discrimination charges before taking final action on a charge or filing a lawsuit. 42 U.S.C. § 2000e-5. This article discusses the conciliation process. It also addresses the U.S. Supreme Court's April 29, 2015, decision in Mach Mining LLC v. EEOC, 135 S. Ct. 1645 (2015) — which gave courts narrow authority to review employers' challenges to the EEOC's conciliation efforts — and provides guidance on subsequent cases that interpret Mach Mining.

Timing and Advantages

If the EEOC finds "reasonable cause" that the employer has engaged in discrimination, it must request that the parties engage in conciliation. 42 U.S.C. § 2000e-5(b). Thus, the opportunity for the employer to conciliate an EEOC charge occurs when the EEOC issues a reasonable cause finding.

Often, it will advantage an employer to dispose of a claim early, before the employer must devote substantial time and resources to its defense. The EEOC, for its part, identifies the following advantages to conciliation:

1. Conciliation is a voluntary process.
2. Conciliation discussions are negotiations, and counteroffers may be presented.
3. Conciliation offers the parties a final opportunity to resolve the charge informally after an investigation has been conducted but before a litigation decision has been reached.
4. Conciliation agreements remove the uncertainty, cost and animosity surrounding litigation.

If the conciliation process does not yield a conciliation agreement, then the EEOC may choose to initiate a litigation in federal court against the employer on behalf of the aggrieved employee(s). If the EEOC chooses not to initiate litigation, it will dismiss the charge and provide both parties with a notice of their rights.

Best Practices for Conciliation

During conciliation, the assigned EEOC investigator works with the parties to identify solutions to remediate the discrimination and settle the matter without litigation. No set format exists for the conciliation process, which can vary widely. It may proceed like a typical employment mediation or it may consist of other informal oral or written communications designed to resolve the dispute. For additional information on employment mediation, see the Lexis Practice Advisor Labor and Employment module's practice note on mediating employment disputes.

You should keep the following tips in mind when you participate in an EEOC conciliation:

- Continually emphasize to the investigator that the employer is willing to reasonably negotiate all conciliation terms.

- Request that the EEOC provide a written explanation of how it calculated any proposed damages. Relatedly, ask the EEOC to inform you in writing as to the individuals for whom they seek money damages or other relief, if it is unclear.

- Have the EEOC substantiate the legal basis for the terms of any suggested remedial measures it proposes.

- Never express hostility towards the investigator during the conciliation process. This approach will not help settle the claim and, if you represent the employer, may spur the EEOC to initiate litigation against your client.

- The EEOC will usually want to approve a settlement agreement between the parties that results from conciliation. It likely will reject a settlement agreement that contains either of the following clauses:

1. An agreement prohibiting an employee from assisting with an administrative charge brought by another employee against the employer (but the agreement can provide that the employee agrees not to instigate others to file charges); or

2. An agreement that completely bars the rehiring of the employee. However, if the employer wants a no-rehire agreement, you should limit the no-rehire language to state that the employee will agree not to initiate an application to the employer (or a particular division of the employer) but is in no way precluded from becoming employed with the employer (or the particular business unit) if such employment otherwise arises. California employers should note that courts may potentially find that broad no-rehire or no-employment clauses are prohibited improper restraints on trade. See Golden v. California Emergency Physicians Medical Group, 782 F.3d 1083, 1092-93 (9th Cir. 2015) (remanding a case for further proceedings in order to determine whether a no-employment provision in a settlement agreement was an unlawful restraint on trade under California Business and Professions Code § 16600).

- Because the EEOC must inform the employer about the specific employees harmed, if the alleged practice involves a potential class of plaintiffs, you

should additionally seek information regarding the number of prospective class members and the identities of prospective class members.

- Document any conciliation efforts by the EEOC — or the EEOC's refusal to engage in such efforts — to support a later argument that the EEOC failed to attempt to engage in a conciliation discussion.

Challenging the EEOC's Conciliation Process or Failure to Conciliate

The Supreme Court's Decision in Mach Mining LLC v. EEOC

If you feel that the EEOC's conciliation efforts are insufficient, you may have grounds to challenge the EEOC's conciliation process in court. The Supreme Court has held that courts have narrow authority to review whether the EEOC has complied with its statutory obligation to conciliate a charge of discrimination under Title VII. Mach Mining LLC v. EEOC, 135 S. Ct. 1645 (2015).

The EEOC is required to inform the employer about the specific allegation and the employees harmed (typically through a letter finding "reasonable cause") and attempt to engage the employer in oral or written communication to remedy the dispute. Mach Mining LLC, 135 S. Ct. at 1655-56. Accordingly, a reviewing court only evaluates whether the EEOC attempted to confer about a charge, not whether settlement was effectively negotiated.

The Supreme Court indicated that the EEOC can usually establish it has satisfied the mandatory conciliation requirement by submitting a sworn affidavit that states it performed the above actions, but that its efforts have failed. Id. at 1656. However, if you disagree with the EEOC's position that it attempted to confer about a charge, you may provide an affidavit or other credible evidence that shows that the EEOC did not provide the requisite information or attempt to conciliate with the employer. Id. If you submit such evidence, a court must then engage in fact finding to determine whether the EEOC satisfied the conciliation requirement. Id.

If a court deems the EEOC's conciliation efforts insufficient, it will order the EEOC to undertake a conciliation process. Id.

Subsequent Cases That Address Mach Mining

Two recent decisions interpreted the Mach Mining decision: (1) EEOC v. OhioHealth Corp., 2015 U.S. Dist. LEXIS 84016 (S.D. Ohio June 29, 2015) and (2) EEOC v. Sterling Jewelers Inc., 2015 U.S. App. LEXIS 15986 (2d Cir. 2015).

EEOC v. OhioHealth Corp.

In EEOC v. OhioHealth Corp., 2015 U.S. Dist. LEXIS 84016 (S.D. Ohio June 29, 2015), the district court, applying the Mach Mining standard of review, held that the EEOC had failed to engage in good faith conciliation efforts.

In support of its position that it met its conciliation obligations, the EEOC had presented an affidavit, along the lines suggested in Mach Mining, which stated that the EEOC had engaged in communications

to remedy discriminatory practices and presented a conciliation proposal. The employer rejected the EEOC's position and filed an affidavit that stated:

> The EEOC presented its [proposed conciliation resolution] as a take-it-or-leave-it proposition, failed to provide information requested by [the employer], demanded a counteroffer, and then declared conciliation efforts to have failed despite [the employer] having made it clear that it was ready and willing to negotiate.
>
> EEOC v. OhioHealth Corp., 2015 U.S. Dist. LEXIS 84016, at*6-7.

The competing affidavits presented a dilemma for the district court. On one hand, Mach Mining limited its jurisdiction to a "relatively bare-bones review," yet, on the other, Mach Mining authorized fact finding. Id. at *8. In its review, the court focused on specific troubling aspects of the purported conciliation process, such as the fact that the EEOC indicated that it would prepare a calculation of monetary damages, but did not do so. The court then concluded that the EEOC failed to show that it met the conciliation requirement and noted that the conciliation process was "nothing but a sham." The court consequently stayed the case for 60 days and ordered the EEOC to "engage in a good faith conciliation effort with OhioHealth during that period of time." Id. at *11-12.

Key Takeaways from OhioHealth

OhioHealth presents two takeaways for employers at the conciliation phase:

- First, conciliation is a condition precedent to suit by the EEOC and not an affirmative defense of the employer. OhioHealth, 2015 U.S. Dist. LEXIS 84016 at *7. The district court therefore denied the EEOC's motion to strike, which asserted that the employer waited too long to assert that the EEOC's conciliation process was deficient. Id. Nevertheless, an employer would be well-served to call attention to any perceived failure by the EEOC to conciliate before the EEOC closes its proceedings.

- Second, employers should look to the factors seized upon by the district court as evidence that the EEOC failed to properly engage in the conciliation process and raise them with the EEOC during conciliation proceedings as appropriate. For instance, employers should clearly demonstrate to the EEOC a readiness and willingness to negotiate. Employers should also request complete information from the EEOC regarding the commission's proposed resolution of conciliation including, but not limited to, any calculation of monetary damages and/or a monetary amount that it would cost to resolve the dispute. Employers certainly should make sure to document their requests for information.

EEOC v. Sterling Jewelers Inc.

The Second Circuit's decision in EEOC v. Sterling Jewelers Inc., 801 F.3d 96 (2d Cir. 2015) also illuminates the Mach Mining standard of review. Although the Sterling Jewelers decision did not deal with the conciliation process, it involved another prerequisite that the EEOC must undertake before filing a lawsuit — investigating the charge of discrimination.

Here, the employer claimed that the EEOC filed a nationwide class action, without first investigating nationwide class action claims. The district court agreed that no evidence supported that the EEOC investigated a nationwide class and granted Sterling Jewelers' motion for summary judgment. The EEOC appealed that decision.

The Second Circuit looked to Mach Mining for the appropriate standard of review of the EEOC's investigation. The Second Circuit concluded that the magistrate judge who recommended the dismissal of the EEOC's lawsuit had exceeded the scope of review allowed by Mach Mining by delving into the sufficiency of the EEOC's investigation. Sterling Jewelers, 801 F.3d at 102. The Second Circuit instead drew the line at whether the EEOC had taken steps to determine whether there was reasonable cause to believe the charge's allegations. Id. at 101. Applying this standard of review, the court found that the EEOC did conduct an investigation in accordance with its obligations, vacated the lower court's decision, and remanded the case for further proceedings. On Dec.1, 2015, the Second Circuit also refused the employer's request to rehear the case en banc.

Key Takeaway from Sterling Jewelers

In Sterling Jewelers, to the extent the court would apply its reasoning to determine whether the EEOC had satisfied its obligation to conciliate, it would appear to be a less exacting standard than that applied in OhioHealth. That is, the Second Circuit might be more deferential towards the EEOC's conciliation process than the Southern District of Ohio.

—By Patrick J. Lamparello, Proskauer Rose LLP

Patrick Lamparello is a senior counsel in the labor and employment law department in Proskauer's New York office.

This article is excerpted from Lexis Practice Advisor®, a comprehensive practical guidance resource providing insight from leading practitioners on the topics critical to attorneys who handle transactional matters. Lexis is a registered trademark of Reed Elsevier Properties Inc., used under license.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2015, Portfolio Media, Inc.