REVIEW OF EEOC PRE-SUIT REQUIREMENTS POST-*MACH MINING*

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I. INTRODUCTION

The Equal Employment Opportunity Commission (EEOC) enforces the nation's employment discrimination statutes.[1] One means of enforcement is bringing pattern or practice/systematic discrimination cases against employers.[2] Pattern or practice cases involve employers who regularly and intentionally discriminate against a class of employees

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1. EQUAL EMP'T OPPORTUNITY COMM'N, EMPLOYEES & JOB APPLICANTS, https://www.eeoc.gov/employees/index.cfm (last visited May 2, 2018). The following are statutes that the EEOC is charged with enforcing: (1) Title VII of the Civil Rights Act of 1964 (Title VII); (2) the Age Discrimination in Employment Act of 1967 (ADEA); and (3) Title I of the Americans with Disabilities Act of 1990 (ADA). EQUAL EMP'T OPPORTUNITY COMM'N, LAWS ENFORCED BY EEOC, https://www.eeoc.gov/laws/statutes/index.cfm; *see also* Mary Kathryn Lynch, *The Equal Employment Opportunity Commission: Comments on the Agency and its Role in Employment Discrimination Law*, 20 GA. J. INT'L & COMP. L. 89 (1990).

2. *See* Angela D. Morrison, *Duke-ing Out Pattern or Practice After Wal-Mart: The EEOC as Fist*, 63 AM. U. L. REV. 87 (discussing the advantages of EEOC systematic discrimination/pattern or practice cases).

because of a protected characteristic, such as race or sex.[3] This type of case is brought by the EEOC on behalf of a class of individuals who are all alleging similar types of discriminatory conduct against a shared employer.[4]

In order to file a lawsuit, the EEOC must: (1) receive a charge from an alleged victim; (2) notify the employer that a charge has been filed; (3) investigate the charge; (4) determine if reasonable cause for believing discrimination occurred exists; and (5) attempt to conciliate the charge.[5] The requirement of conciliation and review of said requirement by courts was addressed in 2015 by the Supreme Court in *Mach Mining, LLC v. EEOC*.[6] In *Mach Mining*, the Supreme Court held that EEOC conciliation efforts were subject to a narrow form of judicial review.[7] The Court, however, has never addressed the level of judicial review applicable to the EEOC's other requirements, such as investigation, nor has it specifically addressed whether conciliation may be done on behalf of a class.

This Note argues that while the Supreme Court case *Mach Mining* only addressed conciliation, its holding that conciliation is subject to a narrow, deferential form of review should apply to other pre-suit requirements, such as the EEOC's investigatory process.[8] As such, adding additional members to a class after discovery has begun should be permissible so long as the EEOC conducted a pre-suit investigation based on the underlying issues in the case.[9] Applying this level of review is also consistent with the holdings of most Courts of Appeal that have addressed this issue.[10] This Note concludes with a discussion of why the EEOC's ability to add class members later in a lawsuit—without having to first investigate and/or conciliate their claims—is both advantageous

3. *Id.* at 87, 93 (stating that discrimination of this degree effectively becomes "the employer's standard operating procedure") (noting that protected characteristics include religion, race, sex, color, and national origin). To prevail in a pattern or practice claim the plaintiff is required "to demonstrate by a preponderance of the evidence that the discriminatory policy is the employer's 'standard operating procedure—the regular rather than the unusual practice.'" *Id.* In other words, the pattern or practice is "something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature." *Id.*

4. *See generally* DONALD R. LIVINGSTON, LLP, EEOC PATTERN OR PRACTICE LITIGATION (Mar. 2010), https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/2010_eeo_016.authcheckdam.pdf.

5. Morrison, *supra* note 2, at 124; *see also infra* Part II.A.

6. *See generally* Mach Mining, LLC. v. EEOC, 135 S. Ct. 1645 (2015); *see also infra* Part II.B–C.

7. *Mach Mining*, 135 S. Ct. at 1656; *see also infra* Part II.C.

8. *See generally infra* Part III.

9. *Infra* Part III.

10. *See infra* Part II.D.1.

for victims of discrimination and not unduly burdensome for employers.[11]

II. BACKGROUND

A. The EEOC's Process

The EEOC enforces federal employment discrimination statutes.[12] In order to personally file an employment discrimination lawsuit, an employee must typically first file a Charge of Discrimination (charge) with the EEOC.[13] Once a charge is filed, the EEOC conducts an investigation in order to determine its next step.[14] If the EEOC's investigation does not reveal a statutory violation, the employee is given a Notice to Sue, or Notice of Right-to-Sue, (notice) allowing the employee to file an employment discrimination lawsuit in federal or state court.[15] If, however, the EEOC does find a statutory violation, it must first attempt to reach settlement with the employer.[16] This settlement process is called conciliation.[17] Should conciliation efforts fail, the EEOC then may decide to file a lawsuit or give a notice to the employee that he or she can file a lawsuit.[18]

In situations where the EEOC finds reasonable cause to believe that the discrimination alleged in a charge did in fact occur, both the employee and employer are issued a Letter of Determination (reasonable cause or determination letter).[19] A reasonable cause letter informs the parties of their right to participate in conciliation, which is a confidential and informal dispute resolution process.[20] While conciliation is voluntary for both the employer and employee, Title VII requires the EEOC to

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11. *See infra* Part III.B.

12. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 1.

13. *Id.* (stating that all of the statutes enforced by the EEOC—except for the Equal Pay Act—require an employee to file a charge with the EEOC prior to suing an employer).

14. *See* EQUAL EMP'T OPPORTUNITY COMM'N, FILING A LAWSUIT, https://www.eeoc.gov/employees/lawsuit.cfm (last visited May 2, 2018).

15. *Id.*

16. *Id.*

17. EQUAL EMP'T OPPORTUNITY COMM'N, WHAT YOU SHOULD KNOW: THE EEOC, CONCILIATION, AND LITIGATION, https://www.eeoc.gov/eeoc/newsroom/wysk/conciliation_litigation.cfm (last visited May 2, 2018); *see also* Amanda Gray & Michael Moore, *The Next Half-Century: Ways for the EEOC to Improve on How It Does What It Does*, 2016 ARK. L. NOTES 1836 (2016).

18. *Id.*

19. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 14.

20. *Id.* (explaining that conciliation is an optional process for the employee and employer, and any settlement must be agreed to by all parties).

conciliate prior to suing an employer.[21] If conciliation efforts fail, the EEOC then must determine whether to sue on the employee's behalf.[22] The Supreme Court recently weighed in on the reviewability of EEOC conciliation efforts in *Mach Mining, LLC v. EEOC*.[23]

B. Procedural Background of Mach Mining

In *Mach Mining, LLC v. EEOC*, the Supreme Court unanimously held that EEOC conciliation efforts are subject to a narrow form of review by courts.[24] The narrow scope of review "recogniz[ed] the EEOC's extensive discretion to determine the kind and amount of communication with an employer appropriate in any given case."[25] Here, a woman filed a charge alleging that Mach Mining's refusal to hire her was because she was a woman.[26] After completing an investigation, the EEOC found reasonable cause to believe that Mach Mining discriminated against the woman in addition to a class containing other women who had applied for and were denied mining jobs.[27] Accordingly, the agency issued a determination letter.[28] The determination letter promised that someone from the EEOC would contact the parties in order to begin conciliation.[29] About a year later, the EEOC sent Mach Mining a second letter that said the required conciliation efforts had occurred and that further attempts to conciliate would be "futile."[30]

After sending its second letter to Mach Mining, the EEOC filed a federal lawsuit alleging Mach Mining engaged in sex discrimination during its hiring process.[31] The EEOC asserted in its complaint that it had fulfilled all "conditions precedent" to filing the lawsuit, including an attempt to conciliate.[32] Mach Mining refuted this assertion.[33] It claimed

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21. *Id.*
22. *See Id.*
23. Mach Mining, LLC. v. EEOC, 135 S. Ct. 1645, 1656 (2015).
24. *Id.* at 1656; *see also* Stephanie Greene & Christine Neylon O'Brien, *Judicial Review of the EEOC's Duty to Conciliate*, 119 PENN ST. L. REV. 837 (discussing the EEOC's pre-suit requirements and the Supreme Court's holding in *Mach Mining*).
25. *Mach Mining*, 135 S. Ct. at 1649.
26. *Id.* at 1650.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* (second letter stating that "such conciliation efforts as are required by law have occurred and have been unsuccessful and that any further efforts would be futile" (internal quotation marks omitted)).
31. *Id.*
32. *Id.* (internal quotation marks omitted).
33. *Id.*

that the EEOC failed to complete the condition precedent of conciliation.[34] The parties disagreed in both district court and in the Seventh Circuit about whether EEOC conciliation efforts were reviewable.[35] After the district court ruled, agreeing with *Mach Mining*, that the court should review whether the EEOC "had made 'a sincere and reasonable effort to negotiate,'" the EEOC requested and was authorized to make an interlocutory appeal.[36]

Ultimately, the Seventh Circuit held that courts cannot review the EEOC's conciliation effort.[37] The Seventh Circuit reasoned that the statute puts conciliation exclusively in the EEOC's hands and that judicial review of conciliation would "undermine enforcement of Title VII by protract[ing] and complicat[ing] discrimination suits."[38] The Supreme Court then granted certiorari to determine if the conciliation requirement is subject to judicial review, and if so, the extent of that review.[39]

C. Mach Mining Decision

The Supreme Court began its discussion of the reviewability of EEOC conciliation efforts by stating that there is a "strong presumption favoring judicial review of administrative action."[40] It also noted that this is a difficult presumption to rebut.[41] The Court then went on to say that Title VII requires that the EEOC attempt conciliation of charges before suing.[42] Further, the duty to conciliate serves as a condition precedent to

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34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* (quoting EEOC v. Mach Mining, LLC, 738 F.3d 171, 177 (7th Cir. 2013)).

38. *Id.* at 1650–51 (internal citation and quotation marks omitted). While the Seventh Circuit did not really subject the EEOC conciliation efforts in this case to judicial review, it did state that since the EEOC "pled on the face of its complaint that it ha[d] complied with all prerequisites to suit and because its two letters to Mach Mining were facially sufficient to show that conciliation had occurred" that its review of the conciliation efforts was "satisfied." *Id.* In effect, the Seventh Circuit subjected the conciliation efforts to what the Court called "a smidgen of review." *Id.*

39. *Id.* at 1651 (indicating that there was also a circuit split concerning the reviewability of Title VII's conciliation requirement as "[o]ther Courts of Appeals [had] held that Title VII allows judicial review of the EEOC's conciliation efforts . . . without agreeing on what that review entails").

40. *Id.* (citing Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 670 (1986)) (internal quotation marks omitted).

41. *Id.* at 1651 (quoting Dunlop v. Bachowski, 421 U.S. 560 (1975)) (stating that an agency carries "heavy burden" if it wishes to rebut the presumption of reviewability).

42. *Id.* (noting that the EEOC's duty to conciliate is a "key component of the statutory scheme").

filing a lawsuit, which means that a lawsuit can only be filed against an employer if the EEOC is unable to negotiate an acceptable conciliation agreement.[43] The Court also noted that Title VII prerequisites for individuals who wish to file an employment discrimination suit are typically enforced.[44] And if courts require that employees fulfill statutory requirements, then courts must similarly require that the EEOC fulfill such requirements as well.[45]

In tackling the EEOC's claims, the Court explained that while the EEOC's conciliation efforts are entitled to broad discretion, this discretion does not render conciliation efforts unreviewable.[46] Rather, the Court held that the EEOC's broad discretion affects only the stringency of judicial review.[47] Further, the Court dismissed the EEOC's argument that Title VII does not provide standards for a court to apply to conciliation efforts.[48] Not only does Title VII include standards that make it clear that if the EEOC attempted no conciliation efforts that it could not sue, but it also provides standards that dictate the requirements of conciliation efforts.[49]

After examining the statutory language addressing conciliation, the Court explained that conciliation requires the parties to communicate through the "exchange of information and views."[50] In addition, the EEOC must outline the claim to the employer, and allow the employer to respond and come into compliance voluntarily.[51] If the EEOC fails to meet these requirements, it has not fulfilled Title VII's conciliation mandate.[52]

The EEOC may meet its requirement to conciliate as it sees fit.[53] There is no required or court recommended method of conciliation.[54]

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43. *Id.* (citing 42 U.S.C.A. § 2000e-5(f)(1) (West 2018)).

44. *Id.* at 1652 (explaining that trial courts typically dismiss an employee's Title VII claims if he or she has not first filed a charge with the EEOC and then received a notice).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 1654.

54. *Id.* (meaning that in fulfilling its duty to conciliate the EEOC can "use in each case whatever informal means of conference, conciliation, and persuasion it deems appropriate").

Regardless of how the EEOC fulfills its duty to conciliate judicial review is limited to determining whether the EEOC attempted conciliation.[55]

D. EEOC Investigatory Requirements Circuit Split

The Supreme Court's *Mach Mining* decision resolved the circuit split in the United States Courts of Appeals concerning the reviewability of EEOC conciliation efforts.[56] However, the Court did not resolve the confusion regarding whether the EEOC may add individuals to a class after a lawsuit has commenced.[57] When the EEOC adds class members after a lawsuit has begun, it is essentially able to skip the pre-suit requirements to investigate and make a reasonable cause determination for those individuals.[58] Despite the continuing confusion and circuit split, on January 9, 2017 the Supreme Court denied certiorari in *Geo Group, Inc. v. EEOC*, which would have given the Court the opportunity to decide whether the EEOC "must identify and investigate the claim of every individual subjected to alleged discrimination before it can sue an employer."[59]

1. Individuals Need Not be Identified Pre-Suit

The Third, Fourth, Sixth, and Ninth Circuits have all held that the EEOC can conciliate on a class basis.[60] The Sixth Circuit held in *Serrano v. Cintas Corp.* that the EEOC satisfied the conciliation requirement when it notified the employer it was investigating discrimination involving a class of individuals in its determination letter.[61] And the

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55. *Id.* at 1655–56 (stating that the existence of prerequisite notice and identification of the alleged practice and affected employee(s) are reviewable when determining EEOC compliance).

56. Elizabeth Dunn, *No Longer A Paper Tiger: The EEOC And Its Statutory Duty to Conciliate*, 63 EMORY L.J. 455, 461–70 (2013) (arguing that using a "differential standard is inadequate to protect private employers from the EEOC's potential abuse of its statutory duty"); Gregory Tsonis, *Irreconcilable Differences: Conflicting Court Approaches To Assessing The Duty to Conciliate*, 2014 U. CHI. LEGAL F. 665, 669–77 (2014) ("argu[ing] that conciliation efforts should be subject to judicial review and that the three-part reasonableness test is superior to the deferential standard.").

57. *See* Tricia Gorman, *Supreme Court Refuses To Weigh In On EEOC Pre-suit Conciliation Process Geo Group v. EEOC*, 23 NO. 12 WESTLAW J. CLASS ACTION 1 (2017).

58. *See* Kevin McGowan, *Justices Won't Hear Prison Firm's Bid to Block Bias Lawsuit*, 18 NO. 2 BLOOMBERG LAW CLASS ACTION REP. (2017).

59. Gorman, *supra* note 57.

60. Ariz. *ex rel.* Horne v. Geo Group, Inc., 816 F.3d 1189, 1201 (9th Cir. 2016).

61. Serrano v. Cintas Corp., 699 F.3d 884, 904–05 (6th Cir. 2012). The Sixth Circuit also held in *EEOC v. Keco Industries* that the EEOC must attempt to conciliate in "good

Third Circuit held in *EEOC v. Rhone-Poulenc, Inc.* that in a class suit the EEOC does not have to prove it completed individual conciliation attempts for every potential class member.[62] Similarly, the Fourth Circuit held in *EEOC v. American National Bank* that conciliation efforts at one bank branch sufficiently covered similar claims at another branch.[63] However, only the Ninth Circuit has considered this issue post-*Mach Mining*.[64]

In *Arizona ex rel. Horne v. Geo Group, Inc.* the Ninth Circuit held that the EEOC may conciliate on behalf of a class.[65] Here, the EEOC informed the employer Geo Group by letter that the EEOC was investigating not just a single employee's charge, but rather a class that was comprised of women alleging discrimination, harassment, and retaliation because of their sex.[66] A female correctional officer at the Arizona State Prison filed the complaint where she alleged that a supervisor "grabbed her crotch and pinched her vagina."[67] During the course of its investigation, the EEOC discovered that male supervisors created a hostile work environment for the complainant and other female correctional officers.[68] After the EEOC completed its investigation and sent Geo Group a determination letter, the parties participated in conciliation.[69] After conciliation, the EEOC proposed a settlement which would include a "class fund for unnamed class members."[70]

The district court granted summary judgment for Geo Group based in part on the EEOC's failure to conciliate.[71] In doing so, the court "dismissed the claims of 15 women who had not been specifically identified during the course of the investigation or in the Reasonable Cause Determination."[72] The court determined that the EEOC was

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faith" before suing and that the EEOC here "merely broadened the scope" of the original charge by adding additional class members. EEOC v. Keco Industries, Inc., 748 F.2d 1097, 1101 (6th Cir. 1984). It also stated that the addition of class members "reasonably could have been expected to grow out of [the complainant's] complaint of discrimination" and as such the EEOC did not need to complete "additional proceedings." *Id.*

62. EEOC v. Rhone-Poulenc, Inc., 876 F.2d 16, 17 (3d Cir. 1989).

63. EEOC v. Am. Nat'l Bank, 652 F.2d 1176, 1185–86 (4th Cir. 1981).

64. *See Geo Group*, 816 F.3d at 1189.

65. *Id.* at 1194.

66. *Id.* at 1199.

67. *Id.* at 1195.

68. *Id.* at 1195–96 (EEOC finding that three supervisors committed "several egregious acts" against female correctional officers, which included physical and sexual assault).

69. *Id.*

70. *Id.*

71. *Id.* at 1197.

72. *Id.*

required to exhaust conciliation efforts for every complainant.[73] The EEOC appealed the district court's decision that it failed to conciliate in addition to several other issues.[74]

The Ninth Circuit, applying *Mach*, first noted that the EEOC's conciliation efforts are subject to a very limited form of review.[75] It then moved on to the question of whether the EEOC is required to conciliate on an individual basis before filing a class lawsuit.[76] The court held that individual conciliation was unnecessary where the conciliation efforts were based on the whole class of individuals.[77]

The Ninth Circuit further explained that its holding was consistent with the precedent in *Mach Mining*.[78] The court seemed to place particular emphasis on the Supreme Court's statement that the EEOC must identify "what the employer has done and which employees (or what *class of employees*) have suffered as a result."[79] The Ninth Circuit explained that because this language did not create the requirement to individually name and exhaust conciliation efforts, it would not impose additional requirements either.[80]

2. Individuals Must be Identified Pre-Suit

In a pre-*Mach* case, *EEOC v. CRST Van Expedited, Inc.*, the Eighth Circuit held that the EEOC is required to investigate each class member's allegations prior to filing a lawsuit on their behalf, and that class members identified during discovery could not be added to the suit.[81] The employer in this case, CRST Van Expedited, is one of the biggest interstate trucking companies in the nation, and the EEOC discovered serious evidence of sexual harassment in the course of an investigation into its New-Driver Trainer Program.[82] The EEOC discovered this harassment during the investigation of an individual charge of discrimination filed by a female employee of CRST Van Expedited.[83]

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73. *Id.*
74. *Id.* at 1197–98.
75. *Id.* at 1198.
76. *Id.* at 1200.
77. *Id.*.
78. *Id.*
79. *Id.* (emphasis added) (quoting Mach Mining, LLC. v. EEOC, 135 S. Ct. 1645, 1656 (2015).
80. *Id.*
81. EEOC v. CRST Van Expedited, Inc., 679 F.3d 657, 674 (8th Cir. 2013).
82. *Id.* at 664.
83. *Id.* at 666–67.

After completing its investigation, the EEOC sent CRST Van Expedited a determination letter stating "that the EEOC had found reasonable cause to believe that CRST [Van Expedited] subjected [the complainant] and 'a class of employees' to sexual harassment on the basis of gender."[84] The letter also contained an offer to conciliate.[85] CRST Van Expedited, however, felt that conciliation would be futile.[86] Accordingly, the EEOC notified CRST Van Expedited that the agency had fulfilled its required conciliation efforts.[87] After sending CRST Van Expedited the notification, the EEOC filed this lawsuit on behalf of the original claimant and "a class of similarly situated female employees."[88]

In its analysis of the case, the Eighth Circuit explained that while the EEOC has wide discretion, this discretion does not entitle the agency to use information uncovered in discovery to add additional class members to a suit.[89] The court's criticism of the EEOC finding additional claimants during discovery stemmed in part from its concern that the EEOC was using discovery "as a fishing expedition to uncover more violations" of Title VII.[90] The Eighth Circuit also asserted that discovery and subsequent addition of class members—all of whom arise from a single charge—has been permitted only when the EEOC has exhausted every pre-suit requirement for each additional claimant.[91] Yet, the Eighth Circuit cited no precedent for this assertion.[92]

III. ANALYSIS

A. Mach Mining's Holding That Conciliation is Subject to a Narrow Form of Judicial Review is Applicable to Review of Pre-Suit Investigations

Title VII grants the EEOC power to investigate, conciliate, and file suit based upon charges of discrimination, but the statute does not

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84. *Id.* at 667.

85. *Id.*

86. *Id.* at 668.

87. *Id.*

88. *Id.* (internal quotation marks omitted). The EEOC did not identify the members of the class until nearly two years after filing the instant lawsuit. *Id.* at 669. The district court noted that "it was unclear whether the instant Section 706 lawsuit involved two, twenty, or two thousand allegedly aggrieved persons." *Id.* (internal quotation marks omitted).

89. *Id.* at 675 (quoting EEOC v. Jillian's of Indianapolis, IN, Inc., 279 F.Supp.2d 974, 982 (S.D. Ind. 2003)).

90. *Id.* (internal citation and quotation marks omitted).

91. *Id.* at 674.

92. *Id.*

indicate precisely what the agency's pre-suit investigation must entail.[93] A search of the Code of Federal Regulations also fails to produce any regulations requiring the agency to adhere to a specific investigatory process. [94] As such, case law seemingly provides the only guide to determine what activities do and do not fulfill the EEOC's statutorily mandated pre-suit investigation requirement.

While the Supreme Court provided some guidance in *Mach Mining*, that case dealt only with what is required during conciliation rather than what is required for an investigation.[95] Yet, the Court's decision that EEOC conciliation efforts were only subject to a narrow form of judicial review should be similarly applied to other EEOC pre-suit requirements.[96] The Supreme Court has held that courts "construe statutes, not isolated provisions."[97] Accordingly, the Court's holding that conciliation efforts are subject to limited judicial review indicates that investigation efforts should be reviewed using the same standard.[98] This is especially true in the EEOC context because the investigation and conciliation requirements are contained in not only the same statute, but also the same subsection of the statute.[99] Applying, a different level of review to each of the EEOC's pre-suit requirements would not only violate the well-established principal of interpreting statutes as a whole,[100] but also would cause unnecessary confusion when interpreting statutes.[101]

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93. Newsome v. EEOC, 301 F.3d 227, 231 (5th Cir. 2002) ("[A]lthough Title VII provides that the EEOC 'shall make an investigation' of a charge filed it does not prescribe the manner for doing so.").

94. U.S. GOV'T PUBL'G OFFICE, ELEC. CODE OF FED. REGULATIONS, http://www.ecfr.gov/cgi-bin/ECFR?page=browse (last visited May 2, 2018).

95. Mach Mining, LLC. v. EEOC, 135 S. Ct. 1645, 1655–56 (2015).

96. *Id.* at 1656.

97. Gustafson v. Alloyd Co., 513 U.S. 561, 568 (1995).

98. *See Mach Mining*, 135 S. Ct. at 1656.

99. 42 U.S.C.A § 2000(f)(1) (West 2018).

100. *See Gustafson*, 513 U.S. at 568; *see also* Graham County Soil and Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 290 (2010) (refusing to "treat . . . categories as islands unto themselves" because courts must construe statutes as a whole); Kokoszka v. Belford, 417 U.S. 642, 650 (1974) (writing that it "will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature" (quoting Brown v. Duchesne, 60 U.S. 183, 194 (1856)).

101. *See* Al Tech Specialty Steel Corp. v. United States, 633 F. Supp. 1373, 1381 (Ct. Int'l Trade 1986) (explaining that there is a "clear judicial policy" of avoiding "unnecessary confusion").

One way to apply *Mach Mining*'s narrow form of judicial review in the investigation context would be to limit courts to simply ensuring the EEOC's reasonable cause letter indicated that the agency is concerned about a class of individuals and that the EEOC investigated the allegedly discriminatory conduct.[102] These two requirements would give an employer notice that there is more than one employee who may have been discriminated against and would indicate what conduct the EEOC finds potentially discriminatory. In addition, courts should limit review of investigations to whether the EEOC conducted an investigation, not the sufficiency of the investigation.[103]

This application is in line with *Mach Mining*. As the Court in that case said, courts may only review two aspects of conciliation.[104] First, the EEOC must give the employer notice of the charge and inform it of the allegations and who has been affected by the alleged practices.[105] Second, the EEOC must attempt to have either an oral or written discussion with the employer.[106]

Many courts have held that "the nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of that agency."[107] For example, in a post-*Mach Mining* and case of first impression for the Second Circuit, *EEOC v. Sterling Jewelers Inc.*, the court considered the proper scope of review for prerequisite conditions other than conciliation.[108] The *Sterling Jewelers* Court concluded that review of an EEOC investigation should be limited just as the Supreme Court in *Mach Mining* limited the judicial review of conciliation.[109]

Based on this conclusion, the Second Circuit definitively stated that courts may only review the existence, but not the adequacy of an EEOC investigation.[110] The court then went on to say that in order to determine whether the EEOC met its pre-suit requirements the agency must demonstrate its methods allowed the agency to determine whether it believed reasonable cause existed as to the truthfulness of the charge's allegations.[111]

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102. *See* Mach Mining, LLC. v. EEOC, 135 S. Ct. 1645, 1655–56 (2015).

103. EEOC v. Sterling Jewelers Inc., 801 F.3d 96, 98 (2nd Cir. 2015), *cert. denied*, 137 S. Ct. 46 (2016).

104. *Mach Mining*, 135 S. Ct. at 1655–56.

105. *Id.* at 1656.

106. *Id.*

107. Newsome v. EEOC, 301 F.3d 227, 231 (5th Cir. 2002) (quoting EEOC v. Keco Indus., Inc. 748 F.2d 1097, 1100 (6th Cir. 1984)).

108. *See* EEOC v. Sterling Jewelers, Inc., 801 F.3d at 100–01 (citing *Mach Mining*, 135 S. Ct. at 1653).

109. *Id.*

110. *Id.* at 100 (citing *Keco Indus.*, 748 F.2d at 1100 (6th Cir. 1984)).

111. *Id.* at 101.

The Second Circuit's reasoning is not only consistent with the Supreme Court's holding in *Mach Mining*— but it is also sound for additional reasons as well. It respects the discretion Congress gave to the EEOC to investigate claims, reflects the fact that substantive results are Title VII's primary goal,[112] and limits the amount of resources the EEOC must expend.[113] The Second Circuit was also concerned that a less deferential level of judicial review would add a second step to Title VII cases.[114] This second step would require parties to "litigate the question of whether EEOC had a reasonable basis for its initial finding" prior to addressing the merits of a particular case.[115]

The *Sterling Jewelers* Court also said that since the EEOC alleged discrimination across the whole county, the agency must show that its investigation was similarly large in scope.[116] This case demonstrates that the narrow level of review advocated by the Second Circuit is easily applied to the class setting.[117] The Second Circuit's application of this level of review is also not unfair to employers since the EEOC must show that its investigation indicated widespread discrimination occurred.[118]

This narrow form of review does not require the agency to name each individual to the class prior to the commencement of a suit.[119] Instead, the EEOC is able to explain why it believes class-wide discrimination occurred.[120] By reviewing only whether an investigation occurred and if the EEOC has provided some support for evidence of widespread discrimination, the court divorces the individual complainants from the investigation review process. Evidence that some members of a proposed class were discriminated against can indicate that widespread discrimination has occurred, without the burdensome requirement of naming each class member prior to the commencement of a lawsuit.

B. A Deferential Standard of Review Promotes Efficiency

Perhaps the most important consideration when determining what level of review is appropriate is whether the selected level of review is

112. *Id.* (quoting *Mach Mining*, 135 S. Ct. at 1653–54)
113. *Id.* at 101–02 (citing *Keco Indus.*, 748 F.2d at 1100).
114. *Id.* at 101.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*

necessary in order to ensure a discrimination free work environment.[121] This purpose is advanced when the selected level of review promotes efficiency.[122] Narrow review cuts litigation expenses and allows the EEOC to handle a higher caseload.[123] This is especially important as the EEOC's staff continues to shrink.[124]

The agency's resources are drained by its many responsibilities, such as the requirement that it investigate every charge of employment discrimination filed with it.[125] Additionally, Congress has recently "added additional statutory claims to the EEOC's responsibilities, such that it is now responsible for processing charges under the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act."[126] As such, the EEOC must carefully consider which cases to litigate in order to ensure their limited resources are spent in the way that gets the most bang for their buck.

The EEOC's ability to effectively enforce Title VII is further served by the EEOC's ability to bring class actions.[127] For example, in a pattern and practice case, the EEOC need only establish a *prima facie* case before the burden of persuasion is shifted to employers.[128] However, the

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121. Ricci v. DeStefano, 557 U.S. 557, 580 (2009) (stating in particular that a level of review must be "consistent with the important purpose of Title VII—that the workplace be an environment free of discrimination").

122. *See Sterling Jewelers*, 801 F.3d at 101.

123. *See* Kevin A. Sullivan, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 46 ST. LOUIS U. L.J 509, 509 (2002) (arguing that expanded judicial review of arbitration awards harms the arbitration goals of "avoid[ing] the costs and delays inherent in the court system").

124. Pauline T. Kim, *Addressing Systematic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. REV. 1133, 1142 (2015) (discussing the "possibilities and the limitations of the EEOC, acting in its role as enforcer of anti-discrimination laws, to address systemic discrimination in the workplace"). The shrinking EEOC staff is exemplified by this statistic: "in 1980, the agency had 3390 full-time equivalent staff, but by FY 2013, the staffing level had fallen to 2147." *Id.* at 1143.

125. *Id.* at 1143 (stating that the EEOC receives tens of thousands of charges per year, with a "high of nearly 100,000 during FY 2010–12").

126. *Id.*

127. *See* Morrison, *supra* note 2, at 94–108; *see also* Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 707 (2005) (arguing that "[t]he importance of the EEOC in vindicating the public interest is even more pronounced when bringing systemic discrimination cases").

128. Morrison, *supra* note 2, at 94, 96 (naming five ways pattern or practice claims are more advantageous to plaintiffs compared to individual disparate treatment claims:

> First, plaintiffs enjoy a more favorable allocation of burdens of proof and stronger presumptions. Second, the pattern or practice claim is better suited to addressing unconscious or hidden biases. Third, it provides savings in litigation costs to plaintiffs, defendants, and courts. Fourth, courts have greater flexibility

burden of persuasion does *not* shift to the employer in an individual disparate treatment case.[129] The persuasion burden shift requires employers to do more in order to prevail in a discrimination case.[130]

Yet, even if class suits did not more effectively serve the purpose of Title VII than individual ones, presently the agency has chosen to prioritize systematic cases[131] that are brought as class actions.[132] As such, maintaining the current level of efficiency in systematic cases is critical to the agency's success at the moment. The absence of efficiency in litigation increases the amount of resources the EEOC must expend in a particular case while also keeping the agency from focusing on other tasks such as clearing the EEOC's complaint backlog.[133]

Efficiency is not served when challenges to pre-suit actions are dragged out, as defense of such challenges diverts the EEOC's attention and postpones resolution of substantive matters.[134] Further, since EEOC class actions are typically systematic disparate treatment cases, which address structural discrimination and require class-wide conciliation, individual complaints are not the focus of these cases.[135] Essentially, it is unlikely that naming class members pre-suit will make employers more likely to resolve claims during the conciliation process.

The Supreme Court's holding in *Wal-Mart Stores, Inc. v. Dukes* also plays a role in the EEOC's decision to focus on systematic cases.[136] This is because the EEOC, unlike employees bringing private suits, is not

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at the remedial phase once a pattern or practice has been demonstrated. Finally, plaintiffs can seek broader discovery and relief by asserting a pattern or practice claim rather than an individual disparate treatment claim.).

129. Morrison, *supra* note 2, at 97.

130. *Id.*

131. Systematic discrimination is defined as:

> An ingrained culture that perpetuates discriminatory policies and attitudes toward certain classes of people within society or a particular industry, profession, company, or geographic location" and "[e]xamples . . . include excluding women from traditionally male jobs, holding management trainee programs on evenings and weekends, and asking unlawful preemployment screening questions.

Systematic Discrimination, BLACK'S LAW DICTIONARY (10th ed. 2014).

132. Kim, *supra* note 124, at 1146.

133. *Id.*

134. *Id.* at 1153.

135. *Id.* at 1153 (emphasizing that the focus of such cases are "workplace structures that are systematically biased against certain groups . . . the conciliation that is required should occur on a class-wide basis. And if the parties cannot resolve the allegations of systemic discrimination, efforts to resolve the claims of affected individuals are beside the point.").

136. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 359–60 (2011) (holding that there was no commonality between the nationwide class of women alleging promotion and pay discrimination).

subject to the class action requirements in FED. R. CIV. PRO. 23.[137] *Wal-Mart* made it considerably more difficult for a class of employees to meet FED. R. CIV. PRO. 23(a)(2)'s commonality requirement.[138] Accordingly, the agency now has an additional advantage in class cases over individuals because it is "unaffected by the heightened 'commonality' standard articulated in *Wal-Mart*."[139] Because the EEOC is "unaffected" many "observers have argued that the EEOC should aggressively pursue systemic cases in order to compensate for the effect of *Wal-Mart* on private class actions."[140]

Some employers have argued for heightened judicial review of EEOC pre-investigation requirements.[141] This is likely, at least in part, an attempt to weaken the EEOC's ability to litigate for a class, even though class litigation also benefits employers.[142] For example, defendants, as well as the EEOC, benefit from the lessened litigation expenses class actions may require.[143] In addition, defendants in particular benefit from the preclusive effect that a decision favorable to the employer would have on future claims.[144] Further, defendants in a class action need only defend the employment practice at issue in one suit, rather than in numerous individual lawsuits.[145]

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137. Kim, *supra* note 124, at 1149.

138. *See generally Dukes*, 564 U.S. at 249–60 (citing FED. R. CIV. PRO. 23(a)(2)); Sherry E. Glegg, *Employment Discrimination Class Actions: Why Plaintiffs Must Cover All Their Bases After the Supreme Court's Interpretation of Federal Rule of Civil Procedure 23(a)(2) In Wal-Mart v. Dukes*, 44 TEX. TECH. L. REV. 1087 (2012) (arguing that Dukes is pro-business and "will deter class actions of large corporations"); Suzette M. Malveaux, *How Goliath Won: The Future Implications of Duke v. Walmart*, 106 NORTHWESTERN U. L. REV. COLLOQUY 34 (2011) (arguing that "the Court drew a boundary line that favors large, powerful employers over everyday workers alleging systemic discrimination").

139. Kim, *supra* note 124, at 1149.

140. *Id.* (citing EEOC's Systemic Program Set to Fill Gap in Private Class Actions, Attorneys Predict, 244 DAILY LAB. REP. (BNA) A-5 (Dec. 19, 2012); Melissa Hart, *Civil Rights and Systemic Wrongs: The Future of Employment Discrimination Class Actions*, 32 BERKELEY J. LAB. & EMP. L. 455 (2011); Barry A. Hartstein et al., Annual Report on EEOC Developments: Fiscal Year 2011, THE LITTLER REP. 5 (January 2012), http://www.littler.com/files/press/pdf/TheLitterReportAnnualReportOnEEOCDevelopmentsFiscalYear2011_0.pdf, archived at http://perma.cc/9CP5-KT7G.

141. *See, e.g.*, Mach Mining, LLC. v. EEOC, 135 S. Ct. 1645, 1655–56 (2015) (Mach Mining arguing that a court should "do a deep dive into the conciliation process," rather than apply a deferential review).

142. *See* Morrison, *supra* note 2, at 100–04.

143. *Id.* at 100.

144. *Id.* at 104.

145. *Id.* at 104 (noting that the employer's liability may be determined in only one class action, as opposed to "each affected individual bringing her own suit").

IV. CONCLUSION

The Eighth Circuit's holding in *CRST Van Expedited*[146] is out of step from the most recent Supreme Court precedent addressing the EEOC's pre-suit obligations. The Court in *Mach Mining* made it clear that the EEOC was entitled to a broad level of discretion, and that courts were severely restricted when reviewing conciliation efforts.[147] Under *Mach Mining*, courts examining conciliation efforts are limited to reviewing whether the reasonable cause letter: (1) identifies the allegedly discriminatory employer conduct and the individual or class of individuals affected, and (2) whether the EEOC attempted to have a discussion with the employer in order to give it an opportunity to correct the allegedly discriminatory behavior.[148] Similar restrictions should apply to other EEOC pre-suit obligations, such as its requirement to conduct an investigation.[149]

In fulfilling Title VII's investigation requirement, it should be enough if the EEOC's reasonable cause letter indicates that the agency is concerned about a class of individuals and that the EEOC investigated the allegedly discriminatory conduct.[150] The agency should not be required to first identify and then investigate and conciliate for each member of a class when the same type of discriminatory conduct exists for each class member.[151] Limiting the level of judicial review is particularly important in the class context because requiring investigation and/or conciliation for each individual would hurt the EEOC's ability to bring class suits and thus would harm victims of discrimination who did not chose to come forward until later in the EEOC process.[152] Further, the limited judicial review is not unduly burdensome to employers, as they are put on notice upon receiving a reasonable cause letter that the EEOC is interested in not just one victim of discrimination, but instead a class of such individuals.[153] An employer, therefore, knows prior to conciliation and the filing of a lawsuit whether it must defend against an individual or class.[154]

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146. EEOC v. CRST Van Expedited, Inc., 679 F.3d 657, 674 (2013).
147. *See supra* Part II.C–D.
148. *See* Mach Mining, LLC. v. EEOC, 135 S. Ct. 1645, 1655-56 (2015); *see also supra* Part II.C–D.
149. *See supra* Part III.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*