

HOW MCLANE V. EEOC MAY AFFECT EMPLOYER SUBPOENA RESPONSES

This article first appeared in [Law360](#), April 11, 2017

What standard should apply when an appellate court reviews a district court's decision on whether to enforce a subpoena issued by the U.S. [Equal Employment Opportunity Commission](#)? That is the question recently decided by the [U.S. Supreme Court](#) in the case of *McLane Co. Inc. v. EEOC*, 581 U.S. ____ (2017). All eight justices agreed that the proper standard of review of an EEOC subpoena enforcement decision is abuse of discretion, not de novo review. The only discord among the justices was whether the case needed to be remanded to the Ninth Circuit for analysis under the correct standard of review.

The question now becomes whether the court's ruling will affect how employers and employment lawyers respond to EEOC subpoenas. For some, the answer may be yes.

EEOC's Broad Subpoena Power

The EEOC relies on its broad investigative authority to request a great deal of prelitigation information from employer-respondents when investigating charges of discrimination. Generally, the EEOC is entitled to inspect and copy "any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by Title VII and is relevant to the charge under investigation." 42 U.S.C. 2000e-8(a). When an employer refuses to provide requested information or fails to cooperate in the investigation, the EEOC has the power to issue administrative subpoenas demanding production of the relevant information.

The relevance standard for information subpoenaed by the EEOC is relatively low, as it need only be information that "might throw light upon" the issues in the charge. *EEOC v. United Air Lines*, 287 F.3d 643 (7th Cir. 2002). The broad scope of information sought by the EEOC through its subpoena power can be frustrating for employers who often feel like the agency is on a "fishing expedition." Consequently, one or both of the parties may seek judicial assistance in either enforcing or quashing the subpoena.

Expanded Scope of EEOC Investigation Led to High Court Subpoena Decision

In *McLane*, a female employee named Damiana Ochoa filed a discrimination charge with the EEOC against her former employer, [McLane Company](#), a grocery distributor. Ochoa had worked for eight years as a cigarette selector, which required her to lift, pack and move large bins of products in McLane's distribution center in Arizona. McLane had a company policy whereby it required physical evaluations of all new hires and all employees returning from medical leave. After Ochoa took three months of maternity leave, McLane required that she undergo a physical evaluation that tested her range of motion, resistance and speed. Ochoa underwent the physical evaluation three times, and failed each time. The company fired her.

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Ochoa filed a discrimination charge alleging, among other things, that she had been terminated on the basis of her gender. As part of its investigation, the EEOC asked the company to provide the agency with information about the physical evaluation test and individuals who had been asked to take the test. McLane provided a list of individuals who had been evaluated, providing each individual's gender, role at the company, reason for the test and evaluation score. The company refused, however, to provide "pedigree information," such as the individuals' personal identifying information, such as name, Social Security number, last known address and telephone number.

After the EEOC learned that the company applied its physical evaluation policy nationwide, the agency expanded the scope of its investigation both geographically and substantively. It asked McLane to provide information not only for the Arizona division where Ochoa worked but also for all of the company's grocery divisions nationwide. It also expanded its information requests beyond gender-related inquiries to ask for information potentially relevant to age discrimination. After the company failed to provide the pedigree information related to the EEOC's expanded investigation, the EEOC issued subpoenas. The company refused to comply, so the EEOC sought to enforce its subpoenas in the Arizona district court.

District Court Quashed Subpoenas, but Ninth Circuit Reversed

The district court ruled that the pedigree information was not relevant to the discrimination charge, as "an individual's name, or even an interview he or she could provide if contacted, simply could not shed light on whether the [evaluation] represents a tool of ... discrimination." Accordingly, the district court refused to enforce the EEOC's subpoenas.

The EEOC appealed to the Ninth Circuit. Under applicable Ninth Circuit precedent, the court stated that it was bound to review the district court's decision to quash the subpoenas de novo. The Ninth Circuit determined that the district court was wrong to quash the subpoenas finding that the pedigree information was relevant to the EEOC's investigation. In a footnote, the Ninth Circuit questioned why it was the only appellate circuit to conduct a de novo review of issues related to the enforcement of administrative subpoenas, noting that its sister circuits uniformly applied abuse of discretion review.

The U.S. Supreme Court granted certiorari to resolve the dispute among the circuit courts on whether the proper standard of review is de novo, as was applied by the Ninth Circuit, or an abuse of discretion review, which other circuits applied.

Abuse of Discretion Review Applies

The Supreme Court decided that a district court's decision whether to enforce an EEOC subpoena should be subject to a deferential review, namely whether the district court had abused its discretion, rather than a de novo review. Recognizing that the Title VII provision that grants the EEOC subpoena power is the same as the authority granted to the [National Labor Relations Board](#) to issue subpoenas, the court looked to the standard of review used when considering NLRB subpoena enforcement decisions. The court found that every circuit that had considered that question had ruled that a district court's

decision whether to enforce an NLRB subpoena should be reviewed for abuse of discretion. In addition, almost every circuit other than the Ninth had applied the same deferential review to a district court's decision whether to enforce an EEOC subpoena. Consequently, this "long history of appellate practice" carried weight with the justices for adopting an abuse of discretion standard in this case.

In addition, the court focused on the case-specific nature of each EEOC subpoena enforcement decision. A district court must consider whether the evidence sought by the EEOC is relevant to the specific charge at issue and whether the subpoena is unduly burdensome in light of the circumstances. Believing that the district court is better-suited than the courts of appeals to address these kinds of "fact-intensive, close calls," the court stated that the abuse of discretion standard of review was appropriate.

Case Remanded to Ninth Circuit

The Supreme Court remanded the EEOC's subpoena enforcement appeal back to the Ninth Circuit so that it can apply the appropriate standard of review. The court specifically stated that in its review under the abuse of discretion standard, the Ninth Circuit may, if it deems appropriate, consider the employer's arguments regarding whether the EEOC's subpoenas are unduly burdensome.

Justice Ruth Bader Ginsberg, who agreed with her fellow justices on the appropriate standard of review, differed on the decision to remand the case to the Ninth Circuit. She concluded that the Ninth Circuit reversed because the district court had made an error of law in demanding that the EEOC show more than relevance to get its subpoena enforced and a question of law was ordinarily reviewable de novo. Justice Ginsberg would have let the Ninth Circuit's reversal stand without remand.

What Will the Ninth Circuit Decide On Remand?

It is never clear what a court will do on remand, but some signals suggest that the Ninth Circuit will again reverse the district court decision not to enforce the EEOC's subpoenas. Because the Ninth Circuit earlier found that the district court made an error of law in deciding that the information was not relevant to the EEOC's investigation, it is likely that it will continue to hold that opinion, even under an abuse of discretion standard. The Supreme Court made clear that the EEOC still retains its broad authority to seek and obtain evidence, noting that the term "relevant" is to be understood "generously" so as to permit the EEOC "access to virtually any material that might cast light on the allegations against the employer." That reaffirmation of the relevancy issue may lead the Ninth Circuit to again reverse the district court.

What the Ruling Means for Employers and Practitioners

Battling the EEOC over a subpoena can be time-consuming and expensive. Because the standard of review at all circuit courts of appeal is now abuse of discretion, there will be less chance of overturning the district court's decision on appeal. Consequently, the real battle over subpoena enforcement will take place in the trial court.

Depending on the circumstances, it may make sense to try to negotiate a resolution, if possible, with the EEOC in the face of an overly broad request for information. If an agreement can be reached before a subpoena is even issued, employers may avoid the expense and publicity that may arise from a subpoena enforcement dispute in court. But, that is not to say that employers should just turn over everything requested by the

EEOC. When the agency's information requests are not relevant to the charge and appear to be a fishing expedition, it remains viable to challenge the EEOC's subpoenas on grounds that they are not relevant, are unduly burdensome on the employer, or are sought for an improper purpose. But practitioners should be prepared to make all necessary arguments at the district court level, as it will be harder to get that decision overturned on appeal.

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