

REVISITING ENFORCEMENT OF EEOC SUBPOENAS AT 9TH CIRC.

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Whether the standard of review is de novo or abuse of discretion, the Ninth Circuit came to the same conclusion: The district court erred in denying enforcement of an administrative subpoena issued by the U.S. [Equal Employment Opportunity Commission](#). In April 2017, the [U.S. Supreme Court](#) decided that the Ninth Circuit had erroneously applied a de novo standard of review in *EEOC v. [McLane Company](#)*, and remanded the case back to the appellate court to apply an abuse of discretion standard of review. Unsurprisingly, the Ninth Circuit relied on its earlier analysis to once again conclude that the district court should have enforced the EEOC's subpoena.

Employee Contact Information Was Relevant to Investigation

In the *McLane Company* case, a former employee, Damiana Ochoa, alleged that *McLane Company* discriminated against her on the basis of sex when it terminated her after she failed to pass a required physical strength test to return to work following maternity leave. Before her termination, Ochoa had worked for the company for eight years in a job that required that she lift, pack and move large bins of products. The company alleged that it required a successful physical capability test from both prospective employees and existing employees returning from leave and that Ochoa's inability to demonstrate her physical capabilities resulted in her termination.

After Ochoa filed a sex discrimination charge with the EEOC, the agency requested that *McLane Company* provide information related to its physical evaluation test and individuals who had been asked to complete the test. Although the company provided a list of individuals who had been subject to the test, along with the individuals' gender, position at the company, reason for the test, and test score, it did so anonymously, refusing to provide the individuals' names, last known addresses, Social Security numbers, and telephone numbers. The EEOC issued a subpoena to *McLane Company* seeking those additional details in what it called "pedigree information." The company refused, and the EEOC sought to enforce its subpoena in district court.

The district court denied to enforce the subpoena, ruling that the pedigree information was not relevant "at this stage" of the EEOC's investigation. The district court suggested that if the information already produced by the company later indicated systemic discrimination, the pedigree information might become relevant and "necessary" at that point, entitling the EEOC to its production.

On appeal and remand, the Ninth Circuit held that the district court committed legal error in its analysis regarding enforcement of the EEOC's subpoena. The Ninth Circuit cited Title VII, which provides the EEOC with the right to obtain evidence that "is relevant to the charge under investigation." If the EEOC shows that the requested information is relevant to the charge, then the court should enforce the subpoena. As stated by the

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Ninth Circuit, “The EEOC’s need for the evidence — or lack thereof — simply does not factor into the relevance determination.”

Court’s Incorrect Legal Standard Was Abuse of Discretion

Because the Ninth Circuit determined that the district court had denied enforcement of the EEOC subpoena based on an “incorrect view of the legal standard governing relevance,” it ruled that the district court had necessarily abused its discretion when it held that the pedigree information was not relevant to the EEOC’s investigation. The appellate court stated that the EEOC was entitled to contact those individuals who had been subjected to McLane Company’s physical strength test to learn whether other female employees and applicants had been subjected to adverse employment actions after failing the test when similarly situated male employees had not.

The Ninth Circuit opined that speaking with those individuals could cast light on the allegations against the company, either positively or negatively, and could enable the EEOC to better assess whether the use of the test had resulted in a pattern or practice of disparate treatment.

Final Decision on Subpoena Yet to Come

The Ninth Circuit sent the subpoena enforcement issue back to the district court for further proceedings. It specifically stated that McLane Company could argue that the EEOC’s request for pedigree information was unduly burdensome. If the company persuades the district court that complying with the subpoena would be unduly burdensome, the district court could again deny enforcement of the subpoena.

In addition, the Ninth Circuit left open a second category of evidence that was not part of the appeal, namely information specifying the reasons that test takers were terminated. Although the district court had previously declined to enforce that part of the EEOC’s subpoena as well, it did not state its reasons for so ruling, prompting the Ninth Circuit to leave that issue for the district court to decide on remand as well. With numerous issues yet to be argued and decided, the enforcement of the EEOC’s subpoena is still up in the air.

Challenging Subpoenas Based on Relevance and Undue Burden

As a result of the Ninth Circuit’s opinion, employers challenging an EEOC subpoena will need to focus on the relevance of the requested information and the burden it imposes on the organization that must gather and provide it. Because the relevance standard is far broader at the EEOC’s investigation stage than at trial, it can be difficult for employers to win the relevancy argument. Only if the information would not cast any light on the allegations against the employer will it likely be denied for lack of relevance. Still, evidence concerning practices other than those specified in the charge could be challenged on relevance grounds to prevent fishing expeditions.

Depending on the type and volume of information sought, employers may be able to challenge an EEOC subpoena as unduly burdensome. Employers should consider this potential argument early in the investigation, when the information is first requested by the EEOC rather than objecting later after the company has provided some or most of the requested information already. Making the undue burdensome argument typically

requires a showing that compliance with the subpoena will threaten the normal operation of the business. This may require a detailed affidavit from the individual(s) who would have to gather the information explaining the difficulty, time and personnel requirement, and/or expense of complying with the subpoena.

Showing a concrete and significant financial and administrative burden on the company vis-à-vis the tangential nature of the requested information may provide a district court judge with grounds to modify or quash an unduly burdensome subpoena. A district court's decision to enforce or quash an administrative subpoena should generally be upheld under an abuse of discretion standard, provided the district court applies the appropriate legal standard and issues findings and conclusions that allow for appropriate appellate review.

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