

EEOC Subpoenas are Subject to the Abuse of Discretion Standard of Review

by Melissa Raphan

On April 3, 2017, the U.S. Supreme Court issued its decision in *McLane Co. v. EEOC*, addressing how federal courts review subpoenas that the EEOC issues while investigating charges of employment discrimination. *McLane* involved a claim of gender discrimination from an employee who was fired for failing to pass a physical exam after returning from maternity leave. During the EEOC's investigation into this gender claim (and the EEOC-initiated charge into age claims arising out of the same physical exam), the agency asked the employer to provide "pedigree information," meaning the names, Social Security numbers, addresses, and telephone numbers of all employees asked to take physical exams. The employer provided an anonymous list of employees that included gender, job duty, exam score, and the reason for being asked to take the exam, but it refused to provide other requested information.

The EEOC then issued subpoenas demanding the information. When the employer refused to provide it, the EEOC moved to enforce its subpoenas in federal court. The trial court determined that the subpoenaed information was not relevant to the underlying charges of discrimination, but the U.S. Court of Appeals for the Ninth Circuit reversed. When the case got to the Supreme Court, the issue was whether the Ninth Circuit should have reviewed the trial court's decision under a deferential "abuse of discretion" standard, as opposed to the more rigorous "de novo" standard. The Court settled on the former and reversed the Ninth Circuit.

The Supreme Court emphasized two key points in support of its decision. First, the Court noted a longstanding practice in federal appellate courts of analyzing these types of orders deferentially. Indeed, when Congress amended Title VII to allow the EEOC to issue subpoenas, it did so against an already-established trend of appellate deference to trial courts that reviewed similar subpoenas from the National Labor Relations Board.

The Court's second key point was that trial courts are particularly well suited to analyze the specific facts of a given case and determine whether a particular subpoena is relevant and not unduly burdensome. Accordingly, allowing an appellate court to conduct

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its own analysis of a subpoena would be an inefficient use of judicial resources.

Practical Considerations for Employers

McLane confirms the legal standards that trial courts must use when reviewing EEOC subpoenas. Although the EEOC has broad authority to obtain evidence that might cast light on allegations of discrimination, there are limits to that authority. Specifically, the requested evidence must relate to the matter under investigation, and producing that evidence must not impose undue burdens on an employer. Employers (and their legal counsel) should carefully review EEOC subpoenas before determining what to produce.

Many employers have had the experience of responding to charges of discrimination in which the EEOC seeks information that far exceeds the scope of the underlying charge. This case is a good reminder that there are limits to the EEOC's subpoena power.

The practical effect of this decision for employers is twofold. First, it is a good reminder that the EEOC does not enjoy unfettered discretion to obtain information about other current and former employees. Second, the battleground to push back on the EEOC's subpoena is in the district court.

The full opinion in *McLane Co. v. EEOC*, is available [here](#).