

# An Employer's Guide to EEOC Systemic Investigations and Subpoena Enforcement Actions

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# AN EMPLOYER'S GUIDE TO EEOC SYSTEMIC INVESTIGATIONS AND SUBPOENA ENFORCEMENT ACTIONS

## I. INTRODUCTION

Over the past year we have continued to witness the EEOC engage in broad based investigations as part of its systemic initiative, including successfully relying on subpoena enforcement actions in circumstances where an employer fails and/or refuses to respond to EEOC requests for information, documents and/or data.

The June 20, 2011, decision by the U.S. Supreme Court in *Dukes v. Wal-Mart*, which placed limits on the potential scope of employment discrimination class actions, may embolden the EEOC to expand its reach involving class-type investigations and related litigation because the EEOC is not bound by the procedural hurdles to class actions faced by plaintiffs under Rule 23 of the Federal Rules of Civil Procedure.

This paper initially focuses on an overview of systemic and/or pattern or practice investigations by the EEOC and the legal basis for commencing such investigations. The basic standard concerning the permitted scope of the EEOC's investigative authority, as discussed in the U.S. Supreme Court's decision in *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984), is next examined, followed by a review of the applicable law and rules regarding the EEOC's subpoena authority and procedural steps required to challenge a subpoena prior to the EEOC initiating a subpoena enforcement action.

The discussion then turns to lessons learned from recent subpoena enforcement actions initiated during the course of an EEOC investigation, including review of recent case authority dealing with: (1) requests for computerized personnel data; (2) requests for information involving personnel actions different from the underlying charge; (3) requests for information over a broad geographical area; (4) the EEOC's authority to conduct systemic investigations even after a charging party settles his/her charge and/or initiates legal action; and (5) subpoenas issued to third parties by the EEOC.

While the courts have shown significant deference to the EEOC in subpoena enforcement actions, because "relevance" is far broader in the investigation stage where issues of "admissibility" are not in play, various courts have denied enforcement of EEOC subpoenas when the EEOC cannot in some way tie the request to the charge under investigation. Courts also have struck down subpoenas where the employer can sufficiently demonstrate with particularity that the subpoena is unduly burdensome.

The discussion below is designed to assist employers in understanding the broad scope of authority given to the EEOC, but also provide some helpful guidance when employers seek to modify or limit the scope of an EEOC subpoena.

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## II. RECENT FOCUS ON SYSTEMIC INVESTIGATIONS

In March 2006, as part of the EEOC's Systemic Task Force Report, the EEOC reported that "combating systemic discrimination should be a top priority at [the] EEOC and an intrinsic, ongoing part of the agency's daily work." While the EEOC had been involved in systemic investigations long before the Task Force was formed, the EEOC clearly has been committed to expanding this initiative since 2006. The EEOC's Systemic Task Force defined systemic cases as "pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location."

In the 2010 Performance and Accountability Report, issued November 15, 2010, (following the end of the EEOC's FY 2010), the EEOC underscored its continued "concerted effort to build a strong national systemic enforcement program." As an example, at the end of FY 2010, the EEOC was involved in 465 systemic investigations, involving more than 2,000 charges. Included among this group were 39 Commissioner-initiated charges, compared with only 15 Commissioners' charges in investigation as of March 2006, when the initiative began. As of the end of FY 2010, EEOC field offices completed work on 165 systemic investigations, resulting in 20 settlements or conciliation agreements, which included \$6.7 million in settlements of such actions. The EEOC also reported that reasonable cause determinations were issued in 50 systemic investigations and referred to field legal divisions for consideration of litigation.

For FY 2010, the EEOC filed 250 merit-based lawsuits across the U.S., and 38% (96 of 250) involved "multiple-victim" suits, which is the term used by the EEOC in its annual Performance and Accountability Report in describing lawsuits filed on behalf of more than one individual. The EEOC characterized 20 of these lawsuits as "systemic cases expected to directly impact large numbers of individuals." During FY 2010 the EEOC also filed 21 subpoena enforcement actions that typically were tied to systemic investigations. Over the past year, since August 2010, the EEOC has filed at least 17 subpoena enforcement actions, most of which focus on broad based requests for information. For various employers, the subpoena enforcement actions have included statewide, and even

nationwide, requests for data and information frequently spanning a period of at least four years.

### A. EEOC Authority to Conduct Class Type Investigations and Initiate "Pattern or Practice" Litigation

Systemic investigations can arise based on one of following: (1) a charge is filed as a "pattern or practice" claim and/or the EEOC expands an individual charge into a "pattern or practice" investigation; (2) the EEOC initiates on its own authority a "directed investigation" involving potential age discrimination or potential equal pay violation; or (3) the EEOC commences an investigation based on the filing of a "Commissioner's Charge."

The EEOC's authority to investigate systemic discrimination stems from its broad legislative mandate. The EEOC has authority to file lawsuits against an employer under either Section 706 or Section 707 of Title VII of the Civil Rights Act of 1964.<sup>1</sup> Section 707 expressly provides authority to file "pattern or practice" (*i.e.*, class type) lawsuits against an employer. While the U.S. Supreme Court's recent decision in *Dukes v. Wal-Mart* may dramatically change the landscape for employment discrimination class actions under Rule 23 of the Federal Rules of Civil Procedure, the EEOC may be emboldened by the ruling because the EEOC, unlike private litigants, is not required to meet the stringent requirements of Rule 23 to initiate a pattern or practice lawsuit against an employer.

To the dismay and frustration of many employers, various courts also have permitted the EEOC to expand the scope of their investigations, and convert an individual charge to a "pattern or practice" investigation and/or lawsuit against an employer. As the U.S. Court of Appeals for the Seventh Circuit explained in *EEOC v. Caterpillar*, the EEOC "may, to the extent warranted by an investigation reasonably related in scope to the allegations of the underlying charge, seek relief on behalf of individuals beyond the charging parties who are identified during the investigation."<sup>2</sup> Therein, the appellate court permitted a class-type lawsuit to proceed that stemmed from an individual charge of harassment, stating, "If courts may not limit a suit by the EEOC to claims made in the administrative charge, they likewise have no business limiting the suit to claims that the court finds to be supported by the evidence obtained in the Commission's investigation."

1 42 U.S.C. §2000e-5 and 42 U.S.C. §2000e-6. Similarly, Section 107(a) of the ADA, 42 U.S.C. §12117(a), incorporates these provisions, "The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment." The ADEA and Equal Pay Act also permit broad based systemic investigations, as further discussed *infra note 5* and accompanying text.

2 *EEOC v. Caterpillar, Inc.* 409 F.3d. 831 (7th Cir. 2005). As discussed below, however, one court recently denied enforcement of a subpoena seeking nationwide data based on the EEOC expanding the scope of its investigation involving two individual ADA charges. The court denied enforcement of the subpoena, in relevant part, because the underlying discrimination charges did not include "pattern or practice" allegations of discrimination. See *EEOC v. Burlington Northern Santa Fe Railroad*, Case No. 1:10-cv-03008, Docket No. 10 (Transcript of Show Cause Hearing) (D. Colo. Feb. 3, 2011). The EEOC filed a Notice of Appeal to the Tenth Circuit on March 23, 2011, and the matter remains pending on appeal. (*Id.*, Docket No. 13). See discussion, *infra*, at pages 10 – 11.

Title VII also provides that EEOC Commissioners have authority to issue charges on their own initiative (*i.e.*, Commissioner Charges).<sup>3</sup> In the leading case discussing Commissioner charges, the U.S. Supreme Court underscored that it is “crucial that the Commission’s ability to investigate charges of systemic discrimination not be impaired,” and based on amendments to Title VII in 1972, “Congress made clear that Commissioners could file and the Commission could investigate such charges.”<sup>4</sup> Further, in several cases involving successful employer challenges to broad based requests for information or data by the EEOC, the court commented that it would have been more inclined to compel production of such information or data from the employer had the EEOC based its subpoena enforcement action on a Commissioner’s charge.<sup>5</sup>

Systemic investigations also may arise under both the Age Discrimination in Employment Act (ADEA) and Equal Pay Act (EPA). Under both statutes, the EEOC can initiate what is referred to as a “directed investigation,” even in the absence of a charge of discrimination. Specifically, the EEOC, on its own authority, is authorized to commence an investigation, seeking information and/or data that may include broad based requests for information,<sup>6</sup> and initiate a lawsuit for violations of the applicable statute.<sup>7</sup>

## B. Scope of EEOC’s Investigative Authority

The starting point for any EEOC request for information is the applicable provision in Title VII:

In connection with any investigation of a charge filed under section 2000e-5 of this title, the commission or its designated representative shall at all reasonable times have access to, for the purposes of examination,

and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.<sup>8</sup>

The key issue is the manner in which the courts have interpreted the scope of the EEOC’s investigative authority. Clearly the leading case involving EEOC requests for information is the U.S. Supreme Court’s decision, *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984), which involved an employer’s failure to respond to an EEOC subpoena issued based on a Commissioner’s charge. While the typical approach dealing with EEOC enforcement actions is for the EEOC to file a subpoena enforcement action in federal court, the employer in that case filed suit to quash the subpoena and enjoin the EEOC’s investigation. This was soon followed by the EEOC enforcement action, and the two cases were consolidated before the district court. After the court denied the employer’s request and enforced the subpoena, the appellate court reversed on the basis that the Commissioner’s charge did not specify sufficient facts. In reversing the Eighth Circuit, the Supreme Court enforced the subpoena.

The EEOC consistently has relied on *Shell Oil* to argue that the concept of “relevancy” in Commission investigations is far broader than that provided under the Federal Rules of Civil Procedure. The Court in *Shell Oil* underscored that although the EEOC is “entitled to access only to evidence ‘relevant’ to the charge under investigation, ... courts have generously construed the term ‘relevant’ and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer.” The Court further stated, “[i]t is crucial that the Commission’s ability to investigate charges of systemic discrimination not be impaired.”<sup>9</sup>

3 42 U.S.C. §2000-e-5(b) (a charge may be filed either “by or on behalf of a person claiming to be aggrieved, or by a member of the Commission”).

4 *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984).

5 42 U.S.C. §2000e-8(a). *See, e.g., EEOC v. United Airlines*, 287 F.3d 643 (7th Cir. 2002); *EEOC v. Southern Farm Bureau Cas. Ins. Co.*, 271 F.3d 209 (5th Cir. 2001); *EEOC v. UPMC*, Case No. 2:11-mc-00121, Docket #13 at 6 (W.D. Pa. May 24, 2011).

6 As an example, in one recent case, the court enforced a broad based request for nationwide data stemming from an EPA directed investigation. *See EEOC v. Performance Food Group Company LLC*, Case No. 1:09-cv-02200, Docket No. 29 (Memorandum and Order re Subpoena Enforcement) (D. Md. Feb. 18, 2010).

7 *See, e.g.*, 29 U.S.C. § 626(a) of ADEA (“the Equal Employment Opportunity Commission shall have the power to make investigations... for the administration of this chapter”); 29 C.F.R. §1626.15 (ADEA: “the Commission and its authorized representatives may investigate and gather data... advise employers... with regard to their obligations under the Act... and institute action... to obtain appropriate relief”); 29 U.S.C. §211 of FLSA, which includes the prohibitions relating to the EPA, 29 U.S.C. Sec. 206(d) (“The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment... as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter”); 29 C.F.R. §1620.30 (EPA: “the Commission and its authorized representatives... may investigate and gather data... advise employers regarding any changes necessary or desirable to comply with the Act... [and] initiate and conduct litigation”). *See also* EEOC Compliance Manual, §22.7.

8 The EEOC follows an identical approach regarding investigations under Title VII, ADA and GINA. *See* 29 CFR §1601.16. Similar language applies to investigations under the ADEA and EPA. *See supra* note 7. In subpoena enforcement actions based on individual-initiated charges under the ADEA, the EEOC also appears to follow an approach similar to Title VII subpoena enforcement actions. *See, e.g., EEOC v. Kable News Company*, Case No. 1:10-cv-05234, Docket No. 1 (Application for an Order to Show Cause Why Subpoena Should not be Enforced)(N.D. Ill, Filed Aug. 19, 2010). The EEOC also has persuasively argued that a directed charge under the ADEA or EPA authorizes a broader investigation based on the language of the applicable statute. This view is best illustrated by the EEOC’s approach in a recent subpoena enforcement action under the EPA, in which the court adopted the EEOC’s view. (*See EEOC v. Performance Food Group Company, supra* note 6).

9 In view of recent court decisions that have penalized the EEOC for failing to properly conciliate based on the failure to fully investigate charges concerning individuals on whose behalf the agency is seeking relief, the EEOC may be more inclusive and thorough in various requests for information in pattern or practice and systemic investigations. *See, e.g., EEOC v. CRST*, 1:07 CV -00095-LRR, Docket No. 320 at 14, 2010 U.S. Dist. LEXIS 11125 (N.D. Iowa Feb. 9, 2010).

Employers, on the other hand, have relied on limitations on the scope of the EEOC's authority, which also is referenced in *Shell Oil*. Specifically, the Court highlighted the limitation on the right only to access documents or data "relevant to the charge under investigation." Further explaining, the Court stated, "Congress did not eliminate the relevance requirement, and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity."<sup>10</sup>

### C. Preliminary Observations

A wide range of issues arise in dealing with EEOC requests for information. An employer must always be mindful that based on the failure to comply with an EEOC request for information, there is a strong likelihood that a subpoena will be issued and served on the employer, and any subsequent failure to comply may result in a subpoena enforcement action.

Employers need to be effectively armed to negotiate in good faith with the EEOC, particularly in circumstances where the employer seeks to limit the scope of an EEOC request for information. Understanding the legal landscape and procedural landmines is even more critical when faced with an EEOC subpoena. The discussion below is designed to assist employers in navigating through these procedural landmines and understanding the broad scope of authority given to the EEOC in conducting investigations of alleged or suspected discriminatory conduct. Notwithstanding, circumstances may arise in which it is critical for an employer to evaluate its options in challenging such authority. As discussed below, various court decisions provide some helpful guidance when employers seek to modify or limit the scope of an EEOC subpoena, either at the administrative level or in a subpoena enforcement action.

### D. Caveat Involving Challenges to EEOC Subpoenas

In recent years, the EEOC typically has relied on its subpoena authority when it reaches the conclusion that an employer has refused to cooperate and/or provide requested information on a timely basis. In addressing such subpoenas, the most critical

reminder is that there generally are very strict time limitations in challenging EEOC subpoenas.

EEOC regulations expressly address the time deadlines and requirements for challenging a subpoena as follows:<sup>11</sup>

(b)(1) Any person served with a subpoena who intends not to comply shall petition the issuing Director or petition the General Counsel, if the subpoena is issued by a Commissioner, to seek its revocation or modification. Petitions must be mailed to the Director or General Counsel, as appropriate, within five days (excluding Saturdays, Sundays and Federal legal holidays) after service of the subpoena. Petitions to the General Counsel shall be mailed to 131 M Street, NE., Washington DC 20507. A copy of the petition shall also be served upon the issuing official.

(2) The petition shall separately identify each portion of the subpoena with which the petitioner does not intend to comply and shall state, with respect to each such portion, the basis for noncompliance with the subpoena. A copy of the subpoena shall be attached to the petition and shall be designated "Attachment A."<sup>12</sup>

The EEOC's rules refer to the Commission granting, revoking or modifying the petition "(w)ithin eight calendar days after receipt or as soon as practicable." In practice, there frequently are extensive delays in rulings by the EEOC on employer petitions to modify or revoke a subpoena, and in various situations, petitions may remain pending at the EEOC over a period of many months.<sup>13</sup> In any subpoena enforcement action, the EEOC will assert that the employer "waived" its right to challenge the subpoena in circumstances where the employer failed to file a petition to modify or revoke the subpoena at the administrative level.

Following issuance of a ruling by the Commission, assuming the petition to modify or revoke is denied, in whole or in part, and the employer continues to resist compliance, the EEOC may then file suit in federal court.<sup>14</sup> The subsequent EEOC subpoena

<sup>10</sup> *Id.* at 69.

<sup>11</sup> Title VII expressly provides in 42 U.S.C. §2000e-9 (*i.e.*, "Conduct of hearings and investigations pursuant to section 161 of title 29") as follows: "For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of title 29 shall apply." See "Appendix B" for a review of the text of 29 U.S.C. §161, which is somewhat at odds with the above regulatory provision, because it states that within five days after service of a subpoena, a person "may" petition to revoke or modify the subpoena, as opposed to the above-cited regulation, which provides that a person "must" petition the EEOC within five days. An excellent discussion of this statutory provision and the related regulation, referenced above, and case law discussing the potential "waiver" of a right to challenge a subpoena is discussed in detail in *EEOC v. Bashas', Inc.*, 2009 U.S. Dist. LEXIS 97736 at \*3-9 (D. Ariz. Sept. 30, 2009).

<sup>12</sup> 29 C.F.R. §1601.16. The above-referenced procedural regulations apply to Title VII, the ADA and GINA. There is no similar language regarding ADEA and EPA subpoenas. See footnote 15, *infra*, and accompanying text.

<sup>13</sup> In some cases, the EEOC has ruled on a petition to modify and/or revoke within 60 days, as recently occurred in the *EEOC v. Cantera Concrete* investigation, in which the petition to modify or revoke the subpoena was filed on July 2, 2010 and ruled on by the Commission on August, 26, 2010. See "Appendix A." On the other hand, in the *McCormick & Schmick Seafood Restaurants* case, the petition to modify or revoke was filed on March 15, 2010, and the EEOC's determination was issued approximately 6 months later on September 21, 2010. *Id.* Notwithstanding, in recent years, some petitions have remained pending at the Commission for over a year.



enforcement action, as filed in federal court, is typically referred to as an “Application for An Order to Show Cause Why Subpoena Should Not Be Enforced.”

It should be noted that there are not any administrative review or appeal procedures involving challenges to subpoenas under the ADEA or EPA. Based on the failure to comply with a subpoena based on these two statutes, the EEOC is empowered to file a petition in federal district court for enforcement of the subpoena.<sup>15</sup>

### III. LESSONS LEARNED FROM RECENT SUBPOENA ENFORCEMENT ACTIONS

#### A. A Study in Contrasts—Two Recent Subpoena Enforcement Actions

A review of recent EEOC subpoena enforcement actions illustrates that the EEOC has been fairly successful when filing such actions. “Appendix A” contains a listing and summary of EEOC subpoena enforcement actions filed over the past year and the approach taken by the courts in dealing with such actions. All of these cases deal with subpoena enforcement actions filed during the course of the EEOC’s investigation of a charge, particularly when an employer has challenged and/or refused to respond to broad based requests for information. Most of the cases settled after the EEOC filed their detailed submissions with supporting case authority and declarations. While the courts issued fairly far-reaching opinions in several cases upholding the EEOC’s investigative authority, some courts have placed limits on the scope of such authority.

Two recent cases involving subpoena enforcement actions are discussed below to illustrate the approach taken by the courts in dealing with such actions. In *EEOC v. Aaron’s Inc.*, 2011 U.S. Dist. LEXIS 38822 (N.D. Ill. Apr. 1, 2011), the subpoena was enforced in its entirety. In the second case, *EEOC v. Quantum Foods, LLC*, 2010 U.S. Dist. LEXIS 41846 (N.D. Ill. Apr. 26, 2010), the court only enforced the subpoena in part. Both recent actions were before the same judge, and therefore provide some useful guidance regarding a court’s approach to such actions, including the burden placed on employers in trying to limit the scope of information and/or documents to be produced based on an EEOC subpoena enforcement action.

In *Aaron’s Inc.*, the employer was faced with a subpoena enforcement action in a race discrimination charge involving the

termination of the Charging Party (herein “CP”) based on his criminal history. The CP was fired shortly after hire stemming from a background check that showed the CP had been convicted of armed robbery and felony murder. The employer did not want to send a convicted murderer into customers’ homes; the CP had been hired as a product technician that included delivering and installing product inside customers’ homes. The subpoena in issue involved a request for an electronic database identifying all individuals who applied for employment at any stores throughout the State of Illinois, including a copy of each applicant’s criminal background check.

In *Quantum Foods LLC*, the CP alleged that he was discriminated against on the basis of his Hispanic national origin and retaliated against after he complained that the same performance standards were not applied to non-Hispanic workers. Throughout his employment, the CP worked at the employer’s Bolingbrook, Illinois facility as a butcher. The Bolingbrook facility, which processed meat products, was one of several different facilities in Illinois and the employer’s largest Illinois facility. As part of its investigation, the EEOC requested data regarding the Company’s hiring, recruiting and advertising policies at all Illinois facilities. The employer produced its general policies, but argued that requesting information on applicants and employees for all positions at all Illinois facilities was overbroad and further submitted that the subpoena should be limited to the butcher position at Illinois facilities. The subpoena enforcement action followed.

The court addressed the following issues in the two cases: (1) timeliness of the challenge to the subpoena (although this only was in issue in the *Aaron’s Inc.* case); (2) relevance of the requested data; (3) the time frame covered by the subpoena; and (4) burdensomeness.

**Timeliness of Challenge to Subpoena.** In *Aaron’s Inc.*, the EEOC contested the employer’s right to even challenge the subpoena and focused on the employer’s failure to file a petition to modify or revoke the petition within five days of receipt of the subpoena, citing 29 CFR §1601.16.<sup>16</sup> It was undisputed that the employer timely challenged one portion of the subpoena, which involved the request for franchise-related documents, which the EEOC and employer ultimately resolved by the EEOC dropping this request. However, with respect to the issue in dispute (*i.e.*, request for an electronic database involving applicant data), the employer initially failed to file an objection and merely responded that it did not have what

14 29 C.F.R. §1601.16. See “Appendix B” for a review of the text of the regulation.

15 See EEOC Compliance Manual, Section 24, Subpoenas, §24.11- Title VII/ADA Subpoena Appeals and Letter 24-E and Letter 24-F.

16 The EEOC relied on various cases to argue that an employer may be barred from challenging a subpoena in a subpoena enforcement action in circumstances where the employer failed to timely move to challenge or modify the subpoena. See, e.g., *EEOC v. Cuzzens of GA., Inc.*, 608 F.2d 1062, 1064 (5th Cir. 1979); *EEOC v. Cnty of Hennepin*, 623 F. Supp. 29, 33 (D. Minn. 1985); *EEOC v. Roadway Express, Inc.*, 569 F. Supp. 1526, 1528 (N.D. Ind. 1983). See also *supra* note 11, which discusses *EEOC v. Basha’s Inc.*, and includes a detailed discussion of recent case developments addressing this issue.

the EEOC requested. Thereafter, prior to the time the EEOC ruled on the petition, the employer modified its response and submitted objections to producing the data. Although the objection was not in strict compliance with the EEOC's procedural rules, the judge nevertheless held that the employer did not forfeit its right to object in the subsequent subpoena enforcement action. While the court in that case ruled that the employer did not waive its right to object, this case is a reminder of the importance of timely filing a petition to revoke or modify an EEOC subpoena to avoid the risk of being confronted with a waiver argument in any subpoena enforcement action.

**Relevance.** In *Aaron's Inc.*, the judge cited the broad "relevance" standard discussed in *Shell Oil* to support the finding that the EEOC was entitled to data involving multiple stores. The court was persuaded by the EEOC's claim that the employer had a "uniform criminal background check policy that it applies to all its corporate owned stores." The court thus ruled that the EEOC was entitled to the requested information for all Illinois corporate-owned stores.<sup>17</sup>

In contrast, in *Quantum Foods*, although the judge permitted information regarding a broad range of employment practices at the Bolingbrook facility where the CP worked, including hiring and recruiting and information involving positions other than the butcher position held by the CP, the court declined to permit enforcement of the subpoena regarding information from other facilities, stating, "This is not a case in which those responsible for the alleged discrimination have responsibilities regarding other Quantum facilities."<sup>18</sup> In the court's view, "On the record before the court, an investigation extending to Quantum's other facilities at this time would amount to a 'fishing expedition.'"

**Time Frame Covered by Subpoena.** In *Aaron's Inc.*, the court rejected the employer's objection that the subpoena was overbroad in requesting data over a four year period – two years before and two years after the CP's termination. In the court's view, "Comparative information ... is absolutely essential to a determination of discrimination," and "pre-charge and post-charge data can provide useful information to enable the EEOC to assess whether discrimination took place."

In *Quantum Foods*, the court took a similar view, explaining that although a charge must be filed within 300 days of the alleged discriminatory conduct, "the EEOC is not limited to information within that period to investigate the charge ... It is not unreasonable for the EEOC to seek four years of information to investigate the charge."<sup>19</sup>

**Undue Burden.** In *Aaron's Inc.*, while the court acknowledged that it may decline to enforce an otherwise valid subpoena if compliance would be unduly burdensome,<sup>20</sup> the court underscored that "an employer has the 'difficult burden' of showing that 'compliance would threaten the normal operation of business.'" In this case, not having an electronic database, as initially requested, did not save the day because the EEOC stated that it would accept paper copies. Equally significant, the employer failed to provide sufficient factual support to establish a purported "undue burden." In the court's view, merely providing a declaration that a search for physical copies "would result in an exorbitant expense" was insufficient, explaining, "To meet the high burden of establishing that compliance would threaten [the employer's] normal business operations, more than conclusory allegations are required."

In *Quantum Foods*, in opposing the petition involving the EEOC's request for company-wide data, the employer supported its burdensomeness claim with an affidavit from the individual who would have primary responsibility for compiling the data. The supporting declaration outlined in detail each of the steps that would have been required to gather the data, explaining that the document gathering process would require an investment of time of approximately 1,000 hours. Although the court ruled that a company-wide production would not be required, the judge referred to most of the employees working at the primary facility where the CP was employed and, thus, the represented amount of time may not be substantially less. However, the EEOC brought to the court's attention that the employer had represented in prior correspondence to the EEOC a much shorter time commitment that would be required to retrieve and review the data. While the employer claimed that the prior correspondence involved inaccurate and premature

17 As discussed *infra*, the EEOC has sought and successfully secured nationwide data in certain cases, particularly when they involve a national policy that is in issue. See, e.g., *EEOC v. United Parcel Service*, 587 F.3d 136 (2nd Cir. 2009); *EEOC v. Schwan's Home Service*, 707 F. Supp. 2d 980 (D. Minn. 2010), *affirmed* 2011 U.S. App. LEXIS 14291 (8th Cir. July 13, 2011). But see *EEOC v. Burlington Northern Santa Fe*, Case No. 10-cv-03008, Docket No. 10, (Transcript of Show Cause Hearing) (D. Colo. Feb. 3, 2011) (court denied enforcement of a nationwide subpoena).

18 The district court distinguished *EEOC v. Deb Shops, Inc.*, 1995 U.S. Dist. LEXIS 14244 (N.D. Ill. Sept. 28, 1995) (request for employment information regarding 13 store district which included store that declined to hire the CP as manager was proper "because all the stores shared the same district supervisor who made the final hiring decision for management positions within the district").

19 It remains unclear whether these timelines will be impacted by the recent cases that have held that any so-called class may be limited to persons adversely affected within 300 days of the charge and/or 300 days of the EEOC announcing a broader scope to its investigation. See, e.g., *EEOC v. Freeman, Inc.*, 2010 U.S. Dist. LEXIS 41336 (D. Md. Apr. 27, 2010) and *EEOC v. Freeman, Inc.*, 2011 U.S. Dist. LEXIS 8718 (D. Md. Jan. 31, 2011); see also *EEOC v. Kaplan*, No. 10 CV 2882 (N.D. Ohio May 10, 2011); *EEOC v. Bloomery, L.P.*, No. 07 CV 8383 (S.D. N.Y. Oct. 25, 2010); *EEOC v. CRST Van Expedited, Inc.*, 615 F. Supp. 2d 867 (N.D. Iowa 2009); *EEOC v. Burlington Med. Supplies, Inc.*, 536 F. Supp. 2d 647 (E.D. Va. 2008); *EEOC v. Custom Cos., Inc.*, Nos. 02 CV 3768 and 03 CV 2293 (N.D. Ill. April 7, 2004); *EEOC v. Optical Cable Corp.*, 169 F. Supp. 2d 539 (W.D. Va. 2001). But see *EEOC v. LA Weight Loss*, 509 F. Supp. 2d 527 (D. Md. 2007); *EEOC v. Sterling Jewelers*, 2009 U.S. Dist. LEXIS 122102 (W.D. N.Y. 2009).

20 The court relied on the key case on this issue, *EEOC v. United Airlines*, 287 F. 3d 643, 653 (7th Cir. 2002).

calculations, the court ordered an evidentiary hearing prior to making a ruling, and the parties thereafter resolved the dispute before the hearing was held. The *Quantum Foods* case is thus important in demonstrating the need to prepare a detailed affidavit outlining the steps and time demands required in assembling any data/documents objected to on burdensome grounds in any subpoena enforcement action, but, just as importantly, taking care to ensure that any prior representations to the EEOC are accurate and consistent with any later representations to the court on burdensomeness grounds.

## B. Review of Recent Cases Authorizing Broad Based Investigations by EEOC

### 1. Requests for Computerized Personnel Data

In any systemic investigation, the EEOC has set up various standard inquiries regarding computerized personnel data. While the data requests may vary in part based on the nature of the charge, the starting point typically has been understanding the nature of the computer systems maintained by the employer, and the courts are inclined to support the EEOC when requesting such information, as best illustrated the Ninth Circuit's opinion in *EEOC v. Federal Express*, 543 F. 3d 531 (9th Cir. 2009).

In *Federal Express*, the CP filed a charge on behalf of himself and other similarly situated African American and Latino employees, challenging a basic skills test required for promotion, and alleged that he was denied promotional opportunities, unfairly disciplined and discriminated against in his compensation.<sup>21</sup> The investigation focused on alleged systemic discrimination based on the employer's practices in an 11 state western region. A key dispute occurred based on the EEOC making the following request involving computerized personnel data:

Please identify any computerized or machine-readable files that are or have been maintained by you (or any other under contractual or other arrangement) since January 1, 2003, which contain data on personnel activities. This type of file would include, but not be limited to applicants, hiring, promotions, testing, discipline, job analyses and evaluations, performance evaluations, demotions, employment history, amounts of pay, adjustments to pay, work assignments, adjustments to work assignments, training, transfers, terminations, job status, and so forth.

The subpoena enforcement action followed the employer's refusal to comply with the EEOC subpoena. After the district court granted the EEOC's application to enforce the subpoena, the employer appealed. In its appeal to the Ninth Circuit, the employer submitted that the subpoena requested "irrelevant information" and was "overbroad." Specifically, in its appeal, the employer argued that demanding information regarding all employment practices was overbroad because requesting "a roadmap of all computerized employment records exceeds the bounds of 'materiality' and 'relevancy' where ... the charge focuses on a much narrower subset of alleged discriminatory practices (*i.e.*, those having to do with promotions, discipline, performance evaluations, compensation and leave)." As an example, hiring was not in issue based on the charge, and thus the employer maintained that such information was not relevant under *Shell Oil*.<sup>22</sup> The EEOC, on the other hand, relied on a similar case involving enforcement of a subpoena by the Fourth Circuit in which the EEOC required the company to describe in detail all of its electronic personnel databases.<sup>23</sup>

**Relevance.** In adopting the view requested by the EEOC, the court in *Federal Express* concluded that "the information sought is not itself evidence of discriminatory treatment in violation of Title VII," but "the information will help the EEOC craft additional information requests that may produce evidence of discriminatory treatment." The appellate court cited the *Lockheed Martin* decision, which held that such electronic information is relevant:

Identification of the computerized personnel information ... is directly relevant to its investigation ...

Such data permits the Commission to better focus its investigation. [T]his information will enable the EEOC to perform its investigative function by allowing it to frame more specific requests which will limit the possibility that irrelevant or unnecessary material will be produced for the EEOC to review. The efficient search for relevant information is imperative in a case like this ... .

**Overbroad.** The Ninth Circuit also rejected the employer's claim that the subpoena was overbroad in requesting information that was not directly tied to the allegations in the charge, explaining, "The subpoena need not request only evidence that is specifically relevant to proving discrimination; the requested information need

21 A separate issue involved the EEOC's jurisdiction, because the EEOC continued to investigate, based on a pattern or practice investigation, even after the plaintiff requested a right-to-sue notice and joined a private lawsuit against the employer. The court held that the EEOC had an independent right to continue its investigation.

22 See Brief *Amici Curiae* of the Equal Employment Advisory Council and Chamber of Commerce in Support of Defendant-Appellant, *EEOC v. Federal Express*, Case No. 06-16864, Docket No. 16 (9th Cir. Jan. 31, 2007).

23 *EEOC v. Lockheed Martin*, 116 F. 3d 110 (4th Cir. 1997). In the *Lockheed* case, the EEOC subpoena enforcement action involved more than 20 separate age discrimination charges.

only be 'relevant and material to the investigation.'" In the court's view, "The EEOC, by requesting identification of the computerized files instead of the files themselves, has refrained from imposing on [the employer] an overbroad request." The court opined that soliciting information regarding the company's electronic files would "enable the EEOC to draft a future request for documents that will not be overly broad."

While *Federal Express* clearly indicates that the courts may require identification of the personnel databases maintained by employers, the decision clearly leaves open the door for employers to focus on the "proportionality" argument currently being made in courts in responding to subsequent requests for electronic discovery.<sup>24</sup>

The *Federal Express* decision should be contrasted with a recent district court decision in which the court denied an EEOC petition for enforcement of a subpoena that requested a description of databases maintained company-wide by the employer relating to applications, hiring and terminations. Despite the fact that the EEOC merely was requesting identification of the databases maintained regarding such information, the court denied the request in its entirety. In short, the court determined that the EEOC did not have authorization to ultimately seek such data because the subpoena was based on individual charges of discrimination, which did not include pattern or practice allegations of discrimination. Thus, even requesting identification of the applicable databases involving such information was deemed not relevant by the court.<sup>25</sup>

## 2. EEOC Requests for Information Involving Personnel Decisions Unrelated to the Underlying Charge

In dealing with specific requests for information, one issue that frequently frustrates employers involves EEOC requests for information concerning personnel actions unrelated to the underlying charge. Two recent cases, however, illustrate the courts' tendency nonetheless to uphold such requests and provide the rationale for the courts' decision: (1) *EEOC v. Konica Minolta Business Solutions U.S.A., Inc.*, 639 F.3d 366 (7th Cir. 2010); and (2) *EEOC v. Schwan's Home Service*, 707 F. Supp. 2d 980 (D. Minn. 2010), affirmed 2011 U.S. App. LEXIS 14291 (8th Cir. July 13, 2011).

In *Konica*, the employer was confronted with a subpoena enforcement action based on a request for hiring data in circumstances where the CP had been hired. The CP's race discrimination charge focused on the claim that he was subjected to different terms and conditions of employment, disciplined for failing to meet a sales quota and fired after he filed a discrimination complaint with the employer's human resources department. The CP further alleged that there was a pattern of race discrimination by his former employer.

Throughout the CP's brief eight-month tenure, he worked at one facility in the Chicago area. As part of the investigation, the employer initially responded to various general inquiries regarding its operations, including demographic information regarding its eight Illinois facilities. This data revealed that there were only six African Americans employed and all of them were on one sales team at the facility where the CP had been employed. The EEOC then began focusing, in part, on whether any illegal steering was involved and ultimately issued a subpoena requesting hiring data for all of the employer's Chicago area facilities, including any communications with applicants. After the employer refused to comply with the request for hiring information, the EEOC initiated the subpoena enforcement action.

The Seventh Circuit ultimately addressed the permitted scope of the EEOC subpoena after the district court granted the EEOC's application for an order enforcing the subpoena, and affirmed the district court ruling, explaining as follows:

When the EEOC investigates a charge of race discrimination for purposes of Title VII, it is authorized to consider whether the overall conditions in a workplace support the complaining employee's allegations. Racial discrimination is "by definition class discrimination," and information concerning whether an employer discriminated against other members of the same class for the purposes of hiring or job classification may cast light on whether an individual person suffered discrimination... For that reason, the EEOC is authorized to subpoena evidence concerning employment practices other than those

24 Principles of "proportionality" were discussed at The Sedona Conference on e-Discovery and have since generally been adopted by the courts. See, e.g., The Sedona Conference, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (June 2007) ("When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(2)(C) and its state equivalents, which require consideration of the technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing electronically stored information as well as the nature of the litigation and the amount in controversy"); *Nat'l Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency*, 2011 WL 381625 (S.D. N.Y. Feb. 7, 2011)(J. Scheindlin) (While Rule 34 requires records to be produced in reasonably usable format, if no agreement can be reached, "the court must determine the appropriate form of production, taking into account the principles of proportionality and considering both the needs of the requesting party and the burden imposed on the producing party"); *John B. v. Goetz*, 2010 U.S. Dist. LEXIS 8821 at \*204 (M.D. Tenn. Jan. 28, 2010) (factors similar to Rule 26(b)(2)(C) found in *Zubulake I* "were [previously] referred to as the 'proportionality' test," citing *Zubulake v. UBS Warburg*, 217 F.R.D. 309, 316 (S.D. N.Y. 2003)("Zubulake I").

25 *EEOC v. Burlington Northern Santa Fe Railroad*, Case No. 10-cv-03008, Docket No. 10 (Transcript of Show Cause Hearing) (D. Colo. Feb. 3, 2011).

specifically charged by complainants in the course of its investigation.

... it is true that [the charging party] was not saying that Konica had refused to hire him, but that does not make hiring data irrelevant. The question under *Shell Oil* and its progeny is not whether [the charging party] specifically alleged discrimination in hiring, but instead is whether information regarding hiring will “cast light” on [charging party’s] race discrimination complaint.

The court underscored that the EEOC limited its inquiry to the Chicago locations and thus “the information sought by the EEOC in this case is properly tailored to matters within its authority.”<sup>26</sup> To the extent that the EEOC subsequently attempted to expand the scope of its investigation, the Seventh Circuit opined, “We remind the parties that should the agency later conclude that a broader investigation is warranted, the Commission is entitled to file its own charge, see 42 U.S.C. §2000e-5(b), in which it can allege a pattern or practice of discrimination and calibrate its investigation accordingly.”<sup>27</sup>

A federal district court in Minnesota made a similar ruling in the *Schwan’s* case, involving alleged sex discrimination, in which the court granted the EEOC’s request for broad based information beyond the scope of the charge. In *Schwan’s* the CP filed a sex discrimination charge after failing to “graduate” from a General Manager Development Program (GMDP). Based on the charge, the CP further alleged retaliation for having complained about sexual harassment. The subpoena enforcement action was filed following an amended charge in which class-based allegations were added and the EEOC requested nationwide data regarding the selection process for participation in the GMPD as well as information regarding the hiring and retention of general managers. In challenging the subpoena, the employer argued:

Information about the sex of all the company’s general managers throughout the country; the selection process for the General Manager Development Program in a case where the Charging party... was selected for the program; and, the identity (and sex) of

every GM who successfully completed the program, clearly had no relevance to the initial charge.

In rejecting the employer’s challenge, the court stated, “Courts have routinely authorized enforcement of administrative subpoenas that request information that goes beyond the information directly tied to the charging party’s personal experiences and circumstances.” The court addressed the case authority relied on by both the employer and EEOC, but ultimately concluded that the authority cited by the EEOC was more persuasive based on the view that the information requested in the subpoena was “like and related to the acts specified in the charge:”

Information that Schwan’s employs very few females as General Managers, or that very few females successfully complete the GMDP, may, in conjunction with other evidence, support a reasonable cause finding that Schwan’s discriminated against [the CP] on account of sex while she participated in the GMDP, or may be relevant to “like or related” allegations of sex-based discrimination... Information suggesting that Schwan’s uses discriminatory selection criteria may, in conjunction with other evidence, support a reasonable cause finding of sex discrimination within the GMDP, because there may be a connection between alleged efforts to exclude women from the GMDP... and alleged sex-based discrimination and retaliation for the few women whom Schwan’s selects for the GMDP.<sup>28</sup>

While *Konica* and *Schwan’s* raise obvious concerns in challenging EEOC requests for information dealing with personnel practices beyond the specific allegations in the charge, the recent decision in *EEOC v. UPMC*, Case No. 2:1-mc-00121, 2011 U.S. Dist. LEXIS 55311 (W.D. Pa. May 24, 2011), provides at least a glimmer of hope that the courts may place some limits on broad based requests unrelated to the charge.<sup>29</sup> In *UPMC*, the court refused to enforce an EEOC subpoena requesting information on employees terminated after 14 weeks of medical leave based on the employer’s leave of absence policy in a case where the CP failed to return to work after

26 The Seventh Circuit rejected the employer’s reliance on *EEOC v. United Airlines*, 287 F.3d 643 (7th Cir. 2002), in which the Seventh Circuit had rejected a subpoena requesting information on all the employer’s employees residing abroad in circumstances where the charge focused on alleged discrimination involving failing to contribute into a French social security system on the charging party’s behalf, because the information was not limited to individuals who were “similarly situated.”

27 As the court noted, the Seventh Circuit had previously addressed that same issue in *United Airlines*, 287 F.3d at 655 n.7, in which the appellate court stated, “Should the EEOC discover, in the course of a significantly narrowed inquiry, evidence of a broader pattern of discrimination, it is, of course, free to file a commissioner’s charge and broaden its investigation accordingly.” See *EEOC v. S. Farm Bureau Cas. Ins. Co.*, 271 F. 3d 209, 211 (5th Cir. 2001). Without a broader charge, however, the EEOC’s current request cannot be sanctioned.

28 The district court’s order enforcing the subpoena was upheld on appeal on July 13, 2011. See *EEOC v. Schwan’s Home Serv.*, 2011 U.S. App. LEXIS 14291 (8th Cir. July 13, 2011).

29 The *UPMC* case is discussed in much greater detail *infra* pp. 16 – 17.

receiving 26 weeks of STD benefits and additional time off based on being granted a personal leave of absence. The court took exception with the EEOC making a broad based request for information relating to such general employer policies in circumstances where the EEOC failed even to investigate the underlying charge.

### 3. Requests for Information Involving Broad Geographic Data

As shown by the *Schwan's* case, to the extent that the EEOC believes that the employment practice and/or policy is national in scope, the EEOC frequently will make requests for nationwide information and data. The Second Circuit's decision in *EEOC v. United Parcel Service*, 587 F.3d 136 (2nd Cir. 2009) is another example in which the EEOC succeeded in a subpoena enforcement action in seeking nationwide information from an employer, particularly where a purported national policy is the focus of the EEOC's investigation.

In *United Parcel Service*, the EEOC was investigating the employer's appearance policy, which stemmed from two separate charges: (1) an individual charge filed at the EEOC's Buffalo, NY office alleging religious discrimination (*i.e.*, Muslim) by the CP, who was barred from wearing a beard based on a purported nationwide policy prohibiting facial hair for those in "public-contact" positions; and (2) a second charge filed in Dallas on similar grounds, which also alleged a "pattern or a practice of refusing to accommodate the religious... beliefs of its employees." The EEOC subsequently requested nationwide data relating to the employer's appearance guidelines. The employer objected to the request and further explained that such information was not retained in any central location. The EEOC then filed a subpoena enforcement action in the U.S. District Court for the Western District of New York. After the judge denied the petition as being overly broad and because national information was not relevant to the individual charges being investigated, the EEOC appealed, and the Second Circuit reversed the district court ruling.

In remanding the case for enforcement of the subpoena, the Second Circuit in the *UPS* case relied on general standards regarding the "extremely limited" role courts are to play regarding enforcement of an administrative subpoena<sup>30</sup> and the broad relevance standards discussed in *Shell Oil*, and thereby held that

the district court applied "too restrictive a standard of relevance" in determining that nationwide information about the appearance standards was not relevant to the charges being investigated. The appellate court focused on the fact that the appearance guidelines were applied nationwide and the employer had limited exceptions to its policy, thereby restricting those who did not comply with the standards from working in public contact positions. As significantly, the court focused on the fact that this request involved the EEOC's investigatory stage where the EEOC is "not required to show that there is probable cause to believe that discrimination occurred or to produce evidence to establish a prima facie case of discrimination." 587 F.3d at 140. A similar result occurred in *EEOC v. Kronos, Incorporated*, 620 F.3d 287 (3rd Cir. 2010), which upheld nationwide testing data based on the view that "an employer's nationwide use of a practice under investigation supports a subpoena for nationwide data on that practice."<sup>31</sup>

The *UPS* and *Kronos* decisions should be contrasted with the recent district court decision in *EEOC v. Burlington Northern Santa Fe*, Case. No. 10-cv-03008, Docket No. 10 (Transcript of Show Cause Hearing) (D. Colo. Feb. 3, 2011), which denied enforcement of a nationwide subpoena. The investigation initially was based on two individual-based ADA charges. In one charge, the CP allegedly was advised that he was not medically qualified for a conductor trainee position due to significant risk of aggravation or recurrence of a prior injury. The other CP filed a charge based on retraction of a job offer following disclosure of various surgeries and impairments. As part of the investigation, despite the absence of any pattern or practice allegations, the EEOC notified the employer by letter of its "intentions to broaden its investigation into a nationwide investigation" and requested any computerized personnel data maintained for employees and applicants throughout the United States. As support for its nationwide subpoena, the EEOC also made reference to other individual ADA charges filed against the employer in others parts of the U.S. The employer cited other authority for the view that relying on the individual charges as a bootstrap for the nationwide subpoena was inappropriate and amounted to an improper "fishing expedition."<sup>32</sup> Following a Show Cause Hearing, the district court judge denied enforcement of the subpoena, stating:

The administrative subpoena is pervasive, and it seeks plenary discovery. There are no allegations of a pattern

30 To obtain enforcement of an administrative subpoena, "an agency must show only: (1) that the investigation will be conducted pursuant to a legitimate purpose; (2) that the inquiry may be relevant to the purpose; (3) that the information sought is not already within [the agency's] possession; and (4) that the administrative steps required... have been followed." *EEOC v. UPS*, 587 F. 3d at 139.

31 See detailed discussion of the *Kronos* decision *infra* pp. 11 – 13.

32 *Id.*, Docket #7, Respondent's Answer to Application to Show Cause Why Administrative Subpoena Should Not Be Enforced, Filed Jan. 14, 2011, which included reliance on *EEOC v. Sears, Roebuck and Co.*, 2010 U.S. Dist. LEXIS 67579 (D. Colo. June 8, 2010), *approved*, 2010 U.S. Dist. LEXIS 67344 (July 2010).

and practice. The demand for data on a nationwide basis with two individual claims involving only applicants in Colorado is excessive. And while wide deference to administrative inquiries and investigations – wide deference to the scope of the subpoenas is given, it does not transcend the gap between the pattern and practice investigation and the private claims that have been shown here. The show cause order is discharged, and BNSF's refusal to comply with the subpoena as issued is sustained.<sup>33</sup>

The *Quantum Foods* case, discussed previously, is also helpful in demonstrating that the courts may decline a request for company-wide data in circumstances where the decision-making impacting on the allegations in the charge are more localized in nature.

#### 4. EEOC Authority to Investigate Even Absent Charging Party

As a preliminary matter, recent cases demonstrate that care must be taken regarding an employer's refusal to respond to EEOC requests for information involving systemic investigations, even based on settlement of the underlying charge with the charging party or initiation of a lawsuit by the charging party.

As an example, in *EEOC v. Watkins Motor Lines, Inc.*, 553 F.3d 593 (7th Cir. 2009), a subpoena arose in the context of an individual charge of discrimination involving a CP who allegedly was not hired based on the company not hiring applicants who had been convicted of a violent crime. The company and CP reached a tentative settlement of the charge, but conditioned settlement on withdrawal of the underlying charge. The EEOC then denied the CP's request to withdraw his discrimination charge and thereafter issued a subpoena requesting information relating to all applicants for the job at the facility involved. Although the district court denied enforcement of the subpoena, the Seventh Circuit reversed the district court and held that the EEOC was entitled to pursue its pattern or practice investigation. The appellate court viewed the situation as analogous to a Commissioner's charge, explaining, "A charging party's change of mind does not diminish the agency's authority to investigate on its own behalf."

Similarly, in *Federal Express Corp. v. EEOC*, 543 F.3d 531 (9th Cir. 2008), *cert. denied*, 130 S. Ct. 574 (2009), the CP filed a charge of discrimination with the EEOC against the employer on behalf of himself and similarly situated African American and Latino employees. After the CP requested and received a right-to-sue letter, the EEOC determined that it would continue to process the CP's charge and subsequently issued a subpoena for various employer records. In a subsequent subpoena enforcement action in federal court, the employer argued that the EEOC no longer had jurisdiction after the CP initiated a private action in federal court. The district court rejected the employer's argument. In affirming the district court's decision, the Ninth Circuit held that the EEOC's authority did not end with the issuance of a right-to-sue letter and relied on the EEOC's investigatory authority, citing with approval EEOC regulations and the EEOC's Compliance Manual. However, the courts remain somewhat divided on this issue because an earlier Fifth Circuit decision concluded that the EEOC lost jurisdiction in such circumstances. *EEOC v. Hearst Corp.*, 103 F.3d 462 (5th Cir. 1997). In the *Federal Express* case, the Ninth Circuit acknowledged the earlier decision but simply disagreed with its conclusion.

#### 5. Subpoenas to Third Parties By EEOC

The leading case discussing third party subpoenas and EEOC enforcement actions is *EEOC v. Kronos Incorporated*, 2009 WL 1519254 (W.D. Pa. June 1, 2009), *enfd in part and denied in part*, 620 F.3d 287 (3rd Cir. 2010).<sup>34</sup> The investigation initially stemmed from the CP being turned down for a bagger, stocker and/or cashier job at one of the respondent employer's grocery stores in West Virginia based on a personality assessment test, created by Kronos, a testing consultant. After the EEOC subsequently expanded its investigation into a class-based charge focusing on hiring and use of the assessment test, it subpoenaed Kronos seeking a broad range of documents, data, tests and other materials as part of the nationwide investigation against the employer. During the course of the investigation, the employer was notified that the investigation was expanded to involve the failure to hire based on race purportedly, which allegedly stemmed from discovery of an article by the EEOC that minority applicants performed worse on the test than non-minority applicants.

<sup>33</sup> An excellent summary of the cases in support of and denying enforcement of nationwide subpoenas in EEOC subpoena enforcement actions is discussed in the parties' filings in the *Burlington Northern* case. (*Id.* Docket No. 2 at pp. 20-23 and Docket No. 7 at pp. 14-18). See also *EEOC v. Sears, Roebuck and Co.*, 2010 U.S. Dist. LEXIS 67579 (D. Colo., June 8, 2010) (court denied nationwide subpoena based on individual charge of discrimination involving employer arrest and conviction policy that required reporting of arrests based on individual charge of discrimination and limited subpoena to ten stores in district where CP worked; court even denied EEOC's proposed narrowing of geographic scope to region of 140 stores).

<sup>34</sup> Following remand, the district court has dealt with crafting an appropriate order consistent with the ruling by the Third Circuit. See *EEOC v. Kronos Incorporated*, 2011 U.S. Dist. LEXIS 29127 (W.D. Pa., March 21, 2011) (order on remand) and 2011 U.S. Dist. LEXIS 47348 (W.D. Pa., May 3, 2011) (denial of EEOC motion for reconsideration, except that the court modified its order in certain limited respects).

Ultimately, the subpoenaed documents requested were on a nationwide basis including documents measuring adverse impact on individuals with disabilities and/or an individual's race. Kronos filed a petition to revoke the subpoena on relevance grounds submitting that the requested information and documents were not relevant to the CP's charge and because the information contained confidential trade secrets, which the EEOC was seeking without adequate protection. Following denial of the petition by the EEOC and the refusal to comply by Kronos, the EEOC initiated a subpoena enforcement action in federal court.

The district court limited the subpoena to the state of West Virginia and for the job positions that formed the basis of the charge and also limited enforcement to information relating to disability discrimination, not race. The district court further ordered the parties to enter into an appropriate confidentiality order to protect any trade secret/confidential information of Kronos and the personal information of those taking the assessment test.

The EEOC appealed the district court's decision, alleging that the lower court abused its discretion by narrowing the subpoena's terms, rather than enforcing it as written. The following issues were addressed by the Third Circuit: (1) positions covered by the subpoena; (2) geographic scope of the subpoena; (3) the applicable time period for the subpoena; (4) potential adverse impact of the test based on other users of the test; (5) application beyond disability to cover race; and (6) the standard to be applied regarding confidentiality of the information covered by the subpoena.

**Positions Covered.** The Third Circuit initially concluded that based on the *Shell Oil* relevancy standard, there was no reason to confine the subpoena to the positions in the charge because information relating to other positions "may shed light on whether the Assessment has an adverse impact on persons with disabilities."<sup>35</sup>

**Geographic Scope.** Similarly, the appellate court ruled that the district court misapplied the relevance standard in limiting the subpoena to the state of West Virginia based on the view that "an employer's nationwide use of a practice under investigation supports a subpoena for nationwide data on that practice."<sup>36</sup>

**Applicable Time Period.** The Third Circuit also ruled that a broader time period was more appropriate dating back to the full duration of the period when the test was used by the employer, taking the view, "Evidence related to the employment practice under investigation prior to and after [the charging party's] charge provides valuable context that may assist the EEOC in determining whether discrimination occurred."

**Use of Kronos Test By Other Employers.** Here, too, the Third Circuit determined that "such information, regardless of whether it was 'performed specifically for' or 'relates specifically to and only to' [the employer], certainly might shed light on the charge of discrimination." In other words, if the test had an adverse impact on others using the test, this could be probative, and thus the court allowed the EEOC's request.

**Limiting EEOC Request for Information Relating to Potential Race Discrimination.** This is one area in which the Third Circuit limited the subpoena, finding that the subpoena for materials involving race constituted an impermissible "fishing expedition."<sup>37</sup> The Third Circuit relied, in principal part, on *EEOC v. Southern Farm Bureau Casualty Insurance Co.*, 271 F.3d 209 (5th Cir. 2001), which is frequently cited to challenge the EEOC's expansion of an investigation to cover other types of discrimination claims. Therein, the appellate court rejected the EEOC's efforts to expand an investigation, through its subpoena power, to request information relating to potential sex discrimination in circumstances where the charge dealt with race discrimination.<sup>38</sup>

**Confidentiality of Documents Produced.** Finally, the Third Circuit reversed the district court based on the confidentiality order that had protected from disclosure under the Freedom of Information Act various records ordered to be produced by Kronos. According to the appellate court, any order of confidentiality required a application of a "good cause balancing test," weighing in the balance public interests against private interests.<sup>39</sup>

On the issue of confidentiality, one other recent court decision involving third party subpoenas requiring mention is *EEOC v. Concentra Health Services*, Case No. 1:11-mc-00039, Docket No. 1

35 The Third Circuit cited *EEOC v. Roadway Express, Inc.*, 261 F.3d 634, 642 (6th Cir. 2001), which held that the EEOC is entitled to information relating to job positions other than those at issue because such information met the *Shell Oil* standard of relevance.

36 The Third Circuit placed primary reliance on *EEOC v. United Parcel Service*, 587 F.3d 136, 139 (2nd Cir. 2009), where the court enforced a nationwide subpoena because the appearance guidelines in issue purportedly involved nationwide guidelines used by the employer.

37 The court relied on *EEOC v. United Airlines*, 287 F.3d, 643, 653 (7th Cir. 2002).

38 In rejecting an expansion of the EEOC's investigation based on the disability charge to cover race discrimination, the Third Circuit in *Kronos* pointed out that based on 42 U.S.C. §2000e-5(b), the EEOC always had the option of filing a commissioner's charge. The Seventh Circuit took the same approach in *EEOC v. United Airlines, Inc.*, 287 F.3d 643, 654 n.7 (7th Cir. 2002), when limiting the scope of the EEOC's investigation.

39 The factors required to be considered include: (1) whether the disclosure will violate any privacy interests; (2) whether the information is being sought of a legitimate purpose or an improper purpose; (3) whether disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefiting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public. *See, e.g., Glenmade Trust Co. v. Thompson*, 56 F.3d 476, 483 (3rd Cir. 1995) (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787-91(3rd Cir. 1994)).



(Motion) (S.D. Ind., Filed Apr. 6, 2011), which involved a subpoena enforcement action relating to medical records.<sup>40</sup> In *Concentra Health* the EEOC successfully argued that HIPAA did not preclude disclosure of various medical records for those who were determined not to be medically cleared for employment.

Finally, the issue of costs associated with production of records by a third party recently was addressed by the court in the *Kronos* matter. In *EEOC v. Kronos Incorporated*, 2011 U.S. Dist. LEXIS 47350 (W.D. Pa. May 3, 2011), the court addressed the issue of protection of third parties from significant costs based on compliance with an EEOC subpoena. The case provides an excellent summary of the case law involving the need to protect non-parties from significant production expenses. Therein, based on principles of “cost shifting/cost sharing,” the district court ruled that the EEOC and Kronos should split the cost of compliance equally (50%/50%), finding this approach “fair and equitable,” but stayed the proceedings for 70 days to provide the parties the opportunity to appeal, and if no appeal is filed, the court would thereafter set a timetable for production.

### C. Successful Challenges to EEOC Subpoenas

While the courts have shown deference to the EEOC in numerous subpoena enforcement actions, various courts have limited or denied enforcement of subpoena enforcement actions on both “relevance” and “burdensomeness” grounds. Discussed below are the leading cases frequently cited by employers as well as recent cases that have supported employer challenges to subpoena enforcement actions by the EEOC.

#### 1. Limits on Scope of Subpoenas—Two Leading Cases

In any challenge to subpoena enforcement actions, two of the leading cases frequently relied on by employers are: (1) *EEOC v. United Airlines*, 287 F.3d 643 (7th Cir. 2002); and (2) *EEOC v. Southern Farm Bureau Casualty Insurance Co.*, 271 F.3d 209 (5th Cir. 2001).

The *United Airlines* case has been relied on to challenge both “relevance” and “burdensomeness” of EEOC subpoenas. In *United Airlines*, the focus of the underlying national origin and sex

discrimination charge involved denial of benefits to an American employee working in France, as compared to French co-workers who received certain benefits based on the French social security system. As part of the investigation, the EEOC expanded the scope of its investigation and requested identification of each employee working abroad who had taken or been placed on medical or disability leave and sought information regarding all of the employer’s benefit programs. A subpoena enforcement action was filed based on the employer’s failure to respond as requested. The Seventh Circuit denied enforcement of the subpoena.

**Relevance.** The court in *United Airlines* initially reviewed the case authority and cited *Shell Oil* to shed light on the meaning of “relevance” in the subpoena context. The court noted that the courts have adopted a much broader concept of “relevance” when dealing with subpoenas, as compared with admissibility of evidence. The court also relied on *Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355 (6th Cir. 1969), and cited the case as standing for the proposition that evidence concerning practices other than those specifically charged by complainants may be sought by an EEOC administrative subpoena. On the other hand, the appellate court cautioned that “relevance requirements should not be construed so broadly as to render the statutory language a ‘nullity,’” and underscored that “(t)he requirement of relevance ... is designed to cabin the EEOC’s authority and prevent ‘fishing expeditions.’”<sup>41</sup> In applying this standard to the facts, the Seventh Circuit reviewed the nature of the charge and concluded that the information request was not limited to individuals who may be “similarly situated” or by location (*i.e.*, France) and was overbroad in requesting information involving all employees residing abroad. The court explained:

... the “policy” at issue in the charge is [the employer’s] failure to pay into the French social security system. Nothing in the charge suggests systemic discrimination on the basis of national origin or sex with respect to life, health, disability and leave benefits. Allowing the EEOC to conduct such a broad investigation would require us to disregard the Congressional requirement that the investigation be based on the charge.<sup>42</sup>

<sup>40</sup> See “Appendix A” for a more detailed discussion of the case and the applicable legal authority relating to third party disclosure of medical records to the EEOC as part of the investigation of an ADA charge.

<sup>41</sup> While not relying on “fishing expedition” language, earlier court decisions took a similar approach in limiting the scope of EEOC subpoenas. In *Joslin Dry Goods v. EEOC*, 483 F.2d 178 (10th Cir. 1973), the court limited a subpoena to a particular facility because the applicable facility was a “separate employing unit,” and there was no showing that the CP was the purported victim of company-wide hiring and firing policies and practices. See also *EEOC v. Packard Electric Division*, 569 F.2d 315 (5th Cir. 1978) (court limited production to applicable departments based on narrow scope of charge and denied facility-wide data).

<sup>42</sup> 287 F.3d at 655. The court opined that in the event the EEOC found evidence of a broader pattern of discrimination, “it is, of course, free to file a commissioner’s charge incorporating those allegations and broaden its investigation accordingly.” The Seventh Circuit cited with approval the Fifth Circuit’s decision in *EEOC v. S. Farm Bureau Cas. Ins. Co.*, 271 F.3d 209 (5th Cir. 2001), which reached a similar conclusion, when it refused to enforce a subpoena involving a request for information involving potential sex discrimination in circumstances in which the charge solely alleged race discrimination. More recently, this same conclusion was reached by the Third Circuit in *EEOC v. Kronos, Incorporated*, 620 F.3d 287 (3rd Cir. 2010), in which the court denied enforcement of a subpoena involving a request for race-related information based on an ADA charge.

**Burdensomeness.**<sup>43</sup> Even assuming “relevance,” the court stated that “burdensomeness” is a consideration that the district court must consider in determining whether to enforce, modify or quash a subpoena. However, there is a “presumption” of compliance and the employer “carries the difficult burden of showing that the demands are unduly burdensome or unreasonably broad,” such as by showing that “compliance would threaten the normal operation of a respondent’s business.” Cost of compliance also is a consideration, taking into account the “personnel or financial burden... compared to the resources the employer has at its disposal.” Each case has to be reviewed on an individual basis, but “conclusory allegations of burdensomeness are insufficient.” In the *United Airlines* case, the court concluded that the “financial and administrative demand placed on [the employer] is significant and, in light of the tangential need for the information, an undue burden on [the employer].”<sup>44</sup>

In the *Southern Farm Bureau* case, the Fifth Circuit affirmed the district court’s denial of enforcement of an EEOC subpoena on “relevance” grounds. Therein, the underlying charge involved a claim of race discrimination, which also included class-based allegations of race discrimination when hiring insurance claims representatives. Based on information provided to the EEOC, the employer was advised that the EEOC was expanding the scope of its investigation “to include the issue of the failure to hire females as Claims Representatives/Claims Adjustors.” After the EEOC requested information regarding the sex of Southern Farm’s employees working in various job positions and the employer refused to provide the requested information on the basis that it was beyond the scope of the charge, the subpoena enforcement action followed. In affirming the district court’s denial of enforcement, the Fifth Circuit explained:

The district court first noted that, even though the EEOC is the agency with primary responsibility for enforcing Title VII, it does not possess plenary authority to demand information that it considers relevant to all of its areas of jurisdiction. Instead, the court observed, information requested by the EEOC must be based on a valid charge filed by either an aggrieved individual or by the EEOC itself. After a valid charge is filed, the EEOC may obtain only “evidence of

any person being investigated... that relates to unlawful employment practices... and is relevant to the charge under investigation.” The district court will enforce the EEOC’s subpoenas when the EEOC carries its burden of demonstrating that the information requested is relevant to the charge filed against the employer. Here, the district court found that the EEOC had not met its burden of demonstrating relevance and therefore denied enforcement.

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We conclude that the district court’s ruling, based on the discrete facts and circumstances before it, was not clearly erroneous. Thomas’s charge specified racial discrimination only. When the EEOC discovered what it considered to be possible evidence of sex discrimination by Southern Farm, the EEOC could have exercised its authority under 42 U.S.C. §§ 2000e-5(b), 2000e-6(e) to file a commissioner’s charge alleging sex discrimination, thereby freeing the EEOC to demand information relevant to Southern Farm’s employment of women. Instead, nineteen months into its investigation of Thomas’s racial discrimination charge, the EEOC simply began requesting information about the sex of Southern Farm’s employees. Given this timing, together with the availability of a statutory avenue for pursuing other discrimination charges and the EEOC’s inability to demonstrate relevance in this case, we perceive no clear error in the district court’s determination. It should be noted, however, that the courts have been mixed in their adoption of the approach taken by the Fifth Circuit in the *Southern Farm Bureau* case.<sup>45</sup>

## 2. Recent Limitations on EEOC’s Investigative Authority

Over the past year, employer challenges to subpoena enforcement actions have been sustained by the courts. Employers have relied on various arguments in challenging EEOC subpoena enforcement actions that have included the following: (1) untimely expansion of an investigation based on the EEOC’s

<sup>43</sup> As discussed *infra*, a recent case upholding an employer on burdensomeness grounds is *EEOC v. Randstad et al*, 765 F. Supp. 2d 734 (D. Md. 2011).

<sup>44</sup> The court also may have been influenced, in part, by the EEOC conceding that a treaty between the U.S. and France also precluded the employer from making the contributions that formed the basis for the charge, thus indicating, “The EEOC cannot justify further investigating a charge for which it has conceded there is a valid defense.”

<sup>45</sup> See *EEOC v. Aerotek, Inc.*, Case No. 1:10-cv-07109, 2011 U.S. Dist. LEXIS 3723 (N.D. Ill. Jan. 12, 2011) (court enforced subpoena seeking information on different types of discrimination where only one type had been included in charge, without citation to *Southern Farm*, and relied on *EEOC v. Tempel Steel Co.*, 814 F.2d 482, 486 n.9 (7th Cir. 1987); *EEOC v. Bay Shipbuilding*, 668 F.2d 304, 311 n. 8 (7th Cir. 1981); *EEOC v. Univ of New Mexico*, 814 F.2d 1296, 1299-1302 (10th Cir. 1974); *Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355, 358 (6th Cir. 1969). *But see EEOC v. Kronos, Inc.*, 620 F.3d 287 (3rd Cir. 2010) (Third Circuit relied on *Southern Farm* in denying enforcement of subpoena in which the EEOC requested race-related information in an investigation based on an ADA charge).

attempt to investigate new claims that did not “relate back” to the initial charge; (2) requesting information to investigate policies beyond the scope of the underlying charge; (3) unreasonable geographic expansion of an EEOC investigation; (4) expanding the investigation of claims involving EEO classifications that were not included as part of the underlying charge; and (5) requesting information through the subpoena process for an improper purpose. Recent district court cases addressing these issues are addressed below.

#### (a) Untimely Expansion of Investigation

In *EEOC v. Randstad et al*, 765 F.Supp. 2d 734 (D. Md. 2011), the district court rejected the EEOC’s untimely attempt to expand a national origin investigation to address a potential ADA claim against the employer. The employer, an employee staffing agency with 600 branches nationwide, provides staffing for two types of clients: (1) light industrial clients in need of laborers; and (2) administrative clients in need of clerical and administrative personnel for office settings. Basic reading is a requirement for virtually every light industrial client assignment. After several assignments, it became clear that the CP could not complete certain paperwork in each job based on language limitations. The CP, who was born in Jamaica and spoke Patois, an English-based Creole language, could not read English. As a result, the CP was advised that he would not be eligible for future assignments until he developed remedial reading and writing skills. The ability to read was viewed as being important, at a minimum, to comprehend written safety warnings that existed at these various industrial assignments.

On January 27, 2007, the CP filed a discrimination charge, claiming he was denied a placement due to his national origin of being Jamaican. The EEOC at some point after the charge was filed had the CP undergo a psychological evaluation, which found that he was mildly retarded. Two years after the original charge, on January 30, 2009, the CP’s charge was amended to add a disability discrimination claim, including the allegation that the employer failed to accommodate the CP due to his disability. On September 30, 2009, the EEOC issued a determination that the CP was discriminated against in violation of the ADA. The EEOC then reopened its investigation in October 2009 and sent a broad based request for information to the employer going back 3-1/2 years,

including information on all position assignments where the CP had worked and whether the ability to read or write was a requirement. This was followed by a subpoena issued in January 2010, requesting company-wide information for all placements made by every branch in the U.S. (375 branches) going back over 5 years.<sup>46</sup> After the employer filed a petition to modify or revoke the subpoena, the EEOC limited the geographic request to the employer’s Maryland offices, but otherwise did not modify the EEOC’s subpoena. The EEOC’s enforcement action then followed.

The district court in *Randstad* cited *Shell Oil* for the basic proposition that a valid charge of discrimination is a “jurisdictional prerequisite to judicial enforcement of a subpoena by the EEOC.” Significantly, the court further stated, “[e]nforcement of administrative subpoenas is ‘not absolute,’ and a court should not enforce a subpoena where the ‘defense raised is ‘jurisdictional’ in nature – when the agency lacks jurisdiction over the subject of the investigation.” The employer argued that the EEOC did not have jurisdiction over the disability claim, aside from arguing that the information being sought was “irrelevant and unduly burdensome.”

#### Untimely Attempt to Expand Charge and Investigation.

The issue addressed by the district court was whether the EEOC had jurisdiction to expand the investigation beyond national origin discrimination to enforce the subpoena involving the EEOC’s investigation of potential disability discrimination. At the heart of the dispute was whether the disability claim, which did not arise until two years after the initial charge, could “relate back” to the initial charge. The EEOC argued that the ADA claim related back because it arose based on the same facts and circumstances as the original charge. The EEOC regulations provide that a charge may be amended “alleging additional acts... related to or growing out of the subject matter of the original charge.”<sup>47</sup> The district court, however, cited a wealth of authority that an amendment to a charge alleging a new theory of recovery does not relate back to the original charge.<sup>48</sup> The court focused specifically on a case in which the Seventh Circuit rejected a similar argument by the EEOC that a disability claim “related back,”<sup>49</sup> concluding that the EEOC “misinterprets the regulation’s language [§1601.12(b)] allowing an amended charge to allege additional acts related to the same subject matter of the original charge, believing that this language allows them to

<sup>46</sup> The subpoena requested a copy of each client job order, all documents relating to the essential job functions, and all documents that identified who was selected, among other documents and requests for information.

<sup>47</sup> 29 C.F.R. §1601.12(b).

<sup>48</sup> The court cited cases from various courts of appeal rejecting the EEOC’s theory: *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 963 (4th Cir. 1996); *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 878 (5th Cir. 2003); *Chanda v. Engelhard/ICC*, 234 F.3d 1219, 1224-125 (11th Cir. 2000); *Simms v. Oklahoma ex rel Dep’t of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1327 (10th Cir. 1999); *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 675 (9th Cir. 1988).

<sup>49</sup> *Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567, 575 (7th Cir. 1998).

add an additional basis for legal liability.” The court thus held that the EEOC lacked jurisdiction to enforce the subpoena because the disability discrimination claim was untimely.<sup>50</sup>

**Relevancy and Burdensomeness.** The district court also rejected the subpoena in the *Randstad* case based on: (1) relevancy and (2) burdensomeness. The EEOC sought information as to every position assignment since 2005. However, in doing so, the subpoena involved requests relating to the other category of temporary jobs for which the CP was never qualified – the administrative position assignments. Further, the court held that the subpoena requesting information about assignments for approximately a 5 year period after the CP’s termination was not relevant to the charge. In addition, in dealing with the EEOC’s request for information involving over 100,000 job placements, the employer explained that in order to collect this information, it would have to create records that do not exist because it does not maintain a specific database of job descriptions, job orders or essential job functions of temporary assignments. The employer estimated that compiling the information would take at least 120 hours and cost between \$14,000 and \$19,000. In the view of the district court, “When evaluating burdensomeness, courts often consider the cost of compliance,” citing *EEOC v. United Airlines, Inc.* 287 F.3d 643. Under the circumstances, the court ruled that the requests were unduly burdensome.

#### (b) Rejecting Request for Information from Successor Employer

Aside from delayed request for information long after the underlying charge, a court also rejected the EEOC’s efforts potentially to expand a charge to include a successor employer and investigate its employment practices where it was never named in the charge, as shown in *EEOC v. ABM Janitorial-Midwest, Inc.*, 2009 WL 4342504 (N.D. Ill. Dec. 2, 2009). Therein, the underlying national origin discrimination charge focused on a supervisor allegedly conducting meetings in Polish. The investigation continued for an extended period of time, and another entity (*i.e.*, ABM Janitorial) purchased the assets of the employer. The subpoena enforcement action arose years after the underlying discrimination charge was filed based on the EEOC requesting a broad range of information from the purchasing entity involving hiring and job placements by the purported successor.

The court rejected any potential “relevance” of the requested information under the circumstances, explaining:

It is easy to see how information about a particular employer’s hiring and job placement practices might shed light on the issue of whether another practice imputed to the employer has a discriminatory motive or effect...<sup>51</sup> It is much harder to see how the hiring and job placement practices of an entity that, although presently related to the charging party’s former employer through a series of corporate transactions, was, at the time the charge was brought and for several years thereafter, an unrelated competitor of the employer named in the charge.

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Nor does the EEOC’s theory of successor liability entitle it to information it seeks... [T]he EEOC cannot plausibly claim that the possibility that ABM might ultimately be liable, as [the predecessor employer’s] successor, for discrimination allegedly practiced by [the predecessor employer], entitles it to information about [the subsequent employer’s] own employment practices.<sup>52</sup>

#### (c) Improper “Fishing Expedition” to Challenge Company Policy

In another recent case, *EEOC v. UPMC*, Case No. 2:1-mc-00121, 2011 U.S. Dist. LEXIS 55311 (W.D. Pa. May 24, 2011), the employer successfully challenged the EEOC in a subpoena enforcement action on grounds that the EEOC was engaged in an improper “fishing expedition” beyond the scope of the underlying charge. In the *UPMC* case, the CP was notified of her termination on July 11, 2008, stemming from her failure to return to work following leave based on short term disability. The CP had been on leave for medical related reasons and received 26 weeks of STD. After her STD benefits expired on May 3, 2008, the CP was granted a personal leave of absence with a return to work date of June 21, 2008, based on the CP’s representation that she would return to work on that date. The CP, however, failed to return to work

50 The appellate court also rejected the EEOC’s attempted reliance on 29 CFR §1626.22(c), which provides, “Whenever a charge is filed under one statute and it is subsequently believed that the alleged discrimination constitutes an unlawful employment practice under another statute administered and enforced by the Commission, the charge may be so amended and timeliness determined from the date of filing of the original charge.” The district court held that this provision relates only to claims brought under the ADEA.

51 In support of this principle, the court cited an earlier decision in a subpoena enforcement action involving the employer that was the subject of the underlying charge, *EEOC v. Lakeside Building Maintenance, Inc.*, 255 F. Supp. 2d 871 (N.D. Ill. 2003).

52 The court made a key distinction between potential liability for the predecessor’s actions, as discussed in *Musikiwamba v. ESSI, Inc.*, 760 F. 2d 740 (7th Cir. 1985) (which discusses successor liability), and expansion by the EEOC to potentially attack the employment practices of the subsequent company (*i.e.*, potential successor) that was never included as part of the underlying charge of discrimination. The EEOC in the *ABM Janitorial* case also did not allege that it was unable to obtain information from the employer that was the subject of the underlying charge.

or contact her employer at the expiration of her personal leave, and was thus viewed as a voluntary resignation, effective June 22, 2008. When the CP contacted the employer on July 11, 2008 concerning her ability to return to work, she was advised that her employment had been terminated.

The CP completed a questionnaire at the EEOC on April 23, 2009, within the 300-day window, but did not file her formal charge until June 17, 2009 (after the 300-day window for a timely charge). The individual-based charge was very specific in focusing on her individual circumstances and alleged in relevant part:

I believe I was discriminated against because of my disability... in that due to my disability, I had to have major surgery. At the time of my discharge, I was still out on short-term disability, as I had not yet been cleared to return full-duty. The respondent was aware that I just had surgery, but did not in any way contact me or warn me that I was going to be discharged.

The employer filed a position statement and denied the allegations and provided further details regarding her employment and termination. The employer also attached to the position statement various policies, including the Personal Leave of Absence (PLOA) Policy and Disability Policy, which addressed STD, LTD and Salary Continuation. The employer submitted that the CP was terminated in accordance with the PLOA policy, not the Disability Policy.

The EEOC subsequently served a subpoena requesting various categories of information about “all employees who were terminated after 14 weeks of a medical leave of absence” pursuant to the employer’s personal leave of absence and/or disability policy or any other policy and sought information “for the period July 1, 2008 to the present time” (*i.e.*, which was for a time period *after* the CP’s termination). A subpoena enforcement action was filed after the employer filed a petition to revoke or modify an EEOC subpoena that requested the identities of all employees at all facilities in the Pittsburgh area who were terminated in accordance with the above-referenced Personal Leave of Absence and/or Disability policies. The litigation followed denial of the employer petition.

While the employer raised several objections to the subpoena, including the claim that the underlying charge was untimely, the critical objection focused on by the court was the claim that the subpoena sought information that was not relevant to the underlying charge. In rejecting the subpoena enforcement action,

the district court held that the subpoena constituted an improper “‘fishing expedition’ that seeks information that is not relevant to the underlying charge,” and thus concluded that it need not resolve the ultimate merit of the employer’s other contentions. The court attacked the EEOC’s failure to investigate the underlying charge and underscored that the subpoena did not even cover the period of the CP’s employment, thus viewing the subpoena as an “improper ‘fishing expedition’ to discover the existence of other potential claimants rather than a reasonable effort to develop information relevant to [charging party’s] charge of discrimination.” The court further explained:

It is readily apparent that [the] EEOC is interested in pursuing an investigation of UPMC’s corporate policies. Upon receipt of UPMC policies, the EEOC immediately turned the focus of its investigation away from the specifics of the [underlying] charge and toward a much larger, corporate-wide issue... EEOC’s reply brief forthrightly explains: ‘the purpose of the investigation is to determine if there are any employees who were denied medical leave in excess of Respondent’s maximum policy limit where such leave would have been an accommodation and would not have been an undue hardship defined by the ADA... Nevertheless, there is no ‘commissioner’s charge’ regarding these UPMC corporate policies and the subpoena cannot be justified by [the CP’s] charge.

#### (d) Limiting Geographic Scope of Subpoena Enforcement Action

As discussed in the prior section discussing recent cases authorizing broad-based investigations by the EEOC, including information requests for broad geographical data, reference was made to *EEOC v. Burlington Northern Santa Fe*, Case No. 10-cv-03008. Docket No. 1 (Petition) (D. Colo. Filed Dec. 13, 2010). Therein, the district court rejected the EEOC’s request for nationwide data because the charge was based on two individual ADA charges and did not arise based on allegations of a pattern and practice of discrimination.<sup>53</sup>

Other recent cases, discussed herein, demonstrate that the courts may limit the geographical scope of an EEOC subpoena in circumstances where decision-making is more localized in nature, as occurred in *EEOC v. Quantum Foods, LLC*, 2010 U.S. Dist. LEXIS 41846 (N.D. Ill., Apr. 26, 2010) (court limited subpoena to facility where CP worked because the decision makers did not appear to have authority beyond the facility involved and an

<sup>53</sup> The *Burlington Northern* case also is summarized in greater detail in “Appendix A.” See also *supra* pp. 10 – 11.

investigation extending to other facilities “would amount to a ‘fishing expedition’”).<sup>54</sup> A similar approach was taken in *EEOC v. Sears, Roebuck and Co.*, 2010 U.S. Dist. LEXIS 67579 (D. Colo. June 8, 2010) (court denied nationwide subpoena based on individual charge of discrimination involving employer arrest and conviction policy that required reporting of arrests based on individual charge of discrimination and limited subpoena to 10 stores in district where CP worked; court even denied EEOC’s proposed narrowing of geographic scope to region of 140 stores).<sup>55</sup>

#### (e) Limiting EEOC Efforts to Expand Investigation Beyond Classification Referenced in Charge

Various courts clearly are more closely scrutinizing EEOC efforts to expand requests for information involving those in a different protected class from the CP in the underlying charge. The Third Circuit’s decision in *EEOC v. Kronos Incorporated*, 2009 WL 1519254 (W.D. Pa., June 1, 2009), *enfd in part and denied in part*, 620 F.3d 287 (3rd Cir. 2010), is a very recent example of the court limiting the EEOC when requesting unrelated EEO data in such circumstances. As discussed previously, the Third Circuit in *Kronos* rejected the EEOC adding race-related requests for information to an ADA charge. Another excellent example is the earlier Fifth Circuit decision in *EEOC v. Southern Farm Bureau Casualty Insurance Co.*, 271 F.3d 209 (5th Cir. 2001), also discussed previously in this paper, in which the appellate court rejected the EEOC’s subpoena enforcement action seeking gender-related information in an investigation involving a race discrimination charge. In short, these cases demonstrate that certain courts will not “rubber stamp” EEOC subpoenas involving requests for such information.

A more recent case worth noting is *EEOC v. Sears, Roebuck and Co.*, 2010 U.S. Dist. LEXIS 67579 (D. Colo., June 8, 2010) (magistrate decision), approved, 2010 U.S. Dist. LEXIS 67344

(July 6, 2010).<sup>56</sup> Although the CP alleged race discrimination, the EEOC also requested information involving national origin relating to the policy in issue that required employees to notify the employer of any arrests. The magistrate focused on the fact that, in her charge, the CP never based her claim on national origin or checked the “National Origin” box on the charge. According to the magistrate, the CP’s “use of the word ‘Black’ to describe her race is insufficient to alert the EEOC and [the employer] that she is also alleging a national origin claim,” and thus held that “requests for national origin information should be omitted from the subpoena.”<sup>57</sup>

As discussed above, the courts remain split on this issue, as best illustrated by the court’s recent decision enforcing a subpoena in *EEOC v. Aerotek, Inc.*, Case No. 1:10-cv-07109, 2011 U.S. Dist. LEXIS 3723 (N.D. Ill. Jan. 12, 2011). Therein, the EEOC requested information involving sex, race and disability based on a national origin discrimination charge. Without even discussing the contrary authority referenced above,<sup>58</sup> the court stated:

The information requested related to sex, race, and disability are also relevant and courts have consistently enforced subpoenas seeking information on different types of discrimination where only one type has been included in the charge. (internal citations omitted).

#### (f) Subpoena Issued for Improper Purpose

Employers challenging subpoenas as being issued for an improper purpose has arisen in at least two recent cases: (1) *EEOC v. Bashas’ Incorporated*, Case No. 1:09-cv-00209, 2009 U.S. Dist. LEXIS 97736 (D. Ariz. Sept. 30, 2009); and (2) *EEOC v. Sterling Jewelers, Inc.*, Case No. 1:11-mc-00028, Docket No. 17 (Memorandum in Opposition to EEOC’s Application for Order to Show Cause Why Administrative Subpoena Should Not be Enforced) (W.D. N.Y. Filed 4/15/11).

54 *Quantum Foods* is discussed in greater detail *supra* pp. 6 – 7. Older cases that have applied the same principles are: *Joslin Dry Goods v. EEOC*, 483 F.2d 178 (10th Cir. 1073) (limited subpoena to particular facility) and *EEOC v. Packard Electric Division*, 569 F.2d 315 (5th Cir. 1978) (limited subpoena to applicable department, even denying facility-wide subpoena).

55 The court referenced and rejected the case authority relied on by the EEOC to support a nationwide subpoena that included: *EEOC v. Technocrest Systems, Inc.*, 448 F.3d 1035, 1040 (8th Cir. 2006) (six charging parties alleged individual discrimination and discrimination against all Filipino employees); *EEOC v. Aaron Brothers, Inc.*, 620 F. Supp. 2d 1102, 1107 (C.D. Cal. 2009) (national data “facially relevant and material” based on allegation that “[o]ther females as a class are paid less than males”); *EEOC v. Morgan Stanley & Co.*, 132 F. Supp. 2d 146, 161 (S.D.N.Y. 2000) (enforced subpoena for company wide lists of employees based on class allegations against African Americans); *EEOC v. Patterson UTI Drilling, Inc.*, 09-cv-1562-PAB, Docket No. 21, p. 5-6 (D. Colo. Oct. 23, 2009) (enforcing nationwide subpoena where CP alleged he witnessed others subjected to racial slurs and there were six other allegations of similar discrimination across the country).

56 See also *EEOC v. Randstad et al*, 765 F. Supp. 2d 734 (D. Md. 2011), discussed previously, regarding the EEOC’s untimely attempt to add an ADA claim to a national origin discrimination charge.

57 While not subpoena-related cases, the court in *Sears* relied on *Rodgers v. Arlington Heights School Dist. No. 25*, 171 F. Supp. 2d 773, 777 (N.D. Ill. 2001) (national origin claim dismissed as outside the scope of the plaintiff’s EEOC charge, on which she described her claim as one based on her race, which she described as “Black”); *Jones v. Breman High School Dist.* 288, No. 08CV3548, 2009 WL 537073, at \*3 (N.D. Ill. Mar. 4, 2009); and *Cordero v. Heyman*, No. 97 Civ. 0435, 1998 WL 730558, at \*5 (S.D. N.Y. Oct. 19, 1998) (finding that where plaintiff, an “Hispanic of Puerto Rican national origin,” alleged only racial discrimination on his EEOC charge, his claim of discrimination based on national origin was not “reasonably related” because he did not state in his administrative complaint that “he was denied a promotion because he was Puerto Rican”).

58 In opposing the subpoena enforcement action, the employer cited both the Third Circuit decision in *Kronos* and Fifth Circuit decision in *Southern Farm Bureau*, which were not even addressed in the court’s opinion. Compare *EEOC v. Aerotek, Inc.*, Case No. 1:10-cv-07109, Docket No. 14 (employer memorandum) and Docket No. 18 (opinion of court).

In *Bashas*, the underlying charge had been pending for an extended period of time involving the issue of whether the employer engaged in discrimination against Hispanic employees on the basis of national origin with respect to wages and promotions. At issue was a Commissioner's charge. The employer argued that a subpoena issued by the EEOC requesting its entire employee database coincided with denial of such data in a private class action lawsuit against the employer. The employer challenged the subpoena claiming that it was issued for the purpose of providing the information to plaintiffs' counsel in the private litigation against the employer, which the employer submitted was an abuse of process. The employer argued, in relevant part, that: (1) the timing was suspicious based on developments in the private lawsuit, which created the suspicion that the subpoena was not issued in good-faith; and (2) the EEOC was sharing information with attorneys in the private litigation. In reviewing such factors, the district court held a hearing on the employer's request for limited discovery and determined that the employer made the requisite showing of abuse of process to justify limited discovery. *EEOC v. Bashas', Inc.*, 2009 U.S. Dist. LEXIS 97736 at 30-42. The matter remains pending before the court.<sup>59</sup>

*Sterling Jewelers* involves an attack on the EEOC allegedly for using the investigation process and its subpoena powers to obtain documents and information that the EEOC failed to secure in a pending EEOC nationwide pattern or practice lawsuit against the same employer. The lawsuit involves alleged discrimination in pay and promotion in a case pending in the Western District of New York. Discovery had not yet commenced in the nationwide lawsuit, and the parties had not yet exchanged initial disclosures. The employer argued that the subpoena enforcement action to secure certain data and information was an improper effort to secure premature discovery, and was thus an abuse of process, warranting revocation of the subpoena. The matter has been briefed and a ruling is soon expected by the court.<sup>60</sup> The employer cited *United States v. Giant Industries, Inc.*, No. Civ 81-321 PBX CLH, 1981 WL 1277, at \*1-2 (D. Ariz. June 17, 1981) to support the view, "If [a government] subpoena is issued for an improper purpose, it is invalid." The employer also relied on an earlier ruling in the *Bashas* case which held, "a limited amount of discovery may be allowed [against the EEOC] if, for example, the defendant makes a preliminary and

substantial demonstration of abuse, that is, where the defendant has presented meaningful evidence that the agency is attempting to abuse its investigative authority."<sup>61</sup>

#### D. Privacy Considerations

Employers frequently are reluctant to produce certain documents, particularly involving other employees, based on privacy considerations. The EEOC, however, consistently has rejected such objections by employers. The EEOC has taken the position that submission to the EEOC are confidential and has articulated its position as follows:

The fact that a subpoena seeks confidential information is no excuse for noncompliance since Title VII imposes criminal penalties for EEOC personnel who publicize information obtained in the course of investigating charges of employment discrimination. *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 312 (7th Cir. 1981) (citing *EEOC v. Univ. of New Mexico*, 504 F.2d 1296, 1303 (10th Cir. 1974)). See also *EEOC v. Illinois Dept. of Employment Security*, 995 F.2d 106 (7th Cir. 1995) (state statutory unemployment compensation privilege making unemployment compensation proceedings confidential did not apply to preclude enforcement of EEOC's subpoena seeking copy of transcript of state unemployment proceedings relevant to EEOC investigation). Title VII specifically prescribes that any officer or employee of the Commission who makes public in any manner such information obtained in the course of investigation shall be guilty of a crime and, upon conviction, subject to a fine of not more than \$1,000.00 or imprisoned for not more than one year. 42 U.S.C. § 2000e-8(e); see also 29 C.F.R. § 1601.22. Courts have held that these penalties are sufficient in themselves to protect employees' privacy rights. See e.g., *Roadway Express*, 750 F.2d at 43.<sup>62</sup>

#### E. Miscellaneous Recent Developments

Subpoena enforcement actions can arise in circumstances other than requests for documents. As shown below, witness interviews by the EEOC are sometimes a source of dispute, and the EEOC

59 Following limited discovery, a show cause hearing was held on November 17-18, 2010, and the matter remains pending before the court.

60 Oral argument on the subpoena enforcement action was held on May 17, 2011, and the matter remains pending before the court.

61 *EEOC v. Bashas', Inc.*, Case No. 1:09-cv-00209, 2009 U.S. Dist. LEXIS 79696, at \*16-17 (D. Ariz. June 18, 2009).

62 See *EEOC v. International Bioresources, LLC*, Case No. 1:11-cv-01438, Docket #22 at 14 and "Appendix A;" see also *EEOC v. Z Foods, Inc. dba Zoria Farms et al.*, 2011 U.S. Dist. LEXIS 17667 (E.D. Cal. Feb. 23, 2011) ("Title VII makes it unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under the Act. See 42 U.S.C. § 2000e-8(e). The EEOC is under a statutory mandate not to disclose information it gathers during its investigation; there is no danger to anyone but the EEOC will have access to the information Respondent seeks to protect.")

may exercise its authority and file a subpoena enforcement action in circumstances where the EEOC believes an employer is interfering with the interview process. Unique issues also can arise in the public sector, such as circumstances in which a public employer argues that certain decision making is shielded from disclosure, and this results in a subpoena enforcement action based on the EEOC's view that it is entitled to such information. Recent case developments involving these issues are briefly summarized below.

### 1. Subpoenas Involving Witness Interviews

*EEOC v. Z Foods, Inc. dba Zoria Farms et al*, 2011 U.S. Dist. LEXIS 17667 (E.D. CA Feb. 23, 2011), involved a motion for reconsideration of a magistrate judge's order enforcing an EEOC subpoena relating to an alleged pattern or practice of sexual harassment. The EEOC's investigation stemmed from 14 charges of alleged preferential treatment toward younger women, "quid pro quo" harassment and sexual misconduct (i.e., assault). The EEOC's investigation included an on-site visit and interview of a supervisor, who was one of the alleged harassers.

The initial source of the dispute with the EEOC stemmed from a company attorney not permitting the witness to respond to questions regarding female employees not named in the charge. The Company attorney also instructed the supervisor not to answer questions regarding the supervisor's alleged relationships with female employees beyond one charging party, invoking the supervisor's privacy rights. Based on the failure and/or refusal to respond, as requested, the EEOC served a subpoena requiring attendance at the EEOC's offices to respond to inquiries regarding the supervisor's sexual activity with current and/or former employees. In response, the employer's attorney requested an advance copy of the interview questions to determine if they invaded the supervisor's right to privacy.

Such actions then led to a subpoena enforcement action in federal court and a ruling by a magistrate that the employer and its counsel had impeded the EEOC's investigation. The magistrate ordered the supervisor to appear at EEOC offices and barred the company's personnel or legal counsel from intimidating any witness cooperating with the EEOC.

Following a motion for reconsideration, the district court cited prior authority and opined that a district court's role is "extremely limited" and the critical questions are: "(1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation." Assuming these factors were demonstrated, a subpoena would be enforced unless the party

objecting "proves the inquiry is unreasonable because it is overbroad or unduly burdensome." Citing both *Shell Oil* and the Ninth Circuit opinion in *Federal Express*, as previously discussed, the court highlighted the broad "relevancy" standard, but qualified its ruling by stating that the administrative subpoena may not be used as a "fishing expedition."<sup>63</sup>

In focusing specifically on the areas of requested inquiry by the EEOC, the court concluded that it was entirely appropriate for the EEOC to investigate and ask questions of the supervisor regarding his sexual relationships with current and former employees to determine whether supervisors engaged in a pattern or practice of sexual harassment. The district court also relied on prior authority that the EEOC is not limited to inquiries solely referenced in the charge and could thus investigate whether others were subjected to sexual harassment. The court denied the employer's claim that it should be entitled to the EEOC's questions in advance.

The district court did, however, reverse the magistrate's ruling that the employer's attorney would be excluded from the room in any further questioning by the EEOC, taking the view that regardless of the so-called obstructionist behavior, "The exclusion of counsel from all investigatory proceedings is tantamount to a disqualification," and courts should hesitate to impose such a drastic step, "except when absolutely necessary."

### 2. Attempts to Shield Public Entities From Required Disclosures to EEOC

A public entity's efforts to shield itself from requested disclosures based on a "legislative privilege" and "legislative immunity" was dealt with in *EEOC v. Washington Suburban Sanitary Commission*, 631 F.3d 174 (4th Cir. 2011). Following a restructuring by this suburban agency and replacement of various merit system positions by non-merit positions, various displaced employees filed an ADEA complaint with the EEOC. After the EEOC subpoenaed the Sanitary Commission's records related to the restructuring, the public agency declined to comply, arguing that the legislative immunity and privilege shielded the materials because the restructuring stemmed in part from the budget making process. After the EEOC modified certain portions of its subpoena, the district court ordered the Sanitary Commission to comply with the subpoena.

The Fourth Circuit affirmed the district court, thereby enforcing the subpoena. The appellate court highlighted certain unique provisions of the ADEA, in which the EEOC retains authority to enforce the ADEA and sue on its own. Congress specifically granted the EEOC authority to "make investigations and require the keeping of records necessary or appropriate for the administration

63 The court cited *Peters v. United States*, 853 F.2d 692 (9th Cir. 2009) and *EEOC v. United Airlines*, 287 F.3d 643 (7th Cir. 2002).



of the ADEA,” including authority to subpoena information.<sup>64</sup> Significantly, the appellate court underscored that the EEOC has authority to investigate claims under the ADEA “independent of any ADEA charge brought by aggrieved employees.”

Notwithstanding, the court outlined certain limits on the EEOC’s authority, and explained the “[t]he EEOC’s subpoena power is... constrained by evidentiary privileges.”

These include: (1) information protected by the work product privilege and (2) information falling within the legislative privilege (*i.e.*, “the right of legislators to be free from arrest or civil process for what they do or say in legislative proceedings”). The latter privilege is linked to “legislative immunity” that “enables legislators to be free, not only from the consequences of litigation’s results, but also from the burden of defending themselves.” Even so, the Fourth Circuit concluded that the proceedings were in the early stages of investigation of an age discrimination claim, it was not at the litigation stage and there was no showing that “production of the requested materials will require that legislative officials divert their time and attention away from their legislative duties.” Thus, the employer could not shield the information from disclosure.

## IV. CONCLUSION

The broad scope of requests for information in many EEOC investigations has been a concern for the employer community, particularly based on the EEOC’s continued focus on systemic and pattern or practice investigations and related litigation.

While the EEOC has the burden of meeting the “relevance” standard in any requests for information, the Supreme Court in *Shell Oil* long ago made clear that the concept of “relevancy” in Commission investigations is far broader than the permitted scope under the Federal Rules of Civil Procedure, giving the EEOC the right to “access any material that might cast light on the allegations against the employer.”<sup>65</sup> Notwithstanding, *Shell Oil* also has been cited by other courts, such as the Seventh Circuit in the *United Airlines* case, for the proposition that the “relevancy requirement is not to be construed so broadly as to render the statutory language a ‘nullity,’” and underscored that “(t)he requirement of relevance... is designed to cabin the EEOC’s authority and prevent ‘fishing expeditions.’”<sup>66</sup>

Based on the dynamics of any matter before the EEOC, because it typically is in the employer’s best interests to avoid a confrontational approach, an employer needs to be effectively armed to negotiate in good faith with the EEOC. Thus, understanding the legal landscape and procedural landmines is critical when faced with an EEOC subpoena.

Assuming an employer seeks to resist an EEOC request for information, and subsequent related subpoena, there are strict timelines that need to be carefully reviewed, such as petitioning the EEOC to revoke or modify a subpoena on a timely basis (*i.e.* within five days, excluding weekends and holidays) to avoid the EEOC’s claim that the employer waived its right to challenge the subpoena. Even so, recent case authority has pointed out that employers may nevertheless have some basis to argue that “waiver” is not as automatic as may be suggested by the EEOC, particularly because the applicable statutory provision states that a person “may” petition to revoke or modify a subpoena within five days after service, as contrasted with EEOC regulations stating that a person “must” petition the EEOC to modify or revoke a petition within five days.<sup>67</sup>

While the courts frequently are inclined to support the EEOC in subpoena enforcement actions based on the limited

64 29 U.S.C. §626(a).

65 *EEOC v. Shell Oil*, 466 U.S. 54, 56-57.

66 *EEOC v. United Airlines*, 287 F. 3d 643, 653.

67 See *supra* note 9, and “Appendix B.” The above procedural timelines focus on Title VII, the ADA and GINA, as set forth in 20 CFR §1601.16, and there is no similar regulatory language regarding ADEA- and EPA-related subpoenas.

role played by the courts in such actions,<sup>68</sup> and such matters are in many cases resolved in the EEOC's favor prior to an ultimate court ruling,<sup>69</sup> various recent court decisions have limited and/or denied subpoena enforcement actions on either or both "relevance" and "burdensomeness" grounds.

These have included:

- The EEOC's untimely attempt to expand a national origin charge to address a potential ADA claim against an employer (*EEOC v. Randstad et al*, 765 F. Supp. 2d 734 (D. Md. 2011));
- An EEOC request for information from a potential successor employer regarding its employment practices in circumstances where the such practices were never the subject of the underlying charge (*EEOC v. ABM Janitorial-Midwest, Inc.*, 2009 WL 4342504 (N.D. Ill. Dec. 2, 2009));
- The EEOC's attempt to investigate an employer's leave policy and potential victims covering a time period after the charging party's employment prior to even investigating the underlying charge, which the court viewed as an improper "fishing expedition;" (*EEOC v. UPMC*, 2011 U.S. Dist. LEXIS 55311 (W.D. Pa. May 24, 2011)) and
- Broad based EEOC requests for information in circumstances where the decision-making was localized in nature and/or the EEOC requested nationwide information based on an individual charge that did not include allegations of a pattern or practice of discrimination. (*EEOC v. Quantum Foods, LLC*, 2010 U.S. Dist. LEXIS 41846 (N.D. Ill., Apr. 26, 2010); *EEOC v. Burlington Northern Santa Fe*, Case No. 10-cv-03998, Docket No. 10 (D. Colo., Feb. 3, 2011)).

Some courts also have begun to more closely scrutinize and limit EEOC efforts to expand requests for information involving those in a different protected class from the charging party involved in the underlying charge. See, e.g., *EEOC v. Kronos Incorporated*, 620 F. 3d 287 (3rd Cir. 2010); *EEOC v. Sears, Roebuck and Co.*, 2010 U.S. Dist. LEXIS 67579 (D. Colo. June 8, 2010), approved, 2010 U.S. Dist. LEXIS 67344 (D. Colo., July 6, 2010). Even so, the courts appear to be split in their approach in dealing with

subpoena enforcement actions requesting such information, and other courts have continued to broadly interpret the EEOC's right to request information involving those in a different protected class. See *EEOC v. Aerotek, Inc.*, 2011 U.S. Dist. LEXIS 3723 (N.D. Ill. Jan. 12, 2011).<sup>70</sup> The most aggressive approach taken by employers to date involve challenges to EEOC subpoena enforcement actions based on the claim that the subpoena enforcement action was filed for an improper purpose, such as filing the action allegedly to provide the information to plaintiffs' counsel in private litigation against the employer or allegedly initiating the action to secure information prematurely that the EEOC was not yet able to secure in a pending lawsuit by the EEOC against the same employer. See *EEOC v. Bashas' Incorporated*, 2009 U.S. Dist. LEXIS 97736 (D. Ariz. Sept. 30, 2009); *EEOC v. Sterling Jewelers, Inc.*, Case No. 1:11-mc-00028, Docket No. 17 (W.D. N.Y., Filed: 4/15/11)<sup>71</sup>

Even assuming "relevance," the Seventh Circuit in *United Airlines* stated that "burdensomeness" is a consideration that the district court must consider in determining whether to enforce, modify or quash a subpoena.<sup>72</sup> However, the court cautioned that an employer "carries the difficult burden of showing that the demands are unduly burdensome or unreasonably broad," such as by showing that "compliance would threaten the normal operation of a respondent's business." Cost of compliance also is a consideration, taking into account the "personnel or financial burden ... compared to the resources the employer has at its disposal." Each case has to be reviewed on an individual basis, and "conclusory allegations of burdensomeness are insufficient."<sup>73</sup> In recent cases, the courts have made clear that in order to prevail based on any claim of "burdensomeness," an employer needs to submit a comprehensive affidavit or affidavits outlining in detail the time and effort, and perhaps even the expense, that would be required to comply with the subpoena, in demonstrating that the EEOC's request is unreasonable under the circumstances.<sup>74</sup>

Finally, employers are reminded that third parties assisting employers in hiring and related activities are subject to subpoenas, and potential subpoena enforcement actions in the event of non-compliance, and the EEOC generally has been successful in securing testing and medical records related to a charge, including broad

68 See *supra* note 26.

69 See "Appendix A" for a review of EEOC subpoena enforcement actions initiated over the past year during the course of EEOC investigations.

70 See discussion and case citations *supra* p. 18.

71 See discussion and case citations *supra* pp. 18 – 19.

72 287 F.3d 643, 653.

73 *Id.*

74 Compare *EEOC v. Aaron's Inc.*, 2011 U.S. Dist. LEXIS 38822 (N.D. Ill. Apr. 1, 2011 (failure to establish burdensomeness) and *EEOC v. Randstad et al*, 765 F. Supp. 2d 734 (D. Md. 2011) (burdensome established by employer).

based information requests involving individuals other than the charging party.<sup>75</sup>

Employers are urged to closely monitor case developments in this area because it is abundantly clear that over the next several years the EEOC will continue to focus on systemic and pattern or practice investigations, and related litigation. Hopefully, this paper will serve as a useful starting point and resource in staying abreast of developments in this area.

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<sup>75</sup> See, e.g., *EEOC v. Kronos Incorporated*, 2009 WL 1519254 (W.D. Pa. June 1, 2009), *enfd* in part and denied in part, 620 F.3d 287 (3rd Cir. 2010); *EEOC v. Concentra Health Services*, 1:11-mc-00039-JMS-MJD, "" (S.D. Ind. Filed: Apr. 6, 2011), discussed in "Appendix A." As discussed herein, the Third Circuit in the *Kronos* decision did, however, deny the EEOC's request for information to the extent that it requested information involving a protected status other than the charging party (*i.e.* denying race-based data in ADA charge). See discussion *supra* pp. 11 – 13.

## APPENDIX A. SUBPOENA ENFORCEMENT ACTIONS BY EEOC FROM AUGUST 2010 THROUGH JULY 2011

**NOTE:** The summary below reviews all reported subpoena enforcement actions filed by the EEOC from August 1, 2010 through July 2011. The information set forth below is based on a review of the applicable court docket for each of these cases. The cases illustrate that in most subpoena enforcement actions, the matters are resolved prior to issuance of a court opinion. The cases in which the courts have denied enforcement of a subpoena also are highlighted. Legal arguments and selected case authority are reviewed in various cases in which the parties briefed the underlying issues, including: (1) waiver of an employer's right to challenge the subpoena; (2) relevance of the requested data, including challenges to the scope of the subpoenas; and (3) burdensomeness. Also included is a discussion of a recent subpoena enforcement action to enforce a third party subpoena by the EEOC involving a request for medical information.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT	COMMENTARY
08/06/2010	TN	USDC WD TN Case No. 2:10-cv-02589  Related case: 2:10-cv-02534 McCalla Case settled.	The Select Family of Staffing Companies	<p>A subpoena enforcement action by the EEOC and separate action by the employer were filed in this matter, stemming from race discrimination charges by African American applicants who allegedly were denied warehouse positions by the staffing company (<i>i.e.</i>, respondent). At issue was a subpoena requesting job applications and/or resumes as well as background checks, criminal background checks, safety tests, and basic skills tests, and the results for all tests, for 836 applicants over a 2-1/2 year period. The request went beyond the charge which, merely alleged that the employer refused to allow African Americans to complete applications, while Hispanics were allowed to apply. The employer argued that the background checks and skill tests were not relevant because neither of the Charging Parties ("CP")s were eliminated based on those standards.</p> <p>On July 22, 2010, the employer initially filed a complaint for an injunction and declaratory relief, following denial of the employer's motion filed with the Commission to modify or revoke the subpoena under the Adm. Procedure Act, 5 U.S.C §551. The Complaint sought <i>de novo</i> review of the final agency "determination" on the basis that the two CPs' allegations were false and potentially fraudulent. The employer alleged that the EEOC could not conduct an investigation and make broad based requests for information under the circumstances and challenged the subpoena on other grounds as well. The employer requested an injunction until the court conducted a hearing on the motion to quash the subpoena.</p> <p>On August 6, 2010, the EEOC filed its subpoena enforcement action based on the ongoing EEOC investigation.</p> <p>Following extensive briefing and a hearing on the respective motions, the parties advised the court that all issues were resolved regarding their respective motions based on 800 unspecified files that were produced for inspection and scanning by the EEOC.</p>
08/19/2010	IL	USDC ND IL 1:10cv5234 Bucklo Court opinion issued enforcing subpoena. Appeal filed. Case settled.	Kable News Company Inc.	<p>The underlying ADEA charge stemmed from a reorganization/reduction in force based on the Charging Party's (Herein CP's) employment at Kable News Company. The subpoena at issue requested information for each employee employed at Kable News and two other (related) companies for a three year period, including identification of each employee, title, supervisor, status, reason for separation (if no longer employed) and name of decision maker involved for each separation.</p> <p>In the subpoena enforcement action, the EEOC justified its broad based subpoena for files involving approximately 1700 employees because over 80% of those impacted by the employer were 40 years of age or older, thus justifying investigating whether the company discriminated against a class of older workers. The EEOC sought information regarding affiliated entities based on the closedown of one and investigated whether employees were rehired by related entities. The EEOC modified its subpoena during the course of the proceeding in one respect – if the only way to determine the reason for separation would be to contact former managers no longer employed, the EEOC deleted that request from the subpoena for that limited group of employees.</p> <p>Court Opinion: On November 4, 2010, the Court upheld the subpoena in its entirety, except to the extent modified by the EEOC, referenced above. The court rejected the employer's objections on relevance grounds, taking the view that "the ADEA's grant of investigative authority to the Commission is not cabined by any reference to charges." The court also rejected the burdensomeness argument, acknowledging some burden, but distinguished it from the extreme burden presented in the Seventh Circuit's <i>United Airlines</i> decision.</p> <p>The employer sought a stay pending appeal, which was denied by the court. The EEOC subsequently filed a motion for contempt based on the employer's failure to fully comply. Ultimately, both the motion for contempt and appeal were dropped, and the case was dismissed based on resolution of the dispute by the parties.</p>
08/27/2010	TX	USDC SD TX 4:10-mc-00363 Ellison Case settled.	Foxconn Corporation; Foxconn Assembly LLC; Q-Hub Logistics	<p>On June 7, 2010, a Commissioner's charge was filed against three related entities in which Commissioner Ishimaru alleged that "since at least January 1, 2005, the employers have discriminated and continue to discriminate against African American/Black, Hispanic/Latino, and/or White employees or applicants for permanent positions in a range of job classifications from entry level, such as production worker or operative, to management."</p> <p>Following various requests for information that were not responded to, a broad based subpoena was served on the three entities requesting identification of any computerized or machine-readable files created or maintained from January 1, 2005 to the present that contain data on personnel activities, "including, but not limited to, applicants, hiring, job analyses and evaluations, performance evaluations, promotions, conversion from temporary employment, layoffs, employment history, amounts of pay, adjustment to pay, work assignments, adjustments to work assignments, promotions, transfers, terminations and job status." Various questions relating to such files were included as well as extensive inquiries on the applicant process, advertising for positions, evaluation procedures, interviewing for temporary positions and entities dealt with for such hiring, processes for retaining applications, documents relating to conversion from temporary to permanent hire, and various organizational charts for the respective entities.</p> <p>The subpoena enforcement action was filed on August 27, 2010, counsel for the employer appeared on September 1, 2010, and the parties stipulated to continue the application for an order to show cause until October 15, 2010. The parties subsequently advised the court that the matter was moot as of February 10, 2011.</p>

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT	COMMENTARY
11/04/2010	IL	USDC ND IL 1:10-CV-07109 Coleman Court opinion issued enforcing subpoena.	Aerotek, Inc.	<p>The EEOC investigation commenced based on two discrimination charges involving claims of national origin discrimination (Hispanic and Mexican) and retaliation. Each CP alleged they were subjected to different terms and conditions of employment as well as being constructively discharged in their roles as recruiters at the respondent's temporary staffing firm at three of the employer's seven Illinois operations. The investigator also was assigned to investigate other charges involving age and disability discrimination, retaliation, and sexual and racial harassment. As part of the investigation, the EEOC asserted that it found indications that certain employers were being placed in lower paying jobs based on their national origin and certain recruiters were being directed to recruit temporary workers based on prohibited (discriminatory) factors.</p> <p>On September 20, 2009, the EEOC served an extensive subpoena on the employer involving 17 categories from six of the employer's Illinois facilities, in which the employer filed a petition to modify and/or revoke. A petition to modify and/or revoke was denied in most respects on January 9, 2010. While various documents subsequently were produced, various disputes remained, which led to the subpoena enforcement action.</p> <p>In the subpoena enforcement action filed on November 4, 2010, the EEOC pursued the following categories of documents:</p> <ul style="list-style-type: none"> <li>• An electronic database for individuals who had applied as internal employees and not hired from 1/1/06 to the present;</li> <li>• An electronic database for the same time period for those who had applied as temporary employees who were hired and who were not hired;</li> <li>• Documents relating to those who applied, such as applications and resume;</li> <li>• Documents relating to requests for temporary employees from the employer's accounts;</li> <li>• All documents relating to job assignments for each account.</li> <li>• The employer objected to the RFI to the extent that it requested: (1) information beyond the employment dates of the CP; (2) information relating to race, sex, age and disability because the charges only alleged national origin discrimination; and (3) information beyond the allegations in the charge, such as information relating to hiring and placement for internal employees.</li> </ul> <p><i>Court Opinion.</i> On January 12, 2011, Judge Sharon Johnson Coleman upheld the subpoena in its entirety and addressed issues such as the following:</p> <p><i>Information related to all Illinois facilities.</i> The court permitted information from all facilities since three already were in issue, underscoring, "The EEOC is entitled to information that 'may provide a useful context' for evaluating employment practices under investigation ..."</p> <p><i>Applicable time period.</i> The court allowed information for the time period when the CPs were employed and a period of time beyond, which made the entire period somewhat extensive, holding, "the post-charge information provides essential context to the employment practices ... during the period of employment in the charge."</p> <p><i>Information regarding other protected classes.</i> "The information requested related to sex, race, and disability are also relevant and courts have consistently enforced subpoenas seeking information on different types of discrimination where only one type has been included in the charge." The court cited as support: <i>EEOC v. Tempel Steel Co.</i>, 814 F.2d 482, 486 n.9 (7th Cir. 1986), <i>Bay Shipbuilding</i>, 668 F.2d 304, at 311 n.8 (7th Cir. 1981); <i>EEOC v. Univ. of New Mexico</i>, 504 F.2d 1296, 1299-1302 (10th Cir. 1974); <i>Blue Bell Boots, Inc., v. EEOC</i>, 418 F.2d 355, 358 (6th Cir. 1969), cited with approval in <i>Shell Oil</i>.</p> <p><i>Information related to other job positions within employer.</i> Information relating to positions other than the Recruiter position involved in the charges also "is relevant to the allegations of discrimination in employment practices," and "courts have consistently upheld subpoenas requesting information related to different job classifications," citing <i>EEOC v. United Airlines, Inc.</i>, 287 F.3d 643, 649 (7th Cir. 2002) and <i>Bay Shipbuilding</i>, 668 F.2d at 331.</p> <p><i>Unduly burdensome.</i> The court rejected the conclusory allegation that "the burden is obvious on its face," underscoring that the employer "has the burden of showing that 'compliance would threaten the normal operations of its business.'" The court cited <i>EEOC v. Quad /Graphics, Inc.</i>, 63 F.3d 642, 648 (7th Cir. 1995) (citing <i>Bay Shipbuilding Corp.</i>, 668 F. 2d 304, at 313, rejecting burdensome claim "absent presentation of any supportive material such as affidavits").</p>

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT	COMMENTARY
12/13/2010	CO	USDC CO 1:10-cv-03008-JLK Kane Court opinion issued denying enforcement of subpoena.	Burlington Northern Santa Fe Railroad	<p>This investigation focused on two ADA charges. In one, the CP allegedly was advised that he was not medically qualified for a conductor trainee position due to significant risk of aggravation or recurrence of a prior injury. A second CP had an offer retracted following disclosure of various surgeries and impairments. As part of the investigation, despite the absence of any pattern or practice allegations, the EEOC notified the employer by letter of its intentions to broaden its investigation into a nationwide investigation and requested any computerized personnel data maintained for employees and applicants throughout the U.S.</p> <p>A petition to modify or revoke was rejected by the Commission, and the Commission cited various cases that have enforced nationwide subpoenas based on an individual charge: (1) <i>EEOC v. Technocrest Systems, Inc.</i>, 448 F.3d 1035 (8th Cir. 2006); <i>EEOC v. Aaron Brothers Inc.</i>, 620 F. Supp. 2d 146 (C.D. Colo. 2009); <i>EEOC v. Morgan Stanley</i>, 132 F. Supp. 2d 146 (S.D. N.Y. 2000); <i>EEOC v. U.P.S.</i>, 587 F.3d 136 (2nd Cir. 2009)</p> <p>As support for its nationwide subpoena, the EEOC made reference to other individual ADA charges against the employer filed in others parts of the U.S. The employer cited other authority for the view that relying on the individual charges as a bootstrap for the nationwide subpoena was inappropriate and amounted to an improper "fishing expedition," (Docket #7, Respondent's Answer to Application to Show Cause Why Administrative Subpoena Should Not Be Enforced, Filed Jan. 14, 2011).</p> <p><u>Court Opinion.</u> Following a Show Cause Hearing, the district court judge denied enforcement of the subpoena, stating:</p> <p style="padding-left: 40px;">The administrative subpoena is pervasive, and it seeks plenary discovery. There are no allegations of a pattern and practice. The demand for data on a nation-wide basis with two individual claims involving only applicants in Colorado is excessive. And while wide deference to administrative inquiries and investigations—wide deference to the scope of the subpoenas is given, it does not transcend the gap between the pattern and practice investigation and the private claims that have been shown here. The show cause order is discharged, and BNSF's refusal to comply with the subpoena as issued is sustained.<sup>1</sup></p> <p>The EEOC filed a Notice of Appeal to the Tenth Circuit on March 22, 2011, where the matter remains pending.</p>
01/06/2011	IL	USDC ND IL 1:11-cv-00081 Marovich Case settled.	Dolgencorp, Inc.	<p>This subpoena enforcement action focused solely on a subpoena to compel testimony by a company representative. There had been a long history with the EEOC involving the charge, which was filed in September 2004. The CP's race discrimination charge was based on her termination after learning of a prior felony conviction. The employer had challenged prior subpoenas, which were denied by the Commission, and various documents and data were produced to the EEOC over the course of the investigation. The most recent dispute stemmed from the EEOC's claim that certain information provided was "unintelligible," and based on not receiving adequate information, from the EEOC's perspective, a subpoena for testimony was served on the employer requesting testimony regarding hiring policies, practices and procedures as well as various termination codes.</p> <p>Following the filing of the subpoena enforcement action on January 6, 2011, the employer appeared through counsel, and as of January 21, 2011, the parties filed an agreed resolution with the court.</p>
01/07/2011	IN	USDC ND IN 3:11-mc-00001-CAN Christopher A. Nuechterlein Case settled.	Trinity Health	<p>The CP's charge, filed on February 5, 2009, focused on alleged retaliation based on being terminated immediately after signing a settlement agreement to settle a race and age discrimination charge. After the employer submitted that the CP was terminated based on a RIF, the EEOC sought documents relating to the RIF. The employer produced information only relating to the department where the CP was employed and objected to a broader request that led to issuance of a subpoena. The employer did not file a petition to modify or revoke the subpoena, and the subpoena enforcement action was filed on January 7, 2011.</p> <p><u>Waiver of Objections to Challenge Enforcement of Subpoena.</u> The EEOC argued that the employer failed to timely petition to revoke the subpoena within five days of service of the subpoena, per 29 C.F.R. §1601.16(b)(1), citing <i>EEOC v. County of Hennepin</i>, 623 F. Supp. 29 (D. Minn. 1985); <i>EEOC v. Cuzzens of Georgia, Inc.</i>, 608 F.2d 1062, 1063-1064 (5th Cir. 1979); <i>EEOC v. City of Milwaukee</i>, 919 F. Supp. 1247, 1255 (E.D. Wis. 1996); <i>EEOC v. Roadway Express, Inc.</i>, 569 F. Supp. 1526, 1528 (N.D. Ind. 1983).</p> <p>The employer argued that it was never notified of the five-day notice for challenge when receiving the subpoena and cited case authority to demonstrate that waiver of the failure to timely object should not apply, particularly focusing on <i>EEOC v. Lutheran Social Services</i>, 186 F.3d 959 (D.C. Cir. 1999) (court of appeals held applicable provision was permissive rather than mandatory and cited regulation did not deprive district court of jurisdiction to consider employer's objections); <i>EEOC v. Guess?</i>, 176 F. Supp. 2d 416 (E.D. Pa. 2001) (adopting view of <i>Lutheran</i> and acknowledging issue was one of first impression in Third Circuit); see also <i>EEOC v. WinCo Foods., 2006 U.S. Dist. LEXIS 64521</i> (E.D. Cal. Sept. 7, 2006); <i>EEOC v. Bashas', Inc., No. CIV 09-0209 PHX RCB</i>, 2009 U.S. Dist. LEXIS 97736 (D. Ariz. Sept. 30, 2009)</p> <p><u>Scope of Subpoena Beyond Department Where CP Worked.</u> In relevant part, the employer cited <i>EEOC v. United Airlines</i>, 287 F.3d 643 (7th Cir. 2002) and <i>EEOC v. Quantum Foods, LLC, No. 09 C 7741</i>, 2010 U.S. Dist. LEXIS 41846 (N.D. Ill. April 26, 2010).</p> <p>Following a show cause hearing on Feb. 23, 2011, the parties met and settled the dispute, and, after being so advised, the court denied the Order to Show Cause on March 30, 2011.</p>

1 An excellent summary of the cases in support and denying enforcement of nationwide subpoenas in EEOC subpoena enforcement actions is discussed in the *Burlington Northern* case. (Docket Nos. 2 and 7). The Commission's decision denying the motion to modify and/or revoke, which also discusses applicable law in support of the EEOC's position, is set forth in the Reporter's Transcript for the Show Cause Hearing, Docket No. 10. The court's ruling is at page 18 of the transcript.

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01/12/2011	IL	USDC ND IL 1:11-cv-00201 Kennelly Court opinion issued enforcing subpoena.	Aaron's Inc.	<p>The employer was faced with a subpoena enforcement action based on a race discrimination charge involving the termination of the CP as a result of his criminal history. The CP was fired shortly after hire based on a background check that showed the CP had been convicted of armed robbery and felony murder, and the employer did not want to send a convicted murderer into customer's homes; the CP had been hired as a product technician that included delivering and installing product inside customers' homes. The CP filed a race discrimination charge on May 1, 2008. The subpoena in issue involved a request for an electronic database identifying all individuals who applied for employment at any stores throughout the State of Illinois, including a copy of each applicant's criminal background check.</p> <p>As part of the EEOC investigation, the employer was requested to provide documents identifying all individuals who applied for employment at any Illinois locations of the employer for a four-year period. The subpoena was served on the employer in December 2009. Although the subpoena requested the information in electronic format, after the employer stated that it did not maintain the information in electronic format, the EEOC stated that it would accept the information in any format. The subpoena enforcement action was filed on January 12, 2011, after the employer failed to provide the requested information.</p> <p><u>Court Opinion.</u> On April 11, 2011, Judge Kennelly issued an order upholding the subpoena:</p> <p><i>Timeliness of Challenge to Subpoena.</i> The EEOC contested the employer's right to even challenge the subpoena and focused on the employer's failure to file a petition to modify or revoke the petition within five-days of receipt of the subpoena, citing 29 CFR §1601.16.<sup>2</sup> It was undisputed that the employer did timely challenge one portion of the subpoena, which involved the request for franchise-related documents, which the EEOC and employer ultimately resolved. However, with respect to the subpoena request in issue (<i>i.e.</i>, request for an electronic database involving applicant data), the employer initially responded that it did not have what the EEOC requested. Thereafter, prior to the time the EEOC had ruled on the pending objections, the employer modified its response and added an objection regarding the request for applicant data. In the court's view, the employer did not forfeit its right to object in the subpoena enforcement action.</p> <p><i>Relevance.</i> Judge Kennelly cited the broad relevance standard under <i>Shell Oil</i> to support the "relevance" of requesting data involving multiple stores based on the finding that the employer had a "uniform criminal background check policy that it applies to all its corporate owned stores." The court thus ruled that the EEOC was entitled to the requested information for all Illinois corporate-owned stores.</p> <p><i>Applicable Time Frame Covered by Subpoena.</i> The employer objected to the subpoena as being overbroad in requesting data over a four-year period—two years before and two years after the CP's termination. In the court's view, "Comparative information ... is absolutely essential to a determination of discrimination," and "pre-charge and post-charge data can provide useful information to enable the EEOC to assess whether discrimination took place." (The time frame involved in this request was quite modest compared to other requests and is only noteworthy regarding the court permitting data requests after the CP's employment, which the court viewed as a reasonable request.)</p> <p><i>Undue Burden.</i> The employer argued that compliance would be unduly burdensome because it did not possess an electronic database to respond to the inquiry and in order to respond the employer would have to search warehouses and storage facilities for responsive information. While the employer argued that searching for physical copies would result in an exorbitant expense, the court held, "(M)ore than mere conclusory allegations are required." The court thus rejected the claim of undue burden.</p>
01/13/2011	IL	USDC ND IL 1:11-cv-00244 Marovich Case settled.	McCormick & Schmick Seafood Restaurants	<p>Based on the EEOC investigation involving six charges of sex discrimination, on March 8, 2010, the EEOC served a subpoena on the employer requesting three categories of documents from 15 of the employer's restaurants in its Chicago and Baltimore (including Washington, DC) regions.</p> <p>The employer timely filed a petition to revoke the subpoena on March 15, 2010. Following the EEOC's determination on September 21, 2010 denying the petition and the employer's subsequent failure to timely respond to the request for information, the subpoena enforcement action was filed on January 13, 2011.</p> <p>An initial hearing set for February 9, 2011, was reset for February 24, 2011. The documents were produced prior to the hearing, and after being given time to review the documents, the EEOC withdrew the petition.</p>

<sup>2</sup> Various cases point out that an employer may be barred from challenging a subpoena in a subpoena enforcement action in circumstances in which the employer did not timely move to challenge or modify the subpoena. *See, e.g., EEOC v. Cuzzens of GA., Inc.*, 608 F.2d 1062, 1064 (5th Cir. 1979); *EEOC v. Cnty of Hennepin*, 623 F. Supp. 29, 33 (D. Minn. 1985); *EEOC v. Roadway Express, Inc.*, 569 F. Supp. 1526, 1528 (N.D. Ind. 1983)

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT	COMMENTARY
01/21/2011	AR	USDC WD AR 5:11-mc-00005 ELS Setser Case settled.	Cantera Concrete Company, LLC	<p>The CP filed a race discrimination charge on November 24, 2008, alleging discrimination in being denied a promotion and raise, which was followed by a second charge on January 26, 2009, alleging race discrimination based on a demotion and different terms and conditions of employment as well as retaliation for filing the first charge, which was amended again in March 2009 to add additional retaliation claims. The company does business in 4 states (Oklahoma, Arkansas, Texas and Kansas).</p> <p>The EEOC served requests for data and information regarding all employees (beyond the facilities where the CP worked), seeking comparative information relating to the CP's allegations, and issued a subpoena based on the failure of the employer to respond or fully respond. Following issuance of the subpoena, the employer timely filed a petition to modify or revoke on July 2, 2010. On August 26, 2010, the Commission issued a written opinion that essentially upheld the subpoena.</p> <p>The subpoena enforcement action was filed on January 21, 2011, and, following briefing by both sides, the parties reached agreement on the terms, which essentially upheld the terms of the subpoena concerning the information requested, and the court issued an order as follows:</p> <p>"Before the Court is the Equal Employment Opportunity Commission's ("Commission" or "EEOC") Application for Order to Show Cause Why an Administrative Subpoena Should Not Be Enforced. The Court referred the EEOC's Application to the Magistrate Judge for a Report and Recommendation. The Magistrate Judge scheduled a hearing on the Application for June 14, 2011. On June 10, 2011, the parties consented to jurisdiction before the Magistrate Judge. (Doc. 14). On that same date, the Commission and Cantera Concrete Company, L.L.C. ("Cantera" or "Respondent") advised the Court that they have reached an agreement on all matters before the Court."</p>
03/01/2011	IL	USDC ND IL 1:11-CV-01438 Gilbert Court granted in part and denied in part EEOC enforcement of subpoena (without opinion).	International BioResources, LLC	<p>The subpoena enforcement action stemmed from a consolidated request for information based on eight charges of discrimination from seven different CPs filed between June 2007 and November 2008 on various bases, including race, color, national origin, sex and disability. Five of the CPs also included retaliation charges. As of the date of initiation of the subpoena enforcement action seeking information involving eight facilities (in which the CPs only worked at two), the employer no longer was an active entity with any Illinois operations.</p> <p>The subpoena enforcement action was filed on March 1, 2011. After both sides briefed the issues, and following a show cause hearing held on June 14, 2011, the court "granted in part and denied in part" (without any written opinion) the EEOC's Order to Show Cause regarding enforcement of the subpoena.</p> <p>Charges were filed by various CPs within weeks of the sale of one of the facilities and the facility involving other charges was closed within approximately a year of other discrimination charges. Position statements were filed in response to the charges, and there were various requests for information prior to issuance of the subpoena. Each side argued the other was responsible for the delay in the investigation, and the employer submitted that it was no longer in operation at the time the dispute ripened into the subpoena enforcement action.</p> <p>While the basis for the court's opinion is not explained, issues raised by the employer included: (1) the EEOC's delay in the investigation; (2) EEOC investigators improperly interviewed former managers (at the new entity) without notice to the respondent, which the employer submitted should be a basis to deny enforcement of the subpoena, or in the alternative should require a hearing concerning who was interviewed, the questions asked, and whether the former managers were apprised of the right to counsel; (3) the EEOC was seeking files and data for every employee that worked at all Illinois facilities for a five-year period, which was not relevant because the charges involved CPs at only two of the eight Illinois facilities; (4) the EEOC requested hiring-related documents that were not relevant because none of the charges involved failure-to-hire claims; and (5) the request was unduly burdensome because the respondent was not currently operating a business, except the wind down activities, was not generating any revenue and had no revenue stream, and it would take significant time to respond to the subpoena.</p> <p>The EEOC challenged the burden based on the claims that: (1) the "current financial situation has been left a mystery;" and (2) "it continues to pay its employees" involved in the wind down and "presumably, its lawyers." The EEOC also argued that it had no obligation to provide notice for an on-site visit to an entity not owned by the respondent or notify them of interviews with "former managerial employees." It otherwise relied on case authority regarding its broad investigative authority.</p>



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04/06/2011	IN	USDC SD IN 1:11-mc-00039-JMS-MJD  Jane Magnus-Stinson  Court ordered enforcement of third party subpoena against health care institution requiring production of medical records of charging party and others not medically cleared for employment (Court Order only-no written opinion).	Concentra Health Services	<p>The subpoena enforcement action involved a third-party subpoena to a health care institution based on an ADA charge. The health care institution cited HIPAA concerns, but the health care institution did not file a petition to revoke or modify the subpoena, and in the EEOC's view, the entity waived the right to challenge the subpoena, except on constitutional grounds.</p> <p>Following the filing of an ADA charge, which referenced the third party, the EEOC served the entity with a broad based subpoena requesting that the entity provide:</p> <ul style="list-style-type: none"> <li>• A list of all individuals who were determined to be deferred or not medically cleared in conjunction with their initial medical examinations;</li> <li>• The applicant's name and date of birth;</li> <li>• A copy of all medical examinations, evaluations, reports and other medical records maintained; and</li> <li>• The medical condition that was the basis of not being medically cleared.</li> </ul> <p>The EEOC submitted in its memorandum in support of the application for an order enforcing the subpoena that: (1) the subpoena was valid and within the EEOC's authority; (2) all procedural prerequisites had been fulfilled; and (3) the information sought was relevant. Pertinent authority was cited in support of this position.</p> <p>The EEOC further challenged the application of HIPAA, submitting that providing the information in the course of an ADA investigation does not disclose the documents to the public, and further cited the Seventh Circuit authority that "confidentiality is no excuse for noncompliance" with an EEOC subpoena, citing <i>EEOC v. Bay Shipbuilding Corp.</i>, 668 F.2d 304, 312 (7th Cir. 1981). Further, the EEOC argued that the ADA imposes strict duties on the Commission and its employees to maintain the confidentiality of information learned during investigations, citing, 42 U.S.C. §2000e-5(b), 2000e08(e)(both incorporated by 42 U.S.C. §12117(a)). Further, the EEOC submitted that it even is entitled to the health information under HIPAA as part of the Commission's oversight activities as a "health oversight agency under HIPAA," 45 C.F.R. §164.501. The EEOC cited the final rule that referred to the EEOC as an example of a "health oversight agency" - "the EEOC's civil rights enforcement activities under titles I and V of the ADA." Standards for Privacy of the Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,492 (Dec. 28, 2000). "The definition of 'health oversight agency' is important, because a covered entity may disclose protected health information to a health oversight agency in administrative investigations of 'entities subject to civil rights laws for which health information is necessary for determining compliance.'" 45 C.F.R. §164.512(d)(iv). This would include disclosing protected information pursuant to subpoena or court order. 45 C.F.R. §164.512(e).</p> <p>The health care entity in response argued that a "health oversight activity" under HIPAA "does not include" an investigation of the individual whose records are at issue:</p> <p style="padding-left: 40px;">(2) For the purpose of the disclosures permitted by paragraph (d)(1) of this section, a health oversight activity does not include an investigation or other activity in which the individual is the subject of the investigation or activity and such investigation or activity does not arise out of and is not directly related to: (i) the receipt of health care; (ii) a claim for public benefits related to health; or (iii) qualification for, or receipt of, public benefits or services when a patient's health is integral to the claim for public benefits or services. [45 C.F.R. §164.512(d)(2).]</p> <p>In reply, the EEOC submitted, however, that the EEOC's investigation is not an investigation "in which the individual is the subject of the investigation." Rather, the EEOC is investigating a company for compliance with the American with Disabilities Act." The EEOC explained that the EEOC was analyzing the company's actions, and individuals are not the subject of the EEOC's investigation. Thus, the carve-out did not apply and the third party was authorized to disclose the information. The third party also had offered to provide information subject to redaction of names and social security numbers, but the EEOC asserted "the EEOC needs the individual identifying information to locate witnesses and identify potential class members."</p> <p>The court ordered the third party, Concentra Health Services, to produce the requested records.</p>
04/11/2011	TN	USDC WD TN 2:11-mc-00012  Subpoena enforcement action pending relating to potential disclosure of investigation report withheld on basis of attorney-client privilege.  Case settled.	Federal Express Customer Information Services, Inc.	<p>The focus of this subpoena enforcement action, filed on April 11, 2011, was an individual charge in which the employer withheld an investigation report based on a charge of improper conduct by the CP that was withheld on attorney client privilege in anticipation of litigation. The court set a motion hearing for July 15, 2011. The parties filed to continue the motion hearing and subsequently reached an agreement, in which the employer agreed to produce the requested information. Based on the settlement, the court dismissed the action on July 26, 2011.</p> <p><i>Waiver of right to challenge subpoena.</i> The EEOC filed the application for an order to show cause why the subpoena should not be enforced, which included a claim of waiver based on the failure to petition to have the subpoena modified or revoked and cited applicable case authority in support of its position.</p> <p><i>Right to Investigation Report.</i> The EEOC submitted that the investigation report was relied on by the employer for purposes of taking its action and thus is pertinent to an evaluation of the alleged discrimination claim, citing <i>In re Perrigo Co.</i>, 128 F.3d 430 (6th Cir. 1997) and <i>Miller v. Federal Express Corp.</i>, 186 F.R.D. 376 (W.D.Tenn. 1999) (employer impliedly waives attorney client privilege and work product when it places an internal investigation in issue). Also see <i>Onwuka v. Federal Express Corp.</i>, 178 F.R.D. 508 (D. Minn. 1997); <i>Reitz v. City of Mt. Juliet</i>, 680 F. Supp.2d 888 (M.D. Tenn. 2010)(court may determine reasonableness of investigation only by disclosure of contents); <i>EEOC v. American Apparel, Inc.</i>, 327 Fed. Appx. 11 (9th Cir. 2009)(party may waive attorney client privilege or work product protection by injecting an issue into the case); <i>Linde Thomson Langworthy Kohn &amp; Van Dyke, P.C. v. Resolution Trust Corp.</i>, 5 F.3d 1508 (C.A. D.C. 1983); <i>Guess? Inc.</i>, 176 F. Supp. 2d 416 (E.D. Pa. 2001)(court granted application to enforce subpoena, subject to in camera inspection of alleged privileged investigation report).</p> <p>As referenced above, the case settled with the employer agreeing to produce the requested documents.</p>

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04/14/2011	NV	USDC NV 2:11-cv-574-KJD-PAL Dawson Case settled.	Foothills Pediatrics	This subpoena enforcement action was filed on April 14, 2011, involving an individual race discrimination charge (and two other African American employees terminated on the same day), based on the failure to produce documents pursuant to a subpoena that were tied directly to the charge and alleged comparables. In response, the employer did not challenge the subpoena and merely referred to delay based on the documents being digitized. As a result, the EEOC filed a voluntary dismissal that was granted on May 31, 2011.
04/15/2011	NY	USDC WD NY 1:11-mc-00028-RJA-JJM Arcara Subpoena enforcement action pending relating to nationwide request for information. <b>Case pending as of August 19, 2011.</b>	Sterling Jewelers, Inc.	<p>A subpoena enforcement action was filed on April 15, 2011 tied to an individual charge involving allegations of sex and age discrimination and retaliation, based on a subpoena requesting nationwide information involving a company policy. The action remained pending as of August 19, 2011.</p> <p>A central focus of the charge is that the CP was disciplined in violation of a company "Code of Conduct" for discussing pay rates with co-workers of the employer. In the employee comments section, the CP wrote that she believed that men always make more money than women at the employer and that the disciplinary action was the result of sex discrimination.</p> <p>The Request for Information and subsequent subpoena requested a copy of the Code of Conduct, all disciplinary and warning notices relating to enforcement of the policy, and documents relating to all discipline. The subpoena was nationwide in scope.</p> <p>The employer filed a petition to revoke or modify the subpoena arguing that the subpoena was: (1) an improper attempt to obtain discovery in a separate nationwide EEOC pattern or practice claim alleging that women are paid less than male employees and denied promotional opportunities; (2) inconsistent with an agreement between the EEOC and the employer to mediate previously filed charges; and (3) overbroad and unduly burdensome. On June 29, 2010, the EEOC determined that the subpoena was valid.</p> <p><i>EEOC Arguments.</i></p> <ul style="list-style-type: none"> <li>As support for its subpoena enforcement action requesting nationwide data based on policy, the EEOC relied on <i>EEOC v. UPS</i>, 587 F.3d 136 (2nd Cir. 2009); <i>EEOC v. Kronos</i>, 620 F.3d 287 (3rd Cir. 2010); <i>EEOC v. Fed. Express Corp.</i>, 558 F.3d 842 (9th Cir. 2009); <i>EEOC v. Technocrest Sys., Inc.</i>, 448 F.3d 1035 (8th Cir. 2006); <i>EEOC v. Roadway Express, Inc.</i>, 261 F.3d 634 (6th Cir. 2001); <i>EEOC v. Morgan Stanley &amp; Co. Inc.</i>, 1999 U.S. Dist. LEXIS 14661 (S.D. N.Y. Sept. 22, 1999). The EEOC focused particularly on <i>UPS</i> and <i>Kronos</i> with regard to seeking information about the application of a company-wide policy that the employer applied to the charging party.</li> <li>Even assuming the EEOC was only investigating an individual charge, it pointed to case law that "statistics and other information about an employer's general practices may certainly be relevant to individual charges of discrimination," citing <i>EEOC v. Associated Dry Goods Corp.</i>, 449 U.S. 590 (1981). See also <i>EEOC v. Univ. of Pittsburgh</i>, 643 F.2d 983 (3rd Cir. 1981); <i>Schwan's Home Serv.</i>, 707 F. Supp. 2d 980 (D. Minn. 2010), <i>affirmed</i> 2011 U.S. App. LEXIS 14291 (8th Cir. July 13, 2011).</li> <li>The EEOC also cited various cases anticipating a claim of an undue burden (based on the prior petition to revoke and/or modify), citing several extreme examples in which an undue burden claim was rejected. <i>EEOC v. Quad/Graphics</i>, 63 F.3d 642, 648 (7th Cir. 1995) (enforcing subpoena despite claim the compliance would require over 200,000 hours); <i>Citicorp Diners Club</i>, 985 F.2d 236 (10th Cir. 1993) (enforced subpoena over objection that compliance would require two full-time employees working approximately six months); <i>EEOC v. Md. Cup Corp.</i>, 785 F.2d 471 (4th Cir. 1985); <i>EEOC v. Sunoco, Inc.</i>, 2009 U.S. Dist. LEXIS 6070 (E.D. Pa. Jan. 27, 2009).</li> </ul> <p><i>Employer Arguments.</i> The employer challenged the subpoena on several grounds:</p> <ul style="list-style-type: none"> <li><i>Improper Purpose.</i> The employer argued that the subpoena was an end run around the discovery process in the primary litigation by the EEOC against Sterling that was pending in federal court. "If a government subpoena is issued for an improper purpose, it is invalid." <i>United States v. Giant Industries, Inc.</i>, 1981 WL 1277 (D. Ariz. June 17, 1981); <i>EEOC v. Bashas' Inc.</i>, 2009 U.S. Dist. LEXIS 97736 (D. Ariz. 2009) (court permitted discovery based on claim that EEOC subpoena was issued for improper purpose to funnel information to plaintiffs' counsel in other litigation against <i>Bashas</i>, which employer argued was an abuse of process).</li> <li><i>Subpoenaed Information Unrelated to Allegations in Charge.</i> The charge focused on sex and age discrimination and retaliation. The request concerning the company policy prohibiting discussions about pay involved a counseling received in 2007, more than 300 days before CP ever filed her charge and thus requested information not relevant to the charge. Further, the employer argued, the underlying charge does not make reference to an alleged pattern or practice of discrimination, unlike <i>UPS</i> or <i>Schwan's</i>, which included such allegations. Additional case authority supporting this position was included.</li> <li><i>Unreasonable burden.</i> Like the subpoena in <i>United Airlines</i>, the employer argued, the EEOC's subpoena in this case was unduly burdensome. Since January 1, 2005, Sterling has employed more than 54,000 employees, each generating significant numbers of documents. To review every file from January 1, 2005 to the present would require thousands of staff or temporary assistance and does not take into account the time to review and redact sensitive data. The company does not maintain a database to retrieve the data.</li> <li><i>The employer argued that the subpoena is inconsistent with a mediation agreement.</i> The charge allegedly arose out of the same or substantially same set of circumstances regarding matters the EEOC and the employer agreed to mediate.</li> </ul>

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT	COMMENTARY
04/19/2011	GA	USDC SD GA 1:11-mc-00005-JRH-WLB Hall Employer admitted failure to comply with subpoena and agreed to produce documents.	JJS Hospitality, LLC d/b/a Microtel Inn & Suites	<p>On April 19, 2011, a subpoena enforcement action was filed based on the employer's failure to comply with a subpoena arising from a race and sex discrimination and retaliation charge. The charge focused on sexual harassment by a supervisor and retaliation after the CP refused his advances, which included termination of the CP. A charge was filed on December 9, 2009, and, following the failure to respond to requests for information, the subpoena and subsequent subpoena enforcement action followed. The subpoena focused on a request for information relating to an individual charge, but the specifics of the subpoena were not provided.</p> <p><i>Waiver of Objections.</i> The EEOC cited the failure to comply with 29 C.F.R. §1601.16(b)(1) regarding the applicable procedure to petition to revoke or modify a subpoena, and also cited applicable case law. <i>EEOC v. Cuzzens of GA</i>, 608 F.2d 1062 (5th Cir. 1979); <i>EEOC v. Sunoco, Inc.</i> 2009 U.S. Dist. LEXIS 6070 (E.D. Pa. 2009).</p> <p>The employer was given until June 8, 2011 to respond, and on June 8, the employer responded to the subpoena enforcement action, admitting that it had not yet complied with the subpoena, but intended to do so.</p>
04/21/2011	PA	USDC WD PA 2:11-mc-00121-TFM McVerry Court opinion issued denying enforcement of subpoena.	UPMC	<p>In this subpoena enforcement action, filed on April 27, 2011, the employer successfully challenged the EEOC on grounds that the EEOC was engaged in an improper "fishing expedition" beyond the scope of the underlying charge.</p> <p>The CP was notified of her termination on July 11, 2008, stemming from her failure to return to work in June 2008 from short term disability (STD). The CP had been on leave for medical reasons and received 26 weeks of STD. After her STD benefits expired on May 3, 2008, the CP was granted a personal leave of absence with a return to work date of June 21, 2008. The CP failed to return to work or contact her employer at the expiration of her personal leave, and was viewed as a voluntary resignation, effective June 22, 2008. When the CP contacted the employer on July 11, 2008, concerning her ability to return to work, she was advised that her employment had been terminated.</p> <p>The CP completed a questionnaire at the EEOC on April 23, 2009, within the 300-day window, but did not file her formal charge until June 17, 2009 (after the 300-day window for a timely charge). The CP alleged disability discrimination based on her termination for not returning on time from STD and that she was given no warning that her employment would be terminated on such grounds. The employer responded that the CP was terminated based on the terms of the Personal Leave of Absence policy, not the STD policy.</p> <p>The focus of the dispute was a subpoena requesting various categories of information about all employees who were terminated after 14 weeks of a medical leave of absence pursuant to the employer's personal leave of absence and/or disability policy or any other policy, and the request for information involved actions from July 2008 to the present.</p> <p>A subpoena enforcement action was filed after the employer filed a petition to revoke or modify an EEOC subpoena that requested the identities of all employees at all facilities in the Pittsburgh area who were terminated in accordance with the above-referenced. Personal Leave of Absence and/or Disability policies. The litigation followed denial of the employer petition.</p> <p><i>Court Opinion. Prohibition of Fishing Expedition.</i> On May 24, 2011, the district court denied enforcement of the subpoena. While the employer raised several objections to the subpoena, including the claim that the underlying charge was untimely, the critical objection focused on by the court was the claim that the subpoena sought information that was not relevant to the underlying charge.</p> <p>In short, the district court held that the subpoena constituted an improper "'fishing expedition' that seeks information that is not relevant to the underlying charge," and thus concluded that it need not resolve the ultimate merit of the employer's other contentions.</p> <p>The court focused on the "relevance test" as governing principle for enforcement of a subpoena and relied, in principal part, on <i>EEOC v. Kronos, Inc.</i>, 620 F.3d. 287 (3rd Cir. 2010) and <i>EEOC v. United Airlines, Inc.</i>, 287 F.3d 643, 653 (7th Cir. 2002) (the relevance test permits access to any materials that "might cast light," but the standard requires the EEOC to demonstrate a "realistic expectation rather than an idle hope" that materials relevant to the charge under investigation will be obtained").</p> <p>In denying enforcement of the subpoena, the court attacked: (1) the EEOC's failure to investigate the underlying charge (e.g., "(i)t remains unclear whether or not [the charging party] promised her employer that she would return to work on June 21, 2008"); (2) the fact that the subpoena did not even cover the period of the CP's employment; (3) the subpoena was clearly a "'fishing expedition' to discover the existence of other potential claimants rather than a reasonable effort to develop information relevant to [charging party's] charge of discrimination." The court explained: "It is readily apparent that [the] EEOC is interested in pursuing an investigation of UPMC's corporate policies. Upon receipt of UPMC policies, the EEOC immediately turned the focus of its investigation away from the specifics of the [underlying] charge and toward a much larger, corporate-wide issue ... EEOC's reply brief forthrightly explains: 'the purpose of the investigation is to determine if there are any employees who were denied medical leave in excess of Respondent's maximum policy limit where such leave would have been an accommodation and would not have been an undue hardship defined by the ADA ... Nevertheless, there is no 'commissioner's charge' regarding these UPMC corporate policies and the subpoena cannot be justified by [the CP's] charge."</p>
06/01/2011	MI	USDC ED MI 2:11-mc-50676 Rosen Case settled.	Bank of America	<p>This subpoena enforcement action was filed on June 1, 2011, involving an individual race and disability discrimination charge, based on the failure to produce documents pursuant to a subpoena that requested lists of employees disciplined and discharged since January 2008 by the same decision makers involved in the complainant's discharge. In response, the employer did not challenge the subpoena through either the EEOC's administrative processes or before the court and instead produced the requested information on June 29, 2011. As a result, the EEOC filed a voluntary dismissal on June 30, 2011.</p>

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT	COMMENTARY
06/01/2011	IN	USDC SD IN 1:11-mc-00056 Pratt Case settled.	Bright Point North America L.P.	This subpoena enforcement action was filed on June 6, 2011, involving an individual race discrimination charge, based on the failure to produce documents pursuant to the EEOC's initial request for information that was served with its request for a position statement as well as the employer's failure to produce information related to a subsequent subpoena, wherein the EEOC restated its initial requests for information. In response, the employer did not challenge the subpoena through either the EEOC's administrative processes or before the court and instead produced the requested information after the EEOC filed its Application for an Order to Show Cause. As a result, the EEOC voluntarily withdrew its Application to Show Cause on June 27, 2011.
06/08/2011	TN	USDC ED TN 4:11-mc-00034 Mattice Case pending as of August 19, 2011.	Best Value Inn	This subpoena enforcement action was filed on June 8, 2011, involving an individual sex discrimination charge, based on the failure to produce documents pursuant to the EEOC's initial request for information that was served with its request for a position statement as well as the employer's failure to produce information related to a subsequent subpoena, wherein the EEOC restated its initial requests for information, which included information about comparable employees requesting accommodations. The Application for an Order to Show Cause was granted and a hearing was scheduled for August 25, 2011. As of August 19, 2011, the case remained pending.
06/16/2011	MI	USDC ED MI 2:11-mc-50744 Battani Case settled.	City of Detroit	This subpoena enforcement action was filed on June 16, 2011, involving an individual ADA charge for failure to accommodate and retaliation, based on the failure to produce documents pursuant to the EEOC's initial request for information that was served with its request for a position statement as well as the employer's failure to produce information related to a subsequent subpoena, wherein the EEOC restated its initial requests for information. In response, the employer did not challenge the subpoena through either the EEOC's administrative processes or before the court and instead produced the requested information after the EEOC filed its Application for an Order to Show Cause on August 11, 2011. As a result, the EEOC voluntarily withdrew its Application to Show Cause on August 17, 2011.
6/20/2011	MI	USDC ED MI 2:11-mc-50764 Tarnow Case settled.	MGM Grand Detroit, LLC	This subpoena enforcement action was filed on June 20, 2011, involving an individual sex discrimination and retaliation charge, based on the failure to produce documents pursuant to the EEOC's initial request for information that was served with its request for a position statement as well as the employer's failure to produce information related to a subsequent subpoena, wherein the EEOC restated its initial requests for information and expanded the initial request to include a few more categories of documentation. In response, the employer did not challenge the subpoena through either the EEOC's administrative processes or before the court and instead produced the requested information after the EEOC filed its Application for an Order to Show Cause. As a result, the EEOC voluntarily withdrew its Application to Show Cause on June 22, 2011.
6/24/2011	MI	USDC ED MI 2:11-mc-50789 Murphy, III Case pending as of August 19, 2011.	Kroger Company of Michigan	<p>This subpoena enforcement action was filed on June 24, 2011, involving two individual charges of disability discrimination related to the employer's termination of employees, who had a disability, after the exhaustion of a one year leave of absence. As of August 19, 2011, the case remained pending.</p> <p>The two individual CPs were both terminated, after they had been on a medical leave of absence for more than one year, pursuant to the employer's policy entitled, "Company Policies Concerning Leaves of Absence," which states that a leave of absence may "extend to total one year from the last day of active employment."</p> <p>The EEOC served a subpoena in one of the actions on June 7, 2010, wherein it sought information regarding: (a) the identities and contact information for all other individuals who were discharged for exceeding the one-year limit for medical leaves of absence and (b) information pertaining to the scope of the policy's applicability.</p> <p>In response, the employer filed a Petition to Revoke the subpoena. While the Commission did not revoke the subpoena, it did modify the subpoena as follows:</p> <ol style="list-style-type: none"> <li>1. List all employees of the Kroger Company of Michigan, who were discharged between January 1, 2007 and the present pursuant to the Company Policies Concerning Leaves of Absence for remaining on medical leave of absence beyond one year. For each person listed, provide his/her name, address, phone number, and social security number.</li> <li>2. For each person listed in response to the request above, produce personnel documents related to his/her medical leave of absence and discharge.</li> <li>3. List all supermarket operating divisions to which the Company Policies Concerning Leaves of Absence are applicable. For each supermarket operating division, list the corresponding state(s) in which the division operates.</li> </ol> <p>The employer responded to the modified subpoena with objections and some information, but the EEOC contended that it interpreted the requests too narrowly and subsequently filed the Application for an Order to Show Cause.</p> <p>The employer filed a Brief in Opposition to the EEOC's Application for an Order to Show Cause on July 25, 2011. In its brief, the employer cited Sixth Circuit authority for the proposition that the policy itself was not discriminatory under the ADA. Moreover, the employer further explained that it had attempted to discuss the scope of the subpoena with the EEOC but that the EEOC did not respond and instead filed the enforcement action in the court. Moreover, the employer explained that it had previously relayed to the EEOC that the policy was applicable only to stores in Michigan because it was a policy that was negotiated and instituted between the employer and the unions in Michigan that represented the employees.</p> <p>On August 1, 2011, the EEOC filed a Reply Brief wherein it explained that it was not attempting to assert that the policy itself was discriminatory, but rather that the application of the policy in certain situations may be discriminatory.</p>
7/12/2011	NC	USDC WD NC 2:11-mc-00001 Reidlinger Case pending as of August 19, 2011.	Rel Cottage, Inc. d/b/a Cottage Salad Station Deli & Market	This subpoena enforcement action was filed on July 12, 2011, involving an individual sexual harassment charge, based on the failure to produce documents pursuant to the EEOC's initial request for information that was served with its request for a position statement as well as the employer's failure to produce information related to a subsequent subpoena, wherein the EEOC restated its initial requests for information. The Application for an Order to Show Cause was granted and a hearing was scheduled for August 23, 2011. As of August 19, 2011, the case remained pending.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT	COMMENTARY
7/26/2011	MI	USDC ED MI 2:11-mc-50938 Friedman Case settled.	Detroit Fire Department	This subpoena enforcement action was filed on July 26, 2011, involving an individual ADA failure to accommodate and age and sex discrimination charge, based on the failure to produce documents pursuant to the EEOC's initial request for information that was served with its request for a position statement as well as the employer's failure to produce information related to a subsequent subpoena, wherein the EEOC restated its initial requests for information. In response, the employer did not challenge the subpoena through either the EEOC's administrative processes or before the court, filed an answer to the Application to Show Cause explaining that the subpoena had not been properly served on the attorney of records for the employer, and the employer produced the requested information on August 11, 2011. As a result, the EEOC voluntarily withdrew its Application to Show Cause on August 17, 2011.
7/28/2011	MI	USDC ED MI 2:11-mc-50949 Tarnow Case pending as of August 19, 2011.	Uptown Grill, LLC	This subpoena enforcement action was filed on July 28, 2011, involving an individual sexual harassment and pregnancy discrimination charge, based on the failure to produce documents pursuant to the EEOC's initial request for information that was served with its request for a position statement as well as the employer's failure to produce information related to a subsequent subpoena. As of August 19, 2011, the only filing on the docket was the EEOC's Application for an Order to Show Cause.
7/28/2011	TX	USDC WD TX 5:11-mc-00638 Biery Case pending as of August 19, 2011.	Alliance Residential Company	<p>This subpoena enforcement action was filed on July 28, 2011, involving an individual disability discrimination charge, based on the failure to produce documents. Specifically, the EEOC issued a subpoena related to the employer's application of a nationwide policy under which the employer contended that 89 persons, who were unable to work, at the expiration of their FMLA/WC leave were terminated. The employer timely requested that the Commission revoke or modify the subpoena.</p> <p>On May 11, 2011, the Commission served the employer with the its Determination on Petition to Modify or Revoke Subpoena. The EEOC denied the employer's request for modification or revocation of the subpoena.</p> <p>In its July 28, 2011 Application for an Order to Show Cause, the EEOC notes that the employer voluntarily provided the data on the 89 persons who were allegedly terminated under its national policy and relies on <i>Shell Oil</i> for the proposition that exploring this national policy further "might cast light" raised in the charging party's allegations. Essentially, the EEOC is asserting that the information regarding the application of the nationwide policy is necessary to assess whether the employer is complying with the ADA's reasonable accommodations requirements and the "individualized assessments," that result therefrom. Moreover, the EEOC notes that the employer did not present any evidence to show that the costs associated with producing responsive information to the subpoena would be "unduly burdensome" or harassing.</p> <p>As of August 19, 2011, the only filing on the docket was the EEOC's Application for an Order to Show Cause.</p>

## **APPENDIX B.**

### **APPLICABLE REGULATIONS RELATING TO EEOC INVESTIGATIONS BASED ON TITLE VII, ADA, GINA, ADEA AND EPA**

#### **I. REGULATIONS APPLICABLE TO INVESTIGATIONS UNDER TITLE VII, ADA AND GINA**

##### **TITLE 29—LABOR**

##### **CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

##### **PART 1601 - PROCEDURAL REGULATIONS**

##### **Subpart B - Procedure for the Prevention of Unlawful Employment Practices**

##### **Sec. 1601.14 Service of charge or notice of charge.**

(a) Within ten days after the filing of a charge in the appropriate Commission office, the Commission shall serve respondent a copy of the charge, by mail or in person, except when it is determined that providing a copy of the charge would impede the law enforcement functions of the Commission. Where a copy of the charge is not provided, the respondent will be served with a notice of the charge within ten days after the filing of the charge. The notice shall include the date, place and circumstances of the alleged unlawful employment practice. Where appropriate, the notice may include the identity of the person or organization filing the charge.

(b) District Directors, Field Directors, Area Directors, Local Directors, the Director of the Office of Field Programs, and the Director of Field Management Programs, or their designees, are hereby delegated the authority to issue the notice described in paragraph (a) of this section.

##### **Investigation of a Charge**

##### **Sec. 1601.15 Investigative authority.**

(a) The investigation of a charge shall be made by the Commission, its investigators, or any other representative designated by the Commission. During the course of such investigation, the Commission may utilize the services of State and local agencies which are charged with the administration of fair employment practice laws or appropriate Federal agencies, and may utilize the information gathered by such authorities or agencies. As part of each investigation, the Commission will accept any statement of position or evidence with respect to the allegations of the charge which the person claiming to be aggrieved, the person making the charge on behalf of such person, if any, or the respondent wishes to submit.

(b) As part of the Commission's investigation, the Commission may require the person claiming to be aggrieved to provide a statement which includes:

- (1) A statement of each specific harm that the person has suffered and the date on which each harm occurred;
- (2) For each harm, a statement specifying the act, policy or practice which is alleged to be unlawful;
- (3) For each act, policy, or practice alleged to have harmed the person claiming to be aggrieved, a statement of the facts which lead the person claiming to be aggrieved to believe that the act, policy or practice is discriminatory.

(c) The Commission may require a fact-finding conference with the parties prior to a determination on a charge of discrimination. The conference is primarily an investigative forum intended to define the issues, to determine which elements are undisputed, to resolve those issues that can be resolved and to ascertain whether there is a basis for negotiated settlement of the charge.

(d) The Commission's authority to investigate a charge is not limited to the procedures outlined in paragraphs (a), (b), and (c) of this section.

##### **Sec. 1601.16 Access to and production of evidence; testimony of witnesses; procedure and authority.**

(a) To effectuate the purposes of title VII, the ADA, and GINA, any member of the Commission shall have the authority to sign and issue a subpoena requiring (emphasis added):

- (1) The attendance and testimony of witnesses;
- (2) The production of evidence including, but not limited to, books, records, correspondence, or documents, in the possession or under the control of the person subpoenaed; and
- (3) Access to evidence for the purposes of examination and the right to copy.

Any District Director, and the Director of the Office of Field Programs, or upon delegation, the Director of Field Management Programs, or any representatives designated by the Commission, may sign and issue a subpoena on behalf of the Commission. The subpoena shall state the name and address of its issuer, identify the person or evidence subpoenaed, the person to whom and the place, date, and the time at which it is returnable or the nature of the evidence to be examined or copied, and the date and time when access is requested. A subpoena shall be returnable to a duly authorized investigator or other representative of the Commission. Neither the person claiming to be aggrieved, the person filing a charge on behalf of such person nor the respondent shall have the right to demand that a subpoena be issued.

(b)

- (1) Any person served with a subpoena who intends not to comply shall petition the issuing Director or petition the General Counsel, if the subpoena is issued by a Commissioner, to seek its revocation or modification. Petitions must be mailed to the Director or General Counsel, as appropriate, within five days (excluding Saturdays, Sundays and Federal legal holidays) after service of the subpoena. Petitions to the General Counsel shall be mailed to 131 M Street, NE., Washington DC 20507. A copy of the petition shall also be served upon the issuing official.
- (2) The petition shall separately identify each portion of the subpoena with which the petitioner does not intend to comply and shall state, with respect to each such portion, the basis for noncompliance with the subpoena. A copy of the subpoena shall be attached to the petition and shall be designated "Attachment A." Within eight calendar days after receipt or as soon as practicable, the General Counsel or Director, as appropriate, shall either grant the petition to revoke or modify in its entirety or make a proposed determination on the petition, stating reasons, and submit the petition and proposed determination to the Commission for its review and final determination. A Commissioner who has issued a subpoena shall abstain from reviewing a petition concerning that subpoena. The Commission shall serve a copy of the final determination on the petitioner.

(c) Upon the failure of any person to comply with a subpoena issued under this section, the Commission may utilize the procedures of section 11(2) of the National Labor Relations Act, as amended, 29 U.S.C. 161(2), to compel enforcement of the subpoena. (emphasis added)(See excerpt below re NLRA procedural rules)

(d) If a person who is served with a subpoena does not comply with the subpoena and does not petition for its revocation or modification pursuant to paragraph (b) of this section, the General Council or his or her designee may institute proceedings to enforce the subpoena in accordance with the provisions of paragraph (c) of this section. Likewise, if a person who is served with a subpoena petitions for revocation or modification of the subpoena pursuant to paragraph (b), and the Commission issues a final determination upholding all or part of the subpoena, and the person does not comply with the subpoena, the General Council or his or her designee may institute proceedings to enforce the subpoena in accordance with paragraph (c) of this section.

(e) Witnesses who are subpoenaed pursuant to Sec. 1601.16(a) shall be entitled to the same fees and mileage that are paid witnesses in the courts of the United States.

[See Code of Federal Regulations, Title 29, Vol. 4, Rev. as of July 1, 2010]

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**29 U.S.C. 161(2) – Excerpt from National Labor Relations Act [ As referenced in EEOC Regulations, 29 C.F.R. Sec. 1601.16 (c)- Procedures for Enforcement of Subpoenas]**

**Sec. 161. Investigatory powers of Board**

**For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title –**

(a) Documentary evidence; summoning witnesses and taking testimony The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceedings or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

**(2) Court aid in compelling production of evidence and attendance of witnesses (emphasis added)**

**In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.**

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**II. REGULATIONS APPLICABLE TO INVESTIGATIONS BASED ON ADEA—[Broad Investigative Authority Beyond Scope Permitted Under Title VII, ADA and GINA]**

**TITLE 29—LABOR**

**CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**PART 1626: PROCEDURES/AGE DISCRIMINATION IN EMPLOYMENT ACT**

**Sec. 1626.15 Commission enforcement.**

(a) As provided in sections 9, 11, 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209, 211, 216 and 217) (FLSA) and sections 6 and 7 of this Act, the Commission and its authorized representatives may (1) investigate and gather data; (2) enter and inspect establishments and records and make transcripts thereof; (3) interview employees; (4) impose on persons subject to the Act appropriate recordkeeping and reporting requirements; (5) advise employers, employment agencies and labor organizations with regard to their obligations under the Act and any changes necessary in their policies, practices and procedures to assure compliance with the Act; (6) subpoena witnesses and require the production of documents and other evidence; (7) supervise the payment of amounts owing pursuant to section 16(c) of the FLSA, and (8) institute action under section 16(c) or section 17 of the FLSA or both to obtain appropriate relief.

(b) Whenever the Commission has a reasonable basis to conclude that a violation of the Act has occurred or will occur, it may commence conciliation under section 7(b) of the Act. Notice of commencement of will ordinarily be issued in the form of a letter of violation; provided, however, that failure to issue a written violation letter shall in no instance be construed as a finding of no violation. The Commission will ordinarily notify the respondent and aggrieved persons of its determination. In the process of conducting any investigation or conciliation under this Act, the identity of persons who have provided information in confidence shall not be disclosed except in accordance with Sec. 1626.4.

(c) Any agreement reached as a result of efforts undertaken pursuant to this section shall, as far as practicable, require the respondent to eliminate the unlawful practice(s) and provide appropriate affirmative relief. Such agreement shall be reduced to writing and will ordinarily be signed by the Commission's delegated representative, the respondent, and the charging party, if any. A copy of the signed agreement shall be sent to all the signatories thereto.



(d) Upon the failure of informal conciliation, conference and persuasion under section 7(b) of the Act, the Commission may initiate and conduct litigation.

(e) The District Directors, the Field Directors, the Director of the Office of Field Programs or their designees, are hereby delegated authority to exercise the powers enumerated in Sec. 1626.15(a) (1) through (7) and (b) and (c). The General Counsel or his/her designee is hereby delegated the authority to exercise the powers in paragraph (a) of this section and at the direction of the Commission to initiate and conduct litigation.

### **Sec. 1626.16 Subpoenas.**

(a) To effectuate the purposes of the Act the Commission shall have the authority to issue a subpoena requiring:

- (1) The attendance and testimony of witnesses;
- (2) The production of evidence including, but not limited to, books, records, correspondence, or documents, in the possession or under the control of the person subpoenaed; and
- (3) Access to evidence for the purpose of examination and the right to copy.

(b) The power to issue subpoenas has been delegated by the Commission, pursuant to section 6(a) of the Act, to the General Counsel, the District Directors, the Field Directors, the Director of the Office of Field Programs, or their designees. The subpoena shall state the name, address and title of the issuer, identify the person or evidence subpoenaed, the name of the person to whom the subpoena is returnable, the date, time and place that testimony is to be given or that documents are to be provided or access provided.

(c) A subpoena issued by the Commission or its designee pursuant to the Act is not subject to review or appeal.

(d) Upon the failure of any person to comply with a subpoena issued under this section, the Commission may utilize the provisions of sections 9 and 10 of the Federal Trade Commission Act, 15 U.S.C. 49 and 50, to compel compliance with the subpoena.

(e) Persons subpoenaed shall be entitled to the same fees and mileage that are paid witnesses in the courts of the United States.

[See Code of Federal Regulations, Title 29, Vol. 4, Rev. as of July 1, 2010]

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## **III. REGULATIONS APPLICABLE TO INVESTIGATIONS BASED ON EPA [Broad Investigative Authority Beyond Scope Permitted Under Title VII, ADA and GINA]**

### **TITLE 29—LABOR**

#### **CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

##### **PART 1620—THE EQUAL PAY ACT—Table of Contents**

### **Sec. 1620.30 Investigations and compliance assistance.**

(a) As provided in sections 9, 11, 16, and 17 of the FLSA, the Commission and its authorized representatives under the Act may (1) investigate and gather data; (2) enter and inspect establishments and records, and make transcriptions thereof, and interview individuals; (3) advise employers regarding any changes necessary or desirable to comply with the Act; (4) subpoena witnesses and order production of documents and other evidence; (5) supervise the payment of amounts owing pursuant to section 16(c) of the FLSA; (6) initiate and conduct litigation.

(b) The General Counsel, District Directors, Washington Field Office Director, and the Program Director, Office of Program Operations, or the designees of any of them are hereby delegated authority to exercise the powers enumerated in paragraphs (a) (1), (2), (3), and (5) of this section and to serve subpoenas. The General Counsel is delegated authority to seek preliminary relief under the Act. The General Counsel is hereby delegated authority to initiate other litigation at the direction of the Commission and to conduct such litigation.

(c) The identity or identifying details of persons giving information in confidence as to violations of the Act shall not be disclosed unless necessary in a court proceeding.

### **Sec. 1620.31 Issuance of subpoenas.**

(a) With respect to the enforcement of the Equal Pay Act, any member of the Commission shall have the authority to sign a subpoena requiring:

- (1) The attendance and testimony of witnesses;
- (2) The production of evidence including, but not limited to, books, records, correspondence, or documents, in the possession or under the control of the person subpoenaed; and
- (3) Access to evidence for the purposes of examination and the right to copy.

(b) There is no right of appeal to the Commission from the issuance of such a subpoena.

(c) Upon the failure of any person to comply with a subpoena issued under this section, the Commission may utilize the provisions of sections 49 and 50 of title 15 of the United States Code to compel enforcement of the subpoena.

[See Code of Federal Regulations, Title 29, Vol. 4, Rev. as of July 1, 2010] [CITE: 29 CFR 1620.30]

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**New York, NY**  
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**Northwest Arkansas**  
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**Pittsburgh, PA**  
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**Providence, RI**  
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**Rochester, NY**  
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**Sacramento, CA**  
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**St. Louis, MO**  
314.659.2000

**San Diego, CA**  
619.232.0441

**San Francisco, CA**  
415.433.1940

**San Jose, CA**  
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