

Supreme Court Deals Blow to Ninth Circuit Power to Review EEOC Subpoena Orders

Employment Law / April 4, 2017 / Demetri J. Economou

Yesterday, the Supreme Court held 7-1 that a federal appellate court may only conduct an abuse of discretion review of orders for enforcement of EEOC subpoenas. The case is *McLane Co. Inc. v. Equal Employment Opportunity Commission*, 581 U.S. --- (2017).

Because the Supreme Court reversed the Ninth Circuit Court of Appeals, which covers almost 20% of the U.S. population, this is a major holding. The Ninth Circuit had employed a *de novo* standard affording no deference to the district court judge hearing the original enforcement arguments, which was incorrect. This decision forces the Ninth Circuit in line with the rest of the country on the issue.

How are EEOC Subpoenas Enforced?

The EEOC has the power to issue subpoenas related to active EEOC charges, but no power to enforce the subpoenas in the event the employer refuses to comply. That power lies exclusively with the United States District Courts.

As the Supreme Court outlined, once the EEOC petitions a district court for enforcement of its subpoena, the district court's inquiry is limited to whether (1) the underlying charge is valid, and (2) the material requested in the subpoena is relevant to that charge. Relevance is determined using the broadest construction of the term – “virtually any material that might cast light on the allegations against the employer.” If this is shown, then the employer has the opportunity to rebut with a showing that the subpoena is too indefinite, brought for an illegitimate purpose, or is unduly burdensome.

The Subpoena in *McLane*

In *McLane*, the EEOC charge was limited to one female employee's failure to pass a physical strength test after returning from maternity leave, and adverse employment action from that test failure. The charge was for Title VII sex discrimination.

During the investigation, the EEOC learned that *McLane* was using the same physical strength test nationwide, and therefore requested the personal information (names, SSNs, last known addresses, and telephone numbers) of thousands of employees who had taken the same test nationwide. *McLane* refused to comply, and the EEOC filed petitions to enforce the subpoena in the district court.

The district court refused to enforce the subpoena on the basis that the personal information was not relevant to whether or not any discrimination occurred.

Ninth Circuit's Faulty *De Novo* Review

The Ninth Circuit, on appeal, substituted its own judgment for that of the trial court by conducting a *de novo* review of the underlying proceedings. It came to the opposite conclusion of the district judge – that the subpoena should have been

enforced and McLane ordered to turn over the information.

Even the Ninth Circuit Court of Appeals, in a footnote, seemed to agree that it was out of line with the other circuit courts of appeal in conducting a *de novo* review. And, before the Supreme Court, the EEOC also conceded that *de novo* review was inappropriate, but argued that the same result should have been achieved under either standard.

The Supreme Court agreed with the other circuits' precedent that an abuse of discretion standard should have applied – which provides great deference to the decision-making of the district court. The district court is particularly suited to deciding “fact-intensive, close calls” and has an “institutional advantage” over the court of appeals because of its hands-on work with the case. Therefore, the Supreme Court held that orders for enforcement of administrative subpoenas are reviewed on appeal for abuse of discretion, and the court of appeals may not re-weigh the evidence and issue its own decision.

Effect of the Holding

The Supreme Court's decision does not curtail the ability of the EEOC to issue and seek enforcement of its subpoenas. But it does provide employers with more certainty following a district court's order enforcing or declining to enforce those subpoenas.

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