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NO FISHING: Court Refuses to Enforce Overbroad "Pattern or Practice" Subpoena From EEOC

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The U.S. Equal Employment Opportunity Commission got a slapdown recently from the U.S. Court of Appeals for the Tenth Circuit. The **decision**, which held that an EEOC subpoena was overbroad and sought information that was not relevant to the case, reinforces the limits of the agency's subpoena and discovery authority and prohibits the EEOC from trying to initiate "pattern and practice" discovery without a proper aggregation of claims.

In other words, the decision is good news for employers.

EEOC v. Burlington Northern Santa Fe Ry. Co.

The EEOC generally has the authority to subpoena "any evidence of any person being investigated" as long as the evidence "related to the unlawful employment practices … and is relevant to the charge under investigation."

In this case, the EEOC issued the subpoena to Burlington Northern Santa Fe Railway Co. in Colorado in connection with the agency's investigation of alleged discrimination against two disabled job applicants that the railroad had not hired.

Gregory A. Graves and Thomas A. Palizzi filed charges with the EEOC in February and October 2007, alleging that the railroad violated the Americans with Disabilities Act by discriminating against them based on "regarded as" disabilities. (Both men received conditional offers of employment as conductors, but their offers were withdrawn after their post-offer medical screening.) The railroad maintained that its decisions to rescind the offers were based on *bona fide* medical requirements and safety concerns relating to the conductor position.

In the course of the investigation, the EEOC issued its subpoena on April 10, 2009, along with a letter explaining it had expanded the scope of its investigation to include a potential "pattern and practice" of discrimination by the railroad throughout the country. In essence, the subpoena sought any and all of the railroad's electronic employment data, nationwide, for the prior six years. The railroad refused to comply with the subpoena, and the EEOC applied to U.S. District Court in Colorado for enforcement on December 10, 2010.

To justify its request, the EEOC filed an affidavit saying that it had four similar complaints against the railroad from other locations, although the agency had never provided that information to the railroad. The District Court denied the EEOC's attempt to enforce the subpoena, characterizing it as "pervasive" and seeking plenary discovery. The EEOC appealed to the Tenth Circuit, which hears appeals from federal district courts in the states of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

The Decision

On appeal, the EEOC argued that the District Court ignored the record because, based on its affidavit, all six charges taken together warranted an investigation into a potential "pattern and practice" of discrimination by the railroad. The court held, however, that the EEOC was entitled to information only if it was "relevant to the charge[s] under investigation."

The court noted that the subpoena itself referred only to the complaints by Graves and Palizzi – "[n]owhere in the document is there any reference to any other charge." Although the EEOC's cover letter accompanying the subpoena made a brief reference to the agency's intent to broaden the scope of the investigation, the court found that this did not justify the expansive discovery request. Finally, the court scolded the EEOC for failing to assert its justification during the administrative process.

> **The EEOC should not wait until it applies to the district court to supply justification or evidence that should have been provided during the administrative enforcement phase, and the EEOC has not explained how or why the district court was required to credit its summaries of other charges filed against [the railroad].**

The "Incredibly Broad" Request

The court went on to examine the scope of the EEOC's discovery request. The subpoena issued in 2010 requested the following:

> [A]ny computerized or machine-readable files…created or maintained by you….during the period December 1, 2006 through the present that contain electronic data about or effecting [sic] current and/or former employees…throughout the United States.

Read another way, the EEOC essentially requested any information that the railroad had about any of its current or former employees for the past four years. The court, rightfully, characterized the request as "incredibly broad." It went on to explain that just because an act of discrimination *could* be part of a wide pattern or practice of discrimination, it does not warrant that depth of investigation for every charge.

In addition to the fact that the request was overbroad, the court also found that the EEOC lacked the power and jurisdiction to make it. Title VII (which applies to ADA claims as well) gives the EEOC authority to seek information "relevant to [a] charge under investigation." Both the District Court and Court of Appeals held that because the discovery the EEOC sought was not relevant to the charges, the EEOC was in essence seeking unlimited, or "plenary," discovery. The Tenth Circuit accurately recognized that the EEOC had no statutory authority for such a fishing expedition.

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Good News, But a Caution

The Tenth Circuit decision is good news for employers. First, it reminds the EEOC that its administrative subpoena powers are not without limits. As dictated by statute, the information sought must be relevant to the charge(s) under investigation. The EEOC cannot justify an overly broad request by simply indicating that it has similar claims, as it did here. The EEOC may not engage in expansive "pattern or practice" investigations unrelated to the charge at hand in hopes of finding other violations. Moreover, when there is a dispute about the appropriate breadth of the EEOC's subpoena power, the EEOC must supply its justification for its request during the administrative enforcement phase.

That having been said, the decision merely prevents the EEOC from putting the cart before the horse. Nothing prevents the EEOC from expanding its investigation beyond the charging parties if it properly has evidence suggesting violations warranting a broader investigation. The Tenth Circuit decision did not clearly define the appropriate scope of an initial EEOC investigatory subpoena. The court implied that the EEOC might have been entitled to information from other offices in the same metropolitan area, or even other positions or offices in Colorado.

Conclusion

In light of the Tenth Circuit decision, employers engaging in discovery practice with the EEOC should be on guard against overly broad requests and ensure that the EEOC does not overstep its authority, particularly in connection with broad "pattern or practice" investigations.

If you have any questions about this or other developments, please contact any member of Constangy's **Litigation Practice Group**, or the Constangy attorney of your choice.