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To assist it in the investigation of allegedly unlawful employment practices, Title VII and its progeny confer on EEOC an array of investigative tools, including subpoena power. Phelps Dunbar's Reed Russell and Erin Malone examine recent case law and advise that, given the favorable treatment courts are according EEOC subpoena enforcement efforts, employers should approach such a subpoena with an eye toward compliance, if possible.

Recent Developments: Courts Continue To Construe Broadly EEOC's Subpoena Power

BY REED L. RUSSELL AND ERIN L. MALONE

I. Introduction

To assist the Equal Employment Opportunity Commission in the investigation of allegedly unlawful employment practices, Title VII of the 1964 Civil Rights Act and its progeny confer on EEOC an array of investigative tools.[1] One such tool is EEOC's power to issue administrative subpoenas during the course of a charge investigation, to obtain documents or other evidence, testimony, or access to facilities.[2] EEOC's subpoena power includes ''any evidence that is relevant and necessary to the resolution of any issue in an investigation, unless it would be unduly burdensome to provide the evidence.''[3]

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Subpoenas are issued by EEOC District Office Directors, and a respondent can either comply or seek revocation of the subpoena. Because of the potential for litigation if a respondent refuses to comply—and the delay

[1] 29 U.S.C. § 2000e-8; 29 C.F.R. § 1601.15; *EEOC Compl. Man.* §§ 22-28.

[2] 29 C.F.R. § 1601.16; *EEOC Compl. Man.* §§ 24.1, 24.3.

[3] *EEOC Compl. Man.* § 24.4. *See also* 42 U.S.C. § 2000 e-8(a) (EEOC is entitled to ''any evidence of any person being investigated . . . that relates to unlawful employment practices covered by [Title VII] and is relevant to the charge under investigation''); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69, 34 FEP Cases 709 (1984) (''Since the enactment of Title VII, 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'').

a subpoena causes in the investigation regardless of whether a respondent complies voluntarily—subpoenas typically are used after other investigative measures, such as requests for information, have been attempted and resisted or rejected.[4]

If the respondent seeks revocation of a subpoena, it must make that petition—typically to the Director issuing the subpoena—within five days after service, or risk waiving any objection to the subpoena.[5] The petition must separately identify each portion of the subpoena with which the petitioner does not intend to comply, and state the basis for noncompliance.[6] The Director either grants the petition or makes a proposed determination on the petition and submits the petition and proposed determination to the Commission for final review and determination.[7]

In the event a respondent fails to comply with a valid subpoena, EEOC may pursue an enforcement action in district court.[8] The district court's role in an enforcement action is ''to satisfy itself that the charge is valid, and the material requested is relevant to the charge . . . and to assess any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose.''[9] Courts have construed broadly the relevance standard in evaluating the scope of evidence to which EEOC may demand access; the U.S. Supreme Court has described it as any material that ''might cast light on the allegations against the employer.''[10]

Courts in recent years have continued to construe broadly the boundaries of EEOC's subpoena power, and in some surprising ways. This article explores some of those recent opinions, which have held that (1) EEOC's investigatory authority does not always cease after a right-to-sue notice issues and the charging party files a private lawsuit; (2) failure by the respondent to exhaust administrative remedies may waive any objection to an administrative subpoena; and (3) the relevance standard in an EEOC investigation is broad enough to allow EEOC to obtain evidence beyond the specific allegations relating to a particular charging party or company location or practice, including sometimes permitting the gathering of evidence on a nationwide basis growing out of an individual-focused charge. Finally, the article provides some practical guidance for respondents in light of the standards discussed.

[4] *EEOC Compl. Man*. § 24.1.

[5] 29 C.F.R. § 1601.16(b)(1); *see EEOC v. Sunoco Inc.*, 2009 U.S. Dist. Lexis 6070, 105 FEP Cases 1207 (E.D. Pa. 2009) (32 EDR 187, 2/18/09) (reasoning that the employer waived its objection to enforcement of the subpoena by failing to timely file a petition to revoke or modify with EEOC within five days).

[6] 29 C.F.R. § 1601.16(b)(2).

[7] *Id*.

[8] 42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1601.16(c); *EEOC Compl. Man*. § 24.13. There have been roughly 30-40 subpoena enforcement actions filed per year. That number dropped to around 20 in 2010, although there was a significant period during that fiscal year where the commission was down to only two commissioners. *EEOC Litig. Statistics FY 1997 through FY 2010*, available at http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.

[9] *Shell Oil*, 466 U.S. at 72, n.26 (internal quotations omitted).

[10] *Shell Oil*, 466 U.S. at 68-69.

II. Recent Federal Court Decisions Evaluating EEOC's Subpoena Power

A. EEOC's investigatory authority does not necessarily cease once a private action is filed.

Many respondents breathe a sigh of relief once they learn that EEOC issued a charging party his right-to-sue notice, because it signals the end of EEOC's investigation. In limited circumstances, however, EEOC may not be done investigating after issuing the right-to-sue notice. In *EEOC v. Federal Express Corp.*,[11] the Ninth Circuit held that EEOC's authority to investigate may continue even where EEOC has issued a right-to-sue notice and the charging party has filed a lawsuit. Over a decade earlier, the Fifth Circuit reached the opposite result in *EEOC v. Hearst Corp.*,[12] holding that the filing of a lawsuit ends the opportunity to investigate the charge.[13] The Ninth Circuit expressly disagreed with the Fifth Circuit's decision in *Hearst*.[14]

In *Federal Express Corp.*, the charging party alleged that the employer's cognitive ability test had a disparate impact on him and similarly situated African Americans and Latinos.[15] At the request of the charging party, EEOC issued its right-to-sue notice, but stated in the notice that it would continue to process the charge.[16] Upon receipt of the right-to-sue notice, the charging party joined an already pending class action lawsuit against the employer.[17]

As part of its continuing investigation, EEOC issued a subpoena to the employer requesting information related to computer files containing personnel records, but it did not request any information regarding specific employees.[18] After EEOC denied the employer's petition to revoke the subpoena, EEOC filed an enforcement action. The district court reasoned that EEOC did not ''plainly lack jurisdiction'' to enforce the subpoena, and granted enforcement.[19]

Regarding the enforceability of the subpoena,[20] the Ninth Circuit reasoned that EEOC had the authority to issue the subpoena, where the charging party alleged a policy or pattern of discrimination affecting African Americans and Latinos.[21] EEOC's regulations and its interpretation of those regulations made clear that a charge could continue to be investigated after a right-to-sue notice issues, such as when the charge implicates

[11] 558 F.3d 842, 105 FEP Cases 1112 (9th Cir. 2009), *cert. denied*, 130 S.Ct. 574, 107 FEP Cases 1216 (2009) (33 EDR 587, 11/18/09).

[12] 103 F.3d 462, 72 FEP Cases 1541 (5th Cir. 1997).

[13] *Id*. at 469.

[14] *Federal Express Corp.*, 558 F.3d at 851.

[15] *Id*. at 845.

[16] *Id*.

[17] *Id*.

[18] *Id*. at 845-46. It is not uncommon in investigations of class charges for EEOC to send a request for information about how the employer maintains its electronic personnel and compensation data, before sending a request for the actual employee information.

[19] *Id*.

[20] Initially, the Ninth Circuit rejected the employer's argument that the subpoena was moot because it had complied with another subpoena relating to a nearly identical charge filed by a different employee, reasoning that the employer and EEOC still had the potential for disputes over future requests for information, or subpoenas. *Id*. at 848.

[21] *Id*. at 852.

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a potential pattern or practice of discrimination.[22] The court reasoned that EEOC was within its authority, because EEOC's regulations and interpretative guidance meant that (i) EEOC's investigative authority is ''triggered by the filing of a valid charge''; (ii) EEOC had the option to sue or issue a right-to-sue notice; and (iii) in limited circumstances, EEOC could continue to investigate a charge, including issuing subpoenas, even after it issued a right-to-sue notice.[23]

The Fifth Circuit in *Hearst* reached the opposite result, explaining that ''in a case where the charging party has requested and received a right to sue notice and is engaged in a civil action that is based upon the conduct alleged in the charge filed with EEOC, *that charge* no longer provides a basis for EEOC investigation.''[24] That is, once the charging party commences formal litigation, EEOC's time for investigation has passed.[25] In addition, EEOC's investigatory authority ceases at the point formal litigation begins because the purposes of Title VII no longer are served by EEOC's continued investigation.[26] ''Instead, if the EEOC has any further interest it may intervene and pursue discovery through the courts; or if its interest extends beyond the private party charge upon which it is acting, it may file a Commissioner's charge.''[27]

The Ninth Circuit in *Federal Express Corp.* disagreed with the Fifth Circuit's *Hearst* decision for four reasons. First, the Ninth Circuit rejected the Fifth Circuit's characterization of EEOC's enforcement procedure as containing ''distinct'' steps.[28] Rather, the multistep procedure is ''integrated,'' ''the beginning of another stage does not necessarily terminate the preceding stage,'' and EEOC can investigate at each stage.[29] Second, the court rejected the idea that a charging party's actions, such as filing suit, can ''divest EEOC of authority,'' because ''EEOC controls the charge.''[30] Third, the Ninth Circuit reasoned that EEOC's investigatory authority serves a purpose beyond investigating an individual's charge allegations; namely, EEOC serves the public interest by investigating and preventing discrimination, which may require continuing an investigation after the individual charging party sues.[31] Finally, the court reasoned that nothing in the text of Title VII stated that EEOC's investigative authority ends when the charging party sues and, absent such textual limitation, it was EEOC's decision when the investigation should end.[32]

[22] *Id.* at 850.
[23] *Id.*
[24] *Hearst*, 103 F.3d at 469-70.
[25] *Id.* at 469.
[26] *Id.*
[27] *Id.*
[28] *Federal Express Corp.*, 558 F.3d at 851.
[29] *Id.* at 852.
[30] *Id.* (citing *EEOC v. Waffle House Inc.*, 534 U.S. 279, 291, 12 AD Cases 1001 (2002) (18 EDR 86, 1/16/02) (concluding that a private arbitration agreement does not divest EEOC of jurisdiction to investigate a charge)).
[31] *Federal Express*, 558 F.3d at 852 (citing 29 C.F.R. § 1601.28(a)(3)).
[32] *Id.* at 853; *see also EEOC v. Watkins Motor Lines Inc.*, 553 F.3d 593, 105 FEP Cases 364 (7th Cir. 2009) (32 EDR 109, 2/4/09) (a settlement between charging party and respondent, conditioned on withdrawal of charge, does not deprive EEOC of ability to pursue a subpoena, because EEOC must approve withdrawal of charge).

Thus, in class or pattern-or-practice charges, at least within courts in the Ninth Circuit, respondents need to read carefully the right-to-sue notice and be aware that EEOC may seek to continue its investigation even after what many—including the Fifth Circuit—have considered ''the end'' of EEOC's involvement. Further, certiorari was denied in *Federal Express Corp.*, so respondents will have to navigate this circuit split until more appellate court guidance is given.

B. Failure to exhaust administrative remedies may waive objection to subpoena.

Just as employers may obtain dismissal of a charging party's private lawsuit if he fails to exhaust administrative remedies, this fate can befall respondents' efforts to fight subpoena enforcement actions in court when they receive subpoenas but fail to seek revocation or modification within the five-day window provided by EEOC's regulations. In *EEOC v. Sunoco Inc.*,[33] a Pennsylvania district court held that the employer waived its objection to enforcement of a subpoena by failing to file a timely petition to revoke or modify the subpoena.[34]

In *Sunoco*, EEOC was investigating a charge alleging individual claims of disparate treatment and retaliation, as well as disparate impact caused by a test.[35] EEOC issued a ''limited'' right-to-sue notice as to the individual claims only, but reserved the right to continue to process the charge as to the issue of disparate impact caused by testing.[36] EEOC informed the employer that it had discontinued processing the individual claims, but would pursue the issue of disparate impact and testing, and served the employer with a subpoena for information.[37] Twenty-five days after EEOC issued the subpoena, the employer filed a petition to revoke the subpoena.[38]

EEOC filed an enforcement action, and the subpoena was enforced. The court first reasoned that the employer had waived its objections to the subpoena by failing to file a timely petition to revoke or modify the subpoena.[39] The court distinguished a D.C. Circuit case, *EEOC v. Lutheran Soc. Servs.*,[40] which had rejected EEOC's waiver argument. *Lutheran* dealt with objections based on attorney-client privilege and work product, which implicated the court's particular expertise, not objections based on relevance or the particularity of requests in EEOC's subpoena, which implicated EEOC's expertise, and should first be addressed through EEOC's administrative process on pain of waiving the objections.[41] The court explained that Sunoco's objections were directed to the validity of the subpoena and, thus, more like objections to relevance that implicate EEOC's particular expertise on those issues in EEOC investigations, and which had been held waived in several prior cases as untimely raised.[42]

Although the court held that the employer had waived its objections, it also addressed the employer's

[33] 2009 U.S. Dist. Lexis 6070, 105 FEP Cases 1207 (E.D. Pa. 2009) (32 EDR 187, 2/18/09).
[34] *Id.* at *14.
[35] *Id.* at **2-3.
[36] *Id.* at **3-4.
[37] *Id.*
[38] *Id.*
[39] *Id.* at *14.
[40] 186 F.3d 959, 80 FEP Cases 1009 (D.C. Cir. 1999).
[41] *Sunoco Inc.*, 2009 U.S. Dist. LEXIS 6070, at *11-12.
[42] *Id.* at *13 (collecting cases).

argument that the subpoena was invalid because there was no valid, open charge. The court rejected this argument, noting that the right-to-sue notice was expressly ''limited'' to the individual claims, making it a ''hybrid'' determination, and distinguishing it factually from the Fifth Circuit's decision in *Hearst Corp.*, where EEOC had not issued a limited right-to-sue notice, and therefore making it unnecessary to determine whether it would follow *Hearst Corp.* or the Ninth Circuit's *Federal Express Corp.* decision.[43]

C. Broad, but not illusory, relevance standard for subpoenas.

EEOC's ability successfully to enforce subpoenas seeking information on a nationwide scope has been highlighted by two recent circuit court decisions, *EEOC v. United Parcel Serv. (''UPS'')*[44] and *EEOC v. Kronos Inc.*[45] In these cases, the Second and Third circuits, respectively, applied a low relevance standard to EEOC's requests, and enforced subpoenas seeking nationwide information arising out of individual charges addressing individual claims of discrimination at individual employer locations. As both of these decisions reinforce, respondents should be mindful that, during a charge investigation, EEOC is not required to show probable cause to believe that discrimination occurred or to produce evidence to establish a *prima facie* case of discrimination in order for information to be deemed relevant to EEOC's investigation of the underlying charge. Instead, and as these courts reiterated, ''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.''[46]

In *UPS*, the Second Circuit held that the district court applied too restrictive a standard of relevance in denying enforcement of EEOC's subpoena that sought nationwide discovery.[47] The employer had nationwide appearance guidelines prohibiting employees in public-contact positions, such as drivers, from wearing facial hair below the lower lip.[48] In 1999, the employer implemented a religious accommodation policy to allow for limited exemptions from the guidelines. Before the employer put in place its religious accommodation policy, employees who refused to comply with the guidelines because of religious reasons simply were not placed in positions involving public contact.[49]

In 2005, Bilal Abdullah filed a charge of discrimination based on religion after he was not hired for a driver position in Buffalo, N.Y.[50] During the interview process, the interviewer informed Abdullah, who wore a beard as a practicing Muslim, that he would have to shave his beard in order to be a driver, and Abdullah informed the interviewer that he could not shave his beard because of his religion.[51] Ultimately, the employer contended that Abdullah was ineligible for employment, not because of his refusal to shave his beard, but because Abdullah provided a false Social Security number with his employment application.[52]

As part of its investigation of Abdullah's charge, EEOC issued a subpoena seeking nationwide information related to the application of the employer's religious accommodation policy to the appearance guidelines, including (1) all documents related to the guidelines and a list of all jobs subject thereto; (2) information for all applicants denied employment because of their failure to comply with the guidelines since 2004; (3) information for all employees who requested a religious accommodation to the guidelines and the outcome of such requests since 2004; and (4) information for all employees who were terminated for reasons related to the guidelines since 2004.[53] The employer objected to the scope of the subpoena, arguing that it did not possess the information in a centralized location and did not maintain records on applicants who requested religious accommodations to the guidelines.[54] After the employer failed to comply with EEOC's subpoena, EEOC filed an enforcement action.[55]

The district court denied EEOC's petition for enforcement, holding that the subpoena was overly broad and sought national information not relevant to the underlying charge filed by Abdullah. EEOC appealed.[56]

In line with the generous relevance standard applied to EEOC's investigatory authority, the Second Circuit held that the district court applied too restrictive a standard of relevance in denying EEOC's request for nationwide information.[57] The court reiterated that subpoenas would be enforced if the agency showed (i) that the investigation was for a legitimate purpose; (ii) the inquiry ''may be relevant to that purpose''; (iii) the agency did not already possess the information sought; and (iv) administrative procedures were followed.[58] Applying this low standard, and finding it had been satisfied, the court also cited several factors that played a role in its decision: (i) the guidelines applied to all facilities nationwide; (ii) until 1999, the employer did not have a religious accommodation policy; and, (iii) a separate charge filed in Dallas in 2007 by another practicing Muslim challenged the facial hair policy and alleged a pattern or practice of religious discrimination.[59]

[43] *Id.* at *15-16.
[44] 587 F.3d 136, 107 FEP Cases (2d Cir. 2009) (33 EDR 610, 12/2/09).
[45] 620 F.3d 287, 110 FEP Cases 392 (3d Cir. 2010) (35 EDR 323, 9/22/10).
[46] *Shell Oil*, 466 U.S. at 68-69 (internal quotations omitted).
[47] *United Parcel Serv.*, 587 F.3d at 140.
[48] *Id.* at 137.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.* at 138.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* at 139.
[58] *Id.*
[59] Two years after Abdullah filed his charge, in 2007, Muhammed Farhan, who also wore a beard as a practicing Muslim, filed a charge of discrimination related to his employment in Dallas, alleging that the employer refused to provide him with a religious accommodation and the employer had a pattern or practice of refusing to accommodate religious beliefs. *Id.* at 138. From 2001 to 2007, Farhan worked for the employer in a position with no public contact. *Id.* In 2007, he accepted an opportunity to work in a public-contact position as a driver. *Id.* On the day he reported to duty, Farhan was informed that he would not be able to wear a beard and drive. Farhan then asked his manager about a religious accommodation to allow him to drive, but his manager informed him that he could not drive if he chose to wear a beard. *Id.* After his manager refused to accommodate his religious belief, Farhan went to the human resources department to obtain a religious accommodation

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The Second Circuit further explained that the employer's argument that the charges were without merit did not prevent EEOC from investigating the allegations because EEOC was not required to show probable cause to believe that discrimination occurred or to produce evidence to establish a *prima facie* case of discrimination at the investigatory stage.[60]

One year after the *UPS* decision, the Third Circuit similarly reasoned in *Kronos* that the district court misapplied the relevance standard when it narrowed by geography, time, and job description a third-party subpoena issued to a testing provider.[61] In 2007, the charging party, who had a hearing and speech impairment, applied for, and was denied, work as a cashier, bagger, and stocker at a Kroger grocery store, a national grocery store chain, in Clarksburg, W.Va.[62] The charging party alleged that she was not hired because of her disability, citing a statement by the manager that she would not be a good fit because of the way she spoke.[63] The employer explained in its position statement that she was not hired, among other reasons, because of her low score on a customer service assessment, which was created by Kronos Inc. and designed to evaluate an applicant's service origination and interpersonal skills.[64]

Because the employer admitted that it relied on the results of the assessment in its hiring nationwide for all retail positions, EEOC sent the employer a request for information, seeking several categories of documents related to the assessment and its use, including validity studies.[65] After the employer failed fully to respond to the request for information, EEOC issued a third-party administrative subpoena to Kronos, the creator of the assessment, seeking, among other materials, validity studies and any documents related to potential adverse impact on individuals with disabilities.[66] EEOC later informed the employer that it was expanding its investigation to include the issue of disability with respect to the use of the assessment in hiring from 2006 to the present for all locations nationwide.[67]

Around this time, EEOC discovered an article cowritten by a Kronos employee suggesting that minority applicants performed worse than non-minority applicants on the assessment. Thereafter, EEOC informed the employer that it was expanding its investigation to include the impact of the assessment on the hiring of minority applicants in store locations nationwide. As a result, EEOC rescinded its original subpoena to Kronos and issued a modified subpoena.[68]

In response thereto, Kronos filed a petition to revoke the subpoena with EEOC, arguing that the information was not relevant to the underlying charge (as well as trade secret property). EEOC denied the petition[69] and, after Kronos failed to comply with the administrative subpoena, EEOC brought an enforcement action.[70]

form, but the human resources officer informed Farhan that he did not know of any such form. *Id*.

[60] *Id*. at 140.
[61] *Kronos*, 620 F.3d at 299.
[62] *Id*. at 292.
[63] *Id*.
[64] *Id*. at 293.
[65] *Id*. at 293.
[66] *Id*.
[67] *Id*.
[68] *Id*. at 294.
[69] *Id*.
[70] *Id*.

In reasoning that the subpoena requested materials not relevant to the underlying charge, the district court limited the scope of the subpoena to include a lesser period of time, the state in which the charging party applied for work (i.e., West Virginia), and the position for which the charging party applied (i.e., bagger, stocker, and cashier).[71] In reversing the district court's decision, and relying in part on the Second Circuit's decision in *UPS*, the Third Circuit reasoned that the district court misapplied the relevance standard in narrowing the subpoena by geography, time, and job description.[72]

The Third Circuit supported its reasoning based on the employer's admission that it relied on the results of the assessment in hiring nationwide for all retail positions: ''An employer's nationwide use of a practice under investigation supports a subpoena for nationwide data on that practice.''[73] The court also reasoned that EEOC could investigate beyond the temporal limits of the charge because information about Kroger's use of the test ''might cast light on the practice under investigation.''[74] Further, the court rejected Kronos's arguments that the subpoena should be cabined by the factual allegations or legal theories advanced by the charging party. Noting the broad relevance standard, the fact that EEOC ''need not cabin its investigation to a literal reading of the allegations in the charge,'' and the absence of a requirement for a charging party to advance a legal theory, the court held that the charging party's failure to allege nationwide discrimination, challenge the use of the test in other job positions, or allege disparate impact were not bars to the subpoena.[75] Finally, the court explained that analyses by Kronos not done specifically for Kroger, or user manuals not actually provided to Kroger, could be obtained, if they ''shed light'' on the issue of whether the tests had an adverse impact on the disabled.[76]

The court refused, however, to enforce EEOC's subpoena as to race information, because race was not a reasonable expansion of the underlying charge. The court acknowledged that ''EEOC is not required to ignore facts it uncovers in the course of a reasonable investigation of the charging party's complaint,'' but also reasoned that EEOC's effort to expand the investigation to race ''constitutes an impermissible fishing expedition,'' and allowing it would permit EEOC to ''wander into wholly unrelated areas.''[77] Nevertheless, in explaining its reasoning, the court alluded to the Fifth Circuit's statement in *EEOC v. Southern Farm Bureau Cas. Ins. Co.*,[78] where that court denied an expanded subpoena that sought information on sex discrimination growing out of a race discrimination investigation, and explained that EEOC could always issue a commissioner's charge if it uncovered evidence of discrimination in an unrelated charge investigation.[79] It is worth noting that the use of commissioner's charges has been growing rapidly under EEOC's systemic initiative.

[71] *Id*. at 294-95.
[72] *Id*. at 297-98.
[73] *Id*. at 298.
[74] *Id*. at 299.
[75] *Id*. at 299, 300.
[76] *Id*.
[77] *Id*. at 301 (internal citations omitted).
[78] 271 F.3d 209, 87 FEP Cases 332 (5th Cir. 2001); *see also* 42 U.S.C. § § 2000e-5(g), -6(e).
[79] *Kronos Inc.*, 620 F.3d at 301.

In a similar case currently pending before the Eighth Circuit—*EEOC v. Schwan's Home Serv.*[80]—a Minnesota district court granted EEOC's petition to enforce a subpoena seeking companywide information related to the company's selection practices for its general manager training program, based on an amended charge that was supported in part by information provided to the charging party by EEOC during its investigation.[81] The district court refused to consider whether the charge on which the subpoena was based was timely or a valid amendment to the original charge, reasoning that those were merits-based defenses not properly considered in a subpoena enforcement action.[82] Further, the court rejected the employer's claim that the charge was invalid as not based on personal knowledge, rejecting the argument that EEOC's provision of information to the charging party that influenced her decision to amend the charge meant that the charge did not meet the oath or affirmation requirement for charges.[83] The court also rejected the timeliness argument because it reasoned that timeliness challenges were inappropriate at the subpoena enforcement stage absent a facially untimely charge, and it refused to consider whether the amended charge properly related back to the original charge.[84] The court summarily rejected the employer's challenge to the charging party's standing, because it was a merits-based argument not appropriate at the subpoena enforcement stage.[85] The court also rejected the employer's relevance challenge, reasoning that the amended charge alleged class discrimination, and the requested information ''might cast light'' on those allegations, and that even if just the original charge were considered, the class allegations were ''like or related'' to the allegations in the original charge, because they related to the charging party's allegations about treatment of females in the general manager development program.[86] The company's appeal in the case has been briefed and oral argument was heard March 16.[87]

But, as the Third Circuit showed in its decision in *Kronos*, rejecting the expansion of EEOC's subpoena to cover race, courts do place limits on the scope of EEOC's subpoenas, even if EEOC could potentially launch a separate investigation through the commissioner charge process. Another example of a limitation on EEOC's subpoena authority is shown in *EEOC v. ABM Janitorial-Midwest Inc.*,[88] where an Illinois district court denied EEOC's application for enforcement of a subpoena issued to a putative successor company.[89]

In *ABM Janitorial-Midwest*, a charging party alleged discrimination based on national origin against her employer, Lakeside Building Maintenance Inc. (''Lakeside''), in November 2000.[90] During the course of its investigation of the individual allegations alleged in the charge, EEOC expanded the scope of the charge to include Lakeside's hiring and job assignment practices and issued a subpoena in 2002.[91] In 2003, EEOC successfully enforced the subpoena against Lakeside, and obtained personnel information covering 1998 to July 12, 2002.[92] At the time EEOC issued its subpoena to Lakeside in 2002, ABM Janitorial-Midwest Inc. (''ABM'') had acquired a substantial portion of Lakeside's assets.[93]

Five years after issuing the initial subpoena to Lakeside, EEOC issued a subpoena to ABM as the successor to Lakeside, seeking information related to certain employees between July 12, 2002, and March 12, 2007.[94] ABM petitioned to revoke the subpoena; two years later, EEOC denied the petition and filed an enforcement action.[95] ABM argued that the information sought was not reasonably relevant to the underlying charge, and ABM was neither the charging party's employer nor a party to the underlying charge.[96] EEOC argued that ABM was collaterally estopped from raising the issue of relevance by the district court's enforcement of Lakeside's subpoena years before.[97]

The district court rejected EEOC's collateral estoppel argument, and refused to enforce the subpoena.[98] The subpoena sought information not only of different employment practices from those alleged in the charge, but also employment practices of a different employer altogether. The district court determined that the minimal relevance of the information sought was outweighed by the burden of compliance by ABM, and also chastised EEOC for its two-year delay in resolving the petition for revocation.[99]

In a more recent district court case, *EEOC v. Randstad*,[100] a Maryland district court denied EEOC's petition to enforce an administrative subpoena on grounds that EEOC's expanded investigation related to disabilities bias claims was time-barred, and, in addition, the information sought was irrelevant and unduly burdensome.[101] In *Randstad*, EEOC investigated a charge alleging individual claims of national origin discrimination.[102] At some point, EEOC arranged for the charging party to undergo a psychological evaluation, the results of which led to the charging party amending his charge to include disabilities discrimination and failure-to-accommodate allegations.[103] EEOC served the employer with a subpoena requesting companywide information as to all job placements made by every office in the United States. The employer petitioned for revocation or modification, and the subpoena was reduced in scope to the employer's Maryland offices. After the employer failed to comply with the subpoena, EEOC filed an enforcement action.[104]

The district court reasoned in part that the disabilities bias claim was time-barred because, unlike the national

[80] 8th Cir., No. 10-3022.
[81] 707 F. Supp. 2d 980, 997-98 (D. Minn. 2010).
[82] *Id*. at 991-92.
[83] *Id*. at 992.
[84] *Id*. at 992-93.
[85] *Id*. at 993.
[86] *Id*. at 995-997.
[87] 8th Cir., No. 10-3022, *oral argument* 3/16/11.
[88] 671 F. Supp. 2d 999, 107 FEP Cases 1876 (N.D. Ill. 2009) (33 EDR 735, 12/30/09).
[89] *Id*. at 1006-07.
[90] *Id*. at 1001.
[91] *Id*.
[92] *Id*. at 1001-02.
[93] *Id*. at 1001.
[94] *Id*. at 1002.
[95] *Id*.
[96] *Id*. at 1003.
[97] *Id*.
[98] *Id*. at 1003-04.
[99] *Id*. at 1006.
[100] Civ. No. 10-3472, 2011 WL 652484, 2011 U.S. Dist. LEXIS 17953 (D. Md. Feb. 23, 2011) (36 EDR 335, 3/23/11).
[101] *Id*. at *8.
[102] *Id*. at *2.
[103] *Id*.
[104] *Id*. at *3.

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original discrimination claim, the disabilities bias claim was filed after the 300-day time limit.[105] In addition, the district court reasoned that the companywide information was irrelevant to the claims at hand, because it sought information for jobs for which the charging party was not qualified, for locations where he did not seek employment, and for a five-year time period when he worked for only 13 months. The court also found the request unduly burdensome because it would require the employer to produce information for over 100,000 job placements, require 120 hours of time compiling the information, and cost between $14,000 and $19,000.[106] Although the company's laudable effort in providing detailed factual support of the burdensomeness the subpoena would cause no doubt helped the district court make a finding of undue burden,[107] the bulk of the court's decision centered on the timeliness issue. One is left to wonder whether the relevance and burdensomeness arguments would have had the same currency with the court if the charge had been timely.

Regardless, practitioners should continue to watch *Randstad*. Unlike, for example, the court in *Schwan's*, the court in *Randstad* did not hesitate to evaluate the timeliness issue, or the relevance issue. Given EEOC's success in getting district court decisions reversed in *UPS* and *Kronos*, and the fact that some of the reasoning of the district court in *Randstad*, particularly on relevance and undue burden, may be, certainly from EEOC's perspective, in some tension with the broad scope of enforcement recognized by the Second and Third circuits in *UPS* and *Kronos*, as well as other subpoena enforcement decisions, EEOC may be expected to consider seriously trying its luck with an appeal to the Fourth Circuit in *Randstad*.

III. Conclusion

The overriding lesson from the recent cases addressing EEOC subpoenas is that traditional arguments of relevance, undue burden, and overbreadth that might succeed under the Federal Rules of Civil Procedure in litigation do not apply with equal force in a subpoena enforcement action. Even where courts have denied enforcement of subpoenas, they have done so on the outer edges of relevance, where the information sought only could be described fairly as ''irrelevant'' to the charge under investigation. Thus, respondents employing a federal-rules litigation discovery analysis in determining their initial responses to EEOC information requests, and, if a subpoena is issued, in evaluating their likelihood of successfully obtaining revocation or fighting an enforcement action, may not be using the correct model to assess their risks.

It is a truism to say that EEOC's information requests can be exceedingly burdensome to employers already engaged in multiple investigations and litigation throughout their organizations, and that EEOC investigative staff can sometimes appear rigid and inflexible or disinterested in the practical difficulties caused by their requests. Nevertheless, respondents must approach EEOC's requests with an eye toward compliance if at all possible, because the broad latitude the courts give EEOC in conducting these investigations means that the chances of blocking a subpoena in court are low. Respondents should strive wherever possible to cooperate with EEOC during its investigation—it is not uncooperative, of course, to seek good faith modifications to the scope or terms of an information request—maintain a positive relationship with the investigative staff, and avoid the appearance of hindering EEOC's investigation. Moreover, in evaluating the strength of EEOC's position in requesting information, respondents should recall that EEOC is not required to show probable cause to believe that discrimination occurred or to produce evidence to establish a *prima facie* case of discrimination in order for information to be deemed relevant to EEOC's investigation of the underlying charge.

Although administrative subpoenas are to be used only after other investigative measures, such as requests for information, have been attempted and failed, EEOC will use them if a respondent is uncooperative. To that end, when faced with requests for information, to the extent possible, respondents should evaluate how they can comply with the request, or negotiate reasonable limitations on the request, rather than assume an adversarial approach based on the view that the request seeks information beyond the scope of the charge.

If EEOC does issue a subpoena and respondents plan to challenge it, they must take advantage of the opportunity to petition to revoke or modify the subpoena with EEOC, or risk waiver of any future objection. Respondents should also consider whether filing the petition creates an additional opportunity to reach a compromise with EEOC. Should EEOC deny the petition and commence an enforcement action, respondents need to evaluate which components of the subpoena might be subject to the argument that they seek information that truly will not shed light on the investigation of the charge under investigation, and support any arguments about burdensomeness with specific evidence.

Finally, employers should not wait until a charge arrives alleging a pattern or practice of discrimination before evaluating their employment practices, including statistical information, to identify any problems. It is still free for individuals to file a charge with EEOC—there were just shy of 100,000 such charges filed in 2010[108]—and it only takes one—as seen in the *UPS* case—to allege a pattern-or-practice claim, and EEOC might provide information to the charging party—as it did in *Schwan's*—to allege a pattern-or-practice claim.

[105] *Id*. at **4-6.

[106] *Id*. at *7.

[107] By contrast, the district court in *Schwan's* dismissively rejected the employer's ''passing'' burdensomeness argument, which was supported only by a ''bald assertion'' and no evidence. 707 F. Supp. 2d at 997, n.2.

[108] EEOC, Charge Statistics, FY 1997 through FY 2010, available at http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.