

# Supreme Court Message – Be Wary of EEOC Subpoenas

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On Monday, the Supreme Court held that appellate courts must utilize the deferential “abuse-of-discretion” standard when evaluating a ruling on a subpoena issued by the Equal Employment Opportunity Commission (“EEOC”) pursuant to Title VII of the Civil Rights Act. This ruling came in response to a Ninth Circuit decision wherein the circuit court reviewed a trial court decision under the less deferential *de novo* standard. By virtue of this ruling, the Supreme Court has confirmed that greater discretion should be given to the trial court in deciding the enforceability of EEOC subpoenas and has set a higher bar for litigants attempting to overturn a trial court’s ruling. See [McLane Co. Inc. v. EEOC](#), 581 U.S. \_\_\_\_ (2017).

## **The Facts**

The case arose out of an employment discrimination action filed by the EEOC against McLane Co. McLane had a policy requiring new hires and employees returning from medical leave to undergo a physical evaluation prior to beginning work in physically demanding jobs. McLane terminated an employee who failed three physical evaluations after returning from three months of maternity leave. The employee ultimately filed a charge of discrimination with the EEOC alleging McLane terminated her employment due to her gender.

After the charge was filed, the EEOC began an investigation. As part of the investigation, McLane provided the EEOC with information regarding the physical evaluation, as well as an anonymous list of employees who were administered the evaluation, along with the employees’ gender, position, score, and reason for taking the evaluation.

McLane refused to provide to the EEOC what was known as “pedigree information”, more specifically, the names, Social Security numbers, last known address, and telephone numbers of these employees.

Eventually, the EEOC widened the scope of its investigation and expanded its request to records regarding McLane’s nationwide business and also to investigate possible age discrimination. The EEOC then issued subpoenas requesting the pedigree information as it related to the broader investigation.

McLane refused to comply with the subpoenas and the EEOC sought enforcement in federal court. The trial court judge declined to enforce the subpoenas with regard to the pedigree information since, in the court’s opinion, the information was not relevant to the charges. The EEOC appealed the decision to the Ninth Circuit, where the trial court’s decision was overturned based on a *de novo* review. However, the Ninth Circuit noted that other circuits utilized the abuse-of-discretion standard in similar situations regarding administrative subpoenas, and questioned why the Ninth Circuit used the *de novo* standard.

## **The Decision**

The Supreme Court heard the case in order to resolve the circuit split about the proper standard of review over a trial court's decision to enforce an EEOC subpoena. Notably, the United States agreed with *McLane* that abuse-of-discretion is the appropriate standard, and the Court appointed *amicus curiae* to defend the trial court decision. The Court ultimately held that abuse-of-discretion is the correct standard of review, vacated the Ninth Circuit's decision, and remanded the matter to be decided in accordance with the abuse-of-discretion review.

The Court first discussed what it described as "the long standing practice of the courts of appeals" in utilizing the abuse-of-discretion standard in evaluating EEOC subpoenas. Significantly, the Court drew a parallel between the EEOC's subpoena power under Title VII and the National Labor Relations Board's subpoena power under the National Labor Relations Act, which was enacted well before Title VII. During those intervening years, circuit courts held that decisions to enforce NLRB subpoenas were subject to abuse-of-discretion review. Accordingly, the Court held that Congress enacted Title VII's subpoena power "against this uniform backdrop of deferential appellate review." In fact, the Court noted that almost every circuit court used the abuse-of-discretion standard to evaluate decisions regarding EEOC subpoenas, except for the Ninth Circuit.

Next, the Court explained that a trial court's expertise in evaluating subpoenas weighed in favor of the abuse-of-discretion standard. To evaluate the enforceability of a subpoena, a trial court must decide whether the evidence at issue in the subpoena is relevant and whether the subpoena is unduly burdensome. This type of evaluation requires a fact-sensitive inquiry that may not be bound by a set of bright line rules. The Court also explained that trial courts routinely engage in these types of evaluation, such as determining relevancy of evidence at trial and the reasonableness of pretrial criminal subpoenas. As such, the Court held that a trial court is better suited than the appellate court to conduct this evaluation since a trial court has an "institutional advantage" in deciding these types of matters.

## **Takeaways**

The practical effect of *McLane* is to be wary of EEOC subpoenas and to be aggressive in challenging these subpoenas at the district court level, as a litigant will have a steep hill to climb on appeal.

The language of *McLane* reinforces the EEOC's generally broad subpoena power. Therefore, this puts pressure on the parties (including the EEOC) to make strategically sound decisions at the trial court or risk ending up on the wrong side of a judicial order that will be extremely difficult to overturn. If an employer decides to challenge an EEOC subpoena, the employer must put the EEOC to task in an attempt to show the information being sought is irrelevant or that the subpoena is unduly burdensome.

However, this is not all bad news for employers. If the employer is successful in the district court, the EEOC will also have difficulty overturning the decision; conversely, if the district court rules the EEOC's subpoena is enforceable, the employer's avenue for relief at the appellate court will be a difficult one.