Out fishing: Overly broad requests for information from the EEOC

When the Equal Employment Opportunity Commission (EEOC) sends a charge of discrimination to an employer it typically makes a request for information. This request is often for information such as the employer's position statement and the workplace discrimination policy. However, many attorneys experienced in employment litigation have seen a request that can only be considered as overbroad and/or irrelevant to the underlying charge.

Sometimes a conversation with the investigator can lead the EEOC to refine its requests for information or even drop certain requests. However, if the investigator will not relent, the employer often will voluntarily provide the requested information with the thought that if it is not provided the EEOC will issue an administrative subpoena and obtain it anyway. In fact, in the last two fiscal years the EEOC has issued a record number of subpoena enforcement actions each year.[1] In general, courts have given considerable deference to the EEOC and have been willing to take a broad view of its subpoena power.[2] However, adding to growing case law on the limitations of the EEOC's subpoena powers are two cases decided in the first half of this year that have given employers hope that at least some courts are willing to put limits on what has been colloquially described as the EEOC's "fishing expeditions."[3]

EEOC v. Burlington Northern Santa Fe Railroad

On Feb. 27, 2012, the U.S. Court of Appeals for the Tenth Circuit issued a decision in *EEOC v. Burlington Northern Santa Fe Railroad*.[4] The court upheld a district court's decision refusing to enforce an EEOC subpoena finding it "incredibly broad." The case involved two job candidates who had not been hired by the Burlington Northern Santa Fe Railroad (BNSF) after receiving conditional offers of employment and a medical screening procedure. In their EEOC charges the job candidates claimed they were being discriminated against in violation of the Americans with Disabilities Act based on a perceived disability. On Feb. 2, 2009, the EEOC issued a letter to BNSF requesting "any computerized or machine-readable files … created or maintained by you … during the period Dec. 1, 2006 through the present that contain electronic data or effecting [sic] current and/or former employees … throughout the United States."[5]

Following a challenge by BNSF to this request the EEOC served a subpoena. The EEOC stated in a letter to BNSF that it was broadening its investigation to include "pattern and practice discrimination," thus warranting the demand for nationwide information.[6] Following BNSF's refusal to comply with the subpoena the EEOC brought an enforcement action in the district court, which discharged the EEOC's show cause order and sustained BNSF's refusal to comply.

On appeal, the Tenth Circuit noted that "the EEOC may access 'any evidence of any person being investigated' so long as that evidence 'relates to unlawful employment practices … and is relevant to the charge under investigation.'"[7] However, the court found that "wide deference to the scope of [EEOC] subpoenas … does not transcend the gap between the pattern and practice investigation and the private claims that have been shown [by the EEOC in its enforcement action]."[8] Citing to its earlier decision in *EEOC v. United Airlines*[9] for its relevance analysis the Court stated that the information demanded in the EEOC's subpoena went far beyond the allegations in the underlying charge and that enforcing it may "render null the statutory requirement that the investigation be relevant to the charge."[10]

Additionally, the court stated that "[t]he 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."[11] In finding against the EEOC's efforts to give their investigation a national scope, the court stated that "nationwide recordkeeping data is not 'relevant to' charges of individual disability discrimination filed by two men who applied for the same type of job in the same state …'"[12] that the request for information was not "relevant to a charge under investigation,"[13] the Court refused to enforce that portion of the subpoena.[14]

EEOC v. Nestlé Prepared Foods

A Kentucky Federal District Court issued a decision on May 23, 2012, in *EEOC v. Nestlé Prepared Foods*.[15] The undisputed facts in that case were that Nestlé had sent an employee to a private physician for a fitness-for-duty evaluation, during which he provided information concerning his family history of certain medical conditions. Later that same month the employee was terminated for the purported reason of taking excessive breaks during work shifts. Subsequent to the employee's filing a charge of discrimination with the EEOC alleging "retaliation," "disability" and "genetic information," the EEOC issued a subpoena based on the allegation

of "genetic information discrimination" under the Genetic Information Nondiscrimination Act (GINA) directing Nestlé to produce:

1. Documents that show the full name, address and telephone number of each physician to whom Nestlé referred individuals for physical or medical examinations (i.e., fitness for duty exams, post-offer exams) for positions at the facility from Jan. 1, 2010 to the present.

2. Documents that show the full name, date of application, if hired, date of hire, if not hired, reason(s) why, and if terminated, reasons(s) for termination for each individual who submitted to a physical or medical examination at Nestlé's request for positions at the facility from Jan. 1, 2010 to the present, as well as the date of each exam and the name of the physician who conducted the exam.[16]

Nestlé refused to comply with the subpoena, and the EEOC applied to the court for enforcement. The court recognized the broad access of the EEOC to evidence relevant to a charge being investigated: "at the investigation stage, the relevance standard is to be construed expansively, 'afford[ing] the EEOC access to virtually any material that might cast light on the allegations against the employer.'"[17] However, as the Tenth Circuit court had also found in *EEOC v. Burlington Northern Santa Fe Railroad*,[18] the court stated that "while the United States Supreme Court has approved a far-reaching notion of relevance with respect to EEOC investigations, it has cautioned that limits must be imposed lest the requirement of relevance become a nullity."[19] Citing the *Burlington Northern* decision, the court explained that while it "recognizes that it is important for the EEOC to have the ability to investigate possible patterns of discriminatory action, this does not mean that every charge of discrimination justifies an investigation of the employer's facility-wide employment practices."[20] The court found that "[t]o conclude otherwise would eviscerate the relevance requirement and condone fishing expeditions against which the Sixth Circuit has warned."[21]

In denying the motion to enforce, the court reasoned that in the matter before them the only alleged GINA violation arose from the employee's EEOC charge in which he checked the box for "genetic information." It stated that since it was unaware of any other charges against Nestlé alleging GINA violations, and since the EEOC had not identified any other information it acquired in the course of its investigation of the employee's charge that would suggest other violations had occurred, the information subpoenaed was irrelevant to the charge being investigated.

What to expect

With the addition of the above-discussed cases it appears that there is growing case law on the limitations of the EEOC's subpoena power. This is good news for employers who have received requests for information that have been deemed overly broad by their counsel. While an employer, in the spirit of full disclosure and with the feeling that they have nothing to hide, might want to voluntarily provide the information rather than risk a subpoena and subsequent enforcement action there are times and circumstances when for reasons of economy or other concerns it is just not practical to do so. Furthermore, an employer who voluntarily provides such information might inadvertently give the EEOC grounds to expand the scope of their investigation.

While the courts still generally give a great deal of deference to subpoenas issued by the EEOC, these cases illustrate that in the right situation, armed with supportive case law and competent counsel, an employer can successfully stand its ground to cut through an overly wide net cast by the EEOC. ◆

By Robert Fekete, an Assistant Attorney General in the Employment Law Section of the Ohio Attorney General's Office. The opinions and advice set forth in this article represent his individual analysis and should not be considered as the opinion of the Attorney General's Office. This article does not constitute legal advice or create any attorney-client relationship and parties should always consult their own attorneys.

Endnotes

1 EEOC's Fiscal Year 2011 Performance and Accountability Report. See www.eeoc.gov/eeoc/plan/2011par.cfm. EEOC's Fiscal Year 2010 Performance and Accountability Report. See www.eeoc.gov/eeoc/plan/2010par.cfm.

2 See e.g., *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69; 104 S. Ct. 1621, 1656-57 (1984) (The limitation "on the Commission's investigative authority is not especially constraining. 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."; See also, *EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738, 746 (1st Cir. 1996) (A charge "is capable of supporting an EEOC investigation into both the discrimination described in the charge itself and into the surrounding circumstances (including a full probing of any evidence of discriminatory practices unearthed during the course of the initial investigation)"); *EEOC v. Cambridge Tile Mfg. Co.*, 590 F.2d 205, 206 (6th Cir. 1979) ("The powers granted to the EEOC under Title VII should not be narrowly interpreted, and we decline to hold that the EEOC is powerless to investigate a broader picture of discrimination which unfolds in the course of a reasonable investigation of a specific charge"); *EEOC v. Konica Minolta Business Solutions USA.*, Inc., 639 F.3d 366, 369 (7th Cir. 2011) ("the EEOC is authorized to subpoena 'evidence concerning employment practices other than those specifically charged by complainants' in the course of its investigation.) (citations omitted); *EEOC v. Delight Wholesale Co.*,

973 F.2d 664, 668 (8th Cir. 1992) ("The original charge is sufficient to support EEOC action, including a civil suit, for any discrimination stated in the charge or developed during a reasonable investigation of the charge …"); *EEOC v. Recruit U.S.A., Inc.,* 939 F.2d 746, 756 (9th Cir. 1991) (The EEOC "must be permitted to investigate the full picture of [a respondent's] practices" and "[w]e therefore decline the companies' invitation to straightjacket the EEOC into an artificially narrow survey of [information].")

3 *EEOC v. Nestlé Prepared Foods*, 2012 U.S. Dist. LEXIS 71864, at *8 (E.D. KY May 23, 2012).

4 669 F.3d. 1154 (10th Cir. 2012).

5 *See Id.* at 1155-56.

6 *See Id.* at 1156.

7 Citing 42 U.S.C. §2000e-8(a).

8 *See Id.* at 1158.

9 287 F.3d 643 (7th Cir. 2002). Note: United Airlines also gave analysis on the burdensomeness of a request for information, however, that is beyond the scope of this article.

10 See Id. at *12.

11 *See Id.* at 1157.

12 *See Id.* at 1159.

13 *See Id.* at 1158.

14 The court did state that nothing prevented the EEOC from investigating the charges by the two job candidates further and then—if it determines some violations warranted a broader investigation—expanding the search. Alternatively the court states that nothing prevented the EEOC from aggregating the information that it possessed, and presented for the first time in it enforcement action, in bringing a commissioner's charge.

15 2012 U.S. Dist. LEXIS 71864 (E.D. KY May 23, 2012).

16 *See* Id. at *3.

17 *See* Id. at *5-6. (Citing EEOC v. *Shell Oil*, 466 U.S. 54, 68-69, 104 S.Ct. 1621 (1984)).

18 *Supra.*

19 See Id. at *6.

20 See *EEOC v. Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1157-58 (10th Cir. 2012)

21 *EEOC v. Nestlé Prepared Foods*, 2012 U.S. Dist. LEXIS 71864 at *9. (Citing to EEOC v. K-Mart Corp., 694 F.2d 1055, 1066 (6th Cir. 1982).

NLRB Region 8 and Region 9 end-of-year summary

September 30 marked the end of fiscal year 2012 for federal agencies, including the NLRB. As in past years, Region 8 (Cleveland) and Region 9 (Cincinnati) have prepared a brief summary of trends and major cases in Ohio.

The acting general counsel and the board, in an effort to save money while better serving the public interest, has moved to restructure field operations by combining several regional offices. Currently, there are no plans that would impact the NLRB's operations in Ohio.

Region 8

Section 10(j) Injunctions

Region 8 has been engaged in significant Section 10(j) litigation, again this year. The region succeeded in obtaining 10(j) injunctions in three cases: *Dr. Pepper; Rite Aid; and Renzenberger* (all in the District Court for the Northern District of Ohio) and has petitions pending in two other cases (one in the Northern District and one in the Southern District of Ohio). There is also a previously obtained 10(j) petition still in place in *General Die Casters, Inc.*, Case No. 8-CA-38916, while that case is awaiting decision by the board.

The 10(j) injunction in *The American Bottling Company, Inc. d/b/a Dr. Pepper Snapple Group*, Case 8-CA-39327, was granted by Judge Adams on Nov. 3, 2011. The underlying unfair labor practice complaint alleged that the respondent employer acted in violation of Section 8(a)(1), (2) and (3) by recognizing a minority union, giving assistance to that union, signing a contract with that union without a showing of majority support, unlawfully deducting union dues for that union, and threatening employees that it would open its new facility non-union.

Procedurally, the 10(j) petition in *Dr. Pepper* was filed on May 17, 2011. The region filed motions to try the matter on the basis of sealed affidavits/documents. While these motions were pending, the administrative hearing was held and the region then submitted the transcript of that hearing to the court. The ALJ ruled in favor of the region, and a copy of his decision was filed with the court. After having received briefs and affidavits from the parties and after having allowed the interested unions to intervene, Judge Adams issued his ruling.

Judge Adams ordered the respondent to withdraw recognition of the minority union as the representative of its employees at its new Twinsburg, Ohio, facility and to cease deducting union dues from employees' paychecks on behalf of the minority union. The respondent fully complied with the order and the region voluntarily dismissed the matter on Jan. 30, 2012.

The region also obtained a 10(j) injunction in *Rite Aid of Ohio, Inc.*, Case No. 8-CA-39376 from Judge Gaughan, on Nov. 1, 2011. The complaint in the underlying case was part of a larger consolidated complaint whose allegations stemmed from an ongoing strike involving six of the respondent's stores in northeastern Ohio. The respondent sought state court injunctions in the three counties where the stores were located to keep striking employees from picketing and hand billing on its properties. The region concluded that these state actions were pre-empted by the act and