NO. 13-15126

In The United States Court Of Appeals For The Ninth Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant

v.

MCLANE COMPANY, INC.

Defendant-Appellee.

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF MCLANE COMPANY, INC.'S PETITION FOR REHEARING *EN BANC*

Appeal from the United States District Court for the District of Arizona (Phoenix Division)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Chamber of Commerce of the United States of America (the "Chamber") certifies that there is no corporate parent of the Chamber, and no publicly held corporation owns 10 percent or more of the Chamber's stock.

Dated: December 18, 2015

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the "Chamber") respectfully files this brief as *amicus curiae* in support of Defendant-Appellee McLane Company, Inc.'s petition for rehearing *en banc*.[1] The Chamber is the world's largest business federation, representing approximately 300,000 direct members and underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Many of the Chamber's members are employers or representatives of employers that are subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, as well as other labor and employment statutes and regulations. The Chamber's members accordingly have a direct and ongoing interest in the scope of the information that the U.S. Equal Employment Opportunity Commission's ("EEOC") is entitled to subpoena from employers.

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[1] Pursuant to Circuit Rule 29-3, the Chamber states that it has secured consent of all parties to the submission of this *amicus curiae* brief by the Chamber. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the Chamber affirms that no counsel for a party authored this brief in whole or in part and no entity other than the Chamber, its members, or its counsel contributed any money to fund its preparation or submission.

STATEMENT OF *AMICUS CURIAE*

The petition for rehearing ably demonstrates the vital role that courts play as gatekeepers protecting employers against overly aggressive and burdensome agency subpoenas. The Chamber submits this brief to emphasize how the sweeping interpretation of the "relevance" requirement adopted by the panel would, as a practical matter, nullify statutory limits on the EEOC's investigative authority. The EEOC in recent years has revealed its inclination to pursue oppressive measures in the name of creative law enforcement, and the broad view of "relevance" that the panel has endorsed would enable that abuse of power.

ARGUMENT

I. BY SECOND-GUESSING THE DISTRICT COURT'S DECISION TO INVALIDATE PORTIONS OF THE EEOC'S OVERBROAD SUBPOENA, THE PANEL OPINION EFFECTIVELY SANCTIONS LIMITLESS FISHING EXPEDITIONS

In granting the EEOC subpoena power, Congress limited that authority to the inspection and copying of evidence "relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a). As the Supreme Court explained in *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984), this limitation is distinguishable from the "plenary authority" granted to other federal agencies. *Id.* at 64. This limitation reflects "Congress' desire to prevent the Commission from exercising unconstrained investigative authority." *Id.* at 65. Accordingly, *Shell Oil* admonished that "Congress did not eliminate the relevance requirement, and

[courts] must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity." *Id.* at 69.

Consistent with *Shell Oil*, courts have recognized at least two ways in which this relevance requirement imposes important limits on EEOC's authority. First, as the statutory text indicates, an EEOC subpoena must be "relevant to the charge under investigation," not merely any potential charge. This limitation is significant given the pre-suit requirements binding EEOC.[2] Accordingly, where the EEOC investigates a single allegation of discrimination on one particular ground, it does not have "free reign [*sic*] to conduct a broad, company-wide investigation" as part of a wider fishing expedition. *EEOC v. Nestle Prepared Foods*, No. 5:11-mc-358-JMH-REW, 2012 WL 1888130, *2 (E.D. Ky. May 23, 2012); *EEOC v. Royal Caribbean Cruises, Ltd.*, No. 12-MC-22014, 2013 WL 9778951, *4 (S.D. Fla. Jan. 4, 2013) ("The requirement of relevance, like the charge requirement itself, is designed to cabin the EEOC's authority and prevent 'fishing expeditions.'")

[2] Originally, Congress did not empower the EEOC with independent charging authority for fear of abuse. *See EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944, 947 (8th Cir. 1974) (stating that initially, "[c]ooperation and voluntary compliance were selected as the preferred means for achieving equality of employment opportunities.") When Congress did give EEOC charging authority via the Equal Employment Opportunity Act of 1972, it carefully limited that authority through a set of pre-suit obligations, *i.e.*, a charge, a reasonable cause determination, investigation, and conciliation. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977). Therefore, tying relevance to the charge is significant, because it refers to the charge that will be subject to these pre-suit procedures.

(internal citation and some internal quotations omitted). Similarly, seeking information generally relating to "overall conditions in the workplace" is well beyond the scope of relevance, rendering the relevance requirement a "nullity," in conflict with the Supreme Court's guidance in *Shell Oil*. *EEOC v. Forge Indus. Staffing Inc.*, No. 1:14-MC-00090-SEB, 2014 WL 6673574, *3 (S.D. Ind. Nov. 24, 2014).

Second, courts have recognized that, while *Shell Oil* stated that the EEOC may be allowed access to information "that might cast light on the allegations against the employer," 466 U.S. at 68-69, "the 'might' in the articulated standard [should] be indicative of a realistic expectation ***rather than an idle hope that something may be discovered.***" *EEOC v. United Air Lines*, 287 F.3d 643, 652-53 (7th Cir. 2002) (examining cases interpreting *Shell Oil*) (emphasis added, internal citation and quotations omitted).

This restriction on "fishing expeditions" is particularly important where it appears that the EEOC is in fact trolling for plaintiffs to bring discrimination claims based on an entirely separate potential charge, *e.g.*, based on membership in a separate protected class. *See, e.g., EEOC v. Kronos Inc.*, 620 F.3d 287, 301-302 (3d Cir. 2010) (declining to enforce portion of EEOC subpoena seeking information relating to possible race discrimination based on charge alleging disability discrimination, on grounds that it constituted "an impermissible 'fishing

expedition'"); *Mayo Clinic v. EEOC*, Slip Copy, Nos. 14-cv-3844 (JNE/TNL), 14-mc-63 (JNE/TNL), 2015 WL 4727289, *5 (D. Minn. Aug. 7, 2015) ("The subpoena cannot … wander into wholly unrelated areas. For example, the EEOC cannot use an individual charge of racial discrimination to subpoena information relevant to a systemic charge of gender discrimination.") (internal quotations and citation omitted). This limitation is likewise significant in light of the other pre-suit obligations through which Congress constrained the EEOC—absent a meaningful relevance limit, the EEOC would be free to use a limited charge as the hook for a fishing expedition that ranges into matters that would not independently justify a charge, reasonable cause determination, or investigation.

In holding the EEOC's subpoena in this case should be enforced, the panel took an approach to relevance that ignores both of these requirements. The charging party in this case initially alleged that the test at issue discriminated on two bases: (i) pregnancy/sex, and (ii) disability. *See* ER 46. Because the charging party acknowledged that she was not disabled, the district court correctly concluded that the EEOC lacked the authority to investigate disability-related claims in connection with her charge. *EEOC v. McLane Company, Inc.*, No. CV-12-02469-PHX-GMS, 2012 WL 5868959, *4 (D. Ariz. Nov. 19, 2012) ("The investigative powers, broad as they are, derived from the charge. … [T]o allow the EEOC to investigate a generalized charge of discrimination that is untethered to

any aggrieved person would invite the oft-cited 'fishing expedition.'"). Yet, as the district court found: EEOC's "primary motivation for obtaining the pedigree information ***related to the ADA charge***. That information is not relevant at this stage to a determination of whether the [test] systematically discriminates ***on the basis of gender***." *Id.* at *5 (emphasis added); *see also* SER 4-5 (portion of district court hearing transcript in which EEOC's counsel acknowledges pursuit of information relating to employees with disabilities).

On appeal, the EEOC apparently abandoned its disability-discrimination theory of enforcing its subpoena, even though that was its primary rationale before the district court for seeking pedigree information. *Compare* SER 9 (EEOC's district court brief stating that "EEOC is investigating the Charging Party's allegations that Respondent engaged in sex and disability discrimination in violation of Title VII and the ADA") *with* Docket No. 12 at 5 n.1 (EEOC's Ninth Circuit brief stating that it "is not challenging the district court's order refusing to enforce parts of the subpoena seeking ADA-related information"). Instead, the EEOC claimed it needed the information to pursue the *gender*-discrimination theory that was still in play following the lower court's ruling. Panel Op. at 6 n.1 ("the EEOC is no longer attempting to enforce the subpoena based on the allegations of disability discrimination. We therefore focus our analysis on the Title VII charge alone.").

In accepting the EEOC's newly adopted theory, the panel suggested that the pedigree information "might cast light" on the Title VII charge. This assumption was nothing more than idle speculation. Specifically, the panel posited that the pedigree information could cast light on whether the at-issue test was applied in a discriminatory manner to McLane's female employees. Panel Op. at 10. But names and contact information are simply not relevant to that inquiry. That kind of information does not tend to make the allegations contained in the underlying charge about sex discrimination more or less probable. *Cf.* Fed. R. Evid. 401. Rather, the only information relevant to that inquiry would be the gender of the affected employees, which McLane *did* provide. The EEOC has received all the information that it would need to investigate the charge at issue.[3] Accordingly, as the district court perceived, there is a strong basis to conclude that EEOC seeks the

[3] To be sure, the Supreme Court has stated that once the relevance requirement is established, there is no additional requirement that the EEOC demonstrate necessity of access. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 188 (1990). Unlike in that case, however, the information sought here does not even meet the threshold of relevance. *Id.* at 191-192 ("The University concedes that the information sought by the Commission in this case passes the relevance test set forth in *Shell Oil*."). The district court in this case was therefore correct in limiting the EEOC, at least for now, to the information it already has. *See EEOC v. Burlington Northern Santa Fe R.R.*, 669 F.3d 1154, 1159 (10th Cir. 2012) ("Nothing prevents the EEOC from investigating the charges filed by Mr. Graves and Mr. Palizzi, and then—if it ascertains some violation warranting a broader investigation—expanding its search."); *EEOC v. Nestle Prepared Foods*, 2012 WL 1888130 at *2 (declining to enforce subpoena on relevance grounds, and distinguishing other cases that "involved articulable circumstances that suggested the existence of violations beyond those specified in the charges").

pedigree information solely to fish for new plaintiffs.[4] That is the only reasonable inference to draw from the EEOC's request seeking information that is not relevant to the charge under investigation. *See EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 761 (11th Cir. 2014) ("The relevance that is necessary to support a subpoena for the investigation of an individual charge is relevance to the contested issues that must be decided to resolve that charge, not relevance to issues that may be contested when and if future charges are brought by others.").[5]

If the EEOC truly believes that there is a basis for pursuing a charge on a separate ground, then the appropriate course would be to bring a Commissioner's charge and then investigate that allegation. *See EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d at 762 ("In any case, the EEOC may not enforce a subpoena in the investigation of an individual charge merely as an expedient bypass of the mechanisms required to file a Commissioner's charge."). Instead, the Commission has opted to pursue an invasive, oppressive subpoena stemming from a wholly unrelated charge. This tactic runs *contra* to both the text of Title VII and the structural limits imposed by the statute on the EEOC's investigatory authority.

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[4] Indeed, the EEOC asserted in its prior briefing that it needed the pedigree information in order to determine which, if any, of the test-takers were disabled, because McLane does not keep track of its employees' disability status. ER 16.

[5] That conclusion is further reinforced by the fact that the EEOC has changed its theory of relevance on appeal.

II. JUDICIAL ADHERENCE TO THE STATUTORY RELEVANCE LIMITATION IS ESSENTIAL TO PREVENT ABUSIVE ENFORCEMENT TACTICS

The Chamber is particularly concerned about the possible implications of the decision in this case because the EEOC in recent years has engaged in reckless and oppressive enforcement tactics. As a result, employers have been subjected to myriad abuses by the Commission's repeated overstepping of its authority. The risk of such abuse here is high.

The possibility that the EEOC could commit misconduct in its investigation of employers is not merely hypothetical. Recent federal decisions have repeatedly criticized the Commission for promoting a "sue-first, prove-later" approach to litigation (*EEOC v. Bloomberg LP*, 778 F. Supp. 2d 458, 461 (S.D.N.Y. 2011) ("'J'accuse!' is not enough in court. Evidence is required.")); for failing to identify alleged victims of discrimination and making no meaningful attempt at conciliation (*EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012)); and for engaging in improper tactics in connection with a subpoena (*EEOC v. HomeNurse, Inc.*, No. 1:13-CV-02927-TWT-WEJ, 2013 WL 5779046, *14 (N.D. Ga. Sept. 30, 2013) (quashing EEOC subpoena and stating that "[t]he federal courts stand as a bulwark to protect this nation's citizens from powerful government agencies that seek to run roughshod over their rights").

As data collected in a Senate Staff Report demonstrates, there is danger to accepting the EEOC's position that there is no role for the courts to ensure that the EEOC is only pursuing information that is actually relevant to the charge at issue. *See EEOC: An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities, and Lack of Transparency Raise Concerns About Important Anti-Discrimination Agency*, Minority Staff Report by the United States Senate Committee on Health, Education, Labor, and Pensions, November 24, 2014, at 4-5 ("Alexander Report").[6] Contained within the Alexander Report's pages is a Table summarizing the sanctions imposed by courts against the EEOC, which shows that the EEOC has been required to pay attorneys' fees ten times since 2011 in cases that were deemed frivolous or mismanaged by the EEOC's attorneys. *Id.*, Appendix 1, at 1-3. Thus the Report finds that the EEOC "is pursuing many questionable cases through sometimes overly aggressive means—and, as a result, has suffered significant court losses...." *Id.* at 3. The EEOC's conduct in this case, far from being an isolated incident, is an additional part of that story. This is not what Congress had in mind when it vested the enforcement authority of the United States in the EEOC.

Here, the panel's opinion will "render nugatory the statutory limitation of the Commission's investigative authority to materials 'relevant' to a charge." *Shell*

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[6] *Available at* http://www.help.senate.gov/imo/media/doc/FINAL%20EEOC%20Report%20with%20Appendix.pdf.

Oil, 466 U.S. at 72. Freeing the Commission from such a limitation threatens to expose employers to the same sort of abusive strategies and tactics for which the courts have already scolded the agency. It is imperative that this Court rehear this case *en banc* so that the scope of "relevance" is not given the breadth that the panel in this case permitted.

CONCLUSION

For the foregoing reasons, as well as the reasons expressed in Defendant-Appellee's petition for rehearing *en banc*, the Court should grant rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4 and 40-1, the foregoing *amicus* brief supporting the petition for rehearing *en banc* is proportionately spaced, has a typeface of 14 points or more, and contains 2,372 words.

Dated: December 18, 2015

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