Business groups urge Supreme Court to OK narrower review of EEOC subpoena rulings

By Tricia Gorman

Appellate courts should defer to trial court decisions regarding subpoena requests by the Equal Employment Opportunity Commission, several business groups and law professors say in two amici briefs recently filed in the U.S. Supreme Court.

McLane Co. v. Equal Employment Opportunity Commission, No. 15-1248, amici briefs filed (U.S. Nov. 21, 2016).

A trial court has conducted hearings, heard witness testimony, and "is the closest to the factual and evidentiary issues at play," so a more thorough de novo review is unnecessary, the business groups say in a Nov. 21 brief.

Cert. granted
Sept. 29

In September the Supreme Court agreed to hear food distributor McLane Co.'s challenge to the 9th U.S. Circuit Court of Appeals' reversal of a lower court ruling and approval of the EEOC's subpoena seeking personal information of other company employees in its investigation of a worker's sex discrimination claim.

The company has asked the high court to determine the proper standard of review of a court's ruling in an EEOC administrative action, noting that the 9th Circuit is the only appellate court to conduct a de novo review instead of a narrower or more deferential review for clear legal error only.

De novo review requires the appellate court to determine if the trial judge has misconstrued the law, while a clear-error review determines if the judge made an obvious error in deciding the facts.

RELEVANT AND NECESSARY INFO

The case came before the 9th Circuit after the U.S. District Court for the District of Arizona refused to enforce an EEOC subpoena against McLane seeking information related to the company-mandated employee strength test. *EEOC v. McLane Co.*, No. 12-2469, 2012 WL 5868959 (D. Ariz. Nov. 19, 2012).

Damiana Ochoa filed a sex discrimination claim with the EEOC against McLane in 2008 after she was fired for failing to pass a physical capability test following her maternity leave.

She alleged the company violated Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e, by discriminating against her based on her gender when it terminated her employment.

In investigating Ochoa's claims, the EEOC asked the company for information about the test and the employees who have taken it.

McLane provided some general information, including the gender and test scores, but refused to provide "pedigree information" — names, addresses, Social Security numbers and phone numbers — of the test takers. It also refused to provide information about when and why it had terminated employees who failed the test, according to 9th Circuit opinion.

The EEOC filed a subpoena enforcement action against the company in Arizona federal court in 2012.

U.S. District Judge G. Murray Snow required McLane to provide some additional information but said the pedigree information was not necessary for the agency to determine if the company used the strength test in a discriminatory way.

Question presented

Whether a district court's decision to quash or enforce an EEOC subpoena should be reviewed de novo, which only the 9th Circuit does, or should be reviewed deferentially, which eight other circuits do, consistent with the Supreme Court's precedents concerning the choice of standards of review.

The EEOC appealed, and the 9th Circuit panel reversed in part and vacated in part, finding the requested information relevant to the agency's investigation. *EEOC v. McLane Co.*, 804 F.3d 1051 (9th Cir. 2015).

"At the investigative stage, the EEOC is trying to determine only whether 'reasonable cause' exists 'to believe that the charge is true,'" the panel said. "So the relevance standard in this context sweeps more broadly than it would at trial."

IRRELEVANT INFO

In its petition for certiorari filed with the Supreme Court in April, McLane argued that the information the EEOC sought on other employees was irrelevant to its investigation since Ochoa had not compared the company's treatment of her to the treatment of other workers.

By allowing the commission broad subpoena powers to collect material, the 9th Circuit essentially nullified limits that Title VII places on the EEOC's jurisdiction, the petition said.

Opposing the company's petition, the EEOC said the appeals court properly conducted a de novo review of Judge Snow's subpoena decision because the panel found legal error. The panel determined that the judge erred in ruling that the commission did not need certain information to establish if the company's strength test was discriminatory, the EEOC said.

'ABUSIVE INVESTIGATIVE TACTICS'

The Chamber of Commerce, Equal Employment Advisory Council and National Federation of Independent Business Small Business Legal Center said in their brief supporting McLane that de novo review of subpoena decisions would only prolong the

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Attorney perspectives on *McLane Co. v. EEOC*

Sage Knauft, partner with Walsworth LLP Orange, California

While *McLane v. EEOC* will turn on whether the 9th Circuit should provide more deference to the district courts, and thereby fall in line with the standard of review employed by all other federal courts of appeal, it may have far-reaching implications on the proper scope of the EEOC's subpoena power when it investigates employment discrimination claims.

The District Court in *McLane* expressed the view that the EEOC should only be entitled to employees' private information which can lead to identity theft when it is misappropriated by others, in certain narrowly defined circumstances.

As Justice Milan D. Smith stated in his concurring opinion in the 9th Circuit's underlying opinion, "it may be that the EEOC's insistence here on obtaining Social Security numbers and other information that could be used to steal an employee's identity will endanger the very employees it seeks to protect."

Employers wishing to safeguard their employees' private information should follow this case closely.

Timm Schowalter, shareholder with Sandberg Phoenix & von Gontard, St. Louis

The key issue for employers is the manner in which the courts have interpreted the scope of the EEOC's investigative authority. The leading case involving EEOC requests for information is the U.S. Supreme Court's decision in *Equal Employment Opportunity Commission v. Shell Oil Co.,* 104 S. Ct. 1621 (1984), which set forth a "relevancy" standard for the scope of the EEOC's investigative authority.

The EEOC consistently has relied on *Shell Oil* to argue that the concept of "relevancy" in commission investigations is far broader than that provided under the Federal Rules of Civil Procedure. The court in *Shell Oil* articulated that although the EEOC is "entitled to access only to evidence 'relevant' to the charge under investigation, ... 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."

However, the Supreme Court also made it clear that the EEOC's subpoena power is limited to access documents or data "relevant to the charge under investigation."

Since *Shell Oil,* the EEOC has aggressively used its subpoena power to burden employers with overreaching subpoenas that at times are tantamount to roving fishing expeditions, especially under the current administration. The EEOC's modus was never more apparent in *McLane* where the EEOC sought information that the District Court found to be entirely immaterial to the pending charge of discrimination and, therefore, quashed the subpoena. Then, the 9th Circuit reviewed the request de novo, opting not to show deference to the District Court's decision on the EEOC subpoena.

Thus, the only legal issue before the Supreme Court is whether federal appellate courts give deference to district court judgments on EEOC subpoenas or whether the appellate courts review such decisions de novo.

Given the limited issue before the Supreme Court it is likely that the Supreme Court will limit its review to the lone legal issue before the court and not provide a substantive ruling on the EEOC investigative authority under *Shell Oil*. With that said, however, we anxiously anticipate dicta on the scope of the EEOC's authority that may provide some persuasive authority to thwart the aggressive tactics of the EEOC.

Christina Alabi, associate with Gould & Ratner, Chicago

The Supreme Court's ruling will either allow the 9th Circuit to maintain its oft-freestanding reputation or bring the circuit in line with eight other circuits. Reversing the 9th Circuit will certainly move the circuit split more toward a deferential standard of review. If the Supreme Court upholds the 9th Circuit's ruling, it will in effect broaden the relevance scope in EEOC administrative investigations and the like.

The relevance employee Social Security numbers nationwide will provide to admissible prima facie evidence is minimal, at most, if at all, to the gender discrimination issue.

With respect to an employer's disclosure of Social Security numbers pursuant to a subpoena, I highlight Judge Milan D. Smith's concurrence point: "The EEOC's insistence ... on obtaining Social Security numbers and other information that could be used to steal employee's identity [may] endanger the very employees it seeks to protect."

The Supreme Court's ruling is certainly an opinion administrative agencies, employers and employment law attorneys await.

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EEOC's already lengthy process that often includes "abusive investigation tactics," the brief says.

"The EEOC often demands as part of investigation of even the most straightforward individual claim, voluminous information that has no relevance to the charge under investigation in an effort to 'fish' for possible targets for systemic enforcement," the groups say.

In a separate brief filed Nov. 21, law professors who teach and write about federal procedure and administrative law said they also support a deferential review of trial court subpoena decisions.

The professors "regard the allocation of adjudicative responsibilities to the different federal courts based on their institutional competencies to be of paramount importance," the brief says.

The professors note that the 9th Circuit is the only circuit to follow the de novo review standard on such decisions, and they say the high court must "unify" all of the circuits in deferring to a trial court.

"In resolving this case, the court's guidance will transcend the specific context of EEOC subpoenas," the professors say. WJ

Related Filings:
Business groups' brief: 2016 WL 6892598
Law professors' brief: 2016 WL 6873055

ENVIRONMENTAL

Landowners' bid to split parcel on protected river now before high court

A Wisconsin family's state court challenge to a county ordinance that merged their adjacent riparian parcels on the federally protected St. Croix River, preventing them from selling or developing one of them, is fully briefed and pending before the U.S. Supreme Court.

Murr et al. v. Wisconsin et al., No. 15-214, reply brief filed (U.S. July 27, 2016).

Cert. granted
Jan. 15, 2016

The Murr family says of the two lots for purposes amounted regulatory taking interfered with their full use of the property.

The Murrs' suit against the state of Wisconsin and St. Croix County went as far as the Wisconsin Court of Appeals, which affirmed a summary judgment for the defendants. *Murr v. State*, 359 Wis. 2d 675 (Wis. Ct. App. 2014).

The state Supreme Court denied the family's petition for review in April 2015.

But in January the U.S. Supreme Court granted certiorari to consider whether the "parcel as a whole" concept in property takings cases requires that commonly owned, contiguous parcels must be combined to determine if a taking occurred.

The case is a rare example of the Supreme Court choosing to review a state court decision that the state's highest court has declined to review.

TWIN RIVERSIDE PARCELS

In 1960 William and Margaret Murr bought and later built a recreational cabin on a 1.25-acre lot along the St. Croix River in Troy, Wisconsin. The Murrs later bought a virtually identical adjacent lot for investment purposes, according to the Court of Appeals opinion.

The St. Croix is one of the original rivers given federal protection under the National Wild and Scenic Rivers Act of 1968, 16 U.S.C.A. § 1271.

In the mid-1970s St. Croix County passed an ordinance intended to mitigate poor shoreline planning, prevent soil erosion and pollution, minimize flood damage, and preserve the river's scenic and natural characteristics.

The ordinance provides that lots cannot be developed unless they have at least 1 acre of project area.

Each of the Murrs' lots has insufficient project area because much of the property is too steep for development, the opinion said.

In 1994 and 1995 the couple gave the lots to their four children, one of whom later sought a variance from the county so the family could sell the undeveloped parcel as a buildable lot.

The Murrs say the purpose of the intended sale was to finance "flood proofing" improvements to the cabin, which had been damaged in multiple floods over the years.

County authorities denied the variance application. The decision was affirmed by the St. Croix County Circuit Court in August 2008 and by the Wisconsin Court of Appeals in February 2011.

TAKINGS ACTION

The Murr children then sued the county and the state in the Circuit Court, saying the ordinance and the state code provision on which it was based effected an uncompensated taking of their property under Article I, Section 13, of the Wisconsin Constitution.

After the Circuit Court granted summary judgment to the defendants, the Wisconsin

Question presented

In a regulatory taking case, does the "parcel as a whole" concept as described in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

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