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The EEOC's Broad Subpoena Power

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Although the Rolling Stones famously sang "you can't always get what you want," that sentiment increasingly seems to not necessarily apply to the Equal Employment Opportunity Commission (EEOC).

As the federal agency that enforces fair employment laws, the EEOC is charged with investigating charges of discrimination. As part of its investigations, the EEOC usually requests that employers provide documents and information. In this regard, the EEOC can wield considerable power, in particular through the use of administrative subpoenas, which the EEOC may issue to employers that refuse to provide the documents initially requested.

The law provides the EEOC broad investigatory powers. For example, Title VII states that the EEOC may access "any evidence ... that relates to unlawful employment practices ... and is relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a). While this standard seems straightforward, a point of contention arises over what is "relevant" to an investigation.

Two recent cases illustrate how the EEOC has painted this term with an increasingly broad brush - and how the courts have agreed.

In *EEOC v. Randstad*, No. 11-1759 (4th Cir. 2012), the employer, Randstad, and the EEOC had significantly different perspectives of what each considered relevant to the investigation.

Randstad was an employment agency that employed approximately 43,000 people during any given week in about 600 U.S. branch offices. The employee at issue, Morrison, was employed by Hagerstown, one of Randstad's 13 Maryland offices and was placed in short-term assignments until he was terminated for poor performance.

A year after his termination, Morrison returned to Randstad and was sent to a warehouse position. When he arrived at the job site, he was asked to fill out some forms. Morrison could not read or write, so he contacted his placement manager, who allegedly told him the company did not hire anyone who could not read or write.

Morrison filed an EEOC charge alleging his termination was discriminatory on the basis of his national origin - Jamaican. One year later, after a psychological evaluation revealed he was intellectually disabled, he amended his charge to add allegations of disability discrimination and a failure to accommodate.

More than two years after the charge was filed, the EEOC issued a "Request For Information" seeking information about literacy requirements and a list of all position assignments made by the Hagerstown office from 2006 through 2009. Randstad objected, arguing that a request for information about all positions was unduly burdensome and irrelevant.

The EEOC then issued an administrative subpoena that requested documents or a data compilation setting forth all position assignments made by Randstad companywide from January 2005 until the date of the subpoena (January 2010). As it had 600 locations averaging 45,000 employees each week, the company (not unsurprisingly) objected. The EEOC narrowed its request to positions in the company's 13 Maryland offices, but insisted on the five-year timeframe.

Randstad provided information only for the positions to which Morrison was assigned, but otherwise refused to comply, arguing that the requested information was irrelevant and compliance would be unduly burdensome because Randstad's Maryland branches made over 100,000 temporary assignments during the five-year timeframe. Randstad asserted that compiling the information would require three employees to review 100,000 job orders, at a cost of approximately 120 man hours and \$14,000 to \$19,000. The lower court agreed, but the United States Court of Appeals for the Fourth Circuit disagreed and ordered the information be produced.

The Fourth Circuit held that the district court applied too strict of a standard in determining what was relevant to the investigation, stating that the relevance requirement was to be "broadly construed" to be defined by what the EEOC deemed to be relevant. The court deferred to the EEOC and held that "all of the EEOC's requested materials fall within the broad definition of relevance applicable to EEOC administrative subpoenas."

The court also rejected the unduly burdensome argument, noting that although there is an absence of any "hard and fast rule" of what is unduly burdensome, to meet the standard the cost must "seriously disrupt its

normal business operations."

The court was not persuaded by Randstad's affidavit citing cost estimates of \$14,000-\$19,000 and said the company failed to demonstrate that complying was "unduly burdensome in the light of the company's normal operating costs" or that gathering the information would "threaten" or "seriously disrupt" its "normal business operations."

The EEOC's subpoena powers were further bolstered by the Third Circuit in its recent decision in *EEOC v. Kronos Incorporated*, No. 2-09-mc-00079 (3rd Cir. 2012). In this case, the employee, Sandy, applied for a position at a large chain grocery store. As part of the application process, Sandy took a Customer Service Assessment that was designed to measure traits showing a strong customer service orientation. Sandy, who was hearing and speech disabled, scored 40%. The grocer acknowledged that it relied, at least in part, on her score when it decided not to hire her. Sandy then filed a charge alleging the grocery chain violated the Americans with Disabilities Act.

As part of its investigation, the EEOC sought information from Kronos Incorporated, the creator of the test, regarding its testing procedure. Initially the EEOC requested information regarding validity testing, but then expanded the scope to include the tests' impact on both minority and disabled applicants. Kronos, *which was not a party to the charge*, pushed back arguing that the information was irrelevant, constituted trade secrets, and was unduly burdensome to produce, suggesting the cost to comply with the request could be between \$650,000 and \$1,000,000.

The court determined the EEOC was entitled to information if it might "shed light" on the charge, noting that "relevance" may change during an investigation. That is, if other unfair employment practices are revealed, the EEOC may request information regarding that as well, even if it falls outside the scope of original allegation.

In addition to the issue of relevance, the court also considered Kronos' argument that the cost of production would be so onerous it would unduly burden the company. Kronos offered an affidavit and exhibits that, in part, attested that there were more than 11 million responsive documents and that the cost of production could reach one million dollars. While the court noted that a non-party should generally not be required to bear as great an expense as a party when complying with a subpoena, it also stated that a non-party must provide some evidence to support its cost estimate. Without providing any further guidance, the Third Circuit sent this back down to the lower court.

What do these cases tell us?

1. The EEOC has very broad investigative powers, and some courts seem to defer to the EEOC.
2. The definition of relevance is fluid and may change over the course of an investigation.

3. The EEOC has taken increasingly aggressive positions with regard to the information it seeks in an investigation.
4. Balance the realistic scope of relevance with what you can reasonably give. If you choose to object to a request for information or take an aggressive position, be explicit as to the reasons for not complying.
5. Gather information about the cost of compliance that is as precise and detailed as possible.
6. Review any information as it pertains to outside testing or assessments.

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