EEOC Subpoena Power

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With the EEOC's increased focus on claims of systemic discrimination, companies may be more likely to receive broad subpoenas seeking the production of nationwide electronic data and documents. Employers who receive such subpoenas should be mindful of the evolving case law in this area and particularly the administrative process for opposing an EEOC subpoena.

Title VII confers on the Equal Employment Opportunity Commission (EEOC) the power to issue administrative subpoenas in furtherance of its investigations.[1] The EEOC can serve subpoenas to obtain documents, data, and sworn testimony.[2] The ability to issue such subpoenas is an important tool available to the EEOC as it focuses increasingly on claims and charges of systemic discrimination. Indeed, the EEOC has issued subpoenas seeking nationwide employment data and information even in investigations of individual charges of discrimination. Employers and their counsel need to be mindful of the issues that may arise. This article reviews some of the recent cases in which courts have addressed key issues regarding the scope of EEOC subpoenas and the process for opposing them.

SUBPOENA ENFORCEMENT AFTER A RIGHT-TO-SUE NOTICE IS ISSUED

Employers increasingly are finding themselves subject to ongoing EEOC investigations after the original complaining party has obtained a right-to-sue notice and filed his or her own lawsuit or after the charging party has settled his or her claims. The reaction of many employers is to resist such investigation efforts and to object to any subpoenas issued. But some courts have not hesitated to enforce EEOC subpoenas in such cases.

Indeed, in 2009, the United States Supreme Court declined to review a ruling from the Court of Appeals for the Ninth Circuit in *EEOC v. Federal Express Corporation*,[3] in which the Ninth Circuit held that the EEOC's subpoena power survives the issuance of a right-to-sue notice

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and the filing of a lawsuit by the charging party. The original charge was filed in 2004, by an African-American employee who alleged, on behalf of himself and similarly situated African-American and Latino employees, that, among other things, a cognitive test that FedEx used in making promotion decisions had a statistically significant adverse impact against African-American and Latino employees. Eleven months after he filed his charge, the employee sought a right-to-sue notice, which the EEOC issued, and then joined a pending class action against FedEx.

In the right-to-sue notice, the EEOC specifically noted that it would continue to process the employee's charge. Several months later, the EEOC issued an administrative subpoena to FedEx seeking information about the computer files it maintains. FedEx refused to comply and filed a petition to revoke. The EEOC rejected the petition and filed an enforcement action in district court.

In court, FedEx argued that the EEOC no longer had investigatory power because the original charging party had joined a private action. The district court rejected FedEx's argument and enforced the subpoena. FedEx appealed.[4]

On appeal, the Ninth Circuit concluded that although the EEOC normally terminates the processing of a charge when it issues a right-to-sue, it can continue to investigate the allegations and this power to investigate includes the authority to subpoena information relevant to the charge. The court noted that the EEOC's own regulations provide:

> Issuance of a notice of right to sue shall terminate further proceeding of any charge that is not a Commissioner charge unless [an enumerated office of the Commission] determines at that time or at a later time that it would effectuate the purpose of title VII, [or] the ADA ... to further process the charge.[5]

The Ninth Circuit expressly disagreed with the Fifth Circuit's decision in *EEOC v. Hearst Corporation*.[6] In *Hearst*, the Fifth Circuit held that "in a case where the charging party has requested and received a right to sue notice and is engaged in a civil action that is based upon the conduct alleged in the charge filed with the EEOC, *that charge* no longer provides a basis for EEOC investigation."[7] The Ninth Circuit took issue with the *Hearst* court's conclusion that the charging party can divest the EEOC of its authority to investigate. Citing the Supreme Court's decision in *EEOC v. Waffle House, Inc.*,[8] the *FedEx* court stated that "the EEOC controls the charge regardless of what the charging party decides to do."[9] The court also disagreed with the *Hearst* court's conclusion that Title VII's purposes are no longer served by a continuing investigation after the charging party has filed suit, noting that the EEOC also acts to vindicate the public interest in preventing employment discrimination. The *FedEx* court expressly declined to address the issue of whether the

EEOC could file suit in this case and limited its ruling to the enforcement of the administrative subpoena.[10]

Following the Ninth Circuit's decision in *FedEx*, the Seventh Circuit in *EEOC v. Watkins Motor Lines, Inc.*[11] reached a similar conclusion. In that case, the charging party had filed a complaint challenging the decision not to hire him because of his criminal record. The company had instituted a policy of not hiring anyone convicted of a violent crime after a series of serious workplace violence incidents. During its investigation, the EEOC issued a subpoena, seeking information to determine whether the policy had a disparate impact on minority applicants and whether the policy was job-related and consistent with business necessity. In the meantime, the charging party and the employer settled. One condition of the settlement was that the EEOC abandon its investigation. The EEOC decided to press ahead with an investigation.

The district court dismissed the EEOC's motion to enforce the subpoena on the grounds that it lacked subject matter jurisdiction. The court felt that the charging party would be best served by the settlement and since the settlement was conditioned on the EEOC closing its investigation, the EEOC's decision not to allow him to withdraw his charge was arbitrary. Because the agency's decision was arbitrary, it was as if no charge had been filed, and if no one makes a valid charge, the EEOC cannot investigate.

The Seventh Circuit reversed and held that "[o]nce [a charge] has been filed, the EEOC rather than the employee determines how the investigation proceeds."[12] The court went on to say:

> The problem with the argument is that it allows litigants to achieve their settlement by injuring other, unrepresented persons. Many a defendant would love to decapitate a class after the statute of limitations has run by paying off the sole representative plaintiff, and thus avoiding potential liability to all other class members. ... That is what Watkins tried to do here by making its settlement contingent on the withdrawal of [the] charge, after the time to file a new charge had expired. For the EEOC had commenced a pattern-or-practice investigation that might lead to relief for many persons in addition to [the charging party].[13]

Although the court questioned the merit of the underlying claims and the EEOC's allocation of resources to this investigation, it nevertheless concluded that "the Executive Branch rather than the Judicial Branch is entitled to decide where investigative resources should be devoted."[14]

PETITIONING TO REVOKE AN EEOC SUBPOENA

EEOC regulations provide that a respondent objecting to a subpoena must file a petition to revoke or modify the subpoena within

five days after service of the subpoena.[15] The petition is to be filed with the District Director whose office issued the subpoena or if a Commissioner issued the subpoena, the petition is to be filed with the EEOC General Counsel.[16] The petition should state the basis for noncompliance with each section of the subpoena to which an objection is being made.[17] The regulations provide that the Director or General Counsel will make a determination within eight days, which will then be sent to the Commission for its review and final determination.[18]

Failure to file a petition to revoke or modify may cost the employer its opportunity to challenge the subpoena. Specifically, the EEOC will argue and courts have agreed that the employer waives its objection to enforcement of the subpoena by failing to exhaust its administrative remedy. Most recently, the Eastern District of Pennsylvania reached this conclusion in *EEOC v. Sunoco, Inc.*[19] In that case, a Sunoco employee had filed a charge claiming race and age discrimination in promotions and retaliation. As part of his promotion claim, he alleged that Sunoco discriminated by administering a test that had a disparate impact against African-Americans. A year after the charge was filed, the EEOC issued a limited right-to-sue notice to the employee, stating that the EEOC would continue to process the charge as to "the issue of testing."[20] The employee then filed his own lawsuit. The EEOC pursued production of information and records related to the issue of discriminatory testing and ultimately issued a subpoena on June 6, 2008. By letter dated July 1, 2008, Sunoco objected to the subpoena on several grounds, including the absence of an active charge, but never filed a petition to revoke. In the subsequent enforcement action, the court held that Sunoco waived its objections to enforcement of the subpoena by failing to file a petition to revoke or modify with the EEOC.

The *Sunoco* court rejected the company's reliance on the DC Circuit's decision in *EEOC v. Lutheran Social Services*, in which the DC Circuit rejected a seemingly similar waiver argument.[21] The *Sunoco* court distinguished the objections that Lutheran Social Services had made, which were based on the attorney-client privilege on the grounds that privilege issues were outside the EEOC's expertise. Sunoco's objections, on the other hand, which were premised on the lack of fair notice of the existence and nature of any pending charge to which the subpoena relates, was within the EEOC's expertise.[22]

Other district courts have concluded that an employer's failure to petition the EEOC does not automatically waive any objections the employer has to the enforcement of a subpoena. These courts have noted that the mandatory language of 29 C.F.R. § 1601.16(b) is at odds with the statutory language of the National Labor Relations Act, 29 U.S.C. § 161(1), which provides that employers *may* petition the EEOC to revoke a subpoena, and as such, have held that compliance with the EEOC regulation is not a jurisdictional prerequisite.[23]

In *EEOC v. Bashas', Inc.*,[24] a case with a long, convoluted history, the district court rejected the EEOC's waiver argument, finding that the EEOC's failure to notify the employer of the five-day petition rule coupled with the company's repeated stated objections to successive subpoenas on the grounds that the EEOC was abusing the subpoena process warranted the denial. In that case, the EEOC had issued right-to-sue notices in 2002 to two employees who had filed charges of national origin discrimination against Bashas', a grocer in Arizona.[25] The two employees then filed a putative class action suit later that year in *Parra v. Bashas', Inc.*[26] alleging that the company discriminated against Hispanics with respect to pay and working conditions. After the class action complaint was filed, the EEOC closed all charges against the employer.

Despite closing its files, the EEOC continued to investigate Bashas' employment practices. In 2006, the EEOC issued an administrative subpoena to Bashas' seeking wage charts and documents reflecting the national origin and race of its hourly employees. Bashas' objected to the subpoena on a variety of grounds; the EEOC neither responded to Bashas' objections nor did it move to enforce its subpoena. Instead, four months later, the EEOC advised Bashas' that it intended to reopen the 2002 charges against the company. It was not until 2007, however, when the EEOC filed a Commissioner's charge against Bashas' and issued three additional subpoenas to the company. A year later, the EEOC issued a fourth subpoena to Bashas' directing it to provide the EEOC with information pertaining to the company's pay policies and the ethnicity of its employees since 2004. Bashas' informally objected to the subpoena, but the EEOC took no action for nearly seven months. Then, in 2009, on the same day that the district court denied the plaintiffs in the *Parra* class action lawsuit additional discovery with regards to Bashas' pay policies, the EEOC filed an Order to Show Cause against Bashas' as to why the 2008 subpoena should not be enforced.

In response, Bashas' filed a motion seeking leave to conduct limited discovery, asserting that the EEOC had engaged in an abuse of process. According to Bashas', the EEOC was using its subpoena power to funnel information to the plaintiffs' counsel in the *Parra* class action suit. The EEOC objected to the limited discovery request and argued that Bashas' had not exhausted its administrative remedies and therefore had waived its right to object to the 2008 subpoena on abuse of process grounds.[27] The court disagreed, noting that despite the mandatory language of the EEOC regulation, "nothing in the governing authorizing statute unequivocally states that exhaustion is a jurisdictional prerequisite."[28] Like the court in *Lutheran Social Services*, the *Bashas'* court noted that the 2008 subpoena did not inform Bashas' that it only had five days within which to petition the EEOC. Nor was the five-day petition requirement stated in any of the four subpoenas issued to Bashas' between 2006 and 2008 or in the Show Cause Order. The court found particularly significant the fact that Bashas' "repeatedly and continually made its objections known

to the EEOC," including the company's objection that the 2008 subpoena was an abuse of process.[39]

THE SCOPE OF AN EEOC SUBPOENA

In opposing an EEOC subpoena, respondents frequently argue that the request is overly broad, unduly burdensome, or otherwise seeks information that is not relevant to the charge under investigation. A number of courts, however, have rejected such arguments and have upheld EEOC administrative subpoenas, even when the subpoenas seek nationwide employment data and information in investigations of individual charges.

For example, in *EEOC v. United Parcel Service, Inc.*,[40] the Second Circuit rejected an employer's objections that an EEOC subpoena was overly broad and sought irrelevant information. The EEOC sought the production of nationwide information regarding the application of the company's Uniform and Personal Appearance Guidelines. Pursuant to the guidelines, which applied to all UPS facilities across the country, employees in public-contact positions were prohibited from wearing any facial hair below the lower lip. In 1999, UPS developed a religious accommodation policy to allow for granting limited exceptions to this prohibition for religious beliefs. The policy provided that exceptions would be coordinated through the Corporate Workplace Planning office although testimony in the case indicated that decisions were made locally by the HR staff at the facility where the request was made.

Two individual charges were filed. The first was filed by an applicant for a seasonal driver's helper and sorter position, a position to which the clean shaven rule applied. The claimant, a practicing Muslim, alleged that he was told that he would have to be clean shaven and was then logged out of the system and not hired. UPS stated that he was not hired because he provided a false Social Security number. The claimant filed a charge with the EEOC's Buffalo office. The second charge was filed by an existing employee who had applied for a truck driving position; he too was a practicing Muslim and was told that he could not have a beard and be a driver. His HR office told him that they knew of no exemption to the policy. He filed a charge with the Texas Commission and the EEOC.

The Buffalo office sent a request for information to UPS seeking nationwide data about the application of the Appearance Guidelines. UPS objected, stating that it did not have the data in a centralized location and did not keep records on job applicants who requested religious accommodations.

The EEOC filed a petition to enforce the subpoena. The district court denied the petition, holding that the subpoena was overly broad and sought national information not relevant to the individual charges being investigated. The Second Circuit reversed.

Noting that the district court has a very limited role in a proceeding to enforce an administrative subpoena, the Second Circuit stated that the agency need only show "'[1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within [the agency's] possession, and [4] that the administrative steps required ... have been followed.'"[51] Accordingly, the Second Circuit concluded that the district court had applied too restrictive a standard of relevance. In so holding, the court found relevant the following facts:

1. That the guidelines applied to all UPS facilities;
2. That there had been no religious exemption prior to 1999 and it initially required centralized evaluation;
3. That neither of the charging parties were permitted to apply for an exemption; and
4. The second charge alleged a pattern or practice of religious discrimination.

The court rejected UPS's arguments, which were based on the lack of merit of the underlying charges, noting that "at the investigatory stage, the EEOC is not required to show that there is probable cause to believe that discrimination occurred or to produce evidence to establish a *prima facie* case of discrimination."[52]

The breadth of the EEOC's subpoena power is further underscored by the Eighth Circuit's decision in *EEOC v. Technocrest Systems, Inc.*[53] In that case, the Court of Appeals held that the district court abused its discretion by limiting certain portions of an EEOC subpoena to only documents and materials relating to the charging parties. Technocrest was subject to an EEOC investigation after six of its Filipino employees filed charges of national origin discrimination against the company. The employees alleged that Technocrest illegally discriminated against them and other Filipino employees as a class based on their national origin because they allegedly received lower wages and were treated less favorably than other employees. The EEOC issued an administrative subpoena against the company requesting documents submitted to or received from the Department of Labor (DOL) and the Immigration and Naturalization Services (INS) as well as the contents of all personnel files and records pertaining to each Filipino employee with an H-1B visa employed from 2001 to the present.

After Technocrest refused to provide the EEOC the requested information, the EEOC filed an enforcement action. The district court found the scope of the subpoena overly broad and ordered Technocrest to provide DOL and INS documents and personnel files for only the six charging individuals. Both sides appealed.

On appeal, the Eighth Circuit explained that "[i]f the EEOC shows that the investigation is for a legitimate purpose and the requested documents are relevant to the investigation, the EEOC is entitled to the documents subpoenaed unless the subpoenaed party 'demonstrates that judicial enforcement of the subpoena would amount to an abuse of the court's process.'"[34] According to that standard, the Eighth Circuit concluded that the district court appropriately enforced the EEOC's request for the company's personnel files and DOL and INS documents for the six charging parties because material "might cast light on the allegations of national origin discrimination against the six employees and Filipino employees as a class."[35] However, the Court of Appeals determined that the district court abused its discretion by limiting the requested materials to only the charging parties. As the court explained, "[b]ecause the six charging parties alleged not only individual discrimination but also discrimination against all Filipino employees of Technocrest," DOL and INS documents and personnel files for all employees were relevant to a determination of whether the company illegally discriminated.[36]

Likewise, the Ninth Circuit in the *FedEx* case rejected the company's argument that the subpoena was overly broad and sought irrelevant information. The Ninth Circuit emphasized that "[r]elevancy is determined in terms of the investigation rather than in terms of evidentiary relevance."[37] Thus, even though some of the information the EEOC sought was not relevant to the specific claims of discrimination, it could nevertheless be relevant to the EEOC's investigation. Specifically, the EEOC sought information about the computerized files the company maintained and not the files themselves. The court also noted that because the individual charge made a pattern or practice allegation, the EEOC was entitled to seek company-wide data.[38]

At least one circuit court also has upheld an administrative subpoena seeking nationwide employer information from a third party. In *EEOC v. Kronos, Inc.*,[39] the EEOC sought to enforce a third-party subpoena that it issued to Kronos regarding an investigation into a discrimination charge against Kroger Food Stores (Kroger), after a hearing and speech impaired woman alleged that she was discriminated against when she was denied a position as a cashier, bagger, and stocker at a Kroger store in West Virginia. In making its hiring decision, Kroger had relied in part on a Customer Service Assessment created by Kronos. The EEOC issued a subpoena to Kronos seeking validation studies, user manuals, and instructions for any Kronos tests used by Kroger at any of its facilities nationwide *and* by other employers. After Kronos refused to comply, the district court limited the scope of the subpoena to include only Kronos's work for Kroger in the state of West Virginia from 2006 to 2007 and for job positions as bagger, stocker, and cashier. On appeal, the Third Circuit emphasized the EEOC has the "power to investigate 'a broader picture of discrimination which unfolds in the course of a reasonable investigation.'"[40]

Accordingly, the court concluded that the district court applied too restrictive a relevance standard and the EEOC was entitled to access to user manuals and instructions, validation information, and materials pertaining to impact on individuals with disabilities without any geographic limitations or limitations on time or job position. The court further held that the EEOC could compel Kronos to produce the same materials for employers other than Kroger as it "may aid the EEOC in understanding the Assessment's potential for disparate impact on the disabled."[11]

Courts also have rejected other arguments made by employers in an attempt to limit the EEOC's ability to enforce its subpoenas. For example, the district court in *EEOC v. Schwann's Home Service*[12] recently held that an employer cannot contest the procedural or substantive merits of a charge at a subpoena enforcement action. In that case, a female employee who was not selected for a general manager position at Schwann's filed a charge against her employer alleging discrimination on the basis of her gender. The EEOC served Schwann's with a subpoena seeking information on employees who had completed the company's general manager development program. After Schwann's had partially responded to the EEOC's subpoena, the employee filed an amended charge alleging that the company discriminated against female employees as a class. The EEOC thereafter served Schwann's with another administrative subpoena.

Before a magistrate judge, Schwann's argued that the subpoena was unenforceable because the amended charge was invalid. The magistrate judge disagreed and enforced the administrative subpoena in its entirety, finding that the subpoena enforcement action was not the proper forum for assessing the validity of the amended charge. The district court adopted the magistrate judge's order explaining that the "EEOC's authority to investigate is not negated simply because the party under investigation may have a valid defense to a later suit. If every possible defense, procedural or substantive, were litigated at the subpoena enforcement stage, administrative investigations obviously would be subjected to great delay."[13] The district court similarly rejected Schwann's argument that the administrative subpoena was overly broad. The court found that amended charge alleged retaliation and discrimination based on sex and EEOC's efforts to obtain information pertaining to the company's selection process to the general management development program and the gender of all of its current general managers was relevant to the charge.

Although the EEOC's investigatory powers have been broadly construed, these powers are not plenary and objections to EEOC subpoenas have been upheld in certain circumstances. For example, in *Kronos*, the Third Circuit rejected a portion of the EEOC subpoena seeking information on the basis of race where the underlying charge alleged disability discrimination exclusively.[14] The court reasoned that the EEOC's inquiry into discrimination based on race "is wholly unrelated to [the

underlying] charge and does not fall within the ambit of reasonable expansion."[15] Likewise, in *EEOC v. United Air Lines, Inc.*,[16] the Seventh Circuit determined that portions of the EEOC's administrative subpoena went beyond the inquiry warranted by the charges. In that case, a flight attendant living in France had filed charges of national origin and sex discrimination against her employer after she was denied disability benefits through France's social security system. The flight attendant alleged that the airline discriminated against her and other Americans by failing to make contributions to the French system on behalf of its employees. The EEOC subsequently issued a subpoena requiring United Air Lines to identify all of its employees living abroad who had taken medical or disability leave or who had applied for unemployment compensation. The Seventh Circuit rejected the EEOC's contention that such information would shed light on propriety of the airline's failure to contribute to the French social security system. The Seventh Circuit concluded that the EEOC's subpoena sought irrelevant information and that "[a]llowing the EEOC to conduct such a broad investigation would require [the court] to disregard the Congressional requirement that the investigation be based on the charge."[17]

More recently, the court, in *EEOC v. Quantum Foods, LLC*,[18] declined to enforce an EEOC subpoena to the extent that it sought information concerning facilities other than the one where the charging party worked, because the EEOC failed to show that the company's allegedly discriminatory employment practices were applied at its other facilities. Noting that the charging party's allegations were specific to one plant, the court noted "[o]ther than the shared employment application and human resources department, the EEOC has presented no information that links Figueroa's employment discrimination and wrongful termination claims to persons with responsibilities in or practices applied at Quantum's other facilities."[19] The court did enforce, however, the subpoena as to the company's hiring and recruiting practices and procedures generally, including for positions other than the one which the charging party held, although his claims were for discrimination while in the position and his termination.

In addition to courts limiting the enforcement of subpoenas on the basis of relevancy and scope, courts have also limited or modified administrative subpoenas on other grounds. For example, in *EEOC v. ABM Janitorial-Midwest, Inc.*,[50] the EEOC filed suit to enforce a subpoena against ABM, the successor employer of a janitor who alleged that she was discriminated on the basis of her national origin. In denying the EEOC's motion to enforce the subpoena, the district court stated that while the federal court's role in enforcing administrative subpoenas is "sharply limited,"[51] the EEOC's investigative powers are not absolute. According to the court, although ABM currently owned a portion of the former employer's business, ABM's employment practices did not "shed any light whatsoever" on whether Lakeside, the first

employer, engaged in discrimination.[52] The court further concluded that ABM adequately demonstrated that the requested information was voluminous and unduly burdensome and therefore the subpoena could not be upheld. The Ninth Circuit recently held that an EEOC's administrative subpoena does not extend to documents protected by the attorney-client privilege or work product protection, unless those privileges are waived.[53]

Finally, at least one court has enjoined the EEOC from disclosing an employer's confidential information pursuant to the EEOC's disclosure policy. In *Venetian Casino Resort, LLC v. EEOC*,[54] Venetian was subject to an EEOC subpoena seeking information pertaining to allegations that the casino violated the Age Discrimination in Employment Act (ADEA). Venetian deemed the information sought by the EEOC confidential and argued that the EEOC's disclosure policy unlawfully permitted agency employees to divulge the employer's confidential information without first notifying the employer that its information would be disclosed. Venetian specifically argued that EEOC's disclosure policy violated the Freedom of Information Act (FOIA), among other statutes. On appeal, the Ninth Circuit agreed with Venetian, finding the EEOC's compliance manual arbitrary and capricious with respect to its disclosure policy. According to the circuit court, the EEOC's compliance manual, as written, allowed EEOC personnel to circumvent FOIA's requirement that an agency provide an employer with explicit notice when a FOIA request has been made for confidential information. The Ninth Circuit remanded the case to enjoin the EEOC from disclosing Venetian's confidential information without adhering to FOIA's notification requirements.

CONCLUSION

In sum, employers should not assume that the EEOC will automatically close an investigation just because the charging party has settled or filed his or her own suit. When faced with broad EEOC requests for information, employers should first explore options for negotiating reasonable limitations on the requests with the EEOC. Providing data or documents on a sampling basis or for facilities, locations, or units from which the underlying complaints arise may satisfy the EEOC's investigatory needs while limiting the burden on the employer. If such negotiations fail and a subpoena issues to which the employers wishes to take exception, filing a petition to revoke with the agency should be the first course of action. If a subpoena enforcement action is filed, the employer may, in some circumstances, be able to challenge the scope of the subpoena if it exceeds the scope of the underlying charge in terms of the type of discrimination alleged, the facilities at which the discrimination is alleged to have occurred, or the reasonable time period based on the date the charge was filed.

NOTES

1. 42 U.S.C. § 2000e-9; 29 U.S.C. § 161(1).

2. 29 C.F.R. § 1601.16(a) (2009).

3. 558 F.3d 842 (9th Cir.), *cert. denied*, 130 S. Ct. 574 (Nov. 9, 2009).

4. FedEx subsequently filed a Notice of Mootness and Request for Dismissal of the appeal on the grounds that it had complied with the subpoena by providing the same information in response to a charge filed by another employee. The Ninth Circuit rejected the argument that the appeal was moot.

5. 29 C.F.R. § 1601.28(a)(3) (2009).

6. 103 F.3d 462 (5th Cir. 1997).

7. *Hearst*, 103 F.3d at 469–470 (emphasis in original).

8. 534 U.S. 279, 291 (2002).

9. *Fed. Express Corp.*, 558 F.3d at 852.

10. *See also* EEOC v. McCormick & Schmick's, No. C 07-80065 WHA, 2007 WL 1430004, at *5 (N.D. Cal. May 15, 2007) (declining to follow *Hearst* and finding that the EEOC may properly issue an administrative subpoena under a Commissioner's charge even after a right-to-sue letter has been issued); EEOC v. Sunoco, Inc., No. 08-MC-145, 2009 WL 197555, at *5–6 (E.D. Pa. Jan. 26, 2009) (declining to follow *Hearst* and noting that the EEOC retained authority to issue an administrative subpoena against the employer because the EEOC stated in the right-to-sue notice that a portion of the charge would remain open).

11. 553 F.3d 593 (7th Cir. 2009).

12. *Id.* at 596.

13. *Id.* at 597.

14. *Id.* at 598.

15. 29 C.F.R. § 1601.16(b)(1) (2009).

16. *Id.*

17. 29 C.F.R. § 1601.16(b)(2) (2009).

18. *Id.*

19. No. 08-MC-145, 2009 WL 197555 (E.D. Pa. Jan. 26, 2009).

20. *Id.* at *5.

21. 186 F.3d 959, 962 (D.C. Cir. 1999).

22. *See also* EEOC v. Cuzzens of Georgia, Inc., 608 F.2d 1062, 1064 (5th Cir. 1979); EEOC v. County of Hennepin, 623 F. Supp. 29, 32 (D. Minn. 1985); EEOC v. Roadway Express, Inc., 569 F. Supp. 1526, 1528 (N.D. Ind. 1983).

23. *See, e.g.*, EEOC v. WinCo Foods, Inc., No. S-05-0486 GEB GGH, 2006 U.S. Dist. LEXIS 64521, *12 (E.D. Cal. Sept. 7, 2006); *see also* EEOC v. Lutheran Soc. Serv., 186 F.3d at 961.

24. No. CIV 09-0209 PHX RCB, 2009 WL 3241763, *6 (D. Ariz. Sept. 30, 2009).

25. *See* EEOC v. Bashas', Inc., No. CIV 09-0209-PHX-RCB, 2009 WL 1783437 (D. Ariz. June 18, 2009).

26. Parra v. Bashas', Inc., Nos. CV 02-0591 PHX RCB, CV 09-0209 PHX JAT, 2009 WL 1024615 (D. Ariz. Apr. 15, 2009).

27. *See* EEOC v. Bashas', Inc., 2009 WL 3241763, at *2.

28. *Id.* at *4.

29. *Id.* at *8.

30. 587 F.3d 136 (2d Cir. 2009).

31. *Id.* at 139 (citation omitted).

32. *Id.* at 140.

33. 448 F.3d 1035 (8th Cir. 2006).

34. *Id.* at 1038–1039 (internal citation omitted).

35. *Id.* at 1039 (internal quotations omitted).

36. *Id.* at 1040.

37. EEOC v. Fed. Express Corp., 558 F.3d at 854.

38. *See also* EEOC v. Aerotek, Inc., 2011 WL 124266 (N.D. Ill. 2011) (court enforced EEOC subpoena seeking documents relating to locations other than those at which the charging parties worked and for information regarding race, sex, age, and disability discrimination although the charges alleged national origin discrimination).

39. 620 F.3d 287 (3d Cir. 2010).

40. *Id.* at 297 (internal citation omitted).

41. *Id.* at 300.

42. 707 F. Supp. 2d 980 (D. Minn. 2010).

43. *Id.* at 991 (internal citation omitted).

44. *Kronos*, 620 F.3d at 301.

45. *Id.* at 302; *see also* EEOC v. U.S. Fidelity & Guar. Co., 414 F. Supp. 227 (D. Md. 1976).

46. 287 F.3d 643 (7th Cir. 2002).

47. *Id.* at 655.

48. No. 09 C 7741, 2010 WL 1693054, (N.D. Ill. Apr. 26, 2010).

49. *Id.* at *4.

50. 671 F. Supp. 2d 999 (N.D. Ill. 2009).

51. *Id.* at 1002 (citation omitted).

52. *Id.* at 1005.

53. *See* EEOC v. Am. Apparel, Inc., 327 Fed. App'x 11 (9th Cir. 2009) (finding that the employer made a preliminary showing that notes and memoranda prepared by outside counsel may be protected by attorney-client privilege and/or work protect); *see also* EEOC v. Lutheran Soc. Serv., 186 F.3d 959 (D.C. Cir. 1999).

54. 530 F.3d 925 (9th Cir. 2008).