

## Should Appeals Courts Give Deference To Lower Courts In EEOC In Subpoena Enforcement Actions?

September 30, 2016 | [EEOC, Labor And Employment](#)

As the U.S. Supreme Court prepares to open its fall term, the Court has agreed to consider the appropriate standard for court review of U.S. Equal Employment Opportunity Commission (EEOC) subpoenas that the agency issues during its investigations of discrimination charges. In *EEOC v. McLane Co., Inc.*, the issue is whether the Ninth Circuit Court of Appeals should have given deference to a lower court's decisions regarding enforcement of an EEOC investigatory subpoena or whether appellate courts should take a completely new look ("de novo" review) at the facts and circumstances to determine whether and to what extent to enforce an EEOC subpoena. The issue has caused a split among federal appellate courts, according to the employer's petition seeking Supreme Court review. The case arose after a former McLane Company employee filed a charge of sex discrimination based on pregnancy with the EEOC, alleging that she was fired after she failed to pass a strength test upon return from a maternity leave. The employer voluntarily provided information to the EEOC about the test and the individuals who were required to take it, including gender, job class, reason for taking the test, and whether the person passed or failed. But the EEOC wanted more detailed information about use of the strength test, including what the parties refer to as "pedigree information" for every test taker nationwide in the same division as the charging party. The EEOC asked for names, Social Security numbers, last known addresses and telephone numbers. The employer instead identified each test taker by an employee ID number created solely for purposes of the EEOC investigation, and declined to disclose when and why certain employees were terminated from their employment. After the EEOC issued an administrative subpoena and the parties failed to work out a compromise, the EEOC filed a federal court action to enforce the subpoena. At the district court stage, the judge granted in part and denied in part the EEOC's request for enforcement. Significantly, the judge refused to enforce the subpoena to the extent that it required the employer to provide (1) the "pedigree information" for each test taker and (2) for employees who were terminated after taking the test, the reasons for termination. The Ninth Circuit Court of Appeals then weighed in and reversed the district court in part. While the employer also asked the Supreme Court to weigh in on whether the Ninth Circuit's ruling also improperly found the EEOC's subpoena to be seeking relevant information and not to be overly broad, the Supreme Court did not agree to hear that issue. The case, therefore, will go forward solely on the question regarding the appropriate standards for courts to apply when asked to review an investigatory subpoena. Further information about the McLane case, including the briefs of the parties on the petition seeking review, is available on the [SCOTUS Blog](#).

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