**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,<br>Petitioner-Appellant,<br>v.<br>VF JEANSWEAR LP,<br>Respondent-Appellee. | No. 17-16786<br>D.C. No. 2:16-mc-00047-NVW<br>MEMORANDUM*<br>(Filed May 1, 2019) |

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Argued and Submitted April 11, 2019
Pasadena, California

Before: GRABER and BYBEE, Circuit Judges, and HARPOOL,** District Judge.

The Equal Employment Opportunity Commission ("EEOC") appeals the district court's decision declining to enforce a subpoena issued by the EEOC against VF Jeanswear. Following a charge of discrimination filed by L.B., a former employee of VF Jeanswear, the EEOC

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable M. Douglas Harpool, United States District Judge for the Western District of Missouri, sitting by designation.

subpoenaed a wide range of employment information from VF Jeanswear relating to its supervisors, managers, and executive employees. We review the district court's decision not to enforce the subpoena for abuse of discretion. *McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159, 1170 (2017).

**1.** The district court abused its discretion when it held that the subpoenaed information was not relevant to L.B.'s charge. For an EEOC subpoena to be enforceable, it must seek information that is relevant to the charge under investigation. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984). The relevance standard allows "access to virtually any material that might cast light on the allegations against the employer." *Id.*

L.B. alleged that because of her sex, she was harassed, demoted, underpaid, and not offered opportunities for promotion. L.B. also alleged that female employees generally were discriminated against because of their sex. Specifically, she stated "Females are not afforded the opportunity in top level positions. Top level positions are male dominated."

In conducting its relevance analysis, the district court proceeded from the premise that only L.B.'s personally-suffered harms could be considered. However, there is no legal basis for limiting the scope of the relevance inquiry only to the parts of the charge relating to the personally-suffered harm of the charging party.

Indeed, we have held otherwise. EEOC subpoenas are enforceable so long as they seek information relevant to any of the allegations in a charge, not just those

directly affecting the charging party. *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 855 (9th Cir. 2009).

**2.** The district court also abused its discretion when it held that the subpoena was unduly burdensome. It is the producing party's burden to prove that compliance would be unduly burdensome. *EEOC v. Children's Hosp. Med. Ctr. of N. Cal.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc).

The district court held that compliance with the subpoena would impose an undue burden to the extent it would require VF Jeanswear to produce information not contained in the computer systems. The district court did not make an explicit finding as to the precise cost of compliance. For its part, VF Jeanswear represented that compliance would cost an estimated $10,698.00.

The EEOC offered into evidence the declaration of Ronald Edwards, who presented evidence that VF Jeanswear's claim of undue burden was unfounded and substantially overstated. VF Jeanswear did not proffer any evidence refuting Edwards' declaration. Even if Edwards' declaration had been rebutted, VF Jeanswear's estimated cost of complying with the subpoena as part of an investigation into systemic and unlawful discrimination does not unduly burden a company with approximately 2,500 employees.

The EEOC has represented that it no longer seeks information concerning "age" and "reason for termination" from VF Jeanswear. The EEOC also has represented that it no longer seeks information predating

2012 for subparagraphs (f) and (g) of the subpoena. We hold the EEOC to those representations.

**REVERSED and REMANDED** with instructions to enforce the subpoena as written except as to information pertaining to age and reason for termination and except as to information predating 2012 for subparagraphs (f) and (g).

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

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| Equal Employment Opportunity Commission,<br><br>Petitioner,<br><br>v.<br><br>VF Jeanswear, LP,<br><br>Respondent. | No. MC-16-00047-PHX-NVW.<br><br>**ORDER**<br><br>(Filed Jul. 5, 2017) |

Before the Court is the Application Why an Administrative Subpoena Should Not Be Enforced (Doc. 1), Subpoena No. PHX-15-041, issued by the Equal Employment Opportunity Commission on August 12, 2015. (Doc. 1.) The Court has considered the parties' briefing, oral argument, and supplemental briefs. (Docs. 1, 7, 11, 16, 17, 23, 26, 28.)

## I. BACKGROUND

On July 3, 2014, Lori Bell filed a charge of discrimination with the EEOC ("Charge") against VF Jeanswear, LP ("Jeanswear"), alleging discrimination based on sex and age and violation of the Equal Pay Act. Bell stated:

> - I had been working for Respondent since September 15, 1985, and last position held was Executive Sales Representative. On February 28, 2014, I was forced to resign my

> position due to being demoted and harassed and no reason given. . . . I was offered a position with less pay and less responsibilities. . . . I requested a lateral move but it was denied. . . . I was also subjected to harassing comments to include but not limited to my manager (WL) stating "isn't great to see all they young men being promoted in top positions and not gray hairs walking around like us". I was also subjected to less pay than similarly situated males performing substantially the same work. During my tenure with the Respondent I was not offered any higher level position than Executive Sales Representative, rather demoted to a lesser position and significantly less pay. Females are not afforded the opportunity in top level positions. Top level positions are male dominated.
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> - I believe I and a class of females have been discriminated against because of sex (female), in violation of Title VII of the Civil Rights Act of 1964, as amended. I have also been discriminated against because of age (48), in violation of the Age Discrimination in Employment Act, as amended. I have also been discriminated against because of sex (female), in violation of the Equal Pay Act, as amended.

On June 30, 2014, before filing the Charge, Bell filed a lawsuit against Jeanswear in Maricopa County Superior Court, alleging gender and age discrimination as well as violations of equal wage statutes. On August 28, 2014, Jeanswear removed the lawsuit to federal court. On December 18, 2014, upon Bell's

request, the EEOC issued Bell a right-to-sue notice, which indicated that it was unlikely the EEOC would be able to complete its processing within 180 days from the filing of the Charge, and it would continue administrative processing of her gender and age discrimination claims.

On November 12, 2014, the EEOC sent Jeanswear its First Request for Information. On February 16, 2015, Jeanswear responded with substantial information, but objected to Request No. 10 on grounds that it was unduly burdensome and not relevant to the issues involved in the Charge. On March 26, 2015, the EEOC sent Jeanswear a modified Request No. 10. On April 13, 2015, Jeanswear renewed its objection, contending that even as narrowed, the request sought information not reasonably related to the Charge. On July 29, 2015, Jeanswear received the EEOC's first subpoena and on July 30, 2015, submitted a petition to revoke the subpoena. On August 6, 2015, the EEOC withdrew the subpoena. On August 21, 2015, Jeanswear received a second subpoena from the EEOC, which was a corrected version of the first subpoena. On August 26, 2015, Jeanswear submitted a petition to revoke the second subpoena.

Subpoena No. PHX-15-041, issued August 12, 2015 ("Subpoena") directs Respondent to:

> Submit an electronic database identifying all supervisors, managers, and executive employees at VF Jeanswear's facilities during the relevant period, January 1, 2012, to present. For each individual, provide:

a. employee identification number, if applicable,

b. name,

c. age and sex,

d. facility name and location,

e. date of hire,

f. position(s) held and date in each position,

g. if no longer employed, provide date of termination, and reason for termination,

h. last known home address, e-mail, SSN, and telephone number.

The EEOC asserts that the information sought is relevant to Bell's individual and class claims regarding lack of promotion opportunities for women and gender-based pay disparities. The EEOC also contends that the information will provide the identities of witnesses and others who may be victims of disparate treatment and may also help the EEOC formulate other requests for information. In its reply brief, the EEOC stated it is willing to narrow the scope of subparagraphs (f) and (g) of the Subpoena to require only responsive information dating back to January 1, 2012.

## II. LEGAL STANDARD

Whenever a charge is filed with the EEOC by a person claiming to be aggrieved, alleging that an

employer has engaged in an unlawful employment practice, the EEOC "shall make an investigation thereof." 42 U.S.C. § 2000e-5(b). "In connection with any investigation of a charge filed under section 2000e-5 of [Title 42], the [EEOC] or its designated representative shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by [subchapter VI] and is relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a). The EEOC may issue an administrative subpoena requiring production of "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question" and may seek judicial enforcement to compel compliance. 42 U.S.C. § 2000e-9 (incorporating 29 U.S.C. § 161).

The Supreme Court recently summarized the role of the district court in enforcing an EEOC subpoena:

> A district court's role in an EEOC subpoena enforcement proceeding, we have twice explained, is a straightforward one. A district court is not to use an enforcement proceeding as an opportunity to test the strength of the underlying complaint. Rather, a district court should satisfy itself that the charge is valid and that the material requested is "relevant" to the charge. It should do so cognizant of the generous construction that courts have given the term "relevant." If the charge is proper and the material requested is relevant, the district court should enforce the subpoena

> unless the employer establishes that the subpoena is too indefinite, has been issued for an illegitimate purpose, or is unduly burdensome.

*McLane Co. v. EEOC*, ___ U.S. ___, 137 S. Ct. 1159, 1165 (2017) (internal quotation marks, alteration marks, and citations omitted). "The critical questions are: (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation." *EEOC v. Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1428 (9th Cir. 1983), *abrogated on other grounds by Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). When deciding whether to enforce a subpoena issued by the EEOC, "any effort by the court to assess the likelihood that the Commission would be able to prove the claims made in the charge would be reversible error." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 72 n.26 (1984).

## III. ANALYSIS

### A. In the Ninth Circuit the EEOC Has Authority to Investigate a Charge of Discrimination After Issuing a Right-to-Sue Notice.

Whenever a charge is filed with the EEOC, the EEOC must investigate. 42 U.S.C. § 2000e-5(b). "If the [EEOC] determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify

the person claiming to be aggrieved and the respondent of its action." *Id.* If the EEOC dismisses the charge or has not filed a civil action within 180 days of the filing of the charge, the EEOC shall notify the charging party, who may bring a civil action within 90 days of receiving the right-to-sue notice. 42 U.S.C. § 2000e-5(f)(1).

By regulation the EEOC claims the authority to keep the charge administratively open and continue issuing administrative subpoenas against an employer, even though the charge proceeding has ended in fact after a charging party has been issued a right-to-sue notice and has brought a private action. *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 845, 854 (9th Cir. 2009). "[E]ven though the EEOC normally terminates the processing of the charge when it issues the right-to-sue notice, it can, under limited circumstances continue to investigate the allegations in the charge, which includes the authority to subpoena information relevant to that charge." *Id.* at 850. In *Federal Express*, the EEOC decided to continue investigating the charge "because it involved a possible policy or pattern of discrimination affecting others." *Id.* The Ninth Circuit reasoned that the "EEOC's investigatory authority serves a greater purpose than just investigating a charge on behalf of an individual," and "[b]y continuing to investigate a charge of systemic discrimination even after the charging party has filed suit, the EEOC is pursuing its obligation to serve the public interest." *Id.* at 852.

To the contrary is *EEOC v. Hearst*, 103 F.3d 462 (5th Cir. 1997), which held the charge no longer provides a basis for EEOC investigation and subpoena after the charging party has requested and received a right-to-sue notice and has brought an action. Jeanswear acknowledges, however, that Ninth Circuit precedent controls here.

### B. Whether the Requested Information Is Relevant to the Charge.

"[T]he EEOC's investigative authority is tied to charges filed with the Commission . . . the EEOC is entitled to access only evidence 'relevant to the charge under investigation.'" *EEOC v. Shell Oil Co.*, 466 U.S. 54, 64 (1984). "Relevancy is determined in terms of the investigation rather than in terms of evidentiary relevance." *Fed. Express*, 558 F.3d at 854. The scope of the charge should be liberally construed:

> "[T]he EEOC's investigatory power is broader than the four corners of the charge; it encompasses not only the factual allegations contained in the charge, but also any information that is relevant to the charge. Thus, the EEOC need not cabin its investigation to a literal reading of the allegations in the charge."

*EEOC v. Kronos Inc.*, 620 F.3d 287, 299 (3d Cir. 2010). The EEOC has authority to investigate charges of discrimination beyond the alleged individual discrimination where the individual charge "raises the specter of

systemic discrimination." *Fed. Express*, 558 F.3d at 855.

The Charge alleges that Jeanswear harassed and discriminated against Bell based on sex and age. The Charge further states, "Females are not afforded the opportunity in top level positions. Top level positions are male dominated." Bell claimed to have been demoted from a sales position, never held a management position, never applied for one, and never was refused or demoted from one. It also states that Bell believed that she and a class of females had been discriminated against because of sex. The EEOC contends these sufficiently "raise the specter of systemic discrimination." *See*, *e.g.*, *EEOC v. United Parcel Serv., Inc.*, 587 F.3d 136, 139 (2d Cir. 2009) (per curiam) (nationwide information was relevant to religious discrimination charge stating, "I also believe that Respondent has a pattern or practice of refusing to accommodate the religious observances, practices and beliefs of its employees"). Even when systemic discrimination is not alleged, information regarding employees other than the charging party may provide reasonable and relevant context for an individual charge of employment discrimination. *Kronos*, 620 F.3d at 298; *EEOC v. Ford Motor Credit Co.*, 26 F.3d 44, 47-48 (6th Cir. 1994); *EEOC v. Roadway Express, Inc.*, 261 F.3d 634, 640 (6th Cir. 2001).

"[C]ourts 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." *Shell Oil Co.*, 466

U.S. at 68-69. However, relevance should not be construed so broadly as to eliminate the requirement. *Id.* at 69. The requirement of relevance "is designed to cabin the EEOC's authority and prevent fishing expeditions." *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002); *accord Kronos*, 620 F.3d at 297.

The Ninth Circuit has not specifically addressed whether deference is owed to the EEOC's determination of relevance. Although the Fourth Circuit has deferred to the EEOC's appraisal of what is relevant because of its expertise, the Sixth Circuit has the better of it that courts are not required to defer to the EEOC's determination of relevance. *Compare EEOC v. Randstad*, 685 F.3d 433, 448 (4th Cir. 2012), *with EEOC v. Ford Motor Credit Co.*, 26 F.3d 44, 47 (6th Cir. 1994). "If Congress had meant for EEOC's determination of relevance simply to be accepted by the courts, it would not have provided for judicial review of these data requests." *Ford Motor*, 26 F.3d at 47.

The Subpoena seeks "an electronic database identifying all supervisors, managers, and executive employees at VF Jeanswear's facilities [companywide and nationwide] [from] January 1, 2012, to present,"[1] and for each individual identified production of routine employment information, such as name, contact information, age, sex, date of hire, and employment history within the company. In addition, the Subpoena seeks the reason for termination for individuals who are no longer employed by Jeanswear. Regarding positions

[1] The Subpoena was issued August 12, 2015.

held, date in each position, date of termination, and reason for termination, the EEOC has limited its request to require only responsive information beginning January 1, 2012.

Jeanswear contends (1) age and reason for termination are not relevant to the EEOC's investigation of whether Jeanswear denies women access to "top level" promotions and (2) the inclusion of all supervisors, managers, and executive employees exceeds what should be considered "top level" positions as described in the Charge. However, "employment context is relevant to a charge of employment discrimination." *Ford Motor*, 26 F.3d at 47 (finding comparative information "absolutely essential" to a determination of discrimination).

For example, in *Kronos*, the charging party alleged she was not hired for work as a cashier, bagger, or stocker because of her disability, which caused her to receive a low score on an assessment the employer used in the hiring process. 620 F.3d at 297-98. The EEOC issued a third-party subpoena to the creator of the assessment, seeking validity studies, job analyses related to any positions at the employer's company, and other information, which the district court limited in geography, time, and job position. The Third Circuit held that the district court applied too restrictive a standard of relevance by imposing those limitations. It stated, "[T]he EEOC is entitled to information that 'may provide a useful context' for evaluating employment practices under investigation, in particular when such information constitutes comparative data." *Id.* at

298. Further, it was "entirely appropriate" for the EEOC to investigate the employer's nationwide use of the assessment for all job positions. *Id.*

In contrast, the Tenth Circuit concluded that the EEOC's subpoena for any computer files created or maintained by the employer that contained electronic data about current and/or former employees and applicants throughout the United States during a two-year period was not relevant to disability discrimination charges filed by two men who received a conditional offer of employment and were not hired after a medical screening procedure. *EEOC v. Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1158 (10th Cir. 2012). The "incredibly broad request" for all employee information nationwide was not justified as necessary to create "a carefully tailored request" for substantive information regarding two charges that alleged only individual discrimination. *Id.*

In *Royal Caribbean Cruises*, an Argentinian national filed a charge with the EEOC, alleging discrimination on the basis of disability when the employer refused to renew his employment contract after he was diagnosed with HIV and Kaposi Sarcoma, but declared fit for duty by his physician. *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 759 (11th Cir. 2014). The employer admitted it terminated the employee because of his medical condition, but contended that the Americans with Disabilities Act did not apply to a foreign national employed on a Bahamian ship, Bahamas Maritime Authority medical standards for seafarers applied, and those standards disqualified the charging

party from duty at sea. The EEOC requested a list of all employees who were discharged or whose contracts were not renewed during a certain period due to a medical reason and detailed information for each, plus all persons who applied for a position within the relevant period who were not hired due to a medical reason and the same detailed information for each. The employer provided records only for employees or applicants who were United States citizens. The EEOC subpoenaed the records for non-United States citizens. The Eleventh Circuit held that the information sought regarding employees and applicants from around the world suffering from any medical condition would not shed light on the individual charge. Where the employer admitted it terminated the employee because of his medical condition, statistical data were not needed to determine whether an employer's facially neutral explanation for the adverse employment decision was pretext for discrimination. *Id.* at 761. "Although statistical and comparative data in some cases may be relevant in determining whether unlawful discrimination occurred, the EEOC was required to make some showing that the requested information bears on the subject matter of the individual complaint." *Id.* Thus, the information sought was not relevant to the charge.

Here, the Charge alleges a one-off discriminatory demotion and unequal pay.[2] Though she never held,

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[2] The evidence at trial was that Bell was one of 17 customer sales representatives, a non-managerial position. One person had to be demoted in an undisputedly legitimate business decision. The local supervisor, a female, selected Bell for demotion over all

sought, or was refused a managerial or "top" position, she said females are not afforded the opportunity of top positions. The EEOC does not demonstrate that its investigatory and subpoena powers are triggered by tips or hunches, but it contends this passage empowers it to investigate company-wide sex discrimination at Jeanswear concerning promotions. The requested information regarding all supervisors, managers, and executive employees does not bear on unequal pay. From Bell, this passage is just a tip not bearing on her own experience or detriment.

The EEOC contends this company-wide subpoena would provide relevant context and comparative data regarding those who have been hired for or promoted to these positions. It says the reasons for termination of those no longer employed could be related to the lack of promotion opportunities.[3] Indeed, under the language of some cases, everything else about employment could provide relevant context to a discrimination charge. Those cases decline closer scrutiny of the subpoenaed evidence for how it could or could not the help the inquiry. But other cases do not stop at the outset, and they do question more specifically about the how the evidence could help before deciding relevance.

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male counterparts, despite her performance metrics superior to those of some of the males. The case had nothing to do with systemic employment practices, management jobs, or promotion.

[3] This is nonsensical. Only lack of vacancies, not reasons for vacancies, can explain lack of promotion opportunities. Nor has there been any suggestion of lack of promotion opportunities.

The two paths can leave a trial judge at a loss, especially in circuits with both kinds of precedents.

The crux of this Court's inquiry is whether Bell's charge of demotion is enough for a companywide and nationwide subpoena for discriminatory promotion, a discriminatory practice not affecting the charging party. The answer could be yes or no, depending on which cluster of cases one yields to, and if one follows the cases that allow some inquiry, how remote the subpoena is from the discrimination in question. The "look no further" approach that the EEOC urges comes close to allowing universal investigation of any employer with a pending (or concluded) charge. But we know that is not correct.

This Court hesitates both ways but must go one way. On balance and even under a generous reading of relevance, the nationwide, companywide search for systemic discrimination in promotions to top positions is too removed from Bell's charge of one-off demotion from a sales job to be relevant in a practical sense, as opposed to the EEOC's indefinitely elastic sense. Therefore, the Application must be denied.

### C. Whether Compliance with the Subpoena Is Unduly Burdensome.

The Ninth Circuit has not specifically addressed how to measure undue burden on the respondent. Some courts have required the respondent to show that producing the documents would seriously disrupt normal business operations. *E.g.*, *EEOC v. Randstad*,

685 F.3d 433, 451 (4th Cir. 2012); *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002); *EEOC v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1040 (10th Cir. 1993). These courts consider the cost of production relative to the company's normal operating costs to be an important factor. *Randstad*, 685 F.3d at 452; *United Air Lines*, 287 F.3d at 653-54 (comparing personal and financial burden to the employer's resources). However, the Seventh Circuit also said, "What is unduly burdensome depends on the particular facts of each case and no hard and fast rule can be applied to resolve the question." *United Air Lines*, 287 F.3d at 653.

The Eleventh Circuit expressly rejected a rigid rule for finding undue burden and has included a number of factors, including balancing hardships and benefits, rather than requiring specific types of evidence or a single factor. *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 763 (11th Cir. 2014). It agreed with the Sixth Circuit that "this court's task is to weigh the likely relevance of the requested material to the investigation against the burden to [the employer] of producing the material." *Id.* (quoting *EEOC v. Ford Motor Credit Co.*, 26 F.3d 44, 47 (6th Cir. 1994)). "[T]he likely relevance . . . against the burden" captures the inquiry.

First, the value of data to be gathered and created concerning all supervisors, managers, and executive employees appears to be attenuated at best. The data are not targeted at any employment practice; nor does the EEOC identify any discriminatory practice that might emerge from analysis of the extensive data it demands. Nor does it identify specific modes of data

analysis it would apply. The incremental statistical value of polling individuals' memories and review of bulk files beyond what is available from computer sources is likely to be nil. The EEOC's focus in its briefs is on its near-absolute right to the data, not anything specific it would do with the data to yield usable conclusions. So the balance of relevance against burden starts with faith, hope, and mystery on the EEOC's side.

On the burden side, the Subpoena directs Jeanswear to produce an electronic database identifying all supervisors, managers, and executive employees at VF Jeanswear's facilities from January 1, 2012, to August 21, 2015. For each person identified, the Subpoena seeks name, employee identification number, Social Security number, last known contact information (address, telephone, email), age, sex, facility name and location, and date of hire. It also seeks the position, and if no longer employed at any time after January 1, 2012, the date and reason for termination.

As of August 15, 2016, Jeanswear had about 2,500 employees. Jeanswear estimated that more than 600 employees have been in a supervisor, manager, or executive position during the relevant period. It estimated that currently about 400 employees hold one of those positions. So that is about 200 people who have terminated. Jeanswear stated that it does not maintain in its ordinary course of business an electronic database with the requested information, and personnel files are maintained at the location where the employee works or reports or at an offsite location.

Jeanswear estimated that it would require 24 hours of work to identify and prepare a complete list of the employees, 300 hours to retrieve and compile information that is available from its computerized personnel records, and additional time to obtain personnel files not available from its computerized personnel records. Jeanswear stated that it has only one employee with knowledge and expertise with each of its three human resources information systems and necessary security clearance to retrieve data from the systems. Based on that employee's base salary, Jeanswear estimated the cost of compliance as $10,698.00. It did not provide information regarding its normal operating costs or state whether compliance would "seriously disrupt" normal business operations, but it is apparent that diverse other people in different places would have to contribute as well.

Jeanswear asserted that compliance with the Subpoena would require compilation of data on an individual basis from three human resources information systems. Jeanswear began using its current human resources information system, Workday, on January 1, 2015. From 2002 through December 31, 2014, it used PeopleSoft. From April 1, 1990, to 2002, it used a system known as CHRS. Because the EEOC no longer seeks employment history before 2012, it may not be necessary to retrieve data from CHRS. With its reply brief in this Court, the EEOC submitted evidence that Workday and PeopleSoft routinely permit users to create customized reports of information kept in the ordinary course of business regarding multiple employees.

Human resources databases routinely include fields for employee name, identification number, birth date, social security number, date of hire, date of termination, position, change of position, work site, and contact information.[4] Both Workday and PeopleSoft permit employers to extract multiple pieces of information for multiple employees and export them to a Microsoft Excel spreadsheet. Thus, it would not be necessary for Jeanswear to prepare a narrative job history for each responsive employee, which was included in Jeanswear's estimated cost of compliance. Jeanswear has not had an opportunity to respond to this, as it came in the EEOC's reply brief.

The Court's penultimate observation on this dispute over burden is that it has not been presented to the Court in a sensible way. It progressed in the pre-subpoena, subpoena, and court litigation phases without the prompt and compromising dialog of real needs and practical burdens that civil litigators owe and district judges expect in document litigation. Instead, the demands, claims of hardship, denials of hardship, unilateral suggestions of alternatives, and rebuttals of alternatives have evolved as the briefs came in. This Court does not believe the law requires it to adjudicate an unripe and evolving process. The Court is required to adjudicate a subpoena enforcement that has already reached stasis in the earlier processes. This Court could order the parties to resume and complete the process that was not concluded when they came to

[4] Jeanswear did not identify what information it has kept in its computerized records.

court. They could then be required to submit a statement of facts on which they agree and statements of their last and best positions, identifying the specific disputes of fact on which, God forbid, they demand trial. This Court cannot be required to figure that out for the parties.

But in the specific circumstances of this case, there would be a better resolution of the dispute over hardship. The EEOC counters Jeanswear's claim of hardship from extensive non-computerized compilation of data and people's memories by asserting that Jeanswear's computer system can yield almost everything the EEOC demands. If required to decide the question of hardship, the Court would hold the EEOC to its assertion and would order Jeanswear to supply all and only the data that its computer system will yield, with no searches of files or people's memories. The Court finds that level of compliance, on balance, to be reasonable. A substantially more burdensome compliance would be unduly burdensome. The entire universe of data is not needed for statistical analysis. If this Court errs in not enforcing the subpoena because it exceeds relevance, the Court would enforce the subpoena to this extent and no further.

Finally, it is impossible to labor through this prolonged and costly dispute without noting that it is needless. The EEOC previously exerted itself to give dead charges eternal life for subpoenas, and though it succeeded in this Circuit, that success may be unstable. In this case, the EEOC presses the limits of burdensomeness and relevance in a party charge. But to

get the data, the EEOC only needed to file a commissioner's charge framed as it wished.

IT IS THEREFORE ORDERED that the Application Why an Administrative Subpoena Should Not Be Enforced (Doc. 1), Subpoena No. PHX-15-041, issued by the Equal Employment Opportunity Commission on August 12, 2015 (Doc. 1) is denied.

The Clerk shall terminate this matter.

Dated this 5th day of July 2017.

/s/ Neil V. Wake
Neil V. Wake
Senior United States
District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,<br>Petitioner-Appellant,<br>v.<br>VF JEANSWEAR, LP,<br>Respondent-Appellee. | No. 17-16786<br>D.C. No. 2:16-mc-00047-NVW<br>District of Arizona, Phoenix<br>ORDER |

(Filed July 10, 2019)

Before: GRABER and BYBEE, Circuit Judges, and HARPOOL,* District Judge.

The panel has voted to deny Appellee's petition for panel rehearing. Judges Graber and Bybee have voted to deny Appellee's petition for rehearing en banc, and Judge Harpool has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellee's petition for panel rehearing and rehearing en banc is DENIED.

* The Honorable M. Douglas Harpool, United States District Judge for the Western District of Missouri, sitting by designation.

42 U.S.C. § 2000e-5

**(a) Power of Commission to prevent unlawful employment practices**

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

**(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause**

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer,

employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty

days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

**(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings**

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by

registered mail to the appropriate State or local authority.

**(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission**

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

**(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system**

**(1)** A charge under this section shall be filed within one hundred and eighty days after the alleged

unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

**(2)** For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

**(3)(A)** For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter,

when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

**(B)** In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

**(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master**

**(1)** If within thirty days after a charge is filed with the Commission or within thirty days after expiration

of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the

giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

**(2)** Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief

shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

**(3)** Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

**(4)** It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall

certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

**(5)** It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

**(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders**

**(1)** If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.

Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

**(2)(A)** No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

**(B)** On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –

> **(i)** may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> **(ii)** shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

**(h) Provisions of chapter 6 of Title 29 not applicable to civil actions for prevention of unlawful practices**

The provisions of chapter 6 of Title 29 shall not apply with respect to civil actions brought under this section.

**(i) Proceedings by Commission to compel compliance with judicial orders**

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

**(j) Appeals**

Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

**(k) Attorney's fee; liability of Commission and United States for costs**

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-8

**(a) Examination and copying of evidence related to unlawful employment practices**

In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

**(b) Cooperation with State and local agencies administering State fair employment practices laws; participation in and contribution to research and other projects; utilization of services; payment in advance or reimbursement; agreements and rescission of agreements**

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for

services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

**(c) Execution, retention, and preservation of records; reports to Commission; training program records; appropriate relief from regulation or order for undue hardship; procedure for exemption; judicial action to compel compliance**

Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee

subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

**(d) Consultation and coordination between Commission and interested State and Federal agencies in prescribing recordkeeping and reporting requirements; availability of information furnished pursuant to recordkeeping and reporting requirements; conditions on availability**

In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

**(e) Prohibited disclosures; penalties**

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the

institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.