

Another Review Of The EEOC's Subpoena For 'Pedigree Information'

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In a prolonged battle over the issue of whether an employer must respond to the U.S. Equal Employment Opportunity Commission's (EEOC) subpoena for "pedigree information" in connection with its investigation of a sex discrimination charge, the U.S. Court of Appeals for the Ninth Circuit ordered the District Court in Arizona to review the matter again. In 2013, former employee Damiana Ocho filed a charge of discrimination against McLane Company, alleging that the company discriminated on the basis of sex when it fired her after she failed to pass a physical capability strength test. In its investigation of this claim, the EEOC issued a subpoena requesting the company provide pedigree information – meaning, the names, Social Security numbers, last known addresses and telephone numbers for employees and prospective employees who took the test. McLane challenged the subpoena arguing pedigree information was unduly burdensome and not relevant because the charge alleged only a "neutrally applied" strength test. The U.S. District Court for the District of Arizona agreed with McLane and found that the pedigree information was not relevant "at this stage" of the EEOC's investigation because McLane had produced evidence that would allow the EEOC to determine whether the strength test resulted in systematic discrimination. The District Court further concluded that pedigree information might become relevant if the EEOC's investigation indicated systemic discrimination. In 2015, the Ninth Circuit found that the District Court erred in this decision and vacated the order. In this initial finding, the Ninth Circuit used the *de novo* standard of review and did not afford deference to the trial court. Instead, at that time, the appellate court found that the information sought was relevant to the EEOC's investigation. In September 2016, the U.S. Supreme Court accepted review of the case and on April 3, 2017, issued a [7-1 decision](#) vacating the Ninth Circuit's decision. In remanding the case back to the appellate court, the Supreme Court stated the Ninth Circuit should have used the more deferential abuse-of-discretion standard of review, rather than the *de novo* standard. On May 24, the Ninth Circuit issued its decision in [EEOC v. McLane Company, Inc.](#) Utilizing the abuse-of-discretion standard of review, the appellate court still found that the District Court erred in its decision and, again, vacated the order. The Ninth Circuit held that the pedigree information sought by the EEOC was relevant in its investigation to determine whether "reasonable cause" existed to believe Ocho's charge was true. The appellate court stated that this information would allow the EEOC to contact McLane employees and applicants who took the test to learn more and "cast light" on the allegations. The Ninth Circuit stressed that the EEOC does not have to show a "particularized necessity of access, beyond a showing of mere relevance," to obtain this information. The Ninth Circuit stated that McLane can renew its argument that the requested information is unduly burdensome; however, the issue of relevancy is now determined. The appellate court further ordered the District Court to address the issue as to whether producing a second category of evidence – the reasons test-takers were terminated – would be unduly burdensome to McLane.

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