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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF ARIZONA

10 Equal Employment Opportunity
Commission,
11 Applicant,
12 v.
13 FedEx Corporation,
14 Respondent.
15

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
APPLICATION FOR ORDER TO
SHOW CAUSE WHY AN
ADMINISTRATIVE SUBPOENA
SHOULD NOT BE ENFORCED**

16 This case is before the Court on the application of the Equal Employment Opportunity
17 Commission ("EEOC" or the "Commission") for an Order to Show Cause Why An
18 Administrative Subpoena Should Not Be Enforced. The EEOC is currently investigating a
19 charge alleging a pattern and practice of race and national origin discrimination filed against
20 Respondent FedEx Corporation under Title VII of the Civil Rights Act of 1964 ("Title VII"),
21 as amended, 42 U.S.C. § 2000e *et seq.* In the course of its investigation, the EEOC issued
22 a subpoena seeking information about the type of computerized personnel files FedEx
23 maintains. Respondent's failure to comply has delayed and hampered the investigation of
24 this charge. The EEOC, therefore, applies to this Court to issue an Order to Show Cause
25 Why the Subpoena Should Not be Enforced.

26 **I. FACTUAL BACKGROUND**

27 On November 27, 2004, Charging Party Tyrone Merritt filed a charge of
28 discrimination against FedEx, on behalf of himself and "similarly situated African-American

1 and Latino FedEx employees" in FedEx's 11 state Western Region. Merritt alleged that
2 FedEx discriminated against him as part of a pattern and practice of discriminating against
3 African-American and Latino employees by failing to promote them in violation of Title VII.
4 He alleged that FedEx requires passage of a Basic Skills Test ("BST"), a cognitive ability
5 test, for promotion from the entry-level position of Handler to positions of Customer Service
6 Agent, Ramp Transporter Driver, or Courier and that he took and failed the BST. In his
7 charge, Merritt alleged that the BST has a statistically-significant adverse impact on African
8 Americans and Latinos, thereby disqualifying them from the jobs listed above for which they
9 are otherwise qualified. He also alleged that he applied for promotion to other positions,
10 including dispatcher and ramp agent, but FedEx gave those positions to similarly-situated
11 white employees. Merritt further alleged that he was subjected to harsher discipline than that
12 imposed on similarly-situated white employees and that FedEx has discriminatorily denied
13 him fair compensation due to its racially-biased disciplinary evaluation policies and
14 practices. Like the allegations regarding the BST, Mr. Merritt made all of these allegations
15 on behalf of himself and similarly-situated African American and Latino employees. Finally,
16 Mr. Merritt alleged, on behalf of himself only, that he was denied leave without pay while
17 other white employees were permitted to take leave with pay. (Affidavit of Susan L. Grace,
18 ¶ 5 ("Dep. Dir. Aff.") and Attach. 1, Charge No. 350-2005-00982).

18 The EEOC sent FedEx notice of the charge and began to investigate whether Title VII
19 had been violated. (*Id.* ¶ 6 and Attach. 2).¹ On October 6, 2005, Merritt's counsel requested
20 a Notice of Right to Sue in order to add Merritt as a representative plaintiff in a class action
21 suit challenging FedEx's use of the BST in FedEx's Western Region. (*Id.* ¶ 8). The EEOC
22 issued a Notice of Right to Sue on October 20, 2005 and, as permitted by 29 C.F.R. §
23 1601.28(a)(3), informed the parties in the Notice that the EEOC would continue to process

24
25 ¹ On June 29, 2005, Merritt filed a supplement to his charge, alleging that he once
26 again took and failed the BST. He alleged that he would have applied, and received, one of the
27 Courier positions available since the test was administered, if he had not failed the test. He also
28 alleged that he was denied other promotions given to white applicants. He continued to bring the
charge on behalf of himself and similarly-situated African-American and Latino FedEx employees.
(Dep. Dir. Aff. ¶ 7 and Attach. 3).

1 the charge. (*Id.* ¶ 7 and Attach. 4). Thus, Merritt’s charge has never been dismissed.

2 During the course of its investigation of the charge, the EEOC issued the
3 administrative Subpoena at issue, EEOC No. PHX-06-18, on February 10, 2006. (*Id.* ¶ 9 and
4 Attach. 5). The Subpoena required and directed FedEx to provide basic information about
5 the type of computerized or machine-readable files that it maintains. Such information would
6 enable the EEOC to describe all subsequent requests for a relevant subset of the information
7 contained within the files in the terms specific to FedEx’s file system. No information was
8 requested about any individual FedEx employee. *Id.* After being granted an extension of
9 time to respond, FedEx served a timely Petition to Revoke or Modify Subpoena (“Petition
10 to Revoke”). (*Id.* ¶ 10 and Attach. 6).

11 In its Petition to Revoke, FedEx asserted four categories of objections to each request
12 within the subpoena: (1) the requests are not relevant, and are vague, overly broad, or unduly
13 burdensome; (2) the EEOC no longer has authority to investigate the charge because Mr.
14 Merritt is a representative plaintiff in a pending class action lawsuit that encompasses the
15 issues and allegations raised in the Charge; (3) rather than seeking documents, the Subpoena
16 serves as a *de facto* set of Interrogatories to FedEx; and (4) FedEx has complied with prior
17 requests for information. (*Id.*)

18 As explained in the Application for Order to Show Cause, the EEOC issued a Final
19 Determination denying FedEx’s Petition to Revoke and requiring FedEx to provide the
20 documents. FedEx sought a reconsideration of that Determination; it was denied. FedEx
21 was advised that, if it failed to provide the documents, the Commission would have no choice
22 but to seek judicial enforcement of its administrative subpoena. FedEx has never complied
23 with the subpoena. (Dep. Dir. Aff. ¶ 12 and Attach. 8 and 9).

24 FedEx’s failure to respond to the administrative subpoena has delayed and hampered
25 the investigation of Mr. Merritt’s charge regarding allegations of a pattern and practice of
26 discrimination against African-Americans and Latinos. (*Id.* ¶¶ 13-14).

27 **II. ARGUMENT**

28 **A. THE ADMINISTRATIVE SUBPOENA IS ENFORCEABLE.**

Administrative subpoena enforcement proceedings in federal court are summary in

1 nature and involve only a limited judicial review. *EEOC v. Maryland Cup Corp.*, 785 F.2d
2 471 (4th Cir. 1986); *EEOC v. Peat, Marwick, Mitchell & Co.*, 775 F.2d 928, 930 (8th Cir.
3 1985). To successfully petition a court to enforce an administrative subpoena, the
4 Commission need only show that: (1) the subpoena is within the agency's authority; (2) the
5 agency has satisfied its own procedural (due process) requirements; and (3) the information
6 sought is relevant to its investigation. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 104 S. Ct. 1621,
7 1633 n.26 (1984); *EEOC v. American & Efird Mills*, 964 F.2d 300, 302-303 (4th Cir. 1992);
8 *Maryland Cup*, 785 F.2d at 475; *Peat, Marwick*, 775 F.2d at 930; *EEOC v. A.E. Staley Mfg.*
9 *Co.*, 711 F.2d 780, 788 (7th Cir. 1983); *EEOC v. Children's Hosp. Med. Ctr.*, 719 F.2d 1426,
10 1428 (9th Cir. 1983) (*en banc*). Once this showing has been made by the Commission, the
11 court must enforce the subpoena unless the party being investigated can prove that the
12 subpoena is unduly burdensome. *See Children's Hosp. Med. Ctr.*, 719 F.2d at 1426, 1428;
13 *EEOC v. Bay Shipbldg. Corp.*, 668 F.2d 304, 313 (7th Cir. 1981).

14 As the following discussion illustrates, the Commission can easily establish each of
15 these three requirements. The Subpoena, therefore, should be enforced.

16 **1. The Subpoena Is Valid And Within The Agency's Authority.**

17 Congress has authorized, and indeed mandated, the EEOC to investigate charges of
18 discrimination alleging that Title VII has been violated. 42 U.S.C. § 2000e-5(b). The EEOC
19 is investigating a charge of race and national origin discrimination filed by Tyrone Merritt
20 against FedEx. On the face of the charge, Mr. Merritt alleges that FedEx engaged in a
21 pattern and practice of race and national origin discrimination. His allegations are broad
22 enough to raise the specter of nationwide systemic discrimination by FedEx. The
23 investigation, therefore, seeks to determine if FedEx has discriminated against not only Mr.
24 Merritt but also against other employees, in any state in which FedEx operates, because of
25 their race (African-American) and national origin (Latino). *The charge remains open.*

26 a. The EEOC is not divested of its Congressional mandate to investigate
27 allegations of discrimination because a charging party initiates a private
28 legal proceeding.

In its Petition to Revoke, FedEx incorrectly argued that the EEOC no longer has

1 authority to investigate or pursue Mr. Merritt’s charge because “the Charging Party is a
2 representative plaintiff in a pending class action lawsuit which encompasses the issues and
3 allegations raised in his charge.” By making this argument, FedEx is implying that Mr.
4 Merritt’s charge is not valid.² (Dep. Dir. Aff., Attach. 6, p. 4). In an effort to support that
5 argument, FedEx contended that uncited, but “applicable case authority,” holds that the
6 EEOC’s authority to investigate ends when a Charging Party files a lawsuit. (*Id.*)

7 FedEx eventually identified *EEOC v. Hearst Corp.*, 103 F.3d 462 (5th Cir. 1997)
8 (“*Hearst*”), as the “applicable case authority” on which it relied in its Petition to Revoke.
9 (Dep. Dir. Aff. ¶ 12, Attach. 8, Robertson letter). *Hearst* is unpersuasive. In *Hearst*, the
10 Fifth Circuit held that the EEOC had no authority “to continue an administrative
11 investigation based upon an individual’s charge once the charging party has been issued a
12 right to sue letter and has initiated litigation based upon that charge.” 103 F.3d at 463. As
13 a result, the Fifth Circuit refused to enforce an EEOC administrative subpoena seeking
14 material regarding charges that remained under investigation.³ *Hearst*, 103 F.3d at 463.
15 According to the Fifth Circuit, the charges no longer provided a basis for an EEOC
16 investigation.⁴ *Id.* at 470.

18 ² The Supreme Court has held that a charge is a valid basis for an EEOC investigation
19 if it meets the requirements of Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b), which provides
20 that “[c]harges shall be in writing under oath or affirmation and shall contain such information and
21 be in such form as the Commission requires.” *Shell Oil*, 466 U.S. at 67. The charge at issue satisfies
22 these statutory requirements and contains the additional information required by Commission
23 regulations set forth in 29 C.F.R. § 1601.12(a)(3). (Dep. Dir. Aff., Attach. 1, Charge). Neither Title
24 VII nor controlling case law suggest the existence of an additional requirement, such as argued by
25 FedEx, for a charge to be valid beyond those set out in *Shell Oil*.

26 ³ In *Hearst*, two women filed separate charges claiming that they had been continually
27 sexually harassed by a high-ranking respondent management official. 103 F.3d at 463. After the
28 EEOC issued an administrative subpoena to the respondent, the charging parties, who had already
filed tort claims against the alleged sexual harasser in state court, asked the EEOC to issue notices
of right to sue. *Id.* The right-to-sue notices were issued 225 days after the original charges had been
filed; the charging parties did not amend their complaints to add Title VII claims. *Id.*

⁴ No other Circuit Court has adopted the ruling of *Hearst*. One district court in the
Fourth Circuit, however, concluded *Hearst* “reach[ed] a sound result” and denied enforcement of

1 It is clear from the reasoning of the Fifth Circuit that *Hearst* is a results-oriented
2 decision that attempts to skirt current binding case law to effectuate the Fifth Circuit’s
3 position that Title VII contains a limitations period on EEOC investigations. In reaching its
4 conclusion, the Fifth Circuit set forth, at length, a critique of its own prior decisions and
5 those of the Supreme Court regarding section 706(f)(1) of Title VII. That provision, codified
6 at 42 U.S.C. § 2000e-5(f)(1), provides that, after 180 days from the date on which a charge
7 is filed, the EEOC shall notify the Charging Party if it has neither dismissed the action, filed
8 a civil action, nor entered into a conciliation agreement resolving the charge. It further
9 provides that a Charging Party has 90 days to file a civil action after the giving of such
10 notice. 42 U.S.C. § 2000e-5(f) (1). The Fifth Circuit strongly expressed its opinion that this
11 statutory language should require the EEOC to end agency action on the charge at 180 days
12 after the charge filing date, including any further investigation of the charge. *Hearst Corp.*,
13 103 F.3d at 467. The Fifth Circuit reluctantly acknowledged, however, that its own prior
14 decisions, and those of the Supreme Court, expressly hold that the 180 day period is not a
15 limitations period for the EEOC, but merely creates an “alternative enforcement procedure”
16 by which a private party can obtain a notice of right to sue and thereafter file a lawsuit. *Id.*
17 at 468-469 (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 97 S.Ct. 2447 (1977)).

18 After expressing at length its discontent with current binding legal authority in both
19 its own Circuit and the Supreme Court, the Fifth Circuit found a way to partially effectuate
20 its view that Title VII imposes a time limit on EEOC investigations. “Although the 180-day
21 period does not terminate the EEOC’s authority to investigate,” the Fifth Circuit found it
22 “statutorily significant” that “the ‘integrated, multistep enforcement procedure’ established
23 by Title VII is divided into four distinct stages: filing and notice of charge, investigation,
24 conference and conciliation, and finally, enforcement.” *Id.* at 468 (citing *Occidental*, 97
25 S.Ct. at 2450-51). Based on this multistep enforcement procedure, the *Hearst* court

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28 an EEOC subpoena after issuance of a right to sue notice. *EEOC v. Fed. Home Loan Mortgage Corp.*, 37 F. Supp. 2d 769, 772 (E.D.Va. 1999).

1 concluded that “Congress granted the EEOC broad investigatory authority so that the agency
2 promptly and effectively could determine whether Title VII had been violated, and to assist
3 the agency in its efforts to resolve disputes without formal litigation.” *Id.* at 469. The Fifth
4 Circuit further concluded that “these purposes are no longer served once formal litigation is
5 commenced.” *Id.* As a result, the Court concluded that a right-to-sue notice issued after the
6 180-day period in Section 706(f)(1), plus initiation of subsequent private litigation, divested
7 the EEOC of its investigative authority under the charge.

8 The *Hearst* decision is inconsistent with the Supreme Court’s decision in *Occidental*.⁵
9 After concluding that the 180-day provision in Title VII was added to provide “an alternative
10 enforcement procedure,” whereby a charging party can ask for a right to sue letter and seek
11 relief through a private enforcement action, the Supreme Court in *Occidental* also noted that
12 this provision “imposes no limitation upon the power of the EEOC to file suit in a federal
13 court.” 97 S.Ct. at 2452, 2454. According to the *Hearst* court, *Occidental* is distinguishable
14 because, unlike the Supreme Court, the Fifth Circuit was not deciding whether the EEOC
15 could still file a lawsuit; it was merely deciding that the time for investigation has passed.”
16 *Hearst*, 103 F.3d at 469. This distinction is without merit because the EEOC cannot file a
17 lawsuit unless it has found reasonable cause to believe discrimination has occurred, and has
18 attempted conciliation. 42 U.S.C. § 2000e-5(a), (f)(1). A reasonable cause finding is itself
19 dependent upon an investigation. 42 U.S.C. § 2000e-5(a). The Fifth Circuit attempts to
20 accomplish in *Hearst* what the Supreme Court rejected in *Occidental* – use of the 180-day

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22 ⁵ At issue in *Occidental* was whether the EEOC could file its own judicial enforcement
23 action after 180 days and whether EEOC actions were subject to any state statutes of limitations.
24 In *Occidental*, the EEOC had filed a lawsuit approximately 38 months after the charging party had
25 first communicated with the agency. 97 S.Ct. at 2450. One of the two grounds on which the district
26 court granted defendant’s motion for summary judgment was that Title VII required that the EEOC
27 bring a judicial enforcement action within 180 days of the filing of the charge. *Id.* The Supreme
28 Court determined that the 180-day time limitation found in Section 706(f)(1) simply provides that
a charging party “whose charge is not dismissed or promptly settled or litigated by the EEOC may
bring a lawsuit but that he must wait 180 days before doing so.” *Id.* at 2452. In other words, Section
706(f)(1) merely provides for an “alternative procedure” so that an aggrieved individual can institute
a private lawsuit rather than wait for the EEOC to conclude the investigation. *Id.* at 2454.

1 provision, which creates an alternative procedure whereby a private party can obtain a right
2 to sue and proceed to court – to limit the EEOC’s ability to file a lawsuit after completion of
3 both an investigation resulting in a cause determination, and failed conciliation.

4 b. After 1972, the EEOC was Intended to “Bear the Primary Burden of
5 Litigation.”

6 In concluding that the EEOC is unable to continue an administrative investigation
7 based upon an individual’s charge once the charging party has been issued a right to sue
8 letter and initiates litigation based upon that charge, the *Hearst* court also dismissed clear
9 Congressional intent regarding the EEOC’s role in Title VII’s enforcement scheme,
10 beginning with the 1972 amendments to Title VII. When Title VII was originally enacted
11 in 1964, the statute authorized private lawsuits by individual employees and public actions
12 by the Attorney General only in cases alleging a “pattern or practice” of discrimination. 42
13 U.S.C. § 2000e-6(a)(1964). The only authority the EEOC had at that time was to investigate
14 and, if possible, conciliate charges of discrimination. *General Tel. Co. of the Northwest v.*
15 *EEOC*, 446 U.S. 318, 325, 100 S.Ct. 1698. 1703-1704 (1980). However, the EEOC’s role
16 changed significantly in 1972, when Congress amended Title VII to authorize the EEOC to
17 file lawsuits. 42 U.S.C. § 2000e-5(f)(1).

18 As the Supreme Court has observed, the 1972 amendments created a system in which
19 the EEOC was intended “to bear the primary burden of litigation.” *General Telephone*, 100
20 S.Ct. at 1704. One purpose of the 1972 amendments to Title VII was to “give . . . broad
21 authority to the Commission . . .” *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1355 (6th
22 Cir. 1975). As noted in *Kimberly-Clark*, had Congress “intended to cut off the Commission’s
23 right to sue after 180 days from a charge’s administrative filing, it should and would have
24 done so expressly.” *Id.* at 1357. Similarly, if Congress “intended to cut off the
25 Commission’s right” to continue to process a charge after 180 days or after a right-to-sue
26 notice was issued (as the *Hearst* court concluded) it “should and would have done so
27 expressly.” *See id.*

28 The Supreme Court reaffirmed the central role of the EEOC in enforcement of Title

1 VII in *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291, 122 S.Ct. 754, 763 (2002). In that
2 decision, the Supreme Court explained that, pursuant to Title VII, the EEOC, not the party
3 filing the charge of discrimination, is “in command of the process” after a charge is filed.
4 *Id.* The Court, therefore, concluded that the EEOC could obtain victim-specific relief,
5 thereby doing on behalf of the charging party that which he could not do for himself after
6 signing an arbitration agreement. *Id.*, 122 S.Ct. at 764-65. The Court added that Title VII
7 makes the EEOC “master of its own case[s]” in litigation and gives the EEOC “the authority
8 to evaluate the strength of the public interest at stake.” *Id.* The Fifth Circuit’s conclusion
9 in *Hearst*, that the EEOC has to stop investigating once a charging party obtains a right to
10 sue and files a private action, would render the charging party, not the EEOC, “in command
11 of the process” and take away the EEOC’s authority to evaluate and act in the public interest.
12 *Hearst* is, therefore, inconsistent with the role Congress established for the EEOC, as
13 recognized by the Supreme Court. *See Waffle House*, 534 U.S. at 291, 122 S.Ct. at 763.

14 Although the *Hearst* court acknowledged that Title VII had been amended in 1972,
15 it proceeded to give short shrift to the consequences and intent of the amendment. *See* 103
16 F.3d at 465. The *Hearst* opinion offers no citation to *General Telephone* nor does it make
17 mention of the special role that Congress intended the EEOC to have regarding judicial
18 enforcement of claims of discrimination as a result of the 1972 amendments. When the
19 EEOC’s role, as reaffirmed and further described in *Waffle House*, is properly understood,
20 it is clear that the EEOC should be allowed to continue its investigation by obtaining the
21 information sought in its subpoena to FedEx.

22 c. Principles of statutory construction require that deference be given to
23 the EEOC regulation permitting the EEOC to continue investigating
after issuance of a right-to-sue notice.

24 *Hearst* is also inconsistent with federal regulations issued by the EEOC. In
25 accordance with Title VII, these Regulations provide for the issuance of a notice of right to
26 sue to a charging party. 29 C.F.R. §1601.28(a)(1). These Regulations further provide that
27 issuance of such a notice “terminate[s] further proceeding of any charge not a Commissioner
28 charge *unless*” the [EEOC] determines that further processing of the charge would effectuate

1 the purposes of Title VII. 29 U.S.C. §1601.28(a)(3) (emphasis added). Thus, the EEOC's
2 procedural regulations expressly allow the Commission to continue its investigative process
3 after a right-to-sue notice is issued. Continued investigation is exactly what the EEOC did
4 with respect to Mr. Merritt's pattern-and-practice race and national origin discrimination
5 charge when it issued the Subpoena it now seeks to enforce.

6 When the validity of an agency regulation hangs in the balance, if the statute is silent
7 or ambiguous as to the specific issue, courts defer to the agency's interpretation. *Chevron*
8 *U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778 (1984).
9 A plain reading of Section 706(f)(1) shows that it does not address whether the EEOC may
10 continue to investigate a charge after the EEOC issues a right-to-sue notice and the aggrieved
11 party initiates a private action. On this issue, the statute is silent. Thus, the EEOC's
12 interpretation, set forth in the regulation quoted above, should be accorded deference. *See*
13 *Chevron*, 457 U.S. at 842-43; *see also EEOC v. Seafarers Int'l Union*, 394 F.3d 197 (4th Cir.
14 2005) (EEOC regulation entitled to *Chevron* deference).

15 The Fifth Circuit ignored the EEOC's regulation in *Hearst*. After first admitting that
16 it was "unclear" what effect providing a charging party a right to sue after 180 days had upon
17 the EEOC's investigative and enforcement authority, the Fifth Circuit ruled, as discussed
18 above, that the EEOC loses investigatory authority once a right-to-sue notice is issued and
19 suit on claims raised in the charge is initiated. 103 F.3d at 463. In so doing, the appellate
20 court failed to accord any deference to the EEOC regulations expressly addressing the issue.
21 When appropriate deference is accorded the EEOC regulation permitting the EEOC to
22 continue investigating a charge after a right-to-sue notice is issued, a subpoena issued as part
23 of that investigation should be allowed and, if necessary, enforced.

24 d. Unless the face of the charge reflects that the EEOC lacks jurisdiction,
25 an EEOC subpoena is generally enforceable.

26 Several appellate courts have held that, for purposes of enforcing an EEOC subpoena
27 issued during the investigation of a charge, it is unnecessary to determine whether the EEOC
28 ultimately will be able to prevail in any lawsuit initiated based on the charge under which the
subpoena was issued. *See Children's Hosp. Med. Ctr.*, 719 F.2d at 1429-30 (whether a prior

1 consent decree would preclude later suit by the EEOC irrelevant at subpoena enforcement
2 state); *EEOC v. Tempel Steel Co.*, 814 F.2d 482, 485 (7th Cir. 1987) (that party may have "a
3 valid defense to a later suit" *no basis* to deny enforcement of an EEOC subpoena); *EEOC*
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5 *v. Roadway Express Inc.*, 750 F.2d 40, 42 (6th Cir. 1984) (subpoena enforcement hearing
6 "not the proper time to litigate the merits of a claim, either procedurally or substantively").

7 The only exception has been when the face of the charge, itself, reflects that the
8 EEOC clearly lacks jurisdiction over the charge, such as when it is conceded, or otherwise
9 apparent, that the charge is untimely, *EEOC v. City of Norfolk Police Dep't*, 45 F.3d 80, 83
10 (4th Cir. 1995), or when the EEOC otherwise "plainly lack[s]" jurisdiction, such as when the
11 charge is against an Indian tribe not subject to the laws that the EEOC enforces. *EEOC v.*
12 *Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1082-1083 (9th Cir. 2001). Here, there is no
13 claim that Mr. Merritt's charge is untimely on its face, or that there is a statutory exemption
14 for FedEx. Moreover, the Supreme Court has established a general rule in favor of
15 enforcement of administrative subpoenas. *Id.* (citing *Endicott Johnson Corp. v. Perkins*, 317
16 U.S. 501, 63 S.Ct. 339 (1943)). It is clear that the EEOC does not "plainly lack[]"
17 jurisdiction over Mr. Merritt's charge. Therefore, the EEOC has authority to investigate the
18 charge and, as part of that investigation, to issue a subpoena for relevant information.
19 Whether or not the EEOC can file and/or prevail in a subsequent proceeding is immaterial.

20 **2. The Commission Has Fulfilled All Procedural Requirements.**

21 Respondent has not disputed that the EEOC satisfied due process requirements and
22 it is clear that the Commission has done so. FedEx received adequate notice of the charge
23 by means of the copy of the charge, which advised FedEx of the "date, place and
24 circumstances of the alleged unlawful employment practice." *Shell Oil Co.*, 466 U.S. at 75.
25 The EEOC also satisfied the procedures for serving an administrative subpoena found in 29
26 C.F.R. § 1601.16(a). Thus, all of the procedural requirements have been met.

27 **3. The Information Sought By The Commission Is Manifestly Relevant**
28 **To A Charge of Pattern and Practice Discrimination.**

Finally, the information sought is relevant and material to the Commission's

1 investigation. In the context of subpoena enforcement, the concept of relevancy is extremely
2 broad. Congress has conferred expansive powers upon the Commission in furtherance of its
3 investigatory responsibilities, granting the Agency power to obtain access to information that
4 “relates to any matter under investigation.” 29 U.S.C. § 161(1) (incorporated in Title VII at
5 42 U.S.C. §2000e-9). The EEOC’s subpoena authority is equally broad. Section 709(a)
6 describes the EEOC's right to information in the broadest of terms, granting the agency
7 access to “**any** evidence of **any** person being investigated or proceeded against that relates
8 to unlawful employment practices covered by [Title VII] and is relevant to the charge under
9 investigation.” 42 U.S.C. § 2000e-8(a) (emphasis added).

10 As the Supreme Court noted with approval in *Shell Oil*, courts have “afforded the
11 Commission access to **virtually any material** that might cast light on the allegations against
12 the employer.” 466 U.S. at 68-69 (emphasis added); *accord EEOC v. Franklin & Marshall*
13 *Coll.*, 775 F.2d 110, 116 (3d Cir. 1985) (citing *EEOC v. Univ. of Pittsburgh*, 643 F.2d 983,
14 986 (3d Cir. 1981) (when a charge is under investigation, the “concept of relevancy is
15 construed broadly”)); *EEOC v. Elrod*, 674 F.2d 601, 613 (7th Cir. 1982) (agency may seek
16 any information that “touches a matter” under investigation).

17 In its Petition to Revoke, however, FedEx asserted that the Subpoena request was
18 “neither relevant to the subject matter of this Charge nor reasonably calculated to lead to the
19 discovery of relevant or admissible information.” (Dep. Dir. Aff., Attach 6, p.3). This is not
20 the standard for assessing relevancy during an administrative investigation.⁶

21 Under the appropriate relevancy standard for an agency subpoena, the requests at
22 issue are undeniably relevant to the investigation of the allegations in Mr. Merritt’s charge
23 of discrimination. The charge contains a number of allegations of disparate treatment on the
24 basis of race and national origin, as well as allegations of disparate impact. On the face of
25 the charge, Mr. Merritt alleged that FedEx engaged in a pattern and practice of race and

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27 ⁶ Whether the evidence sought is “reasonably calculated to lead to the discovery of
28 relevant or admissible information” will not be discussed herein because it is the standard by which
discovery is limited during litigation, not during an enforcement action. See Fed. R. Civ. P. 26(b)(1).

1 national origin discrimination with regard to the use of the Basic Skills Test (“BST”), which
2 he contends has a disparate impact on African-Americans and Latinos. In addition, he
3 alleged FedEx discriminated in the areas of promotions, discipline, and compensation.

4 To investigate these allegations of systemic discrimination by FedEx, the EEOC asked
5 FedEx to identify its computer-readable personnel files by name and to provide certain basic
6 information about the files. Essentially, the EEOC sought a description of how Respondent
7 maintains its personnel files. This information will allow the EEOC to create subsequent
8 tailored requests for a relevant subset of the information contained within the files, using the
9 terms applicable to FedEx’s file system. Obtaining preliminary information about FedEx’s
10 computer files allows the EEOC to create a precisely-worded request for substantive
11 information, thereby avoiding potential problems such as vagueness, irrelevance, and
12 inefficiency. Such a request is well within the broad standard of relevance set forth by the
13 Supreme Court. *See Shell Oil*, 466 U.S. at 68-69.

14 In a strikingly similar enforcement action, the Fourth Circuit ordered enforcement of
15 a subpoena in which the Commission requested that the employer identify computerized
16 personnel files maintained on certain employees. *See EEOC v. Lockheed Martin Corp.*, 116
17 F.3d 110 (4th Cir. 1997). In *Lockheed Martin*, as here, the EEOC sought relevant information
18 regarding the employer’s computerized personnel information so that subsequent requests
19 for information could be tailored accordingly. *Id.* at 114. The Fourth Circuit concluded that
20 information about the computerized filing system for five years worth of personnel records
21 was relevant to the investigation. *Id.* As the Fourth Circuit explained:

22 [s]uch data permits the Commission to better focus its investigation. As the
23 district court found, this information will enable the EEOC to ‘perform its
24 investigative function’ by allowing it to ‘frame more specific requests’ which
25 ‘will limit the possibility that irrelevant or unnecessary material will be
26 produced for the EEOC to review.’ The efficient search for relevant
27 information is imperative in a case like this, where the Commission must
28 investigate not one or two claims against the company, but nearly two dozen.
Without this means of locating pertinent data, both the EEOC and the
employer could be overwhelmed by the sheer quantity of information needed
to address each claim treated individually.

Id. The Fourth Circuit further concluded that such information also would ensure “the
Commission misses no *relevant* data, *while minimizing the burden on the employer* and the

1 extent to which it must provide irrelevant information to the EEOC.” *Id.* (emphasis added).
2 Similarly, the information the EEOC sought in the Subpoena will allow the EEOC to tailor
3 further requests in a manner that will minimize the burden on FedEx.

4 FedEx’s specific “relevancy” objections go to the Subpoena’s (1) temporal scope, (2)
5 substantive scope , and (3) geographic scope. (Dep. Dir. Aff., Attach. 6, p. 3).

6 The Subpoena seeks a description of how Respondent has maintained electronically
7 its personnel records since January 1, 2003; the charge was filed November 27, 2004. Thus,
8 the EEOC seeks information about the maintenance of personnel files for a time period
9 beginning approximately 23 months before the filing of the charge. This temporal scope is
10 not so far-reaching as to make the request irrelevant. *EEOC v. Recruit U.S.A., Inc.*, 939 F.2d
11 746, 755 (9th Cir. 1991) (reasonable to “conclude that evidence from preceding years is
12 relevant to the investigation of specific discriminatory acts and practices”); *James v.*
13 *Newspaper Agency Corp.*, 591 F.2d 579, 582 (10th Cir. 1979) (allowing discovery into four-
14 year period prior to alleged discrimination); *EEOC v. Autozone, Inc.*, 258 F. Supp. 2d 822,
15 830-832 (W.D. Tenn. 2003) (in demonstrating a showing of pattern or practice
16 discrimination, discovery permitted for a nine-and-one-half-year period).

17 In another subpoena enforcement action, the EEOC was permitted to obtain
18 information concerning employees other than the charging party for a period of three years
19 and 300 days prior to the filing of the charge. *EEOC v. Ford Motor Credit Co.*, 26 F.3d 44,
20 46-47 (6th Cir. 1994). Evidence of past business practices may reveal that the unlawful
21 conduct is part of a bigger pattern of discrimination. *Maryland Cup*, 785 F.2d at 476
22 (documents from 1976-78 relevant to discrimination charge filed in 1979); *see also Recruit*
23 *U.S.A.*, 939 F.2d at 755. Such historical evidence can be relevant to whether the employer
24 has engaged in a pattern of discrimination. *Recruit U.S.A.*, 939 F.2d at 755. It is reasonable
25 for the EEOC to seek information about how FedEx maintained records for a period
26 beginning 23 months before the date the charge was filed.

27 With regard to the substantive scope of the Subpoena, FedEx argued in its Petition to
28 Revoke that the request “covers, without limitation, every possible kind of employment-

1 related information that FedEx does or could maintain for any and all employees.” (Dep.
2 Dir. Aff., Attach 6, p. 3). As explained *supra*, Mr. Merritt’s charge raises the specter of
3 systemic discrimination against African-Americans and Latinos. Merritt alleged in his
4 charge that FedEx has engaged in a pattern or practice of employment discrimination against
5 African-American and Latino employees with regard to a broad range of employment
6 decisions, including promotion, testing, discipline, evaluations, and compensation. Because
7 of the breadth of the allegations against FedEx and its size, it is reasonable for the EEOC to
8 request information about maintenance of computerized records regarding these decisions.

9 Moreover, employment decisions can impact a wide variety of other issues. For
10 example, employment evaluations and/or disciplinary actions can be used to justify
11 subsequent decisions concerning compensation, transfers, and/or terminations. Thus, the
12 EEOC’s request is not substantively too broad as to be irrelevant. *See Lockheed Martin*
13 *Corp.* 116 F.3d at 114 (computerized personnel information relevant and material to
14 investigation of pattern and practice of discrimination). Moreover, the EEOC is entitled to
15 evidence requested in a subpoena even though the evidence “focuses on the existence of
16 patterns of racial discrimination in job classifications or hiring situations *other than those*
17 *that the EEOC’s charge specifically targeted.*” *EEOC v. Roadway Express, Inc.*, 261 F.3d
18 634, 638 (6th Cir. 2001) (emphasis added).

19 Finally, Defendant objected to the geographic scope of the request, arguing that it
20 “apparently covers every employee without regard to locations.” (Dep. Dir. Aff., Attach 6,
21 p.3.) FedEx is mistaken. This request does not seek information about any FedEx employee.
22 Instead, it seeks basic information about the manner in which FedEx maintains computerized
23 files so that a subsequent request can be tailored to FedEx’s computerized filing system.
24 Thus, the geographic scope is not too broad. To suggest otherwise is disingenuous.

25 As discussed in detail *supra*, whether evidence sought pursuant to an EEOC
26 administrative subpoena is relevant is “generously” construed, “afford[ing] the Commission
27 access to virtually any material that might cast light on the allegations against the employer.”
28 *Shell Oil Co.*, 466 U.S. at 68-69. Moreover, the EEOC's assessment of relevance is entitled

1 to deference unless “obviously wrong.” *Lockheed Martin*, 116 F.3d at 113 (internal citation
2 omitted). Certainly, evidence about FedEx’s maintenance of its personnel files is well within
3 the standard of relevance enunciated by the Supreme Court in *Shell Oil*.

4 **4. The Request Is Not Vague, Overly Broad, or Unduly Burdensome.**

5 FedEx contended that the request, in its entirety, was vague, overly broad, and unduly
6 burdensome. (Dep. Dir. Aff., Attach. 6, pp. 3-6). FedEx offered no specifics nor support for
7 this contention. The Subpoena requests contain plain language. It is not overly broad, for
8 the reasons set forth in the discussion of relevance, *supra*.

9 With regard to the assertion that the request is unduly burdensome, FedEx has the
10 burden of establishing that production of a description of its computerized personnel records
11 would be unduly burdensome. *See Maryland Cup*, 785 F.2d at 479. FedEx failed to meet
12 its burden. Whether a request is unduly burdensome is viewed “in the light of the company’s
13 normal operating costs.” *Id.* FedEx has not even argued that gathering the requested
14 information would “threaten its normal business operations.” *Id.* Absent the showing of
15 such a threat, the assertion that the Subpoena is unduly burdensome is without merit.

16 **B. AN EEOC ADMINISTRATIVE SUBPOENA IS NOT LIMITED TO SEEKING
17 DOCUMENTS.**

18 FedEx also asserted in its Petition to Revoke that, rather than seeking documents, the
19 Subpoena serves as a *de facto* set of Interrogatories to FedEx. (Dep. Dir. Aff., Attach 6, p.
20 4). Again, this objection is not well taken. The EEOC’s subpoena power is not limited to
21 production of existing documents. *Maryland Cup*, 785 F.2d at 478-479 (EEOC has authority
22 to require employer to inspect photo identification badges and interview supervisors and
23 other employees so as to ascertain race of former employees). Congress granted the EEOC
24 the broad authority to require “the production of any evidence.” *Id.* at 478 (quoting 29
25 U.S.C. § 161(1) (incorporated in Title VII, 42 U.S.C. §2000e-9)). Thus, all relevant
26 information, even that which is not already in document form but is within a party’s control,
27 is subject to the EEOC’s subpoena power. Certainly, the EEOC has asked FedEx to do much
28 less than that asked of the employer in *Maryland Cup*. The Subpoena at issue merely asks
FedEx to compile and produce evidence regarding the maintenance of its computerized file

1 systems containing personnel information, including information such as the name of the
2 computer on which the file is stored, the date the file began to be retained, etc.

3
4 **C. FAILURE TO RESPOND TO PRIOR REQUESTS IS NOT A CONDITION
5 PRECEDENT TO THE ISSUANCE OF AN ADMINISTRATIVE SUBPOENA**

6 Although FedEx also asserted in its Petition to Revoke that there were no prior
7 requests with which it failed to comply, it cites no authority that a failure by FedEx to
8 respond to prior requests is a condition precedent to the issuance of an agency subpoena.
9 Moreover, whether FedEx has complied with previous informal requests is irrelevant to
10 whether it has an obligation to comply with a subpoena. Title VII, 42 U.S.C. § 2000e-9,
11 grants the EEOC the investigatory powers given to the NLRB in the National Labor
12 Relations Act. *See* 29 U.S.C. § 161. The latter statute expressly authorizes issuance of
13 subpoenas for production of evidence. *Id.* See also 29 C.F.R. § 1601.16 . No mention is
14 made regarding any conditions precedent to the issuance of administrative subpoenas.

15 **III. CONCLUSION**

16 For the foregoing reasons, this Court should enforce the EEOC's Subpoena, which
17 seeks information relevant to a valid charge of discrimination and which is within the
18 EEOC's enforcement authority. Had Congress intended the EEOC's investigative authority
19 to terminate when an aggrieved individual initiates a private proceeding, it would have said
20 so. FedEx will be unable to establish that complying with the Subpoena would be unduly
21 burdensome. In asking for FedEx to identify what computerized personnel files it has
22 maintained, the EEOC subpoenaed relevant information, i.e., information that affords the
23 agency an opportunity to determine what material might cast light on the allegations raised
24 against this employer. The Commission, therefore, respectfully requests the Court to issue
25 the accompanying proposed Order to Show Cause and, after giving FedEx an opportunity to
26 be heard, to enforce the Subpoena.

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28 //

1 DATED this 1st day of June, 2006.

2 Respectfully submitted,

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17 I hereby certify that on June 1, 2006,
18 I electronically transmitted the attached
19 document to the Clerk's Office using
20 the ECF System for filing.

21 s/Phyllis Brady
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