UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 15-60333

SANDERSON FARMS, INCORPORATED; SANDERSON FARMS, INCORPORATED (PROCESSING DIVISION),

Plaintiffs - Appellants,

v.

NATIONAL LABOR RELATIONS BOARD; M. KATHLEEN MCKINNEY, in her Official Capacity as Regional Director of Region 15,

Defendants - Appellees.

Case No. 15-60820

NATIONAL LABOR RELATIONS BOARD,

Plaintiff - Appellee,

v.

SANDERSON FARMS, INCORPORATED,

Defendant - Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION CIVIL ACTION NO. 2:14-CV-126 AND MISCELLANEOUS ACTION NO. 2-14-MC-201

BRIEF OF PLAINTIFF-APPELLEE NATIONAL LABOR RELATIONS BOARD

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STATEMENT REGARDING ORAL ARGUMENT

These cases involve the straightforward application of settled legal principles. Oral argument is unwarranted.

Whether or not oral argument is granted, and consistent with the order of this Court dated December 7, 2015 granting the National Labor Relations Board's request to expedite this appeal, the NLRB hereby requests that this case be accorded priority treatment. 5th Cir. R. 47.7(5). As more fully explained in the NLRB's motion to expedite, "good cause" for priority treatment exists here, given that (i) a stay pending appeal has been granted, and (ii) this case involves matters wholly collateral to the merits of the underlying unfair labor practice cases, which cannot proceed until this case concludes.

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COUNTERSTATEMENT OF JURISDICTION

The National Labor Relations Board agrees with Sanderson Farms, Inc.'s statement of jurisdiction.

COUNTERSTATEMENT OF THE ISSUES

1. The NLRB has applied for enforcement of two investigative subpoenas. Sanderson Farms raises no challenge to several paragraphs of one subpoena. Did the District Court abuse its discretion in enforcing those paragraphs of the subpoena?

2. Sanderson Farms challenges parts of the subpoenas, claiming that NLRB agents engaged in "dishonesty." It does not allege that it relied in any way upon misrepresentations, or that any part of the NLRB's investigation was aided by deceit. Did the District Court abuse its discretion in enforcing the challenged subpoena paragraphs?

3. The District Court (i) found that the subpoena did not seek privileged information, and (ii) balanced privacy interests against the NLRB's statutory power to obtain access to relevant information. The court concluded that the subpoena should be enforced. Did it abuse its discretion?

4. The underlying charges allege that employees were discriminated against, but do not use the exact phrase "disparate treatment." Sanderson Farms alleges that evidence of disparate treatment is irrelevant to the charges. (i) Did Sanderson

Farms forfeit this argument by failing to preserve it? (ii) If not, did the District Court abuse its discretion in finding that evidence of disparate treatment could conceivably be relevant to the merits of charges alleging antiunion discrimination?

5. An employee signed a statement stating her opinion that she was terminated for filing a workers' compensation claim. The District Court concluded that such a statement, without more, does not oust the NLRB of all jurisdiction to investigate charges of antiunion discrimination relating to the employee. Did it abuse its discretion?

COUNTERSTATEMENT OF THE CASE

I. Charges are filed with the NLRB; the Regional Office investigates.

The facts of this case are set out in the Board's brief in case 15-60333 ("NLRB Br. I" 2-12). We will not repeat that description, but limit our discussion to facts pertinent to new matters raised in this second appeal.

For some time now, Region 15 ("the Region") of the National Labor Relations Board (the "NLRB" or "Agency")[1] has been investigating a group of seven related unfair labor practice charges filed against Sanderson Farms, Inc. ("Sanderson Farms").[2] One of those charges, NLRB Case No. 15-CA-089244 (the

[1] References to the "NLRB" or "Agency" refer to the agency as a whole; references to the "Board" refer specifically to the five-member administrative adjudicatory body created by 29 U.S.C. § 153(a).

[2] NLRB Charge Nos. 15-CA-066574 (ROA.15-60333.77), 15-CA-071103 (ROA.15-60333.82), 15-CA-071104 (ROA.15-60333.86), 15-CA-071119

Taylor charge), was filed by an individual, Tina Taylor, in September 2012, and later amended twice. (ROA.15-60820.23-25). The Region investigated the Taylor charge and, in furtherance of that investigation, issued a subpoena duces tecum, No. B-626194, to Sanderson Farms.[3] (ROA.15-60820.68-75). Sanderson Farms refused to comply and instead petitioned to revoke that subpoena; the Board denied the petition to revoke in March 2013. On April 30, 2013, the Region determined that the Taylor charge should be deferred to a contractual grievance-arbitration procedure then in effect between Local 693 and Sanderson Farms. (ROA.15-60820.27-31).[4]

(ROA.15-60333.90), 15-CA-089244 (ROA.15-60820.23-25), 15-CA-103890 (ROA.15-60820.35-36), and 15-CA-109264 (ROA.15-60820.38).

[3] Subpoena B-626194 is not at issue in this case; since its issuance, it has been superseded by Subpoena B-716560 (see below).

[4] In certain cases, the issues raised in unfair labor practice charges overlap substantially with issues relating to potential breach of a collective bargaining agreement (often where discipline may be alleged both to violate a contract's requirement that discipline be for "just cause," and the NLRA's requirement that discipline not be motivated by unlawful animus against an employee's protected activity). Assuming that certain other procedural requirements are satisfied, the NLRB's Regional Offices will generally hold those charges in a form of abeyance known as "deferral" until proceedings under the contract conclude, typically through the issuance of a final award by an arbitrator. *See generally Babcock & Wilcox Constr. Co.*, 361 NLRB No. 132 (Dec. 15, 2014) (describing this process as well as the standard of review that the Board uses once an arbitral award issues); National Labor Relations Board, *Casehandling Manual Part I: Unfair Labor Practice Proceedings* § 10118 (Aug. 2015).

If, as occurred in this case, it becomes clear that a charge cannot or will not be adequately resolved through contractual processes, the Region may revoke deferral and resume processing the charge. *See, e.g.*, (ROA.15-60820.29) (Regional

The remaining six charges were filed by Laborers' International Union of North America, Local 693 ("Local 693" or "the Union"). The two charges relevant to this proceeding, NLRB Case Nos. 15-CA-103890 and 15-CA-109264, alleged that Sanderson Farms discriminated against an employee, Takisha McGhee, because of her union activity (the McGhee charges). (ROA.15-60820.35-38). Those charges were deferred to arbitration on July 31, 2013 and September 19, 2013, respectively.

At virtually the same time as the second McGhee charge was deferred, the Laborers' International Union put Local 693 into trusteeship. (ROA.15-60333.20). On February 4, 2014, the Deputy Trustee wrote the Region and asked to withdraw all seven charges. (ROA.15-60333.20).[5] On February 24, the Region notified Sanderson Farms that it had revoked deferral of the Taylor and McGhee charges and would resume processing of those charges. (ROA.15-60820.63).

On March 3, 2014, the Region solicited a position statement from Sanderson Farms on the Taylor charge, and also requested that Sanderson Farms provide documents previously sought in subpoena B-626194. (ROA.15-60820.65-66). That request was renewed on April 11. (ROA.15-60820.77). Also on March 3, the

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Director's letter explaining the circumstances under which deferral will be revoked).

[5] Later, counsel for Local 693 wrote the Region clarifying that the Union had entirely disclaimed its representation of Sanderson Farms employees. (ROA.15-60333.26-27).

Region asked Sanderson Farms to provide a position statement and relevant documentary evidence on one of the McGhee charges, and on March 6, the Region solicited Sanderson Farms' evidence on the other McGhee charge. (ROA.15-60820.79 and ROA.15-60820.81). On April 17, 2014, the Region again solicited Sanderson Farms' evidence on all three charges. (ROA.15-60820.83).

II. The Region issues investigative subpoenas to Sanderson Farms.

On April 28, having still received no responsive evidence from Sanderson Farms on either the Taylor or McGhee charges, the Region issued subpoena ad testificandum A-971389 (the "Testimonial Subpoena"), requiring testimony as to the McGhee charges. (ROA.15-60820.85-88). The next day, the Region issued subpoena duces tecum B-716560 (the "Document Subpoena"), which required Sanderson Farms to produce documents relevant to both the Taylor charge and the McGhee charges. (ROA.15-60820.90-99).

Each of the two subpoenas at issue (collectively, "the Subpoenas") seeks relevant information for the Region's investigation. The Testimonial Subpoena requires a Sanderson Farms official to appear and provide a sworn affidavit concerning the McGhee charges. The Document Subpoena seeks information on both the Taylor charge (paragraphs 1-11) and the McGhee charges (paragraphs 12-15). (ROA.15-60820.92-96). As to Taylor, the Document Subpoena seeks Taylor's personnel file and her medical records retained by Sanderson Farms, as well as

documents relating to Sanderson Farms' policies with regard to employees working under medical restrictions and a list of employees who worked under medical restrictions during a defined period in 2012. (ROA.15-60820.15-17). As to McGhee, the Document Subpoena requires production of her personnel file, Sanderson Farms' applicable progressive discipline policy, documents reflecting the work rules which McGhee is alleged to have broken prior to her termination, and comparable disciplines issued to other employees. (ROA.15-60820.18).

III. Sanderson Farms refuses to comply with the Subpoenas; the Board and District Court reject its arguments.

Sanderson Farms petitioned the Board to revoke the Subpoenas, but the Board denied both petitions on July 23, 2014. (ROA.15-60820.141-143). Following the Board's denial of the petitions to revoke, the Region sent six emails to Sanderson Farms' counsel (two each on July 25, August 4, and August 13) requesting that Sanderson Farms comply with the Subpoenas. (ROA.15-60820.155-159). On August 17, Sanderson Farms' counsel acknowledged receipt of these emails and intimated that Sanderson Farms would await proceedings to enforce the Subpoenas. (ROA.15-60820.176).

On December 22, 2014, the NLRB moved the United States District Court for the District of Mississippi (the "District Court") to enforce the Subpoenas. (ROA.15-60820.8). Sanderson Farms sought to stay that action pending resolution of the lawsuit against the NLRB which has now been briefed to this Court in the

companion case 15-60333. (ROA.15-60820.182-184). On April 20, 2015, following the dismissal of Sanderson Farms' lawsuit, the District Court denied (as moot) Sanderson Farms' motion to stay proceedings and ordered Sanderson Farms to respond to the NLRB's application. (ROA.15-60820.244-245).[6] Sanderson Farms then filed *another* delaying motion, this one styled a "Motion For Stay Pending Appeal," on May 8, 2015, asking the District Court to halt the subpoena enforcement case until case 15-60333 was decided. (ROA.15-60820.254-255). On May 12, Sanderson Farms finally responded to the NLRB's enforcement application. (ROA.15-60820.268-285).

On November 18, 2015, the District Court issued a memorandum opinion and order ruling against Sanderson Farms on all points. (ROA.15-60820.340-349). First, the court rejected Sanderson Farms' request to stay enforcement of the Subpoenas pending appeal of its suit against the NLRB. (ROA.15-60820.341-344). Next, the court determined that "privacy concerns of employees" did not warrant refusal to enforce the Subpoenas, and that the information sought by the Subpoenas was and is relevant and necessary. (ROA.15-60820.345-347). The court then held that the NLRB did not "lack [] jurisdiction" to investigate the McGhee charges. (ROA.15-60820.347-348). Finally, the court ruled that the Subpoenas were not

[6] Contrary to Sanderson Farms' assertion to this Court (Br. 3), the District Court never stayed proceedings in the subpoena enforcement action.

unduly burdensome, an argument Sanderson Farms has since abandoned. (ROA.15-60820.348-349).

On November 19, 2015, Sanderson Farms filed its notice of appeal to this Court. (ROA.15-60820.350-351). Subsequently, in brief orders, this Court granted motions to stay enforcement of the Subpoenas pending appeal and to expedite this appeal, and consolidated the subpoena enforcement appeal with the appeal in 15-60333. (ROA.15-60820.352-355).

SUMMARY OF ARGUMENT

This case involves enforcement of two routine investigative subpoenas. In determining whether to uphold a district court decision to enforce subpoenas of this type, this Court employs a highly deferential standard of review. The NLRB need show only that the district court did not abuse its discretion in finding that the information sought meets a minimal threshold of relevance and is not unduly burdensome. Appellant Sanderson Farms nonetheless alleges that the District Court abused its discretion in multiple respects.[7]

First, Sanderson Farms rehashes its argument from companion case 15-60333, in which it contends that supposed NLRB "dishonesty" should result in the NLRB's Regional Office being ordered to dismiss two of the three unfair labor

[7] Sanderson Farms does not challenge six paragraphs of the Document Subpoena, and the District Court judgment enforcing those paragraphs is accordingly entitled to summary enforcement.

practice charges underlying the subpoenas. The NLRB's prior brief explains why this request has no legal basis, and we fully reaffirm those arguments. But Sanderson Farms' argument is doubly erroneous in the context of a subpoena-enforcement case. The only scenario where this Court has permitted such matters to be litigated in subpoena-enforcement proceedings is where the subpoenas themselves were issued as a direct result of fraud or deceit, and Sanderson Farms alleges no comparable misconduct here. *Securities and Exchange Commission v. ESM Government Securities, Inc.*, 645 F.2d 310, 317-18 (5th Cir. 1981). As a result, Sanderson Farms' argument relates only to the merits of the underlying charges, and long-settled law precludes the assertion of merits defenses to resist a subpoena.

Second, Sanderson Farms contends that the subpoenas unduly burden employee privacy. The District Court did not err—much less abuse its discretion—in finding (i) that none of the information sought was privileged from disclosure pursuant to subpoena, and (ii) that the relevance of the information sought outweighs its impact upon employee privacy interests.

With respect to privilege, it is undisputed that a single line-item of one of the Subpoenas—paragraph 2 of the Document Subpoena—seeks information that enjoys statutory confidentiality under the Americans with Disabilities Act (the ADA) and related legislation. (The remaining information that Sanderson Farms

suggests is confidential is not, in fact, covered by the ADA or related laws.) But numerous trial courts have squarely rejected claims that the ADA privileges information against civil discovery. The correct rule, as those courts have recognized, is to permit discovery subject to appropriate limitations and confidentiality requirements—requirements which pose no issue here, as the NLRB strictly limits outside-party access to private information obtained during its investigations.

The District Court also correctly concluded that Sanderson Farms' more generalized complaints about privacy were outweighed by the relevance of the subpoenaed information to the NLRB's investigation. The court applied the balancing test announced by the Third Circuit in *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 578 (3d Cir. 1980)—a legal standard that Sanderson Farms itself approves. Sanderson Farms also does not suggest that the District Court failed to take pertinent facts into account; consequently, it fails to show an abuse of discretion.

Third, Sanderson Farms attempts to raise an issue never raised to the Board, and hardly even argued to the district court—an alleged disconnect between the language of the underlying unfair labor practice charges, which allege antiunion discrimination but do not use the precise phrase "disparate treatment," and the Document Subpoena, which seeks disparate-treatment evidence. This argument,

aside from being forfeited below, is patently frivolous. Nearly sixty years ago, the Supreme Court expressly rejected the idea that the NLRB's investigatory powers were limited to the "precise particularizations of a charge." *NLRB v. Fant Milling Co.*, 360 U.S. 301, 308 (1959). The test of relevance for purposes of an administrative subpoena is whether the information sought could bear upon the validity of the underlying charges, and that test is trivially passed here.

Fourth, Sanderson Farms puts before the court a statement from employee Takisha McGhee, stating in relevant part that she believes that she was terminated for seeking workers' compensation. Sanderson Farms suggests that this statement somehow ousts the NLRB of all jurisdiction to investigate McGhee's charges. This argument is a *non sequitur*—employees' speculative opinions about the most likely reasons why they may have been terminated do not delimit agency jurisdiction, and even if McGhee's statement *is* correct, it does not establish that Sanderson Farms did not violate the National Labor Relations Act, much less establish that subpoena enforcement should be denied. The District Court did not abuse its discretion by finding McGhee's statement irrelevant to the issues at hand.

The judgment of the District Court should be affirmed in its entirety.

STANDARD OF REVIEW

Section 11 of the National Labor Relations Act, 29 U.S.C. § 161, grants to the NLRB and its agents "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 any matter under investigation or in question." Such subpoenas may "requir[e] the attendance and testimony of witnesses," *id.*, and "attendance of witnesses and the production of [] evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing," *id.*

"A district court is required to uphold a subpoena if production of the evidence . . . called for by the subpoena . . . relate[s] to a matter under investigation or in question, and if that evidence is described with sufficient particularity." *NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 113 (5th Cir. 1982) (quotations and citations omitted). In turn, a district court's order enforcing a subpoena will be overturned only if the court abused its discretion. *Id*. As this Circuit has stated, "[o]ur standard of review, in short, requires us to reverse the district court's decision to enforce the subpoenas only in the most extraordinary of circumstances." *Id.*

ARGUMENT

I. The NLRB is entitled to summary enforcement of uncontested paragraphs of the Document Subpoena.

Paragraphs 3-7 and 10 of the Document Subpoena are not challenged by any of Sanderson Farms' arguments on appeal in this case. Those paragraphs relate to the Taylor charge, which is not encompassed by Sanderson Farms' claims of

NLRB "dishonesty" in declining to permit the withdrawal of charges filed by Local 693 (Br. 8-12) (§ II, *infra*); because the Taylor charge was filed directly by Taylor herself, the Union could not withdraw it. Of course, those paragraphs are also not encompassed by Sanderson Farms' claim that the Board "lacks jurisdiction" over the *McGhee* charges (Br. 34-36) (§ V, *infra*). Moreover, Sanderson Farms' arguments concerning employee privacy (Br. 13-23) (§ III, *infra*) apply only to paragraphs 1, 2, 8, 9, 11, 12, and 15, and its arguments as to relevance (Br. 23-34) (§ IV, *infra*), apply only to paragraphs 9, 11, and 15. Because Sanderson Farms raises no argument on appeal that would affect the validity of paragraphs 3-7 and 10 of the Document Subpoena, the District Court's order enforcing those paragraphs is entitled to summary affirmance.

II. Putative "agency dishonesty" cannot justify Sanderson Farms' refusal to obey the Subpoenas.

Sanderson Farms opens its attack upon the Subpoenas by rehashing its arguments from case 15-60333 that the McGhee charges should have been permitted to be withdrawn, but were not, due to NLRB "dishonesty." (Br. 8-12.) In the NLRB's prior brief in these now-consolidated cases, we explained why inchoate claims of "dishonesty" do not suffice to establish subject-matter

jurisdiction to impose injunctive relief against the NLRB, and we reaffirm those arguments here. (NLRB Br. I 16-39.)[8]

Moreover, even if Sanderson Farms' claim of "dishonesty" were valid (which it is not), the argument would go to the merits of the NLRB's proceeding against Sanderson Farms, not the enforceability of the Subpoenas. Liberally construed, Sanderson Farms' argument seems to be that the Subpoenas are unenforceable due to abuse of process by the Region. If so, however, Sanderson Farms has entirely failed to cite the controlling case regarding when an agency's alleged "fraud, deceit or trickery" amounts to an abuse of process and is grounds for denying enforcement of an administrative subpoena: *Securities and Exchange Commission v. ESM Government Securities, Inc.*, 645 F.2d 310 (5th Cir. 1981). Because any errors committed by the NLRB in this case plainly do not meet the

[8] Sanderson Farms confuses the concept of "equity" with that of subject-matter jurisdiction. Br. 8-9. They are entirely distinct. Since the merger of law and equity through the Federal Rules of Civil Procedure nearly eighty years ago, there has been no such thing as federal "equity jurisdiction"; there is only federal subject-matter jurisdiction, which is either present or not present, depending upon whether applicable requirements have been met. *Cf.* 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1042 n.3 (3rd ed. 2004) (separate equity practice of the federal courts is eliminated); *id.* § 1044 (noting that an argument that a federal court lacks equity jurisdiction "serves no purpose unless the posture of the case excludes federal jurisdiction over the subject matter—that is, the court lacks power to administer any relief whatsoever").

Here, the relevant jurisdictional requirements are set forth in *Leedom v. Kyne*, 358 U.S. 184, 190 (1958), and for the reasons already set forth in the NLRB's earlier brief, those requirements cannot be satisfied.

requirements to find abuse of process under *ESM*, they do not warrant denial of enforcement of the Subpoenas.

In *ESM*, a government agent obtained access to a facility through a ruse, stating that he was present to investigate another company and that he would like "a basic education in the [relevant] market." *Id.* at 311. He and other SEC agents then repeated this behavior to gather additional information. *Id.* at 312. After the respondent became suspicious and stopped cooperating, the SEC issued a subpoena to ESM to continue its investigation. This Court held that abuse of process would bar enforcement of the subpoena only if three distinct factual findings were made: "First, did the SEC intentionally or knowingly mislead ESM about the purposes of its review of ESM's files? Second, was ESM in fact misled? Third, is the subpoena the result of the SEC's allegedly improper access to ESM's records?" *Id.* at 317-18 (internal citation and footnote omitted). Having framed these questions for the district court to resolve, the Court then remanded for further proceedings.

Perhaps Sanderson Farms has elided *ESM* because its test cannot be met. While Sanderson Farms vents much spleen at the Agency's "dishonesty," it does not and cannot show that the NLRB has ever misled it about anything material to the Subpoenas.[9] The purpose of the Agency's investigation (whether McGhee's

[9] All of these alleged "dishonesties" relate to the supposed desire of employees *other than McGhee* not to participate in the litigation of *other charges* against Sanderson Farms. And as stated, the asserted "dishonesties" are not relevant to

discipline and termination violated the NLRA's prohibition on antiunion discrimination) has always been clear.[10] Nor can Sanderson Farms prevail upon the remaining factors identified by the *ESM* court: Sanderson Farms has never detrimentally relied upon misrepresentations by the NLRB. And the information that led to the issuance of the Subpoenas was obtained from third parties, not by duping Sanderson Farms into damaging admissions through "dishonesty."

Thus, since the alleged "dishonesty" constitutes at most a defense to the underlying Board proceeding and not an abuse of process in issuance of the Subpoenas themselves, it is of no moment here.[11] Both this Court and every other circuit court to consider the matter, in a veritable legion of cases, have held that defenses to the merits of an action have no bearing on the enforceability of a subpoena.[12] Nor, indeed, may parties assert claimed "procedural irregularities" in

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Taylor because she filed her own charge; accordingly, the union could not request its withdrawal.

[10] The supposed "dishonesties" were also not knowing—they were, at worst, miscommunications or inadvertent errors. NLRB Br. I at 13 n.11. This Court need not resolve this disputed issue, because the other requirements of *ESM* are patently not met here.

[11] Sanderson Farms counterproductively notes that its "dishonesty" defense would appear to be unmeritorious under Board law. Br. 12 n.3. But even if so, this does not mean that Sanderson Farms is *denied an adequate opportunity* to raise that defense in the administrative proceedings—it means only that the defense is unlikely to succeed.

[12] *See Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943); *NLRB v. Line*, 50 F.3d 311, 315 (5th Cir. 1995); *NLRB v. Wilson*, 335 F.2d 449, 451 (5th Cir. 1964); *Link v. NLRB*, 330 F.2d 437, 440 (4th Cir. 1964); *NLRB v. C.C.C.*

an agency investigation as defenses to a subpoena.[13] This rule is essential; parties cannot be permitted to turn every proceeding to enforce a subpoena into a miniature inquest into the merits of agency proceedings. To do so would both enmesh the district courts in adjudication of matters over which they have no jurisdiction, and waste the resources and time of the parties.[14]

Accordingly, Sanderson Farms' first assignment of error must be rejected.

III. The NLRB's compelling interest in obtaining a response to the Document Subpoena outweighs its minimal impact upon employee privacy.

Sanderson Farms' second claim of error (Br. 12-23) is that several paragraphs of the Document Subpoena should be denied enforcement because "privacy concerns" of Sanderson Farms employees outweigh the NLRB's interest

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Associates, 306 F.2d 534, 538 (2d Cir. 1962); *see also EEOC v. A.E. Staley Mfg. Co.*, 711 F.2d 780, 788 (7th Cir. 1983); *EEOC v. Children's Hosp. Medical Center of Northern California*, 719 F.2d 1426, 1430 (9th Cir. 1983) (en banc), and cases cited therein; *NLRB ex rel. Int'l Union of Elec., Radio & Mach. Workers v. Dutch Boy, Inc.*, 606 F.2d 929, 932-33 (10th Cir. 1979); *Cudahy Packing Co. v. NLRB*, 117 F.2d 692, 694 (10th Cir. 1941).

[13] *Dutch Boy*, 606 F.2d at 933 (citing *C.C.C. Associates*, 306 F.2d at 538, and *Storkline Corp. v. NLRB*, 298 F.2d 276, 277 (5th Cir. 1962) (pin cites added)).

[14] *Endicott Johnson*, 317 U.S. at 508-09 (district court had no authority to hold its own trial of question of statutory coverage in subpoena enforcement proceeding, and it would be impractical to require agency to bifurcate its proceedings to resolve the coverage issue first); *Wilson*, 335 F.2d at 451 (court in subpoena enforcement case has no authority to determine disputed fact issues); *Hamilton v. NLRB*, 177 F.2d 676, 677 (9th Cir. 1949) (inappropriate for respondent to "demand that the pending inquiry be halted while piecemeal reviews are sought in the courts"); *Dutch Boy*, 606 F.2d at 933 ("piecemeal appeals will disrupt and delay resolution of labor disputes").

in obtaining "confidential medical information." These claims are without merit.[15] The subpoenaed information is not protected by any privilege created by federal law. Moreover, the Region seeks information that bears directly upon the question at issue in the unfair labor practice cases, while the confidentiality interests identified by Sanderson Farms are attenuated and provide no basis for withholding relevant information.

A. Compliance with the Document Subpoena would not force Sanderson Farms to violate federal law.

Sanderson Farms alleges that four paragraphs of the Document Subpoena should be denied enforcement because, it claims, to enforce them would require it to violate federal law: paragraph 1 seeks Tina Taylor's personnel file, paragraph 2 seeks Tina Taylor's medical file, paragraph 8 seeks Sanderson Farms' work-restrictions policies, and paragraph 9 seeks the names and contact information of employees who worked under restrictions at the same facility as Taylor at relevant times in 2012.[16]

Under the Americans with Disabilities Act of 1990 (the ADA), 42 U.S.C. § 12101 et seq., and an implementing regulation of the EEOC, 29 C.F.R. § 1630.1-

[15] In the interests of narrowing the issues, we assume *arguendo* that Sanderson Farms has standing to raise the privacy rights of third-party employees, as the District Court apparently did below by failing to pass on the question.

[16] Sanderson Farms intermingles this contention with its more general claim that the subpoenas constitute unwarranted intrusions on employee privacy (Br. 15-23); for clarity, we have sought to untangle these analytically distinct arguments.

16, employers are generally prohibited from requiring employees to undergo medical examinations, but may do so at certain specified times, including when the examination is "job-related and consistent with business necessity." 29 C.F.R. § 1630.14(c). Information obtained through medical examinations must be "maintained on separate forms and in separate medical files and be treated as a confidential medical record." *Id.*[17]

Confidentiality provisions of this sort, however, do not create an absolute privilege against disclosure of medical files; rather, they limit such disclosure to "those with a legitimate need for the information." *Scott v. Leavenworth Unified School District No. 453*, 190 F.R.D. 583, 586 (D. Kan. 1999).[18] Indeed, the *Scott*

[17] Similarly, an implementing regulation of the Department of Labor under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq., requires employers to keep certifications of qualifying serious health conditions and medical history information in confidential medical files. 29 C.F.R. § 825.600. Other federal laws, such as the Genetic Information Nondiscrimination Act of 2008, impose similar requirements. However, one of the statutes cited by Sanderson Farms, the Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320d-1(a), does not apply to employers as such. It applies only to "covered entities," i.e. health care providers, plans and clearinghouses, or "business associates" which create, receive, maintain, or transmit health information on behalf of covered entities. 45 C.F.R. §160.103. As Sanderson Farms is none of these things, HIPAA is irrelevant to this case.

[18] *Accord Doe v. U.S. Postal Service*, 317 F.3d 339, 344 (D.C. Cir. 2003) (purpose of ADA's confidentiality provisions is to "ensur[e] that the information disclosed pursuant to an employer's medical inquiry spreads no farther than necessary to satisfy the legitimate needs of both employer and employee"); *In re National Hockey League Players' Concussion Injury Litigation*, MDL No. 14–2551, __ F. Supp. 3d __, 2015 WL 4621368, at *6-8 (D. Minn. July 31, 2015) (authorizing

court ordered disclosure of *comparator employees'* medical files to a plaintiff alleging disability discrimination, not merely (as here) the complainant's own medical file. *Id.* at 585-87. The court observed that "[s]urely, Congress never intended for a defendant charged with violating the ADA to use the ADA's confidentiality provisions to impede a plaintiff's ability to discover facts that might help the employee establish his/her claims." *Id.* at 587.[19] Likewise, Sanderson Farms' argument in this case amounts to an attempt to wield *Taylor's own privacy rights* as a sword against her claim that Sanderson Farms treated her medical conditions differently from those of other employees for prohibited reasons, not as those rights were intended (as a shield against unwarranted disclosure of medical history to parties with no need for that information).

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plaintiffs to discover information about head trauma injuries for purposes of showing defendant's knowledge about dangers of concussions); *Floyd v. SunTrust Banks, Inc.*, 878 F. Supp. 2d 1316, 1326-27 (N.D. Ga. 2012) (employer's disclosures of confidential medical records pursuant to discovery requirements of Federal Rules of Civil Procedure were "required or necessitated by another federal law or regulation" and therefore did not violate ADA); *McDonald v. Akal Sec.*, No. 09-CV-573-CVE-TLW, 2010 WL 3168102, at *3-5 (N.D. Okla. Aug. 10, 2010), *objections overruled sub nom. McDonald v. Holder*, No. 09-CV-0573-CVE-TLW, 2010 WL 4362821 (N.D. Okla. Oct. 26, 2010) (confidential medical files not privileged from civil discovery).

[19] There is no merit to Sanderson Farms' suggestion, Br. 19-20, that disclosure of medical information is justified only by threats to public health. At the outset of its discussion of privacy issues, the court in *Westinghouse* made plain that "public health *or other public concerns* may support access to facts an individual might otherwise choose to withhold." 638 F. 2d at 576 (emphasis added).

Sanderson Farms counters by citing *Johnson v. Nissan North America, Inc.*, 146 S.W. 3d 600, 606 (Tenn. Ct. App. 2004). *Johnson* does note, in *dicta*, that the EEOC once took the position that disclosure of information contained in confidential medical files in a state-court civil action could potentially subject an employer to liability under the ADA. *Id.* But *Johnson* cited no examples of this scenario actually occurring, and had no occasion to address the rule that, in general, a mere confidentiality requirement will not automatically be construed to create a litigation privilege. *See Scott*, 190 F.R.D. at 586 (creation of privilege requires more than mere confidentiality requirement; the privilege must also be consistent with statutory objectives); *McDonald*, 2010 WL 3168102, at *4, and cases cited therein (distinguishing confidentiality from privilege). Nor does Johnson address the ADA's own provision exempting employers from liability where *federal* law or regulation requires that information be disclosed. *Floyd*, 878 F. Supp. 2d at 1326-27 (where disclosure is mandated under Federal Rules of Civil Procedure, it does not violate the ADA). Indeed, it was unclear whether any of the information sought in discovery in *Johnson* actually constituted a confidential medical record at all. 146 S.W. 3d at 606. *Johnson* is thus of little persuasive value on this issue.

Even if *Johnson* were persuasive, it is inapplicable to paragraphs 1, 8, and 9 of the Document Subpoena. Paragraph 1 seeks Tina Taylor's personnel file, which

by Sanderson Farms' own admission (Br. 18), must not contain medical information. Paragraph 8 seeks corporate policies, not medical information.[20] And paragraph 9 seeks only names and contact information of employees who worked with restrictions during part of 2012. The District Court correctly held that this information does not fall within the protections of any relevant statute. (ROA.15-60820.347). Employees may have worked light duty for reasons having nothing to do with the ADA. The mere fact that an employee appears upon the produced list will not even inform the NLRB that the employee had an ADA-covered disability at all, much less the nature of that disability. Thus, these subpoena paragraphs impair no statutory confidentiality interest.[21]

Finally, Sanderson Farms' suggestion that the District Court should have "require[d] the NLRB to give [other] employees prior notice and allow them to raise their personal claims of privacy" (Br. 21) effectively ends any dispute over paragraph 9, because that is *precisely the effect* of providing the Region with employee contact information. The Region will contact those employees, who may

[20] Indeed, given that corporate policies must be generally understood by employees to have any salutary effect, we are at a loss to understand how the information requested in paragraph 8 could possibly be deemed "private" at all.

[21] The Region has also twice offered to accommodate Sanderson Farms' concerns about employee privacy by accepting the *inverse* of what is requested in paragraph 9: relevant records concerning Sanderson Farms' use of light duty for third-party employees, with personally identifiable information redacted. (ROA.15-60820.65; ROA.15-60820.159).

disclose as much (or as little) information to the investigator as they are comfortable with disclosing. Employees can only be compelled to provide information if the Region separately subpoenas them, and those employees may "raise their personal claims of privacy" at such time.

Thus, statutory confidentiality requirements do not excuse Sanderson Farms from compliance with paragraphs 1, 2, 8, and 9 of the Document Subpoena.

B. Generalized privacy concerns do not outweigh the NLRB's specific need for the subpoenaed information.

There is also no merit to Sanderson Farms' fallback contention that generalized concerns about "the ability of government officials to use information technology in a manner detrimental to individual privacy" warrant a denial of enforcement. Br. 16-17.[22] The District Court correctly found that the public interest in preventing unfair labor practices outweighs any impact upon employees' privacy.

"In addressing the merits of an individual's right to confidentiality claim, a court must weigh the government's interest in disclosure against the individual's

[22] Sanderson Farms does not make clear which paragraphs of the subpoena it is challenging as violative of employee privacy. In places, it discusses "personnel records" (*e.g.*, Br. 14, 26), but the bulk of its discussion at Br. 13-23 focuses upon considerations specific to medical records. In an abundance of caution, we discuss both types of records below.

privacy interest."[23] In *United States v. Westinghouse Electric Corp.*, cited with approval by Sanderson Farms (Br. 15-17) and by the District Court below (ROA.15-60820.345), the Third Circuit identified a number of factors to be analyzed in striking this balance:

> the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

638 F.2d 570, 578 (3d Cir. 1980).

The information sought by the Document Subpoena falls at various points upon the spectrum of employees' privacy interests. Tina Taylor's medical file (paragraph 2) may be at the zenith of such interests. *Id.* at 577. But mere disclosure to the NLRB that particular employees were assigned light or restricted duty (paragraph 9) poses a lessened risk of intrusion, and the contents of employees' general personnel files (paragraphs 1, 11, 12, and 15) are only modestly private and are subject to subpoenas where relevant.[24]

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[23] *Nat'l Treasury Employees Union v. U.S. Dept. of Treasury*, 25 F.3d 237, 242-43 (5th Cir. 1994) (citing *Woodland v. City of Houston*, 940 F.2d 134, 138 (5th Cir.1991); *Fraternal Order of Police, Lodge 5 v. City of Phila.*, 812 F.2d 105, 110 (3d Cir.1987); *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978)).

[24] *See generally EEOC v. Alliance Residential Co.*, 866 F. Supp. 2d 636, 645 (W.D. Tex. 2011), and cases cited therein.

Set against these pedestrian privacy interests are the NLRB's explicit statutory mandate to eliminate unfair labor practices, 29 U.S.C. § 160(a), and its equally explicit Congressional authorization to obtain evidence relevant to its cases, 29 U.S.C. § 161(1). All of the information sought is vital to the NLRB's investigation. Taylor's personnel and medical files are essential to understand the history of her employment, Sanderson Farms' reasons for disciplining her, and whether those reasons were honestly believed or were a mere pretext for unlawful animus.[25] The same can be said of McGhee's personnel file. And evidence of comparable disciplines (paragraphs 11 and 15) and treatment of employees with comparable work restrictions (paragraph 9) is even more important. Dissimilar disciplines (or the absence of discipline altogether) given to other employees for similar actions or with similar restrictions may show whether Taylor and/or McGhee were treated with undue harshness relative to similarly-situated employees.[26] Or the evidence may show the opposite—that the instant disciplines were lawfully motivated. Regardless of which of these scenarios unfolds, the

[25] *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 782 (8th Cir. 2013); *Tidewater Construction Corp.*, 341 NLRB 456, 458 (2004); *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995), *enfg.* 312 NLRB 155 (1993) (evidence of pretext may be used to show discriminatory motivation).

[26] *E.g. Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 465 (5th Cir. 2001); *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4 (Feb. 20, 2014) (citing *Windsor Convalescent Center*, 351 NLRB 975, 983 (2007), *enfd. in relevant part sub nom. S & F Market Street Healthcare LLC v. NLRB*, 570 F.3d 354 (D.C. Cir. 2009)).

public and the Agency have a compelling interest in ensuring that decisions as to whether to issue complaints upon unfair labor practice charges are based on evidence, not speculation.

Sanderson Farms asks this Court to conclude that the District Court abused its discretion and "short-circuited its analysis" in striking this balance. Br. 17. But the court appropriately recognized the competing interests: the NLRB's "statutorily mandated public interest in preventing" discrimination on the basis of union activity on one hand, and the fact that the subpoenaed documents "may contain private information that would cause harm if inadvertently disclosed" on the other. (ROA.15-60820.346). The court noted multiple factors weighing in the NLRB's favor. (ROA.15-60820.346). It explained that Taylor and McGhee had been discharged and thus disclosure of information about their employment had no potential to harm an existing relationship. (ROA.15-60820.346). The court also pointed out that there was no reason to believe that the NLRB could not protect the subpoenaed documents from unauthorized disclosure.[27] (ROA.15-60820.346). And it explained that the "need for access to those records is great, as the entire history

[27] To the contrary, the NLRB maintains a policy of strict confidentiality with respect to the contents of its investigative files. *See, e.g., NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224-25 (1978); *Alirez v. NLRB*, 676 F.2d 423, 426-27 (10th Cir. 1982). This Court has previously recognized that privacy interests are diminished when the information sought will remain within confidential government files. *Nat'l Treasury Employees Union*, 25 F.3d at 244.

of employment is needed for [the NLRB] to decide whether to pursue the charges." (ROA.15-60820.346).

Sanderson Farms identifies no additional facts that should have been considered, and (with the exception of its erroneous conflation of ADA confidentiality requirements with a privilege against discovery) does not even allege that the District Court applied the wrong legal standard. Sanderson Farms may *disagree* with the District Court's balancing, but mere disagreement cannot establish an abuse of discretion. The appeal on these points should be rejected.

IV. Comparator evidence is relevant to the NLRB's inquiry; Sanderson Farms' claim to the contrary is frivolous.

Paragraph 9 of the Document Subpoena seeks contact information for employees who, like Tina Taylor, worked for periods of time under medical restrictions. Paragraph 11 seeks disciplinary records and related documents for employees at the plant where Taylor worked who received discipline for one of four types of offenses similar to those for which Taylor was disciplined. And Paragraph 15 seeks similar records for employees who received discipline for either of two types of offenses similar to those for which Takisha McGhee was disciplined. While this is wholly ordinary grist for the mill of a discrimination case, Sanderson Farms spends 11 pages (Br. 23-34) explicating an almost entirely new argument that this evidence is irrelevant to the merits of the underlying charges. The putative basis for this is that the underlying charges do not state *in haec verba*

that the plaintiffs suffered disparate treatment. As shown below, Sanderson Farms' relevance argument is frivolous.

A. Sanderson Farms forfeited its relevance argument.

Sanderson Farms' relevance argument is nowhere to be found in its petition to revoke the subpoena. The *word* "relevance" is vaguely invoked at two points in paragraphs 13 and 15 of Sanderson Farms' petition. (ROA.15-60820.108). But the first of these is a complaint that the subpoena is a "fishing expedition," and the second is a catch-all complaint about undue burden. Sanderson Farms' relevance argument to this Court instead complains that the Document Subpoena does not adequately fit the charge language. The Board was never accorded any opportunity to rule on this issue (and, for that matter, the charging parties never had the opportunity to amend their charges to satisfy Sanderson Farms' specifications). Indeed, relevance is barely mentioned even in Sanderson Farms' brief at the District Court level. One can unearth a sort of fossil ancestor of its current argument (ROA.15-60820.279), but that half-paragraph scarcely resembles Sanderson Farms' appellate brief. This argument is forfeited.

A respondent's failure to exhaust administrative remedies for the quashing of a subpoena estops the respondent from challenging the subpoena before reviewing courts. *See EEOC v. Cuzzens of Georgia, Inc.*, 608 F.2d 1062, 1063 (5th Cir. 1979); *Maurice v. NLRB*, 691 F.2d 182, 183 (4th Cir. 1982); *NLRB v.*

Frederick Cowan & Co., 522 F.2d 26, 28 (2d Cir. 1975). To be sure, the respondents in those cases failed even to *file* petitions to revoke, but the same rule of forfeiture should apply where a respondent's petition to revoke fails to raise an argument. A key purpose of administrative exhaustion requirements is to permit agencies to correct their own errors, and thereby conserve scarce judicial resources by resolving matters at the agency level when possible rather than making a proverbial federal case out of every administrative dispute. *McKart v. United States*, 395 U.S. 185, 193-95 (1969). These purposes would be ill-served by treating any petition to revoke, no matter how sparse, as preserving any and all arguments for later use in court. An agency has no opportunity to correct a perceived error when the problem is not called to its attention.

And even if Sanderson Farms' failure to raise this argument to the Board had not forfeited this issue, its failure to adequately press the argument to the District Court did so. "If a litigant desires to preserve an argument for appeal, the litigant must press and not merely intimate the argument during the proceedings before the district court. If an argument is not raised to such a degree that the district court has an opportunity to rule on it, we will not address it on appeal." *FDIC v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994) (citing *Butler Aviation Int'l, Inc. v. Whyte (In re Fairchild Aircraft Corp.)*, 6 F.3d 1119, 1128 (5th Cir.1993)). In the District Court, Sanderson Farms never seriously contended that the subpoenaed information was

outside the scope of the charges—it merely made a handful of passing references to relevance in its discussion of employee privacy (addressed above in § III-B). In this Court, however, Sanderson Farms independently attacks the relevance of the subpoenaed information, and spends several pages discussing three EEOC cases (*see infra* § IV-B) which were never passed upon by either the Board or the District Court. This Court should decline to rule on Sanderson Farms' inadequately-preserved relevance argument.

B. Controlling law forecloses Sanderson Farms' relevance argument.

Setting forfeiture aside, Sanderson Farms' argument fails on its merits. As the Supreme Court explained 56 years ago:

> A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. The responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party. . . .
>
> Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power [citing 29 U.S.C. § 161, the Board's subpoena power] in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge.

NLRB v. Fant Milling, 360 U.S. 301, 307-08 (1959) (footnotes and internal citations omitted); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984) (relevant information for investigative purposes encompasses "virtually any material that might cast light on the allegations against the employer").

Sanderson Farms' flyspecking criticism of the charges for not explicitly alleging disparate treatment cannot prevail under *Fant Milling*. The Region's inquiry has been set in motion; it, not the charging parties, is tasked with "framing the issues." At this, the investigative stage, the only objective is to discover evidence relevant to whether to proceed with a complaint.[28] In short, Sanderson Farms' argument has no place in the statutory scheme of the NLRA.

The few nonbinding authorities Sanderson Farms cites are easily distinguishable. *EEOC v. Loyola University Medical Center*, 823 F. Supp. 2d 835 (N.D. Ill. 2011) (Br. 27), involved a charge that alleged that an employer had required employees to undergo medical examinations that were not job-related and consistent with business necessity, under 42 U.S.C. § 12112(d)(4)(A). The EEOC's subpoena, however, sought information about the individual medical records of

[28] It bears pointing out that *even as applied to a complaint itself,* the decision not to specifically allege disparate treatment would not impair the prosecution of a disparate-treatment theory at hearing. A Board complaint must set out "the unfair labor practices" and also "a clear and concise description of the acts which are claimed to constitute unfair labor practices." 29 C.F.R. § 102.15. Like other forms of notice pleading, however, a Board complaint need not set out the General Counsel's legal theory. *McDonalds USA, LLC*, 362 NLRB No. 168 (Aug. 14, 2015) ("The General Counsel is not required to plead his evidence or the theory of the case in the complaint."); *cf. Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 347 (2014) (summary per curiam) (reversing, without briefing or argument, the dismissal of a federal court complaint; plaintiff is not required to cite the particular statutory provision alleged to have been violated); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1219 (3d ed. 2004) ("[I]t is unnecessary to set out a legal theory for the plaintiff's claim for relief.") (footnote omitted).

employees, a matter the district court found to have no bearing on whether the tests themselves were sufficiently job-related. That information, the court found, would only be relevant to an allegation of disability *discrimination* under 42 U.S.C. § 12112(a). *Id.* at 839.[29] Similarly, *EEOC v. Forge Industry Staffing*, No. 14-mc-090, 2014 WL 6673574 (S.D. Ind. Nov. 24, 2014) (Br. 31-33), involved a charge alleging individual sexual harassment (under 42 U.S.C. § 2000e-5), yet the EEOC's subpoena focused on the possibility that the employer might be engaging in a pattern or practice of interference with employees' access to the courts (under 42 U.S.C. § 2000e-6).

These cases would be on point if the Region had, for instance, issued Sanderson Farms a subpoena to investigate whether it had dominated or impermissibly supported Local 693, which would implicate Section 8(a)(2) of the NLRA, which prohibits "company unions," rather than the antidiscrimination provisions of Section 8(a)(3) alleged in the charges. Evidence of disparate treatment, however, tends to show discrimination where it exists, which is all that relevance requires. *See supra* n. 26.

Meanwhile, the other case upon which Sanderson Farms relies heavily, *EEOC v. McLane Co.*, No. CV-12–615–PHX–GMS, 2012 WL 1132758 (D. Ariz.

[29] The charge in *Loyola* did allege disability discrimination as well as improper medical testing, but the district court separately found that the subpoena was overbroad as to that allegation. *Id.*

Apr. 4, 2012) ("*McLane I*") (Br. 23-25, 34), has been abrogated by a related case involving the same employer. The twin cases involved EEOC investigations into McLane's use of a physical capacity exam. In the first, which involved an allegation that the exam caused systemic age discrimination, the EEOC sought the contact information of individuals who had been subjected to the exam. The district court opined that individuals' information "could not shed light on whether [the test] represents a tool of age discrimination in the aggregate." *Id.* at *5. Some months later, the district court reaffirmed this claim in the context of a charge alleging that the exam caused systemic *gender* discrimination. *EEOC v. McLane Co.*, No. CV–12–02469–PHX–GMS, 2012 WL 5868959, at *5 (Nov. 19, 2012) ("*McLane II*").

The Ninth Circuit reversed *McLane II*. It explained, with respect to the EEOC's request for employee contact information, that

> the EEOC also wants to contact other McLane employees and applicants for employment who have taken the test to learn more about their experiences. Speaking with those individuals might cast light on the allegations against McLane—whether positively or negatively. To take but one example, the EEOC might learn through such conversations that other female employees have been subjected to adverse employment actions after failing the test when similarly situated male employees have not. Or it might learn the opposite. Either way, the EEOC will be better able to assess whether use of the test has resulted in a "pattern or practice" of disparate treatment. To pursue that path, however, the EEOC first needs to learn the test takers' identities and contact information, which is enough to render the pedigree information relevant to the EEOC's investigation.

EEOC v. McLane Co., 804 F.3d 1051, 1056-57 (9th Cir. 2015) ("*McLane III*"). Matters are no different in this case—the Region might learn, through conversations with employees other than Taylor who worked under medical restrictions, that open Union supporters received worse treatment with respect to light duty assignments than other employees. Or it might learn the opposite. Either way, the low bar of relevance for an investigative subpoena is easily hurdled.

Making matters even worse for Sanderson Farms' argument, the *McLane III* court then went on to squarely reject the company's claim that because the charge only alleged a disparate *impact* theory, evidence of disparate *treatment* was irrelevant. *Id.* at 1057. Much as *Fant Milling* held for the NLRB, *supra* p. 30, *McLane III* held that it was for the EEOC "to investigate whether and under what legal theories discrimination might have occurred." *Id.* The upshot: nothing of consequence from *McLane I* survives, even in the Ninth Circuit. All of the holdings upon which Sanderson Farms relies have been abrogated.

The contact information of similarly situated employees and information concerning similar disciplines plainly aids the NLRB's investigation on the question of whether Taylor and/or McGhee were disciplined for engaging in union or other protected activities. The District Court did not abuse its discretion by concluding that the challenged subpoena paragraphs seek relevant information.

V. The NLRB has not been deprived of jurisdiction over the McGhee charges.

Sanderson Farms' final argument relates to the McGhee charges. It alleges that the NLRB "lacks jurisdiction" over those charges because McGhee's real complaint relates to workers' compensation retaliation. (Br. 34-36.) Again, Sanderson Farms misconstrues the nature of administrative inquiry.

The basis for Sanderson Farms' claim of "lack of jurisdiction" is a one-page statement apparently signed by McGhee which states, in pertinent part, "I believe I was terminated because I filed a claim for worker's compensation benefits." (ROA.15-60820.286). There are at least three different reasons why McGhee's statement is immaterial, even assuming that it reliably reflects McGhee's views.[30]

First, the Agency investigates facts, not opinions. McGhee's opinion as to the most likely reason for her termination does not establish as a matter of law that her opinion is correct. (Ms. McGhee might be happy to accept a legally binding factual stipulation by Sanderson Farms that it terminated her solely for filing a workers' compensation claim, but we would be quite surprised if such a stipulation was on offer.)

[30] The NLRB's established policy is to take its own investigative affidavits concerning pertinent information. National Labor Relations Board, *Casehandling Manual Part I: Unfair Labor Practice Proceedings* § 10060.1 (Aug. 2015) (witnesses who have given non-Board affidavits should be re-interviewed on all pertinent details by Board agents). Non-Board affidavits are accorded substantially diminished weight by comparison.

Second, terminations can violate two or more statutes.[31] If an employer were to automatically terminate all union stewards for taking workers' compensation, but no other employees who took workers' compensation, such terminations would undoubtedly violate both state workers' compensation law and the NLRA. So even if Ms. McGhee's statement is true in all respects, it would not end the NLRB's inquiry.

Finally, if Sanderson Farms is really suggesting that it did not violate the NLRA because it terminated McGhee for filing a workers' compensation claim, such an idiosyncratic defense would run, at most, to the merits of the charges.[32] It has nothing to do with the NLRB's jurisdiction. The NLRB is investigating whether McGhee was fired for engaging in union activity, and Section 10(a) of the NLRA plainly empowers the Agency to prevent unfair labor practices of that sort—an authority which "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 29 U.S.C. § 160(a). Consequently, "it is for the agency, not the court, to determine the question of coverage in the first instance, regarding preliminary

[31] *E.g.*, *Beyoglu*, 362 NLRB No. 152, slip op. at 1 (July 29, 2015) (discharge of employee in retaliation for filing collective-action lawsuit under Fair Labor Standards Act violated the NLRA); *id.* at 5 (Member Miscimarra, dissenting) (disagreeing that discharge violated the NLRA, but explaining that the discharge violated the FLSA's antiretaliation provisions).

[32] As we have already shown in § II, merits defenses cannot be invoked to resist subpoena enforcement.

investigations into possible violations." *New Orleans Steamship Association v. EEOC*, 680 F.2d 23, 26 (5th Cir. 1982).

The district court did not abuse its discretion by rejecting Sanderson Farms' attack on the NLRB's jurisdiction.

CONCLUSION

The decision of the District Court should be affirmed in all respects.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,073 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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