The Mixed Case Dilemma: You Can't Get There From Here

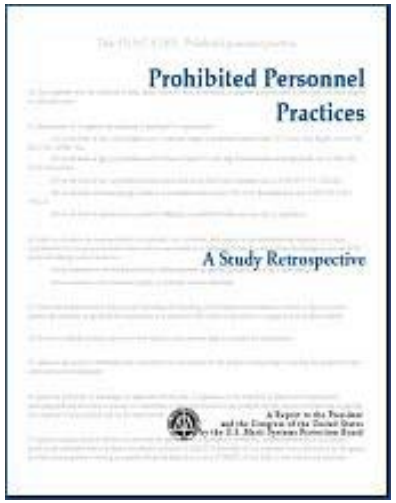
Laura M. Albornoz
Chief Administrative Judge
Denver Field Office

U.S. Merit Systems Protection Board

Merit Systems Protection Board's (MSPB) Mission

To protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices.

- By adjudicating employee appeals;
- Conducting merit systems studies; and
- Reviewing significant actions of the Office of Personnel Management (OPM).



What is an Adverse Action?

- An adverse action is an official action taken by a federal agency and imposed on an employee, such as an actual removal from employment or an actual reduction in grade or pay. 5 U.S.C. § 7512. Such official action is by statute clearly within the jurisdiction of the Board, and an aggrieved employee can appeal such an action to the Board.

Garcia v. Homeland Security, 437 F.3d 1322 (Fed. Cir. 2006).

Appealable Actions Involving Discrimination

- When an employee or applicant –

  a) has been affected by an "action" which the employee or applicant may appeal to the MSPB; and

  b) alleges that the basis for the action was prohibited discrimination –

The Board shall within 120 days decide both the appealable adverse action and the discrimination issue. 5 U.S.C. § 7702(a)

Mixed Case Appeal

- An appeal filed with the MSPB alleging an <u>appealable agency action</u> was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, age, disability, or genetic information. 29 C.F.R. § 1614.302(a)(2); 5 C.F.R. § 1201.151(a).
- An employee may file a mixed case complaint with the agency or may file a mixed case appeal directly with MSPB, but not both.
- The first filed action is considered an election to proceed in that forum. § 1614.302(b).

Lethridge v. USPS, 99 M.S.P.R. 675 (2005)

- July 2002, agency proposed Appellant's removal for for medical inability to perform. The appellant filed an EEO complaint of the proposal.
- One year later, the agency effected the removal. Mr. Lethridge filed a Board appeal.
- While the MSPB case was pending, the EEOC Judge found the appellant was denied a reasonable accommodation but dismissed the proposed removal claim as "inextricably intertwined" with the removal action at MSPB.
- Commission vacated the EEOC Judge's decision.
- Ordered all the claims to the MSPB.

- Did the Board agree?

MSPB Jurisdiction is Limited

- The Board has the ultimate authority to decide whether an appeal is within its jurisdiction.
- Applicable statutes limit the Board's jurisdiction to removals, not proposed removals.
- **The Board will not hear matters outside its jurisdiction that are alleged to be inextricably intertwined**.
- *Result: Claims leading up to an appealable adverse action (hostile work environment, performance ratings, performance improvement plans, details, etc.), will proceed separately in the EEO forum.*

Election Process at MSPB

- Agency decision letter must notify employee of right to file MSPB appeal or EEO complaint. 5 C.F.R. § 1201.21.
- When an employee is subject to an appealable action, he or she may file a timely Board appeal within 30 days, or
- If the employee has filed a timely formal EEO complaint, a Board appeal must be filed within 30 days of the final agency decision or if there has been no decision, anytime after 120 days. 5 C.F.R. § 1201.154(b).

Formal EEO Complaint Filed First

- The MSPB Appeal Form and the agency response file should address whether the appellant has first filed a formal EEO complaint on the same matter before MSPB.
- If so, the agency should file a motion to dismiss the MSPB appeal pending exhaustion of the EEO process. 5 C.F.R. § 1201.154(b). The dismissal will be without prejudice to the appellant filing a new MSPB appeal.

Checketts v. Treasury, 91 M.S.P.R. 89 (2002)

- Agency issued a proposal and decision letter to remove this GS-08 Contract Specialist on June 16, 2000, for making false statements. Ms. Checketts retired in lieu of removal.
- Ms. Checketts filed a formal EEO complaint on June 29, 2000 alleging she was forced to retire due to the agency's EEO retaliation.
- On September 14, 2000, before the agency issued a FAD or 120 days passed, Ms. Checketts withdrew her EEO complaint and filed an MSPB appeal.

Can the appellant proceed before the MSPB?

The First Election Must Be Exhausted

- In *Checketts*, the AJ dismissed the appeal as untimely filed, but the Board disagreed and instead dismissed the appeal for lack of jurisdiction. The Board held that because the agency's decision letter gave the appellant clear notice of her election rights, the appellant made an informed election to proceed with her formal EEO complaint and she was bound to exhaust before coming to MSPB.
- An agency motion to dismiss for lack of jurisdiction, not timeliness, was appropriate.
- Withdrawal of the formal EEO complaint before a FAD or before 120 days, leaves the MSPB without jurisdiction. Case dismissed.

Constructive Actions

- Resignations and retirements are presumed to be voluntary, and as such, do not invoke the procedures and rights that the Civil Service Reform Act (CSRA) mandates for an adverse agency actions *See Schultz v. United States Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987).
- MSPB authority to decide discrimination only if there is jurisdiction over the constructive action.
- The appellant has the burden to make a non-frivolous allegation that could establish jurisdiction (i.e., that the resignation/retirement was involuntary) before the MSPB Judge will grant a **jurisdictional hearing**.

Garcia v. Homeland Security, 437 F.3d 1322 (Fed. Cir. 2006)

- Most resignations and retirements are not constructive removals and "the doctrine of coercive involuntariness is a narrow one" requiring that the employee "satisfy a demanding legal standard."
- In constructive actions, jurisdiction is usually determined by involuntariness. The MSPB Judge will only consider discrimination evidence that relates to involuntariness.
- While much of the same evidence of discrimination or retaliation relied upon to establish coercion may also be relevant to proof of discrimination if the appellant establishes jurisdiction -- a second (bifurcated) hearing may be required.

29 C.F.R. § 1614.302(c)(2)(ii)

- When the agency or MSPB Judge questions Board jurisdiction, the agency shall hold the mixed case complaint in abeyance until the MSPB Judge rules on jurisdiction and notify the appellant.
- All time limits are tolled.
- If the Board finds jurisdiction, the complaint is dismissed. If no jurisdiction, the agency recommences processing as a non-mixed case complaint.

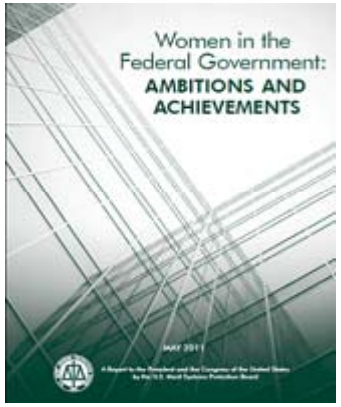
"Un-Mixing" an MSPB Appeal

- *Markon v. State,* 71 M.S.P.R. 574 (1996) held that because the Board may initially consider only jurisdiction, the case is not really "mixed" under 5 U.S.C. § 7702 involving discrimination as an affirmative defense to an otherwise appealable action.
- Is it administratively efficient to proceed to a jurisdictional hearing in a constructive action appeal where the appellant alleges prohibited discrimination the MSPB may never reach?
- What are the benefits?

Blount v. Napolitano, No. 0720070010 (2009).

- Immigration Officer, GS-07, in Seattle filed an EEO complaint alleging that after his stroke, he was accepted into the leave transfer program, but was charged AWOL; subjected to a hostile work environment (called names and subject to profanity); the agency did not respond to his request for accommodation. As a consequence, he filed for disability retirement.
- Agency argued that the EEOC lacked jurisdiction because the matter was a mixed case complaint of involuntary disability retirement.
- The EEOC Judge found jurisdiction on the basis that the constructive discharge was inextricably intertwined with the accommodation issue.

A Direct Consequence of Discrimination



- The Commission held that the "AJ correctly determined that the constructive discharge claim is inextricably intertwined in the EEO process."
- Noting, the more appropriate characterization of the issue is whether the agency denied accommodation resulting in the employee's inability to work, *i.e.*, was the constructive discharge a direct consequence.

Strategies for Un-Mixing

- Stipulating Facts in a Motion to Dismiss
  - The appellant or the parties jointly may enter a joint motion to dismiss. The risk is that the EEOC may consider the constructive action waived.
- Settlement Agreement
  - Appellant agrees to withdraw. Agency agrees not to contest that constructive action is inextricably intertwined with EEO matters.
- Withdrawing the Constructive Action Appeal
  - The risk is that the EEOC may consider the constructive action withdrawn.

Shapiro v. VA, 114 M.S.P.R. 585 (2010)

- Appellant filed a motion to withdraw his MSPB appeal stating he had filed his EEO complaint first.
- MSPB Judge allowed the withdrawal without determining whether the complaint was formal.
- Employee had not filed a formal complaint. Agency dismissed the EEO complaint on the basis that the appellant elected to proceed before MSPB first and his election was binding even though he withdrew his MSPB appeal.
- Held: When the Judge did not inquire whether the EEO complaint was formal, reinstatement of the MSPB appeal was appropriate.

Kloeckner v. Solis, 133 S.Ct. 596 (2012)

- MSPB dismissed removal appeal without prejudice to refiling pending EEO proceedings. *The EEOC Judge had granted a motion to include the otherwise appealable removal in the EEOC case.*
- Appellant missed deadline for re-filing her Board appeal by 2 months and the MSPB Judge dismissed her appeal as untimely. She filed an appeal in U.S. District Court of the MSPB dismissal and her discrimination claims. The District Court dismissed.
- Supreme Court Overruled: ***Employee who claims an action appealable to MSPB violates anti-discrimination laws should seek review in U.S. District Court not the Federal Circuit regardless of whether the dismissal is procedural or on the merits.***
- *Conforto v. MSPB,* No. 2012-3119 (April 18, 2013). The Federal Circuit held that it would retain jurisdiction over jurisdictional dismissals.

Kloeckner, Note 2

- The Supreme Court noted:

  Neither the CSRA nor any regulation authorizes an EEOC Judge to consider the legality of a removal or other serious personnel action before the Board has done so. *Nonetheless, the EEOC has approved that approach when the issues the personnel action raises are "firmly enmeshed" in an ongoing EEOC proceeding in order to avoid delaying justice and creating unnecessary procedural complications.*

QUESTIONS???