

**MIXED CASES  
MSPB AND EEOC  
WHAT'S IT ALL ABOUT?**

**PRESENTER  
PETER BROIDA**

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**What Does the MSPB Do?**

For career employees

- people who have been around awhile
- a year or more in competitive service
- two years or more excepted service

Removals: disciplinary and performance  
Demotions  
Long suspensions  
Reductions in Force

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**What's the MSPB Process**

Appeal  
Acknowledgment Order  
Agency Response to Appeal  
Discovery

the usual: interrogatories, document requests, depositions; requests for admissions.

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## Post-Discovery at MSPB

Hearing Notice and Schedule for Prehearing and Hearing Dates

Prehearing Submissions

- facts
- issues
- stipulations
- witnesses
- exhibits
- other matters

Prehearing Conference to define issues, witnesses, deal with exhibits

Hearing

Initial Decision

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## After the Initial Decision?

Petition for Review to MSPB Headquarters

Final Decision

Or, let Initial decision become final with no PFR or with final decision after PFR, to Federal Circuit Court of Appeals on civil service issues

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## What About those EEO Issues?

MSPB Adjudicates Affirmative Defenses

Whistleblowing Reprisal

EEO

Anything under any civil rights law

Disparate treatment

Disparate Impact (rare)

Failure to Accommodate

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## Appeal from MSPB to EEOC

If the appellant is dissatisfied with MSPB's treatment of EEO issues/defenses, the appellant may appeal to EEOC OFO or take the matter (both EEO and civil service issues) to federal district court if he or she does not want to surrender EEO claims in the Federal Circuit (which deals only with civil service issues).

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## Alternative Process

For a case that is within the Board's jurisdiction

- Removal
- Demotion
- Suspension

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## Start out with EEOC Instead

Counseling—45 days  
ADR, if available  
Complaint  
Investigation  
perhaps more ADR  
Agency provides report of investigation  
If the matter is within the purview of MSPB, final decision and notice of MSPB appeal rights  
If matter not MSPB, given option: final agency decision (appealable to EEOC or court) or request EEOC hearing by an administrative judge

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### EEOC Definition-Mixed Case Complaint

Mixed case complaint. A mixed case complaint is a complaint of employment discrimination filed with a Federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

29 CFR 1614.302(a)(1)

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### EEOC Definition-Mixed Case Appeal

Mixed case appeals. A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age.

29 CFR 1614.302(a)(2)

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### For Cases Going to MSPB

File MSPB appeal any time starting at 120 days following filing of complaint

Or, wait until the investigation is done and get the report of investigation and final agency decision, and then file appeal with an MSPB regional or field office within 30 days.

29 CFR 1614.302(d) ("Mixed Case Complaints")

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## EEOC Regulation

29 CFR 1614.302(b):

Election. An aggrieved person may initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB and who has either orally or in writing raised the issue of discrimination during the processing of the action of the right to file either a mixed case complaint with the agency or to file a mixed case appeal with the MSPB. The person shall be advised that he or she may not initially file both a mixed case complaint and an appeal on the same matter and that whichever is filed first shall be considered an election to proceed in that forum. If a person files a mixed case appeal with the MSPB instead of a mixed case complaint and the MSPB dismisses the appeal for jurisdictional reasons, the agency shall promptly notify the individual in writing of the right to contact an EEO counselor within 45 days of receipt of this notice and to file an EEO complaint, subject to § 1614.107. The date on which the person filed his or her appeal with MSPB shall be deemed to be the date of initial contact with the counselor. If a person files a timely appeal with MSPB from the agency's processing of a mixed case complaint and the MSPB dismisses it for jurisdictional reasons, the agency shall reissue a notice under § 1614.108(f) giving the individual the right to elect between a hearing before an administrative judge and an immediate final decision.

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## MSPB Regulation

5 CFR 1201.154 (2008):

Appellants who file appeals raising issues of prohibited discrimination in connection with a matter otherwise appealable to the Board must comply with the following time limits:

- (a) Where the appellant has been subject to an action appealable to the Board, he or she may either file a timely complaint of discrimination with the agency or file an appeal with the Board no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of the appellant's receipt of the agency's decision on the appealable action, whichever is later.
- (b) If the appellant has filed a timely formal complaint of discrimination with the agency:
  - (1) An appeal must be filed within 30 days after the appellant receives the agency resolution or final decision on the discrimination issue; or
  - (2) If the agency has not resolved the matter or issued a final decision on the formal complaint within 120 days, the appellant may appeal the matter directly to the Board at any time after the expiration of 120 calendar days. Once the agency resolves the matter or issues a final decision on the formal complaint, an appeal must be filed within 30 days after the appellant receives the agency resolution or final decision on the discrimination issue.
- (c) If the appellant files an appeal prematurely under this subpart, the judge will dismiss the appeal without prejudice to its later refiling under 1201.22 of this part. If holding the appeal for a short time would allow it to become timely, the judge may hold the appeal rather than dismiss it.

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## Why go the EEO Route?

Obtain some additional time.

45 days to go counselor rather than 30 days to file Board appeal

May want to delay Board appeal, which is on a pretty quick adjudication track: 120 days to the point of a decision unless there are delays requested

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## Other Reasons for Going to EEO First

ADR quickly into the process if the agency will agree.

MSPB has ADR processes too, but meanwhile you are engaged in the MSPB fast track litigation process.

May have an EEO case in the works already, for example, failure to accommodate, and then along comes the removal and you want to try to keep all the related matters in the EEO system.

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## Good Reasons to Go Through EEO

Investigation

At government expense

Documentation  
Affidavits

Inexpensive discovery that would otherwise be through MSPB but with payment to counsel for appellants represented by counsel

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## Reasons Not to Use EEO

Delay.

May add half a year or more to the process.

May not need discovery or investigation.

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## The Problem of Constructive Adverse Actions

Allegedly Forced  
Retirements  
Resignations  
Downgradings

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## The Theory

The employee was forced to leave the agency or take a downgrade

- working conditions were
  - discriminatory
  - harassing
  - retaliatory
  - failed to provide accommodation for a disability

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## MSPB May or May Not Have Jurisdiction

Retirements, resignations, and downgradings are presumed voluntary

Voluntary actions are not within MSPB's jurisdiction

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## But, MSPB May Have Jurisdiction

If the appellant proves discrimination by

showing the agency failed to provide accommodation necessary to continue on the job

showing the agency allowed discriminatory working conditions to become so oppressive that a reasonable person would have left the job

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## If MSPB Does Not Have Jurisdiction, Case Goes to EEOC

EEOC may find that the actions complained of by the employee at MSPB

Were sufficiently discriminatory to warrant a finding of a constructive adverse action, or

They were not that bad, but still constitute discrimination and require entry of a remedy under the EEO laws

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## Result: Cases Can Get Bounced Back and Forth

A person could start an EEO case through the EEO process, demand an EEOC hearing and then, on the issue that might be appealable to the MSPB, the Agency could ask for dismissal of that claim, with leave for the employee to take the case to the Board.

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- Or, a person might start at MSPB, the judge there decides that the appellant has not proved a constructive adverse action and dismisses the matter for lack of Board jurisdiction, even after a hearing.

Then, the appellant appeals to EEOC OFO which, if it is not satisfied with the evidentiary record, may send the case to an EEOC AJ for hearing.

*Bernard v. Runyon*, 01922970 (1992)

Or the Agency may give the employee a notice that she can start counseling and go through the EEO process—we will talk about that step later.

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## What if You File Both Places

If neither the agency nor the MSPB AJ questions MSPB jurisdiction, the agency may dismiss the EEO complaint.

Sec. 1614.302(c)(2)(i)

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If the agency or MSPB AJ questions MSPB jurisdiction, agency holds EEO complaint in abeyance until the MSPB AJ rules on jurisdiction.

1614.302(c)(2)(ii)

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If the MSPB judge tosses the case for lack of jurisdiction, but the complainant / appellant appeals on a PFR to MSPB, agency is to process the complaint if the full Board upholds the AJ's ruling finding no jurisdiction.

Harris v. England  
01A50046 (Feb. 8, 2005)

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### Inextricably Intertwined

To avoid the problem, and waste of resources, of cases moving from EEOC to MSPB and then possibly back to EEOC:

The Commission allows cases to stay with the Commission if the judge determines that the case that could have been brought to MSPB is inextricably intertwined with EEO issues that were in the EEOC process before the claim arose that arguably could have gone to MSPB

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### Intertwined: disability claims, constructive actions—EEO Controls

When a complainant claims that it was the agency's failure to provide reasonable accommodation that resulted in his constructive discharge, the claim of failure to accommodate is subsumed within the constructive discharge claim. *West v. Smithsonian Institute*, 01A22912 (2002).

This appears to be the situation even if the disability claim is raised for the first time with a termination claim that otherwise could go to MSPB. *Capitulo v. Potter*, 01A43252 (2005)

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**EEOC Characterization of  
Constructive Adverse if Disability  
Discrimination is the Main Issue**

The Commission holds that the issue is not constructive discharged, but whether the complainant was denied a reasonable accommodation resulting in his inability to work.

Blount v. Napolitano, 0720070010

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**Intertwined: Drug Testing and  
Removal: MSPB Controls**

*Davis v. Secretary of Navy, 01960558 (1997)*

Allegations regarding the agency's drug testing program were "inextricably intertwined" with the complainant's removal for failing the drug test. The Commission found that the complainant's allegations that the drug testing procedures were flawed and the agency improperly disseminated information about her test results to her supervisors were addressed by the MSPB when it decided the removal case.

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**Intertwined: Reassignment and  
Removal-MSPB Controls**

When the complainant filed an EEO complaint about a reassignment and was later removed for not completing the duties of the job to which he was reassigned, the reassignment, argued to the Board to be improper, was inextricably intertwined with the Board's removal case and the agency properly dismissed the EEO complaint that only concerned the reassignment.

Smith v. Runyon, 01965186 (1997)

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## Firmly Enmeshed in EEO EEOC Controls

Where the complainant files a complaint about something clearly in EEO jurisdiction, an EEO complaint concerning a scheduling issue, and then there is a related event, e.g., a constructive discharge claim arising out of the first, scheduling, issue, EEO has jurisdiction because the complaint is firmly enmeshed in the EEO forum.

*Silverman v. Ridge*, 01A33571 (2004).

*Harrell v. West*, 05940652 (1995) (alleged discriminatory reassignment leading to resignation characterized as a constructive removal: so firmly enmeshed in the EEO process that it would delay justice and create unnecessary procedural complications to remand to MSPB)

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## What Happens to Matters Raised in MSPB Case and in EEO?

EEO:

2 reprimands  
Unsatisfactory appraisal

MSPB: removal

decision addresses the appraisal as part of analysis of removal case; no mention of reprimands

Result:

EEO process is to be completed for the reprimands.

*Shores v. England*, 01A01588 (2002)

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## But It's Not Always Predictable

When the complainant alleged in 2004 that he was denied disability accommodation to work at home, and the complainant was removed in 2005 for AWOL, the complainant's principal claim was removal and the accommodation claim merged into the removal claim and the matter should be referred to MSPB.

*Oshel v. Rumsfeld*, 07A60011 (2006)

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## Effect of MSPB Rulings on EEO Claims-Res Judicata

In a removal case before the MSPB that was preceded by an EEO complaint concerning the underlying reassignment, when MSPB ruled against the appellant on the EEO issues, he could not, after going to the Federal Circuit on civil service issues, reactivate the EEO process on the EEO issues. He elected his forum and the MSPB decision was res judicata on all claims that could have been raised there.

Aho v. USDA, 05860085 (1987)

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## What if MSPB Incorrectly Decides Not to Consider an EEO Issue

The appellant was fired for misconduct and appealed to the Board. He raised the issue of reprisal and the Board's judge held that he had no jurisdiction to consider the issue. After the appellant lost the case with the Board, the EEOC, on appeal, directed the agency to allow the complainant to pursue the EEO process concerning the EEO issue that was presented to but not considered by the Board.

Barnett v. Potter, 0120093400 (2010)

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## Dual Filings Agreed MSPB Controls-MSPB First

MD-110 at 4-4 to 4-7, the Commission advised agencies of the procedures to follow when confronted with dual filings:

### 4. Procedures for Handling Dual Filing

#### a. Where the agency does not dispute MSPB jurisdiction

(1) If an individual files a mixed case appeal with the MSPB before filing a mixed case complaint with the agency, and the agency does not dispute MSPB jurisdiction, the agency must thereafter dismiss any complaint on the same claim, regardless of whether the claims of discrimination are raised in the appeal to the MSPB.

(2) The agency or the EEOC Administrative Judge must advise the complainant that s/he must bring the claims of discrimination contained in the dismissed complaint to the attention of the MSPB, pursuant to 5 CFR § 1201.151, et seq.

(3) Where an agency has not accepted a complaint for processing, i.e., has disposed of the complaint on procedural grounds, the resulting final agency decision is appealable to the Commission. § 1614.302(d)(1); Abegglen v. Department of Energy, EEOC Appeal No. 01966055 (October 9, 1998).

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## Dual Filings MSPB Jurisdiction Disputed

b. Where the agency or the MSPB Administrative Judge questions MSPB jurisdiction. The agency shall hold the mixed case complaint in abeyance until the MSPB Administrative Judge rules on the jurisdictional issue, notify the complainant that it is doing so, and instruct him/her to bring the discrimination claim to the attention of MSPB. During this period, all time limitations for processing or filing the complaint will be tolled.

An agency decision to hold a mixed case complaint in abeyance is not appealable to EEOC. If the MSPB Administrative Judge finds that MSPB has jurisdiction over the claim, the agency shall dismiss the mixed case complaint and advise the complainant of the right to petition EEOC to review MSPB's final decision on the discrimination issue. If the MSPB administrative judge finds that MSPB does not have jurisdiction over the claim, the agency shall recommence processing of the mixed case complaint as a non-mixed case EEO complaint.

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## Dual Filings EEO First

c. Where a complainant files with the agency first.

If an employee first files a mixed case complaint at the agency and then files a mixed case appeal with the MSPB, the agency should advise MSPB of the prior agency filing and request that the MSPB dismiss the appeal without prejudice.

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## Prior EEO Complaints and then Matter Appealable to MSPB

MD-110, Chapter 3-Sec. 4: Dual Filing Procedures

d. Where a complainant has pending a non-mixed case complaint or a series of non-mixed case complaints and the claims raised in those complaints are inextricably intertwined with an appeal on a claim that is appealable to the MSPB [4] The agency should file with the MSPB a motion to consolidate the non-mixed case claim with the mixed case appeal. Upon filing the motion, the non-mixed case complaints will be held in abeyance pending a decision by the MSPB administrative judge on the agency's motion. If the MSPB administrative judge should fail to consolidate the non-mixed case complaints, they shall be processed pursuant to § 1614.106, et seq.

Time for processing will commence to run without notice, fifteen (15) days following the decision denying jurisdiction. The time periods are to run from the time processing ceased. This means that if processing of the non-mixed claim ceased on the seventieth (70th) day, the count of days will begin with day 71. If the MSPB Administrative Judge consolidates, the mixed case complaint should be dismissed.

[4] This provision is specifically meant to address those situations where a series of events, connected in time or type, culminate in an appealable action against a person with standing to appeal to the MSPB. For example: minor discipline, warnings or other claims may form the basis for a non-mixed case, but ultimately lead to suspension in excess of 14 days or termination; similarly, an allegedly discriminatory performance evaluation and subsequent placement on a performance improvement plan are non-mixed claims that may culminate in denial of a within-grade promotion, or even in removal, both of which are appealable to the MSPB.

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## Defending an MSPB Case

Historical Patterns:

At the Board headquarters level, involving cases that resulted in Board final decisions on the merits:

Aside from cases involving disability discrimination, particularly last chance cases that used to be involved with employees who were dependent on alcohol, probably only about 25-30 findings of discrimination since 1979.

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## Use of Summary Judgment

Extensive, relatively commonplace in EEOC cases that would otherwise go to hearing.

Normally, if an EEOC case is decided against the complainant on summary judgment, the whole case is dismissed, subject to further appeal or litigation in district court.

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## Summary Judgment at MSPB

Under the Board's decision in *Redd v. USPS*, 101 MSPR 182, 2006 MSPB 32 (2006), summary judgment may be sought as to the EEO affirmative defense.

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### Judges Not Likely to Use SJ at MSPB

Going to have to go to a hearing or merits determination anyway.

Why write two decisions, with the possibility of remand on the EEO decision, when one decision will suffice and when many EEO claims submitted to the Board are insubstantial?

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### Can the Appellant Get SJ at the Board ?

No decision from the Board says yes or no.

But seems a reasonable approach on a very strong case

E.g., a clear case of disability discrimination.

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### Offer of Judgment at MSPB?

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MIXED CASES  
WHAT'S IT ALL ABOUT?

NOW YOU KNOW.  
TELL YOUR FRIENDS.

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