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Panel Presentation

ISSUE SPOTTING & ELECTION OF REMEDIES IN THE FEDERAL SECTOR

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This paper presents a summary of the elections of remedies plus a discussion of some of the key elections issues that federal employees commonly encounter when bringing their workplace employment complaints.[1] Generally, federal employees must be provided with an administrative forum to redress their grievances and complaints of alleged unlawful treatment and deprivation, especially as a step before going to federal court. The corollary is that at key moments in some proceedings, federal employees are limited to choose only one forum, and the first one accessed will create an irrevocable election for those who have underlying MSPB appeal rights.

Whether challenging whistleblowing retaliation or other prohibited personnel actions, adverse actions appealable to the Merit System Protection Board (MSPB), or discrimination-related claims, you must decide which options to choose – that is, where to elect to pursue a remedy – and, just as importantly, what your deadlines are by which to do so. Choices must usually be made between and among seeking redress at the MSPB, OSC, EEOC, or through a union grievance. In this way, elections of remedies present a web of procedure-related choices involving jurisdictional and exhaustion of remedies issues, as well as choices that may shift a burden of proof (away or upon your client) or offer different discovery options and processing times.

At the end of the day in the best of all possible worlds, elections of remedies sometimes boil down to a strategic "forum-shopping" analysis. Knowing your client's

[1] This paper does not cover the full panoply of labor rights and enforcement options within the scope of the Federal Labor Relations Authority other than to note, below, when there is an election to pursue an action that is otherwise appealable through an available MSPB, EEOC, or negotiated union grievance process.

options will be the only way to avoid procedural traps and to take an offensive position against the powerful federal government, the largest U.S. employer with thousands of attorneys on staff who are ready to represent the wrongdoers in perpetuity at virtually no cost to the agency.

Despite popular assumptions, the remedy of punitive damages is not available against the federal government at the administrative level or in federal court for any EEO claims, MSPB-appealable claims, or OSC-exhausted claims.[2] Moreover, do not go to federal court under the misconception that you can obtain damages that are different from that which an administrative judge could award. While important differences exist, such as the potential availability of a jury in federal court and, arguably, possible access to some preliminary injunctive relief, and the possible ability to combine administratively disparate claims into one action, the scope of relief will be essentially the same.

PART ONE: OUTLINE OF ELECTION OF REMEDIES ISSUES

I. EEO claims

A. Election between CBA grievance and Agency EEO processing. 29 C.F.R. §§ 1614.107(a)(4); 1614.301.

A.1. Does not apply to agency grievance procedures that were not negotiated with a union

A.2. Does not apply to USPS cases as USPS unions are governed by NLRB and not FLRA

A.3. Election of EEO process requires filing formal complaint. Requesting informal counseling is not an election.

A.4. See Part Two, Branch I, below, on the “First-in-Time” rule.

B. Election between ADR or regular informal counseling. 29 C.F.R. §§ 1614.102(b)(2); 1614.105(d)

B.1. Unlikely to get good settlements at informal stage

B.2. Extends time for Agency’s informal processing

B.3. Requesting ADR may tip off managers to commencement of EEO complaint.

2 Although subject to some dispute, federal employees who are retaliated against for their protected disclosures in connection with the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9, may seek “exemplary” damages in their whistleblowing retaliation complaint filed with OSHA within 30 days of learning of the adverse action. 29 C.F.R. § 24.103(d)(1).

B.4. Employee might not be able to document management knowledge of EEO complaint, so consider sending a “revealment” email to document knowledge by Agency decision-makers.

C. Election of decision-maker.

C.1. 30 days to request a hearing with an EEOC AJ. 29 C.F.R. § 1614.108(f)

C.2. 90 days to file in U.S. District Court. 29 C.F.R. § 1614.407; 42 U.S.C. § 2000e-16(c).

C.3. If employee fails to make either election, Agency will issue Final Agency Decision (FAD)

D. Elections to appeal a FAD

D.1. 30 days to file Notice of Appeal with EEOC Office of Federal Operations (OFO). 29 C.F.R. § 1614.402(a).

D.1.a. If there was no hearing before an AJ, then OFO review is de novo

D.2. 90 days to file in U.S. District Court. 29 C.F.R. § 1614.407; 42 U.S.C. § 2000e-16(c).

D.2.a. De novo proceeding

E. After OFO decision, election to file for reconsideration. Time limit is 30 days. 29 C.F.R. § 1614.405(c).

F. After reconsideration, or if no reconsideration is sought, time limit to file in U.S. District Court is 90 days. 29 C.F.R. § 1614.407(c)

G. Employees may also file in U.S. District Court at any time after the 180th day after:

G.1. a formal complaint is filed, if the Agency has not served a FAD. 29 C.F.R. § 1614.407(b)

G.2. an appeal to OFO is filed, if no OFO decision has been issued. 29 C.F.R. § 1614.407(d)

II. <u>Appealable adverse actions</u>

A. Appealable adverse actions are:

A.1. Removals

A.2. Suspensions of over 14 days

A.3. Demotions

A.4. Denial of Within-Grade-Increases (WIGIs)

A.5. Furloughs

A.6. 5 U.S. C. § 7512; 5 U.S. C. § 7513(d)

B. Option to submit written response.

B.1. Time can be extended if Agency agrees

B.2. Information upon which decision was based can be requested

C. Option to submit an oral response.

C.1. Agency decision-maker does not have to answer questions or respond

D. Option to submit both written and oral responses. 5 U.S. C. § 7513(b)(2)

E. Elections of remedies among CBA grievance, MSPB appeal or OSC complaint. When alleging a prohibited personnel practice under 5 U.S.C. § 2302(b)(1), the employee may elect one and only one of the following:

E.1. a statutory procedure, i.e., a Board appeal or an equal employment opportunity complaint; or

E.2. a grievance under the applicable negotiated grievance procedures. 5 U.S.C. § 7121(d).

E.3. As with EEO complaints, USPS employees are not subject to this election of remedies requirement and may pursue both union grievances and MSPB appeals (if they are “preference eligible”). Non-bargaining unit USPS employees can also appeal to the MSPB.

F. When alleging a prohibited personnel practice other than under 5 U.S.C. § 2302(b)(1), the employee may elect one and only one of the following:

F.1. an appeal to the Board under 5 U.S.C. § 7701;

F.2. a grievance under the applicable negotiated grievance procedures; or

F.3. a complaint seeking corrective action from the Office of Special Counsel under 5 U.S.C. chapter 12, subchapters II and III.

F.4. 5 U.S.C. § 7121(g).

G. CBA grievance can be the best option if

G.1.a. Employee has support of the union and the union will take the grievance to arbitration

G.1.b. The union has experience with arbitrations, is competent to complete the process and has a track record showing success in similar cases.

H. OSC could be viable if

H.1.a. Whistleblower retaliation is the only defense (all other defenses would be waived); or

H.1.b. Other time limits were missed. Time limit for OSC complaint is 3 years (although the only penalty for missing this time limit is that OSC can dismiss without an investigation); see 5 U.S.C. § 1214(a)(6)(A)(iii).

H.1.c. Whistleblowers can then make a timely Individual Right of Appeal (IRA) to the MSPB within 65 days of an OSC close-out letter.

I. MSPB appeal must be made within 30 days of the effective date of the adverse action (60 days if ADR is properly documented).

I.1. 5 C.F.R. § 1201.22(b)(1): an appeal must be filed 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, whichever is later. Where an appellant and an agency mutually agree in writing to attempt to resolve their dispute through an alternative dispute resolution process prior to the timely filing of an appeal, however, the time limit for filing the appeal is extended by an additional 30 days—for a total of 60 days.

J. If the Agency failed to give notice of the effect of electing a remedy, then the Agency cannot later assert an election of remedies.

J.1. *Kaszowski v. Air Force*, 2023 MSPB 15, Docket No. CH-0752-16-0089-I-1 (Apr. 4, 2023)

J.1.a. Appellant had elected to challenge her removal via a union-filed grievance.

J.1.b. Union did not pursue arbitration.

J.1.c. AJ found that, pursuant to 5 U.S.C. § 7121(e), the appellant had elected to challenge her removal through the negotiated grievance procedure, which precluded her Board appeal.

J.1.d. For an election of an option to be binding, it must be knowing and informed. *Agoranos v. Department of Justice*, 119 M.S.P.R. 498, ¶ 16 (2013).

J.1.e. The Board has held that, when an agency takes an action without informing the appellant of her procedural options under section 7121 and the preclusive effect of electing one of those options, any subsequent election by the appellant is not binding. Id., ¶ 17; cf. *Johnson v. Department of Veterans Affairs*, 121 M.S.P.R. 695, ¶¶ 6-7 (2014) (finding that the appellant's election to grieve his removal was not binding because the agency's removal decision did not inform him of his right to file a request for corrective action with the Office of Special Counsel (OSC), or of the effect that filing a grievance would have on his right to file an OSC complaint and a subsequent individual right of action appeal before the Board), *aff'd*, 611 F. App'x 496 (10th Cir. 2015).

J.1.f. The Board's regulations require that, when an agency issues a decision notice to an employee on a matter appealable to the Board, it must provide the employee with notice of the available avenues of relief and the preclusive effect any election will have on the employee's Board appeal rights. See 5 C.F.R. § 1201.21(d)(1).

J.1.g. "Given the various laws and [collective bargaining agreements] that come into play, it is essential that agency notices of appeal and grievance rights state the situation clearly with respect to the particular employee against whom the action is being taken." 64 Fed. Reg. 58,798 (Nov. 1, 1999).

J.1.h. The decision letter did not explicitly inform the appellant that she could raise the matter at issue with the Board or under the negotiated grievance procedure, "***but not both,***" [emphasis added] 5 U.S.C. § 7121(e)(1), nor did it provide her with notice as to "[w]hether the election of any applicable grievance procedure will result in waiver of the employee's right to file an appeal with the Board," 5 C.F.R. § 1201.21(d)(1).

J.1.i. *Kaszowski* is a reminder to agencies that they may wish to review and update, if necessary, the notice of appeal rights language in their decision notices consistent with the applicable statutes and 5 C.F.R. § 1201.21.

K. Election at MSPB to have a hearing

K.1. A hearing can be requested with the appeal, or separately within the time limit set by the ALJ. 5 C.F.R. § 1201.24(e).

K.2. Once made, an election to have a hearing can be withdrawn any time before the hearing.

K.3. If a hearing is held, the AJ is granted deference in findings about credibility. But see, *Miller v. Dept of Justice*, 842 F.3d 1252 (Fed. Cir. 2016), where the Federal Circuit rejected (over dissent) the agency's "same

decision" defense as falling short of "clear and convincing evidence" without disturbing the AJ's finding that the RMO was credible.

K.4. Issues to be considered may be added at any time, up to and including the pre-hearing statements and conference. 5 C.F.R. § 1201.24(b).

L. Election to file a Petition for Review (PFR) with the MSPB or with the Circuit Court of Appeals

L.1. Time to file PFR with MSPB is 35 days from Initial Decision. 5 C.F.R. § 1201.114(e)

L.2. Time can be extended by motion supported by declaration. 5 C.F.R. § 1201.114(f). Extensions of up to 30 days are routinely granted upon filing a compliant request.

L.3. To file with the Circuit Court of Appeals, miss the deadline to file a PFR with the MSPB, and then file a PFR with the Federal Circuit within 60 days of that deadline. 5 C.F.R. § 1201.113; 5 U.S.C. § 7703(b)(1). This deadline is jurisdictional and cannot be extended.

L.4. If the circuit appeal raises only issues arising under the Whistleblower Protection Act (WPA), then the All Circuit Review Act permits filing the petition for review in "any court of appeals of competent jurisdiction." 5 U.S.C. § 7703(b)(1)(B). Otherwise, it must be filed in the Federal Circuit.

L.5. If the case involves any issue of discrimination that could have been brought to the EEOC, then no Circuit Court of Appeals has jurisdiction, but the employee has 30 days to file a de novo mixed case civil action. 5 U.S.C. §§ 7703(b)(2), 7702. *Perry v. Merit Sys. Protection Bd.*, 137 S.Ct. 1975 (2017).

III. <u>No election of remedies between OSC and EEO for non-appealable adverse actions.</u>

A. Non-appealable adverse actions include:

A.1. suspensions of up to 14 days

A.2. Non-selection claims

A.3. Performance ratings

A.4. hostile work environments (HWEs)

A.5. For Whistleblower Protection Act claims:

A.5.a. detail, transfer, or reassignment; 5 U.S.C. § 2302(a)(2)(A)(iv)

A.5.b. denial of training “if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action” 5 U.S.C. § 2302(a)(2)(A)(ix)

A.5.c. a decision to order psychiatric testing or examination; 5 U.S.C. § 2302(a)(2)(A)(x)

A.5.d. the implementation or enforcement of any nondisclosure policy, form, or agreement; 5 U.S.C. § 2302(a)(2)(A)(xi)

A.5.e. any other significant change in duties, responsibilities, or working conditions; 5 U.S.C. § 2302(a)(2)(A)(xii)

B. Collateral estoppel and res judicata can still apply if either proceeding results in a final order.

IV. Mixed cases are complicated.

Congress provided rules, but little guidance and no statement of purpose. Mixed cases are controversial because most judges outside the Supreme Court disfavor them.

A. What is a mixed case?

A.1. It must include “an action which the employee or applicant may appeal to the Merit Systems Protection Board.” 5 U.S.C. § 7702(a)(1)(A)

A.1.a. This certainly includes the appealable adverse actions, listed above, from 5 U.S. C. § 7512

A.1.b. Does it also include whistleblower claims for which an “Individual Right of Action” (IRA) appeal can be made to the MSPB? The Fourth Circuit said “no” in a split decision. *Zachariasiewicz v. U.S. Dept of Justice*, 48 F.4th 237 (4th Cir. 2022). Judge Diaz dissented saying, “I would instead take Congress at its word that an employee need only allege agency action he can appeal to the Board, directly or not, to sustain a mixed case—as is true in an IRA appeal. So I dissent.” 48 F.4th at 250

A.2. It must also include an allegation of discrimination prohibited by—

A.2.a. (i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e–16),

A.2.b. (ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 206(d)),

A.2.c. (iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. § 791),

A.2.d. (iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 631, 633a), or

A.2.e. any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

A.2.f. 5 U.S.C. § 7702(a)(1)(B)

B. Where do you file a mixed case complaint?

B.1. MSPB; 5 U.S.C. § 7702(a)

B.2. “an agency” presumably through its investigation of formal EEO complaints; 5 U.S.C. § 7702(b)

B.3. Through a union grievance and arbitration process authorized by U.S.C. § 7121 (so, not USPS union contracts).

B.4. Not more than one (except for USPS union employees). See 29 C.F.R. § 1614.302(b).

B.5. Savings clause for filing in the wrong agency. 5 U.S.C. § 7702(f):

(f) In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency.

C. When do you file a “mixed case”?

C.1. Direct appeals to the MSPB must be filed within 30 days of the effective date of the adverse action. 5 C.F.R. § 1201.22(b)(1).

C.1.a. In mixed cases, the employee may also file within 30 days “after the date of the appellant's receipt of the agency's decision on the appealable action[.]” 5 C.F.R. § 1201.154(a). This is a reference to the Agency FAD. 5 C.F.R. § 1201.154(b).

C.2. EEO complaints must be initiated through a request for informal counseling to the Agency’s EEO office within 45 days of “the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.” 29 C.F.R. § 1614.105(a)(1).

C.3. Because the federal government's administrative procedures for resolving complaints of discrimination are complex and confusing, individuals sometimes file their complaints with the wrong agency. In an effort to deal

with this problem, Congress adopted a savings clause: "[i]n any case in which an employee is required to file any action ... under this section and the employee timely files the action ... with an agency *other than the agency with which the action ... is to be filed,* the employee shall be treated as having timely filed the action ... as of the date it is filed with the *proper* agency." 5 U.S.C. § 7702(f) (emphasis added). So how does this provision apply where, as here, the complainant initiates an action before the wrong agency—timely according to the rules of that agency but untimely according to the rules of the proper agency? Because we understand that the savings clause measures timeliness with respect to the deadlines for filing with the *proper* agency, we affirm the district court's dismissal of the complaint.

Schlottman v. Perez, 739 F.3d 21, 22 (D.C. Cir. 2014)

D. Features of a mixed case

D.1. "Agency" has 120 days to decide both the civil service and discrimination claims. 5 U.S.C. § 7702(a)(2). See also:

D.1.a. MSPB: AJ has 120 days from the date the employee raises a claim of discrimination. 5 C.F.R. § 1201.156(b)

D.1.b. Agency EEO investigation. See, 29 C.F.R. § 1614.302(d)(1)(i); 5 C.F.R. § 1201.154(b)(2) (allowing MSPB appeal after 120 day period has expired).

D.2. Union arbitration decisions in mixed cases are subject to petitions for review to the MSPB. 5 C.F.R. § 1201.155. PFRs must be filed within 35 days of the arbitrator's decision, or within 30 days of receipt of the decision, whichever is later.

D.3. Agency EEO FADs in mixed cases may be appealed to the MSPB. 29 C.F.R. § 1614.302(d)(1)(ii)

D.4. MSPB decisions on discrimination claims can be appealed to EEOC. 29 C.F.R. § 1614.303.

D.4.a. Time limit is 30 days from a final MSPB decision.

D.4.b. Decisions of the MSPB on PFRs are final when issued.

D.4.c. AJ Initial Decisions are final on the 35th day after issuance if no PFR is filed; 5 C.F.R. § 1201.113.

D.5. If the EEOC and MSPB disagree about an employee's discrimination claim, a "special panel" will be convened to resolve the dispute.

D.5.a. 5 U.S.C. § 7702(d); 29 C.F.R. §§ 1614.306 to 1614.309 (EEOC regulations); 5 C.F.R. §§ 1201.171 to 1201.175 (MSPB regulations).

D.6. Employees can file in federal district court.

D.6.a. Any time after the 120 day time limit for a final decision has passed and there is no final decision. 5 U.S.C. § 7702(e).

D.6.b. Within 30 days of the final agency decision (EEO FAD). 29 C.F.R. § 1614.310

D.6.c. Within 30 days of a final MSPB decision. 5 C.F.R. § 1201.157.

D.7. District court will have jurisdiction over civil service issues even if the discrimination claim fails on the merits.

D.7.a. Perry v. Merit Sys. Protection Bd., 137 S.Ct. 1975 (2017) (reaffirming the district court's jurisdiction over all claims in a mixed case)

D.7.b. *Bonds v. Leavitt*, 629 F.3d 369, 379 (4th Cir. 2011) (remanding the WPA claim for a jury trial, even after affirming dismissal of the discrimination claim).

D.8. A jury's decision on the discrimination claim is binding on the court's review of the civil service claims.

"The Seventh Amendment demands that facts common to legal and equitable claims be adjudicated by a jury." *U.S. ex rel. Drakeford v. Tuomey Healthcare System, Inc.,* 675 F.3d 394, 404 (4th Cir. 2012), citing *Lytle v. Household Mfg.*, 494 U.S. 545, 550, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990) ("When legal and equitable claims are joined in the same action, the right to jury trial on the legal claim, including all issues common to both claims, remains intact.") (quotation marks omitted).

(Part Two, next page)

ISSUE SPOTTING & ELECTION OF REMEDIES IN THE FEDERAL SECTOR

PART TWO: DISCUSSION OF KEY ELECTION OF REMEDIES ISSUES

I. General First-In-Time Rule

Typically, the forum which is elected first-in-time will be held to be an irrevocable choice of forum, even if the election was an uninformed one, or if time appears not to have expired on other options. For our purposes and as explained in more detail below, the election generally occurs with the employee's (not the union's) filing of a 7121(d)-covered union grievance allowing discrimination claims, filing a formal EEO complaint (not just pre-complaint activity), filing an MSPB appeal, filing a claim of whistleblower retaliation with the Office of Special Counsel (instead of directly with the MSPB in connection with an otherwise MSPB appealable adverse action).

If the election was based on misinformation provided by the agency, discussed more below, you may have grounds to seek a new election under some form of equitable tolling or by a remand for the purposes of contacting an EEO counselor. Where the agency or MSPB judge questions the MSPB's jurisdiction on grounds that an MSPB appeal contains the same matter as one pending before the agency's EEO office, the appellant must bring the discrimination issue to the MSPB judge for review and "the agency shall hold the mixed case complaint in abeyance" until the MSPB judge rules on it. 29 CFR § 1614.302(c)(2)(ii). An agency shall dismiss an EEO complaint if the same claim is pending with or has been decided by the agency or the Commission (29 CFR § 1614.107(a)(1)), or that was raised in a negotiated grievance procedure that permits allegations of discrimination (29 CFR § 1614.107(a)(4) and 1614.301), or was raised in an appeal to the MSPB (29 CFR § 1614.107(a)(4) and 1614.302).

II. Election of Remedies via the EEO Process for Discrimination and Retaliation Claims Covered by 29 CFR Part 1614.

The firm rule is that the filing of a written formal EEO complaint constitutes an irrevocable election of the EEO process for claims that are covered by (and require administrative exhaustion by resort to) the procedures in 29 CFR Part 1614. Consulting with an EEO Counselor, filing an informal complaint, attending mediation, or merely filling out EEO processing forms (short of a formal complaint) does not constitute an election of the EEO process. 29 CFR § 1614.301(a).

The EEO counselor is required to provide notice of election of remedies for 7121(d) negotiated grievances and mixed cases, but in reality, they know little and just provide legalese-like notices that your client will likely not understand. 29 CFR § 1614.105(b)(1). Given how confusing it can be and given the general focus of EEO counselors on only the EEO process, an employee's attorney needs to be familiar with these options and provide good advice.

The election of the EEO complaint process, i.e. filing a formal EEO complaint (opposed to a 7212(d) negotiated grievance or an MSPB appeal in a mixed case), takes

extensive time because EEO counseling has to take place first, is usually not done by mistake, and will not generally create problems with electing other avenues because they would have already expired. Before filing a formal complaint (electing the EEO process), an employee must initiate contact with an EEO counselor or EEO Official logically connected with the EEO process with an intent to file a discrimination complaint within 45 calendar days of the effective date of the personnel action at issue or within 45 calendar days of when the employee knew or should have known of the discrimination. 29 CFR § 1614.105(a)(2).[3]

MSPB appeals must generally be filed within 30 days (or less for some VA actions), and union grievances often within 10 days. If employees do not first elect those options, if available, or if employees miss those deadlines, the EEO process provides 45 days within which to initiate EEO counseling. Although it is not even an election, if the other options have expired, the employee must timely initiate the EEO process within the 45-day window to preserve this option. EEO counseling typically takes about 30 days before the notice of an employee's right to file a formal complaint is issued, but it is generally extendable up to 90 days for mediation or if otherwise useful. After exhausting EEO counseling for 30 days, employees can file their formal EEO complaint – the irrevocable election of remedies – even if the notice of right to file (providing 15 days to file) has not been issued. Again, if the 45-day initiation is untimely, or the 15-day formal complaint (election) deadline is untimely, proceed apace and argue for equitable tolling of these deadlines. 29 CFR § 1614.604.

III. Election of Remedies for Mixed Cases – MSPB Appealable Adverse Action Plus an EEO Basis – Allow Filing Either with the MSPB or in the EEO Process.

If discrimination or EEO retaliation is suspected, the actions that you need to red-flag as likely to involve MSPB-appealable adverse actions and mixed case elections of remedies are:

- Removal
- Suspension without pay for more than 14 days
- Reduction in grade (demotion)
- Reduction in pay
- Furlough
- *Constructive* claims for the above appealable actions (e.g., constructive discharge/forced resignation, forced retirement, forced demotion) – see discussion in the next section.
- Denial of within grade increase
- Denial of restoration of employment rights

[3] For a discussion of who is logically connected with the EEO process, *see, e.g., Kinan v. Department of Defense*, EEOC Request No. 05990249 (May 6, 1999); *Floyd v. National Guard Bureau*, EEOC Request No. 05890086 (June 22, 1989).

If the agency is an executive agency subject to the MSPB (5 U.S.C. § 7511(b)), if an employee has standing to file an MSPB appeal (5 U.S.C. § 7511(a)(1)), and if an MSPB appealable action is at issue (see 5 CFR § 1201.3(a)), a claim generally must be filed, if at all, with the Merit Systems Protection Board (MSPB) within thirty (30) calendar days of the effective date of the adverse action. 5 CFR § 1201.22(b); *see also* 1201.22(c) (equitable tolling may apply); 38 U.S.C. § 714(c)(4)(B) (10 business days for certain Title 38 VA employees for removal, demotion, suspensions over 14 days). One exception is the case where the employee claims that an unlawful discriminatory or retaliatory basis motivated the decision-making. That is referred to as a mixed case. It can be filed either by initiating it within 45 days (as explained above) in the EEO process (called a mixed case complaint) or raising it directly as an affirmative defense in a claim challenging the adverse action at the MSPB (called a mixed case appeal). The election of remedies is making the irrevocable choice to initiate the claim through the agency EEO process (utilizing the mixed case complaint procedures, 29 CFR Part 1614) or at the MSPB (utilizing MSPB appeal processing regulations, 5 CFR Part 1201).

Regardless of whether the claim is started in the EEO process or directly at the MSPB, the hearing will only be at the MSPB. Once at the MSPB, the case processing will not be differentiated based on how it began.

When discrimination is at issue, the question of whether to elect the direct MSPB appeal process or the EEOC mixed complaint process is a complicated one. Some of the important factors to consider in whether to elect initiation in the EEO process or directly at the MSPB are:

- length of time to get to an MSPB hearing (delay of 120 days or more in EEO process)
- how the administrative record is developed (only the MSPB agency file or an EEOC Report of Investigation and then the agency file)
- mediation programs
- case fragmentation issues (cannot necessarily be overcome)
- perception of a loss of EEO perspective at the MSPB (cannot necessarily be overcome)

If the employee elects to initiate the claim via the EEO process as a mixed case complaint, it must begin with the same EEO counseling pre-complaint process as a non-mixed case. Likewise, once EEO counseling concludes, the same (one and only) formal EEO complaint form can be used as for a non-mixed case. While the form is not required, using it to anchor a written description of the claim ensures the inclusion of necessary information. The EEO office must accept or reject the formal complaint just as with a non-mixed case.

If the EEO office rejects the entire EEO complaint, it is appealable to the EEOC's Office of Federal Operation just like a non-mixed case. (Partial rejections are not subject to interim appeal.) However, an OFO appeal takes a long time (months to years, even if priority is given to reverse improper dismissals). It would be advisable to file the OFO

appeal AND jump to the MSPB where you can file a new MSPB appeal on the same matter right away on the electronic filing system. The OFO appeal will take a long time. At the MSPB during the early jurisdictional stage, argue that the EEO office improvidently dismissed the mixed case complaint. Advise the MSPB Administrative Judge that you will immediately withdraw the OFO appeal once the MSPB AJ issues an order finding MSPB proper. The MSPB should not deem it untimely because the EEO office erroneously dismissed the claim. Waiting for an OFO reversal will harm and delay necessary MSPB processing.

Assuming the EEO office accepts the mixed case complaint, it will be assigned to an EEO investigator who will have only 120 days to finish the EEO investigation (instead of the usual 180 days). 29 CFR § 1614.302(d)(1)(i). When the investigation is concluded, the employee will not receive an election between a final agency decision and an EEOC hearing. Instead, the agency must produce a final agency decision (FAD) within 45 days. 29 CFR § 1614.302(d). The EEO will issue the FAD to the complainant along with a notice of their right to file an MSPB appeal at the MSPB and seek a hearing at the MSPB (not EEOC) within thirty (30) days (or pursue a civil action). 29 CFR § 1614.302. The employee will have the benefit of an EEO investigation (which may be of debatable use) but has lost about 150 days in processing time at the MSPB (had the appeal been directly filed with the MSPB in the first instance). If the EEO office does not conclude the EEO investigation within 120 days, you may file the MSPB appeal without further delay.

Allegations that may be connected with the MSPB appealable action but which do not independently have MSPB appeal rights, will *not* be able to be taken to the MSPB.[4] *See Greenidge v. USPS,* EEOC Appeal No. 01A52532 (Sept. 27, 2006) (a series of non-mixed events leading to a claim appealed to the MSPB are not in themselves appealable to MSPB; these claims are background for the MSPB case and the Commission has jurisdiction to process them) (citing EEOC, Management Bulletin 100-1, ¶ 2 (Oct. 24, 2003)). For example, if an employee was not reasonably accommodated by an agency, filed an EEO complaint about it, and the agency – perhaps during the EEO investigation – separated the employee due to an alleged medical inability to perform or for attendance, only the separation goes to the MSPB. The underlying EEO complaint alleging failure to accommodate must go to the EEOC for a hearing. There is no MSPB jurisdiction over related claims. Likewise, if there is evidence that the proposal to remove (or a proposal for another MSPB appealable adverse action) is itself retaliatory or discriminatory, it must be described and amended as an EEO claim, not an MSPB claim.

That said, beware of – or celebrate – unified penalties at the MSPB. It is a double-edged sword. If the record demonstrates that at least one of the reasons for an otherwise unappealable reassignment was also the reason, or cause, of the adverse action (e.g., removal), the penalty is said to be unified (or compound) and within the

[4] If an agency is required by the Board to cancel an adverse action, such as removal, and then, as part of or soon after the reinstatement process, the agency reassigns the employee, you can attempt to challenge the agency's restoration of the status quo ante in an enforcement action.

Board's jurisdiction. Originally articulated by the Federal Circuit when striking down a geographical reassignment that was factually tied to the appealable adverse action, the Federal Circuit determined that the Board has jurisdiction to review an otherwise-unappealable action that accompanies or implements an appealable adverse action as a portion of the penalty imposed by an agency. *Brewer v. American Battle Monuments Comm'n*, 779 F.2d 663, 665 (Fed. Cir. 1985), after remand, 31 MSPR 243, 245-47 (1986). This holding has permitted the Board to order an agency to return an employee to his or her former position when the unified penalty of reassignment is tied to an adverse action that is found to be unwarranted. *Brown v. USPS*, 64 MSPR 425, 431 (1994). If the adverse action is affirmed, it could also affirm the reassignment and harm your chances in another forum, like the EEOC. The Board has jurisdiction over such a reassignment even if it is not effected simultaneously with the appealable adverse action if the record shows that the adverse action and the reassignment constitute a "unified penalty arising out of the set of circumstances of which" the employee "was found culpable." *Brewer*, 779 F.2d at 664-65. A reassignment or detail tied to a proposed removal that does *not* ripen into a removal decision (or resignation challenged as a constructive removal) remains an unappealable action. *See Pann v. Dept. of Navy*, 82 MSPR 294, 295-96 ¶ 1 (1999) (remanding for determination of whether an appealable reduction in pay occurred when the appellant was shifted into a position that no longer carried "dive pay").

Strictly speaking, there is no pendent jurisdiction at the MSPB, although it might seem like there should be. According to the MSPB, preliminary steps and proposals to take appealable adverse actions are not within their limited statutory appellate jurisdiction and you should strongly argue that the EEO office and EEOC AJs should accept such amendments and claims as EEO claims in their own right even if a subsequent MSPB-appealable adverse action is factually connected to it.[5] While

[5] The Board rejects any type of claim that is not explicitly set forth by statute as one within its limited jurisdiction. The most authoritative position for MSPB practitioners would be the recent brief by the MSPB filed in *Crowe v. Wormuth*, 74 F.4th 1011 (9th Cir. 2023), discussed below, upon which the Ninth Circuit relied. (Attached).

Formerly, the EEOC took the position that such actions could remain at the EEOC if the complainant argued that they were inextricably intertwined with non-MSPB-appealable issues (e.g., an underlying harassment claim or failure to accommodate that led to a forced retirement). The MSPB objected. The EEOC overruled their doctrine by case law and in its guidance. *See Complainant v. Inter-American Foundation*, EEOC Appeal No. 0120132968 (Jan. 8, 2014) (wherein the Commission explicitly overturned the doctrine of inextricably intertwined); *see also* EEOC-MD-100, Chapter 4 (2015). Until the EEOC amends or otherwise rejects one part of its regulations, the EEOC may continue to take the untenable position that a proposed adverse action and preliminary actions to an appealable adverse action merge with the ultimate adverse action (and cannot be separately processed) except as a retaliation claim. *See* 29 CFR 1614.107(a)(5); *Wilson v. VA, EEOC Appeal* No. 0120122103 (Sept. 10, 2012) (“The doctrine of inextricably intertwined was effectively overturned … We note, however, that a proposed action merges with the decision on an appealable action, i.e., a proposed removal merges into a decision to remove.”). The Federal Circuit and MSPB believe otherwise. See *Mays v. Dept. of Transportation*, 27 F.3d 1577 (Fed. Cir. 1994); *Lethridge v. USPS*, 99 MSPR 675 (2005) (firmly rejecting consideration of an alleged discriminatory proposed removal claim). There is a circuit split on the issue of whether preliminary steps to an adverse action need to be exhausted as a mixed case at the MSPB. *See McAdams v. Reno*, 64

fragmentation of an arguably related claim is inefficient as is litigating similar claims in two fora, on a positive note, your client will have two opportunities to obtain damages. Both parties may still pursue global resolution.

IV. How to *Unmix* MSPB Constructive Adverse Action Claims Based on Discrimination – Like a Discriminatory Constructive Discharge Claim or a Discriminatory Forced Retirement Claim – and Return to the EEOC for a Hearing.

An important corollary to understanding mixed cases and one's elections of remedies connected thereto is understanding when and how to *unmix* them. This may be covered in other materials, but in case not, for completeness, the basics are set forth below.

Any constructive adverse action claim that includes a discrimination allegation needs to be treated like a mixed case described in the previous section. It is an otherwise-appealable MSPB adverse action claim with a discrimination allegation. Whether it starts with a direct appeal to the MSPB or as a mixed case complaint in the EEO process, the employee should request a hearing before the MSPB *at first*. It will just cost you precious time to correct the error later if you are mistakenly allowed to request an EEOC AJ first.

When you get to the MSPB (by filing your MSPB appeal), the MSPB AJ will almost immediately require you to show cause why jurisdiction exists. This is because a forced resignation or forced retirement, etc., is just a voluntary resignation and voluntary retirement if you do not prove that the EEO basis involuntarily forced it to happen. Voluntary resignations (any voluntary major personnel action) are not adverse actions appealable to the MSPB. Thus, the MSPB lacks jurisdiction to hear them unless you prove they were involuntary. The MSPB will expect you to prove your entire case in a jurisdictional hearing (or by brief), and typically before discovery takes place. That is almost assuredly a losing proposition. MSPB AJs routinely find insufficient evidence and dismiss the appeal for lack of jurisdiction. Because the dismissal technically denies the allegation of discrimination from being heard (even if there is a jurisdictional hearing because the MSPB finds it lacks jurisdiction to hear the case), the discrimination allegation still needs processed and a potential hearing. Therefore, the MSPB AJ dismisses the constructive adverse action for remand to the agency's EEO office for issuance of a notice of the complainant's right to request an EEOC hearing on the now-unmixed EEO complaint.

Unless you have strategic considerations and/or incredible evidence motivating you to keep fighting for MSPB jurisdiction, do not oppose (or take any action) to try to convince the MSPB AJ that there is MSPB jurisdiction. Do not waste attorneys fees or time briefing it. Let the MSPB AJ dismiss it, accept it, and get back to the EEOC AJ

F.3d 1137 (8th Cir. 1995) (exhaustion required); *Crowe v. Wormuth*, 74 F.4th 1011 (9th Cir. 2023) (no exhaustion required).

process, where you can do discovery or request a FAD. The EEOC process provides a much better forum to decide liability and damages on a discrimination claim.

V. Election of Remedies for Whistleblower Reprisal – MSPB Appealable Adverse Action (Ch. 75 or 43) Plus Whistleblower Reprisal Basis – Allows Filing Either with the MSPB or OSC-then-IRA.

This is probably the single most important election of remedies issue. If the agency has taken an "appealable action" (e.g., removal, suspension of 15-days or more, etc.), your client can *either* file a timely direct appeal at the MSPB or file a whistleblowing PPP complaint with OSC (deadline is three years, 5 U.S.C. § 1214(a)(6)(A)(iii)). Your choice significantly impacts the burdens of proof in the case. The agency maintains the burden of proof on a direct MSPB appeal, as it typically does in any other similar action, even if you raise whistleblowing retaliation as an affirmative defense. If you initially file with OSC, and return to the MSPB with an IRA, the agency has no burden of proof. You must prevail on the prima facie claim of your affirmative whistleblowing retaliation claim, including a showing that protected activity was a "contributing factor, in order to reverse the action. 5 U.S.C. § 1221(e)(1).

If the agency takes an action against your client based on Chapter 75 for misconduct, 5 U.S.C. § 7501 *et seq*., or Chapter 43 for poor performance, 5 U.S.C. § 4301 *et seq*., if your client has MSPB appeal rights, and <u>if you file an appeal of that action directly with the MSPB</u>, <u>the agency has the burden of proof on the adverse action</u>. For Chapter 75 adverse actions, the agency bears the preponderance of the evidence burden of proof, and a substantial evidence burden in Chapter 43 actions. The employee bears the preponderance of evidence burden of proof on their affirmative defense (whether on the EEO basis, or something else like another prohibited personnel action). If the agency fails to meet its burden, your client wins the appeal of the adverse action, even if they fail to prove whistleblowing reprisal. Your client's whistleblower claim will be subject to the WPA's bifurcated causation standard in which the whistleblower has to show protected activity, an adverse action, and that the protected activity was a "contributing factor." 5 U.S.C. § 1221(e)(1). Thereafter, the burden shifts to the agency to show that it would have taken the same adverse action without the protected activity by "clear and convincing evidence." 5 U.S.C. § 1221(e)(2); *Whitmore v. Dept. of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012) (" 'Clear and convincing evidence' is a high burden of proof for the Government to bear.").

Instead, <u>if you first file a complaint with the Office of Special Counsel</u> asking that the Special Counsel seek corrective action from the Board under the Whistleblower Protection Act of 1989, as amended, and if the OSC declines, your client only has the option of filing an Individual Right of Action (IRA) appeal at the MSPB. *See* 5 C.F.R. 1209.5 (60- or 65-day filing period after OSC issues notice or your receipt thereof). In an IRA appeal, 5 CFR § 1209.6, the agency has no burden of proof on the underlying Chapter 43 and Chapter 75 adverse actions. The only burden of proof is on your client to prove prohibited whistleblowing reprisal (same contributing factor bifurcated causation standard explained above). Failing that, the adverse action will be upheld.

If your client missed the MSPB filing deadline, it is great to have the OSC and IRA option, even with this upside-down result on the burden of proof. The point is, as always, to not lightly miss the MSPB deadline. The MSPB rarely allows equitable tolling. *See Heimberger v. Commerce*, 121 MSPR 10, ¶10 (2014) (equitable tolling is rare, for unusual circumstances, requires a showing that the appellant has been pursuing her rights diligently and some extraordinary circumstances stood in her way; maybe proper when the complainant has been induced or tricked by her adversary's misconduct into allowing the deadline to pass); *see Robinson v. Dept of Homeland Sec. Off. of Inspector Gen.*, 71 F.4th 51 (D.C. Cir. 2023) (finding that the 30-day appeal filing period is non-jurisdictional and subject to equitable tolling).

Bypassing the MSPB direct appeal is risky. If the employee fails to prove their whistleblowing allegations, they will NOT win their case. The OSC rarely takes these whistleblowing reprisal cases to the Board. The OSC may investigate, creating a record which you will never see, leaving you where you began, but bearing a more substantial burden of proof and longer odds of obtaining any relief.

VI. Election of 7121(d) Negotiated Grievance Procedure Reserved for CBAs That Allow Claims of Discrimination and/or Prohibited Personnel Actions.

Relatively few 7121(d) negotiated grievance procedures appear to include EEO claims. But when they do, they will create an election of remedies. The general rule is that whichever one is filed first – a union grievance or a formal EEO complaint – will control. Thus, having first filed a timely written grievance containing an allegation of discrimination under the auspices of a 7121(d) negotiated grievance procedure that explicitly *allows* for the processing of the particular discrimination claim will constitute an irrevocable election of that negotiated grievance procedure and rejection of the EEO process. 29 CFR § 1614.301(a). This is true even if you do not actually raise the discrimination issue in your union grievance. This is also true even if the particular CBA does not guarantee a hearing/arbitration on the issue.

Allegations of discrimination by employees who are *excluded* from 7121(d) grievance procedures, including those covered by one that will not allow complaints of discrimination and those who are employed by an agency not subject to 7212(d), shall only be processed through the EEO process. 29 CFR § 1614.301(b) & (c). Any attempt to raise them in other processes will not exhaust their EEO claims.

Generally, for an employee covered by a 7121(d) negotiated grievance procedure, if the claim also includes a discrimination allegation arising under the auspices of 29 CFR Part 1614, certain actions arising under 5 U.S.C. § 4303 or 5 U.S.C. § 7512, and/or an allegation of a prohibited personnel action, the employee has an election of remedies. They must make an election between a 7121(d) negotiated grievance procedure, a direct MSPB appeal (raising the issues as affirmative defenses), or by seeking corrective action for a prohibited personnel action at the Office of Special

Counsel. (See discussion below about concerns with filing at OSC first.) The first action filed constitutes an election. 5 CFR § 1201.3(c)(2). The employee may NOT withdraw their union grievance (or OSC complaint) and then file an MSPB appeal, even if the MSPB appeal-filing deadline has not passed yet. Once the election is made, it is irrevocable.

Withdrawal of a 7121(d) grievance (filed by the employee opposed to the union) will not negate the election. *See Marsh v. Dept. of Treasury*, EEOC Appeal 05910383 (Aug. 8, 1991); *Atanus v. MSPB and GSA*, 434 F.3d 1324 (Fed. Cir. 2006) (J. Newman dissenting, statute only prohibits filing both, and she just timely changed her mind). It will be the agency's burden to prove that an employee elected a negotiated grievance procedure (instead of the EEO process) under 29 CFR Part 1614. *See Mkrtchyan v. Broadcasting Board of Governors International Broadcasting Bureau*, EEOC Appeal No. 01991800 (Feb. 16, 2001). This means that if the union filed the grievance instead of the employee, the employee remains free to elect to file an EEO complaint on the same matter.

Filing of a formal EEO complaint – and *not merely participating in EEO counseling* – will constitute an irrevocable election of the EEO process. 29 CFR § 1614.301(a). Because time limits for filing a grievance are universally much shorter than exhausting EEO counseling and filing a formal complaint, it is typically the case that an employee may have quickly filed a union grievance that will preclude their subsequent EEO complaint even without knowingly doing so. There is no duty under EEOC regulations for an agency to provide notice of this election of remedies before an election is made, i.e., before a grievance is filed. Always check to see exactly what your PC/client filed as a union grievance and figure out whether it counts as an election. EEO complaints can be dismissed at any time on this jurisdictional issue, even at hearing or on an appeal. For MSPB appeals, the Agency does have a duty to clearly explain the effect of electing a remedy and its failure to do so will preserve the employee's option to appeal to the MSPB. *See Kaszowski v. Air Force*, 2023 MSPB 15 (2023), discussed at page 5, above.

If the union grievance is defective because it is discovered that the employee is not actually covered by a negotiated grievance procedure that allows allegations of discriminations in connection with the agency action at issue, the grievance will be dismissed. Appeal rights must be provided to the EEOC's Office of Federal Operations or to the MSPB if it is a mixed case (discussed below). 29 CFR § 1614.401(d). However, the discrimination claim will remain viable. Time used to process the misplaced grievance will act as a tolling mechanism such that the employee should be provided 45 days within their receipt of the dismissal to initiate contact with an EEO counselor because no valid election had been made. *See Holmes v. Navy*, EEOC Appeal 05931010 (Oct. 14, 1994). If the grievance was dismissed as untimely, and the EEO complaint was subsequently timely initiated, the EEO complaint will not be precluded. *See Ball v. Dept. of Veterans Affairs*, EEOC Appeal No. 05930261 (Jan. 31, 1994).

In any case in which the employee was confused and seeks EEO counseling late, the employee should argue for equitable tolling, which the regulations explicitly provide for. (29 CFR § 1614.105(a)(2), 1614.106(b), 1614.604(c)). It would be best to press your case both before the EEO office (to get them to change their mind and accept the issue) and also to file a notice of appeal with the EEOC's Office of Federal Operation to reverse the dismissal on grounds of equitable tolling. The best tolling argument is generally when actions of the agency misled or substantially confused the options. Argue waiver by the agency and equitable estoppel based on your reliance upon the agency advice (at several junctures, no doubt).

VII. HR Complaints and "Administrative Grievances" Are Allowed Because They Are Not a Covered 7121(d) Negotiated Grievance Procedure.

If an employee (regardless of whether they are covered by any CBA or not) files what is typically referred to as an administrative grievance (or really any other internal complaint, often through HR), and even if it alleges or mentions discrimination, it will *not* constitute an election of remedies and it will not exhaust administrative processing for an EEO claim. An administrative grievance or HR complaint will have no effect on an EEO complaint. *See* 29 CFR § 1614.301(b). That said, an EEO office may erroneously dismiss the subsequent EEO complaint, but it should be relatively easily to sort out or reverse.

Beware of vague grievances. If the employee is subject to a negotiated grievance process under 5 U.S.C. § 7121 (thus, not at USPS), and also an administrative grievance process, care should be taken in filing to grievance to make clear that the employee is filing it only pursuant to the agency's administrative process and not the negotiated grievance process. Otherwise, the agency is likely to argue that it was a grievance under the procedure negotiated by the union.

This means that employees are free to file an administrative grievance on the *same action* that may also be incorporated in an EEO complaint (i.e. violation of an agency policy regarding work schedules, leave time, etc.) without fear that it will have any preclusive effect on an EEO complaint. It is occasionally useful to pursue informal administrative grievances for the purpose of cornering the agency on an issue of pretext such as its failure to follow a certain policy that is important in a discrimination claim.

VIII. Non-7121(d) Negotiated Grievance Procedures are Not Binding.

Employees who work at an agency which is not subject to 5 U.S.C. § 7121(d), but which is covered by another negotiated union grievance procedure, shall only be permitted to raise discrimination allegations in the EEO process. 29 CFR § 1614.301(c). However, if they take the same adverse action through their other union grievance process, the agency may inform the employee that it is placing the EEO complaint in abeyance (tolling all deadlines) until the grievance is decided. 29 CFR § 1614.301(c).

Once the grievance is decided, the EEO complaint will be allowed to proceed, and it may be amended as necessary depending upon the outcome of the grievance.

IX. Age Discrimination Claimants May Bypass the EEO Process.

Age complaints fall within 29 CFR Part 1614. Everything discussed above applies to them. However, in addition to the processing rights provided for in 29 CFR Part 1614, federal employees may file age claims directly in federal district court, bypassing the administrative EEO process by simply giving a thirty (30) day notice to the EEOC at the address specified in the EEOC regulations. 29 CFR § 1614.201. If one chooses to file a formal EEO complaint regarding an age claim, it must stay in the EEO process for a minimum of 180 days before exhausting administrative remedies and opening up another option to file in federal district court. 29 CFR § 1614.201(c)(1). Beware that the statute of limitations does not stop (is not tolled) during the EEO administrative process. If federal court action is envisioned, calculate whether you have time for the EEO administrative process.

X. Equal Pay Act Claimants May Bypass the EEO Process or Do Both.

Like age claims under the ADEA, the EEO process covers claims arising under the Equal Pay Act, and claimants may file their EPA claims directly in federal court if they wish, bypassing the EEO process. 29 CFR § 1614.408. The interesting difference is that a complainant with an EPA claim may jump from the EEO administrative process into federal court at any time “regardless of whether he or she pursued any administrative complaint processing.” 29 CFR § 1614.408. Unlike ADEA claims, notice need not be provided to the EEOC as a precondition of filing a civil action. As such, even if a federal employee files a formal EEO complaint alleging an Equal Pay Act violation, it does not constitute an election of remedies for purposes of administrative exhaustion of remedies. It would constitute an election of remedies, however, for purposes of MSPB jurisdiction and options under negotiated grievance procedures, as discussed above.

While it is naturally best to plead both Equal Pay Act violations and sex-based Title VII compensation claims at the same time, the sex-based compensation claims may not be filed directly in federal court even if they are factually the same as the EPA claims. All wage claims alleged under Title VII as sex discrimination must be administratively filed and exhausted through the EEO process.

Like age claims, a federal employee’s EPA statute of limitations does not stop (is not tolled) during the EEO administrative process. 29 CFR § 1614.408. Even though there is not a minimum exhaustion time period like there is for age claims, if federal court action is envisioned, care should be taken to ensure the statute of limitations does not expire while sitting in the EEO process.

XI. Settlement Breach

There is one minor election of remedies issue in the case of a breach claim regarding a settlement agreement. The EEO complainant may elect whether to seek enforcement (specific performance) or to reinstate the complaint where processing ended. 29 CFR § 1614.504(a). Likewise, an MSPB appellant may elect to enforce the agreement or rescind it and reinstate the underlying appeal. *Poett v. Dept. of Agriculture*, 98 MSPR 628, ¶ 20 (2005).

XII. ATTACHMENT

MSPB Amicus Brief, filed November 18, 2022, in *Crowe v. Wormuth*, 74 F.4th 1011 (9th Cir. 2023).

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