

Issue Spotting & Election of Remedies in Federal Sector Cases
Representing Federal and Public Employees
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I. Introduction and overview

- A. Identify federal sector claims suitable for EEO, MSPB, OSC and federal court
- B. Be aware of elections of remedies and applicable time limits

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II. EEO claims

- A. Federal sector time limit to request EEO counseling from the Agency's EEO office: **45 days**

- 1. 5 C.F.R. § 1614.105(a)(1)
- 2. Equitable tolling can apply
- 3. Find Agency EEO offices at: <https://www.eeoc.gov/federal-sector/federal-agency-eeo-directors>

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- B. Laws covered

- 1. Title VII (race, color, religion, sex, national origin, pregnancy) (42 U.S.C. § 2000e-16)
 - a. Employees "shall be made free from any discrimination"
 - b. The private- and public-sector provisions are "couched in very different terms."
Gómez-Pérez v. Potter, [553 U.S. 474, 488](#), [128 S.Ct. 1931](#), [170 L.Ed.2d 887](#) (2008).
 - c. *Babb v. Wilkie*, 140 S. Ct. 1168, 1173 (2020) ("The phrase "free from" means "untainted" or "[c]lear of (something which is regarded as objectionable)."
- 2. Equal Pay Act (EPA) (sex-based wage and compensation discrimination) (29 U.S.C. § 206(d)),
- 3. the Age Discrimination in Employment Act (ADEA) (age over 40) (29 U.S.C. § 621 et seq.),
- 4. the Rehabilitation Act of 1973, as amended (disability, essentially the ADAAA) (29 U.S.C. § 791 et seq.),
- 5. the Genetic Information Nondiscrimination Act (GINA) (42 U.S.C. § 2000ff et seq.),
- 6. the Pregnant Workers Fairness Act (PWFA) (pregnancy, childbirth, related medical conditions) (42 U.S.C. § 2000gg et seq.).
- 7. Retaliation is an implied claim. See *Gómez-Pérez v. Potter*, cited above.

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- C. Election between CBA grievance and Agency EEO processing

- 1. Does not apply to agency grievance procedures that were not negotiated with a union
- 2. Does not apply to USPS cases as USPS unions are governed by NLRB and not FLRA
- 3. Election of EEO process requires filing formal complaint. Requesting informal counseling is not an election.

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- D. Election between ADR or regular informal counseling

- 40 1. Unlikely to get good settlements at informal stage
 2. Extends time for Agency's informal processing
 3. Requesting ADR may tip off managers to commencement of EEO complaint.
 4. Employee might not be able to document management knowledge of EEO complaint, so
45 consider sending a "revelment" email to document knowledge by Agency decision-
 makers.
- E. Election of decision-maker
 1. 30 days to request a hearing with an EEOC AJ, 5 C.F.R. § 1614.108(f)
 2. 90 days to file in U.S. District Court, 5 C.F.R. § 1614.407(a)
 a. except the time is only 30 days for "mixed cases." 5 C.F.R. § 1614.310(a)-(f)
50 3. If employee fails to make either election, Agency will issue Final Agency Decision
 (FAD)
- F. Elections to appeal a FAD
 1. 30 days to file Notice of Appeal with EEOC Office of Federal Operations (OFO)
 a. If there was no hearing before an AJ, then OFO review is de novo
55 2. 90 days to file in U.S. District Court
 a. Except the deadline is 30 days for mixed cases
 b. De novo proceeding
- G. After OFO decision, election to file for reconsideration. Time limit is 30 days. 29 C.F.R.
 § 1614.405(c).
- 60 H. 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) (except for "mixed cases" where the time limit is
 30 days)
- I. Employees may also file in U.S. District Court at any time after the 180th day after:
 1. a formal complaint is filed, if the Agency has not served a FAD. 29 C.F.R. § 1614.407(b)
65 2. an appeal to OFO is filed, if no OFO decision has been issued. 29 C.F.R. § 1614.407(d)
 3. Except that the kick-out is available after 120 days for mixed cases, 5 U.S.C. § 7702(e)
 (1)
- J. Electronic filing is through the EEOC Public Portal.
 <https://publicportal.eeoc.gov/Portal/Login.aspx>
- 70 K. Resources
 1. MD-110, [https://www.eeoc.gov/federal-sector/management-directive/management-](https://www.eeoc.gov/federal-sector/management-directive/management-directive-110)
 [directive-110](https://www.eeoc.gov/federal-sector/management-directive/management-directive-110)
 2. EEOC Digests. <https://www.eeoc.gov/digest>
 3. Leading resource on Federal Sector EEO practice is *A Guide to Federal Sector Equal*
75 *Employment Law & Practice* by Ernest C Hadley (2020), out of print

III. Appealable adverse actions at the MSPB

- A. Appealable adverse actions are:
- 80 1. Removals
 2. Suspensions of over 14 days
 3. Demotions
 4. Denial of Within-Grade-Increases (WIGIs)
 5. Furloughs
 6. *Constructive* adverse actions
85 7. 5 U.S. C. § 7512; 5 U.S. C. § 7513(d)

8. Restoration of employment after a workplace injury or leave of absence. 5 C.F.R. § 353.304

B. Option to submit written response.

1. Time can be extended if Agency agrees
2. Information upon which decision was based can be requested

C. Option to submit an oral response.

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:

1. a statutory procedure, i.e., a Board appeal or an equal employment opportunity complaint; or
2. a grievance under the applicable negotiated grievance procedures. 5 U.S.C. § 7121(d).
3. As with EEO complaints, the USPS 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:

1. an appeal to the Board under 5 U.S.C. § 7701;
2. a grievance under the applicable negotiated grievance procedures; or
3. a complaint seeking corrective action from the Office of Special Counsel under 5 U.S.C. chapter 12, subchapters II and III.
4. 5 U.S.C. § 7121(g).

G. CBA grievance can be the best option if

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

- a. Whistleblower retaliation is the only defense (all other defenses would be waived); or
- 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).
- c. Whistleblowers can then make a timely Individual Right of Appeal (IRA) to the MSPB within 65 days.

I. MSPB appeal must be made within 30 days of the effective date of the adverse action.

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.

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.

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

- a. Appellant had elected to challenge her removal via a union-filed grievance.
 - b. Union did not pursue arbitration.
 - 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.
 - 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).
 - 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).
 - 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).
 - 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).
 - 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).
 - i. Agencies 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
- 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).
 - 2. Once made, an election to have a hearing can be withdrawn any time before the hearing.
 - 3. If a hearing is held, the AJ is granted deference in findings about credibility.
 - 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
- 1. Time to file PFR with MSPB is 35 days from Initial Decision. 5 C.F.R. § 1201.114(e)
 - 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.
 - 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).

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).
 - a. 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); 5 U.S.C. § 7702.
 - b. Otherwise, a PFR must be filed in the Federal Circuit within 60 days (waiving any discrimination claims).

M. Resources

1. Electronic filing is available through “e-Appeal” <https://e-appeal.mspb.gov/etk-mspb-appeals-prod/login.request.do>
2. MSPB weekly Case Reports are available at: <https://www.mspb.gov/decisions/casereports.htm>
3. *A Guide to Merit Systems Protection Board Law and Practice*, by Peter Broida

IV. Prohibited Personnel Practices (PPPs)

A. Listed at 5 U.S.C. § 2302(b)(1)-(14)

1. discrimination
 - a. Title VII, ADEA, Equal Pay Act, disability (Rehab Act)
 - b. Also marital status or political affiliation
 - c. OSC and the MSPB will not enforce them when a remedy is available through the EEO procedures, see 5 C.F.R. § 1810.1; *Edwards v. Department of Labor*, 2022 MSPB 9 (2022), *aff’d Edwards v. Merit Sys. Prot. Bd.*, No. 2022-1967 (Fed. Cir. 2023))
2. References not based on merit
3. Coercing political activity
4. Deceiving or obstructing applicants for federal employment
5. Influencing an applicant to withdraw
6. grant any preference or advantage not authorized by law, rule, or regulation
7. nepotism
8. Whistleblower disclosures
 - a. Lawful disclosures unclassified information if it is about evidence of
 - i. any violation of any law, rule, or regulation, or
 - ii. gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
 - iii. Such disclosures can be made to anyone, including MSNBC. *Dep’t of Homeland Sec. v. Maclean*, 574 U.S. 383, 393 (2015) (“Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks.”)
 - iv. Laws prohibiting disclosure of certain information:
 1. Bank Secrecy Act.
 2. FDA
 3. IRS

- 225 4. HIPAA (although an exception protects whistleblower disclosures to lawyers
 and public health agencies); 45 C.F.R. § 164.502(j)(1)
5. Computer Access and Frauds Act (CAFA)
6. Defending Trade Secrets Act (with an immunity for whistleblowers at 18
 U.S.C. §1833(b))
- 230 b. Disclosures of classified information
- i. to OSC, IG, or “another employee designated by the head of the agency to
 receive such disclosures”
- c. Disclosures to Congress
- 235 i. Except not information classified by the Intelligence Community (they may
 make disclosures to IGs and the Director of National Intelligence pursuant to 50
 U.S.C. § 3033(k)(5))
- ii. Except not “intelligence sources and methods”
- d. Disclosures cannot be denied protection because of (5 U.S.C. § 2302(f)(1))
- 240 i. (A) the disclosure was made to a supervisor or to a person who participated in an
 activity that the employee or applicant reasonably believed to be covered by
 subsection (b)(8)(A)(i) and (ii);
- ii. (B) the disclosure revealed information that had been previously disclosed;
- iii. (C) of the employee’s or applicant’s motive for making the disclosure;
- 245 iv. (D) the disclosure was not made in writing;
- v. (E) the disclosure was made while the employee was off duty;
- vi. (F) the disclosure was made before the date on which the individual was
 appointed or applied for appointment to a position; or
- vii. (G) of the amount of time which has passed since the occurrence of the events
 described in the disclosure.
- 250 9. Other protected activities
- a. Grievances, complaints and appeals
- i. About retaliation or
- ii. otherwise
- iii. Makes a difference because only those about retaliation can support an
 Individual Right of Action (IRA) appeal to the MSPB. 5 U.S.C. § 1221(a)
- 255 b. Assisting another federal employee in any complaint, grievance or appeal.
- c. Any disclosure to OSC, any IG, or “any other component responsible for internal
 investigation or review”
- i. As of January 31, 2025, includes disclosures to Sexual Assault Prevention and
 Response (SAPR) programs; *Reese v. Dep’t of the Navy*, 2025 MSPB 1
- 260 d. Refusal to violate any law, rule or regulation.
- i. Unclear if the employee must show an actual violation, or if a “reasonable
 belief” will suffice
- 265 10. The “Catch-All.” “discriminate for or against any employee or applicant for
 employment on the basis of conduct which does not adversely affect the performance of
 the employee or applicant or the performance of others”
- a. Protected LGBTQI+ employees before EEOC protected them in *May v. Holder*, No.
 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012)
- b. Protects probationary and trial period employees today
- c. Consideration of criminal convictions permitted for suitability and fitness

- 270 determinations.
11. Veterans preferences
12. Violations of any other law, rule or regulation, including the Merit System Principles in 5 U.S.C. § 2301
13. Implement or enforce any Non-Disclosure Agreements (NDAs) and Gag Orders
- 275 a. such orders must state: “These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General or the Office of Special Counsel of a violation of any law, rule, or regulation, or
- 280 mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.”
- 285 b. May not restrict communications to Congress, OSC or any IG
14. Accessing or disclosing medical information
- B. Procedure: Use Office of Special Counsel Form 14
1. Use of the form is required
- a. 5 C.F.R. § 1800(c)(1)
- 290 b. Can include supplemental material, but consider that
- i. supplemental material can be submitted separately to the investigator.
- ii. The original OSC complaint is often requested to show exhaustion or otherwise during MSPB discovery
- c. There is NO TIME LIMIT for OSC complaints
- 295 i. However, OSC can decline to investigate complaints filed over 3 years after the adverse action. 5 U.S.C. § 1214(a)(6)(A)(iii)
- ii. OSC’s declination has no effect on the MSPB’s IRA jurisdiction.
2. Complaints can include “disclosures”
- a. 5 U.S.C. § 1213
- 300 b. OSC makes referrals to the Agency IG
- c. But, the OSC reviews the IG report to make its own conclusions
- d. Reports sent to President, Congress and the public. <https://osc.gov/PressReleases>
- e. Complaints that include disclosures are sent to the Disclosure and Retaliation section (DR)
- 305 3. OSC complaints can be amended by email. *Lewis v. Dep’t of Def.*, 123 M.S.P.R. 255, 260 (2016) (“The appellant also may submit his own letters to OSC to demonstrate the scope of the complaints he has exhausted with that agency.”)
- C. OSC can seek formal and informal stays of adverse actions. 5 U.S.C. § 1214(b)(1).
- D. OSC must acknowledge complaints and report on the status of investigations. 5 U.S.C. § 1214(a)(1)
- 310 E. OSC must issue “13-day” letters before dismissing a complaint
- a. 5 U.S.C. § 1214(a)(1)(D)
- F. OSC will issue TWO (2) letters upon dismissal
- a. One letter is intended to be shown to the MSPB to show exhaustion. It will list the
- 315 protected activities and adverse actions alleged

- b. The other states OSC's reasons for dismissal.
 - i. OSC's letters CANNOT be used as evidence, and disclosure CANNOT be compelled without the whistleblower's consent
- c. 5 U.S.C. § 1214(a)(2)(B)

320 G. Individual Right of Action (IRA)

- 1. Available for PPPs (b)(8) and (b)(9)(A)(i), (B), (C), or (D)
- 2. Time limit is 65 days from OSC close-out. 5 U.S.C. § 1214(a)(3)(A)(ii); 5 C.F.R. § 1209.5(a)(1).
- 3. IRAs can be filed if OSC fails to act within 120 days. 5 U.S.C. § 1214(a)(3)(B)
- 4. MSPB has special rules at 5 C.F.R. Part 1209

325 H. For PPPs that have no IRA, OSC can file complaints at the MSPB. 5 U.S.C. § 1214(b)(2)(C).

330 **V. No election of remedies between OSC and EEO for non-appealable adverse actions.**

A. Non-appealable adverse actions include:

- 1. Probationary and trial period terminations
- 2. suspensions of up to 14 days
- 3. Non-selection claims
- 4. Performance ratings
- 5. hostile work environments (HWEs)
- 6. other "personnel actions":
 - a. detail, transfer, or reassignment; 5 U.S.C. § 2302(a)(2)(A)(iv)
 - 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. a decision to order psychiatric testing or examination; 5 U.S.C. § 2302(a)(2)(A)(x)
 - b. the implementation or enforcement of any nondisclosure policy, form, or agreement; 5 U.S.C. § 2302(a)(2)(A)(xi)
 - c. any other significant change in duties, responsibilities, or working conditions; 5 U.S.C. § 2302(a)(2)(A)(xii)

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

VI. Mixed cases

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

B. What is a mixed case?

- 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)
 - 355 a. This certainly includes the appealable adverse actions, listed above, from 5 U.S. C. § 7512
 - 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. Dep't 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

2. It must also include an allegation of discrimination prohibited by—
 - a. (i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16),
 - b. (ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),
 - c. (iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),
 - d. (iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or
 - e. any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,
 - f. 5 U.S.C. § 7702(a)(1)(B)

C. Where do you file a mixed case complaint?

1. MSPB; 5 U.S.C. § 7702(a)
2. “an agency” presumably through its investigation of formal EEO complaints; 5 U.S.C. § 7702(b)
3. Through a union grievance and arbitration process authorized by U.S.C. § 7121 (so, not USPS union contracts).
4. Not more than one (except for USPS union employees). See 29 C.F.R. § 1614.302(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.

D. When do you file a “mixed case”?

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).
 - 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).
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).
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)

E. Features of a mixed case

1. “Agency” has 120 days to decide both the civil service and discrimination claims. 5
410 U.S.C. § 7702(a)(2). See also:
 - a. MSPB: AJ has 120 days from the date the employee raises a claim of discrimination.
5 C.F.R. § 1201.156(b)
 - 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).
- 415 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 arbitrators
decision, or within 30 days of receipt of the decision, whichever is later.
3. Agency EEO FADs in mixed cases may be appealed to the MSPB. 29 C.F.R.
§ 1614.302(d)(1)(ii)
- 420 4. MSPB decisions on discrimination claims can be appealed to EEOC. 29 C.F.R.
§ 1614.303.
 - a. Time limit is 30 days from a final MSPB decision.
 - b. Decisions of the MSPB on PFRs are final when issued.
 - c. AJ Initial Decisions are final on the 35th day after issuance if no PFR is filed; 5
425 C.F.R. § 1201.113.
5. If the EEOC and MSPB disagree about an employee’s discrimination claim, a “special
panel” will be convened to resolve the dispute.
 - a. 5 U.S.C. § 7702(d).
6. Employees can file in federal district court.
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 - 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).
 - b. Within 30 days of the final agency decision (EEO FAD). 29 C.F.R. § 1614.310
 - c. Within 30 days of a final MSPB decision. 5 C.F.R. § 1201.157.
- 435 7. District court will have jurisdiction over civil service issues even if discrimination claim
fails on the merits.
 - 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)
 - 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).
- 440 8. A jury’s decision on the discrimination claim is binding on the court’s review of the civil
service claims.
 - a. “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.*,
445 675 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).