

by Joseph Creed

The Proper Forum for Judicial Review of Merit Systems Protection Board Decisions in Mixed Cases

As a general matter, the employment claims of federal employees follow one of two tracks, depending on whether they relate to discrimination or a challenge to an adverse personnel action. In most cases of discrimination, after initially filing an administrative claim with the employing agency, employees may have their claims adjudicated by the Equal Employment Opportunity Commission (EEOC), followed by a *de novo* action in federal district court. Alternatively, they may choose to forgo the EEOC altogether and file an action in district court.¹ In cases of adverse personnel actions, employees may have their case adjudicated by the Merit Systems Protection Board (MSPB), followed by on-the-record judicial review in the U.S. Court of Appeals for the Federal Circuit.² For a number of reasons, including the opportunity to have the case adjudicated *de novo* and the right to a jury trial, employees generally favor filing an action in district court.

Mixed cases involve both a challenge to a personnel action and a claim of discrimination—such as a challenge to remove or suspend, in which the employee claims that the action was discriminatory.³ Although the MSPB does not have jurisdiction over pure discrimination cases (which are within the jurisdiction of the EEOC), it does have jurisdiction to decide mixed cases involving claims of discrimination.⁴ Until 2012, courts were divided over the question of where an employee may seek judicial review of an MSPB decision in a mixed case—in the district court or the Federal Circuit.

The Federal Circuit had long held that if the MSPB disposed of a mixed case on the merits, the proper forum for judicial review was the district court.⁵ On the other hand, if the MSPB disposed of a mixed case on procedural grounds, the only available judicial review was an appeal to the Federal Circuit.⁶ Most federal courts followed this dichotomy between mixed cases that were resolved on the merits and those that were resolved on procedural grounds.⁷ But a circuit split developed when the Second Circuit rejected the Federal Circuit's reasoning and held that all mixed cases are reviewable in the district court.⁸ The Tenth Circuit then followed suit, deepening the circuit split.⁹

The Supreme Court settled this split in *Kloeckner v. Solis*,¹⁰ holding that when the MSPB decides a mixed case, the proper forum for

judicial review is the district court, regardless of whether the MSPB ruled on the merits or on procedural grounds. Carolyn Kloeckner, a former employee of the Department of Labor, had been terminated for reasons that she claimed were discriminatory. She filed an action in the MSPB, which dismissed her complaint on procedural grounds, ruling that it was untimely. She filed an action in the U.S. District Court for the District of Columbia, which transferred the case to the U.S. District Court for the Eastern District of Missouri. The district court then dismissed the case, holding that Kloeckner's right to judicial review was limited to an appeal to the Federal Circuit. The Eighth Circuit Court of Appeals affirmed, ruling that because the MSPB had disposed of the case on procedural grounds, Kloeckner had to seek judicial review in the Federal Circuit.¹¹

But the Supreme Court rejected the notion that a federal employee's forum for judicial review differs depending on whether the MSPB decision was on the merits or on procedural grounds. "A federal employee who claims that an agency action appealable to the MSPB violates an antidiscrimination statute listed in [5 U.S.C.] §7702(a) (1) should seek judicial review in district court, not in the Federal Circuit."¹² "That is so," the Court concluded, "whether the MSPB decided her case on procedural grounds or instead on the merits."¹³

In the little more than a year since *Kloeckner* was decided, the Federal Circuit has declined to exercise jurisdiction in a handful of mixed cases.¹⁴ But the court held or suggested that it maintains jurisdiction to decide mixed-case appeals in three circumstances: (1) cases in which the MSPB dismisses for lack of jurisdiction, (2) cases in which the director of the Office of Personnel Management requests review of an MSPB decision, and (3) cases in which the appellant waives all claims of discrimination. Possibly creating a fourth category, the MSPB has opined that the Federal Circuit has jurisdiction over cases dismissed on procedural grounds before the board addresses the question of jurisdiction.

When the MSPB Dismisses for Lack of Jurisdiction

Under longstanding pre-*Kloeckner* precedent, the Federal Circuit held that it has jurisdiction to decide cases involving questions of the MSPB's jurisdiction. In *Conforto v. MSPB*,¹⁵ the

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court held that it maintains jurisdiction over such cases even post-*Kloeckner*.

In *Conforto*, a woman retired from the Department of the Navy after 39 years of service. But before her retirement became effective, she filed an Equal Employment Opportunity (EEO) complaint with the agency, alleging that she was forced to retire based on age and sex discrimination and retaliation for prior EEO activity. The agency found no discrimination or retaliation, and she appealed the decision to the MSPB, which dismissed the case for lack of jurisdiction because her retirement was presumed to be voluntary. Ms. Conforto appealed the MSPB's decision to the Federal Circuit, but, after *Kloeckner*, argued that the court lacked jurisdiction over her mixed-case appeal.

The Federal Circuit recognized that, under *Kloeckner*, “the district court, and not this court, is charged with jurisdiction over any mixed case appeal that the Board resolves either on the mer-

the MSPB “only if the Board has jurisdiction to decide the appeal from the adverse action in issue.” The Federal Circuit, not the district court, has jurisdiction “to review a Board determination that an employee’s case is not appealable to the Board.”²⁰

When the Director of OPM Appeals to the Federal Circuit

Under 5 U.S.C. § 7703(d), the director of OPM—though not a party to the case—may appeal any decision by the MSPB to the Federal Circuit “if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board’s decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.” In *Kaplan v. Conyers*,²¹ the Federal Circuit held that it has jurisdiction to hear an appeal from the MSPB, in a mixed case, when the appeal is taken by the director of OPM.



its or on procedural grounds.”¹⁶ The court interpreted *Kloeckner* to mean, in effect, “that any case in which the Board exercises its jurisdiction to decide a discrimination claim, and in which the employee seeks review of that decision, is not appealable to this court.”¹⁷ The court stated, however, that *Kloeckner* “was silent on the question of how to treat jurisdictional dismissals.”¹⁸ And the court concluded that *Kloeckner* did not affect the Federal Circuit’s longstanding precedent that it “has jurisdiction to review a determination by the Board that it lacks statutory jurisdiction over an employee’s appeal.”¹⁹ According to the Federal Circuit, the district court has jurisdiction to review a decision by

Kaplan arose in part from the demotion of Devon Northover by the Department of Defense based on a determination that he had lost eligibility to hold a “noncritical sensitive” position. One of Northover’s defenses was that the action was discriminatory, making the case a mixed case. The MSPB ruled that the scope of its review—which, in a case involving access to classified information, would be limited—was not limited here because Northover’s position did not require access to classified information. The director of OPM viewed this ruling as incorrect and having broad implications and appealed the decision to the Federal Circuit.

The MSPB argued that, under *Kloeckner*, the Federal Circuit

lacked jurisdiction over Northover's case because it was a mixed case. But the Federal Circuit rejected this argument, holding that, in a case in which the director of OPM exercises the right to appeal a decision by the MSPB under 5 U.S.C. § 7703(d), the proper forum for the appeal is the Federal Circuit.²² The court pointed out that *Kloeckner* involved judicial review by an aggrieved employee under section 7703(b), and not an appeal by the director of OPM under section 7703(d).²³ Thus, even post-*Kloeckner*, the Federal Circuit maintains jurisdiction to hear appeals in mixed cases in which the director of OPM seeks review under 5 U.S.C. § 7703(d).

When the Employee Waives All Claims of Discrimination

In *Taylor v. MSPB*,²⁴ the Federal Circuit suggested in *dicta* that it has jurisdiction to hear an appeal in a mixed case if the appellant waives all claims of discrimination. In *Taylor*, a woman was removed from her position at the IRS. She asserted that it was discriminatory, creating a mixed case. The MSPB dismissed her case as untimely, and she appealed the decision to the Federal Circuit.

In a nonprecedential opinion, the Federal Circuit held, based on *Kloeckner*, that it lacked jurisdiction over the mixed case. Citing its own pre-*Kloeckner* case law, however, the court suggested in *dicta* that it would have jurisdiction if the appellant dismissed all claims of discrimination.²⁵

But in *Brooks v. Dep't of the Air Force*,²⁶ in a nonprecedential order, the Federal Circuit stated just the opposite. In that case, Larry Brooks appealed his removal to the MSPB and raised claims of age and race discrimination, creating a mixed case. The MSPB affirmed his removal, and he appealed to the Federal Circuit, where the court issued a show cause order as to why the appeal should not be dismissed under *Kloeckner*. Both Brooks and the department informed the court that Brooks had waived all claims of discrimination and wished to proceed with the appeal in the Federal Circuit. Relying on recent MSPB case law, however, the court concluded, "there is nothing in the statutes suggesting 'that the appellant can transform a mixed case into a nonmixed case after the Board has issued a decision simply by not seeking judicial review on a discrimination claim.'"²⁷

Obviously, the court's ruling in *Brooks* contradicts its pre-*Kloeckner* case law and recent *dicta* in *Taylor*. It remains to be seen whether the court will address and resolve this issue in a precedential opinion.

When the MSPB Dismisses on Procedural Grounds Without Addressing the Issue of Jurisdiction

The MSPB recently recognized an additional category of mixed cases in which it says the proper forum for judicial review is the Federal Circuit: cases that the MSPB dismisses on procedural grounds before considering the issue of jurisdiction. In *Bean v. U.S. Postal Service*,²⁸ Kevin Cortez Bean challenged a constructive suspension and raised discrimination claims in an appeal to the MSPB, creating a mixed case. But before the case was resolved, Bean filed a second MSPB appeal based on the same issues. The administrative judge dismissed the second case for adjudicatory efficiency, and Bean appealed to the full board.

In a precedential opinion, the board affirmed the dismissal and further ruled that Bean's only right of judicial review was an appeal to the Federal Circuit. In the board's view, because the case was dismissed on procedural grounds before there was

a finding as to jurisdiction, "it is not clear whether the appeal is a mixed case."²⁹ The board reasoned that judicial review in the Federal Circuit is the "general rule," and that mixed cases are an exception to this general rule. It ruled that, "[b]ecause the mixed case exception in this appeal has not been affirmatively established, we find that nonmixed case appeal rights apply."³⁰ In the board's view, the petitioner would not lose his or her right to file an action in district court in an appropriate case because, "[i]f the Federal Circuit reverses the procedural dismissal, the appeal will return to the Board for adjudication of the jurisdictional issue, after which it will become clear whether mixed or nonmixed case appeal rights apply."³¹ On the other hand, "[i]f the Federal Circuit affirms, it will be established that the dispositive issue was a matter of civil service law and that the Federal Circuit was indeed the most appropriate reviewing tribunal."³²

While this makes some sense, it is difficult to see how *Bean* can be squared with *Kloeckner*, in which the Supreme Court held that the proper forum for judicial review in mixed cases is the district court, irrespective of "whether the MSPB decided [the] case on procedural grounds or instead on the merits."³³ The Federal Circuit will undoubtedly address this issue in *Bean*, or in a future case, which could create yet another exception to *Kloeckner*.

In sum, *Kloeckner* holds that, in mixed cases decided by the MSPB, the claimant has a right to judicial review in federal district court. But since *Kloeckner*, the Federal Circuit and the MSPB have held or suggested that in some circumstances the only right of appeal in a mixed case is to the Federal Circuit. Thus, in mixed cases claimants and counsel must carefully review the case, the ground on which the MSPB has disposed of it, the appealing party, and other issues to determine the appropriate forum for judicial review. ☉

Endnotes

¹42 U.S.C. § 2000e-16; 29 CFR § 1614.407.

²5 U.S.C. §§ 7513, 7703.

³29 CFR § 1614.302.

⁴5 U.S.C. § 7702.

⁵*Ballentine v. MSPB*, 738 F.2d 1244, 1246-1247 (Fed. Cir. 1984).

⁶*Id.*

⁷*See, e.g., Powell v. Dep't of Def.*, 158 F.3d 597, 598-99 (D.C. Cir. 1998); *Sloan v. West*, 140 F.3d 1255, 1261-62 (9th Cir. 1998); *Wall v. United States*, 871 F.2d 1540, 1542-1543 (10th Cir. 1989); *Blake v. Dep't of the Air Force*, 794 F.2d 170, 172-73 (5th Cir. 1986).

⁸*Downey v. Runyon*, 160 F.3d 139, 144-145 (2d Cir. 1998).

⁹*Harms v. Internal Revenue Serv.*, 321 F.3d 1001, 1008-1009 (3d Cir. 2003).

¹⁰*Kloeckner v. Solis*, 133 S. Ct. 596, 184 L. Ed. 2d 433 (2012).

¹¹*Kloeckner v. Solis*, 639 F.3d 834, 838 (8th Cir. 2011).

¹²*Kloeckner*, 133 S. Ct. at 607, 184 L. Ed. 2d at 447.

¹³*Id.*

¹⁴*See, e.g., Taylor v. MSPB*, Case No. 2013-3113 (Fed. Cir., Nov. 7, 2013) (recognizing that, under *Kloeckner*, "the district court, not this court, is vested with jurisdiction over any mixed

drawn out, you sound like a hick, and people will look to see if you scraped the manure off your boots before you came in. So I guess either way you can't win.

With All Due Respect to Opposing Counsel

Say this just before firing below-the-belt personal insults at opposing counsel. And if the other attorney says it, take a deep breath, 'cause here it comes at you.

Good luck, and you're welcome. (Oh, and don't bother to ask another judge if I speak for them—I don't. We all see ourselves as independent contractors.) ☺

MIXED CASES continued from page 72

case appeal that the Board resolves either on the merits or on procedural grounds”).

¹⁵*Conforto v. MSPB*, 713 F.3d 1111 (Fed. Cir. 2013).

¹⁶*Conforto*, 713 F.3d at 1116.

¹⁷*Conforto*, 713 F.3d at 1116.

¹⁸*Conforto*, 713 F.3d at 1117.

¹⁹*Conforto*, 713 F.3d at 1116-17.

²⁰*Conforto*, 713 F.3d at 1118. See also *Kafele v. U.S. Postal Service*, 513 Fed. Appx. 987 (Fed. Cir. 2013) (following *Conforto*).

²¹*Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013).

²²*Id.* at 1154.

²³*Id.*

²⁴*Taylor v. MSPB*, Case No. 2013-3113 (Fed. Cir., Sept. 18,

2013).

²⁵*Id.* at 5 (citing *Garcia v. Dep't of Homeland Security*, 437 F.3d 1322, 1348 n.6 (Fed. Cir. 2006)).

²⁶*Brooks v. Dep't of the Air Force*, Case No. 2013-3033 (Fed. Cir., Nov. 21, 2013).

²⁷*Id.* at 3 (quoting *Mills v. USPS*, 119 M.S.P.R. 482, ¶ 9 (M.S.P.B. 2013)).

²⁸*Bean v. U.S. Postal Service*, 2013 M.S.P.B. 98 (MSPB, Dec. 16, 2013).

²⁹*Bean, supra*, at ¶ 9.

³⁰*Bean, supra*, at ¶ 10.

³¹*Bean, supra*, at ¶ 11.

³²*Id.*

³³*Kloeckner*, 133 S.Ct. at 607.

CRIME continued from page 69

¹⁵S.619, available online at beta.congress.gov/bill/113th/senate-bill/619 (accessed Jan. 13, 2014).

¹⁶Niraj Chokshi, “State Spending on Prison Health Care Is Exploding. Here's Why,” WASHINGTON POST, Oct. 30, 2013, available at www.washingtonpost.com/blogs/govbeat/wp/2013/10/30/state-spending-on-prison-health-care-is-exploding-heres-why/?tid=hpModule_ba0d4c2a-86a2-11e2-9d71-f0feafdd1394&hpid=z13.

¹⁷Monica Davey, Safety Is Issue as Budget Cuts Free Prisoners, NY TIMES, March 4, 2010, available online at www.nytimes.com/2010/03/05/us/05parole.html?pagewanted=all (accessed Jan. 13, 2014).

¹⁸The Chief Justice's 2013 Year-End Report on the Federal Judiciary, available online at www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf.

¹⁹The Chief Justice's 2012 Year-End Report on the Federal Judiciary, available online at www.supremecourt.gov/publicinfo/year-end/2012year-endreport.pdf (accessed Jan. 13, 2014).

²⁰See U.S. Department of Justice, U.S. Parole Commission, “Report of the U.S. Parole Commission Oct. 1, 1988, to September 30, 1989,” at pages 10 and 7, respectively, available at www.ncjrs.gov/pdffiles1/Digitization/131426NCJRS.pdf.

²¹Supra note 4.



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