



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

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Mr. William D. Spencer
Clerk of the Board
Office of the Clerk of the Board
1615 M Street, NW
Washington, DC 20419

Re: Amicus Brief: Conyers and Northover

Dear Mr. Spencer:

This letter transmits comments from the Equal Employment Opportunity Commission's Office of Federal Operations ("OFO") to the Merit Systems Protection Board ("MSPB") in response to the MSPB's Notice of the Opportunity to File Amicus Briefs in the Matters of Conyers v. Department of Defense, Docket No. CH-0752-09-0925-I-1, and Northover v. Department of Defense, Docket No. AT-0752-10-0184-I-1. 75 Fed. Reg. 6728 (Feb. 10, 2010).

The question presented by the MSPB is whether, pursuant to 5 C.F.R. Part 732, National Security Positions, the rule in Department of the Navy v. Egan, 484 U.S. 518, 530-31 (1988), limiting the scope of MSPB review of an adverse action based on the revocation of a security clearance also applies to an adverse action involving an employee in a "non-critical sensitive" position due to the employee having been denied continued eligibility for employment in a sensitive position.¹ For the reasons presented below, OFO urges the MSPB not to make this far-reaching extension of the holding in Egan as it will deny basic procedural rights to an additional broad class of federal employees and effectively foreclose them from asserting their rights under this nation's anti-discrimination laws.

¹ Under 5 C.F.R. § 732.201(a), "the head of each agency shall designate, or cause to be designated, any position within the department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position at one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive." OPM issuances provide the investigative requirements for each sensitivity level. 5 C.F.R. § 732.201(b).

The Commission was established by Congress to administer, interpret, and enforce Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq.; Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 et seq.; and other federal laws prohibiting employment discrimination. The Commission's regulations provide that individuals may petition OFO to review MSPB final decisions on mixed case appeals and complaints.² 29 C.F.R. § 1614.303. The Commission has a substantial interest in ensuring that applicants and employees continue to be protected by the federal anti-discrimination statutes. Accordingly, OFO offers the MSPB its views on this important issue.

In Egan, 484 U.S. 518, the Supreme Court held that the MSPB did not have the authority to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action. In its decision, the Court noted that "the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." Id. at 527. The Court further noted that "[i]t should be obvious that no one has a 'right' to a security clearance," and "[t]he general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" Id. at 528. "Predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information." Id. at 529.

Under Egan, an agency removing an employee for failure to have a valid security clearance need only prove that 1) the employee's position required a security clearance; 2) the employee's security clearance was denied or revoked; 3) transfer to a non-sensitive position was

² A mixed case complaint is a discrimination complaint filed with a federal agency based on race, color, religion, sex, national origin, age, or disability related to, or stemming from, an action appealable to the MSPB. 29 C.F.R. § 1614.302(a). A mixed case appeal is an appeal filed with the MSPB alleging that an appealable agency action was effected, in whole or in part, because of discrimination based on race, color, religion, sex, national origin, age, or disability. 29 C.F.R. § 1614.302(b).

not feasible; and 4) the agency followed the procedural requirements of 5 U.S.C. § 7513 in processing the removal action. Under the elements of proof noted above, an employee subject to the removal action for lack of a security clearance is effectively foreclosed from pleading and proving that the removal was motivated by illegal discriminatory animus. Thus, under Egan, federal employees cannot assert their federally protected rights to be free from employment discrimination by asserting an allegation of discrimination as an affirmative defense to a removal based on the lack of a security clearance.

In applying Egan, the Commission has consistently held that it is precluded from reviewing the substance of security clearance decisions or the validity of the security requirement itself. See Rezaee v. Dep't of the Air Force, EEOC Appeal No. 01A60451 (Apr. 25, 2006); Carr v. Dep't of the Army, EEOC Appeal No. 01A44011 (Nov. 4, 2004); Thierjung v. Dep't of Def. (Def. Mapping Agency), EEOC Request Nos. 05880664, 05870161 (Nov. 2, 1989); see also Policy Guidance on the Use of the National Security Exception Contained in § 703(g) of Title VII of the Civil Rights Act of 1964, as amended, EEOC Notice No. N-915-041 (May 1, 1989). However, the Commission has held that it is not precluded from determining whether the grant, denial, or revocation of a security clearance is conducted in a nondiscriminatory manner. See Anderson v. Dep't of the Navy, EEOC Appeal No. 0120092413 (October 16, 2009) (holding that the Commission has the authority to review the agency's decision to initiate review of complainant's security status and the agency's request for documentation for the security clearance process); Pangarova v. Dep't of the Army, EEOC Petition No. 03900028 (March 29, 1990) (finding no discrimination because the agency applied the requirement of a security clearance in order to occupy the position of General Engineer in petitioner's division to both employees in her protected classes and those outside her classes).

The cases currently before the MSPB involve employees in non-critical sensitive positions who were subjected to adverse actions. However, while the adverse action in Egan occurred due to the denial or revocation of a security clearance, the adverse actions in Conyers and Northover occurred because the appellants were denied eligibility for employment in sensitive positions. The appellants in these cases were subject to some form of background investigation, but their positions did not require them to obtain a security clearance to access classified information. As we said above, such a far-reaching extension of the holding in Egan will effectively foreclose a broad class of federal employees from challenging actions seeking their removal for denial of eligibility under the federal anti-discrimination laws. We urge the MSPB not to extend Egan's holding to situations that do not require a review of the substance of a security clearance determination or the validity of the clearance requirement itself.

To extend Egan to an additional "untold number" of federal employees who do not even have access to classified information or require access to classified information would result in a major infringement of their basic due process protections and effectively foreclose them from exercising their rights under laws prohibiting employment discrimination. See Crumpler v. Dep't of Defense, Docket Nos. DC-0752-09-0033-R-1, DC-0752-09-0033-N-1, 2009 WL 5248887, *2 (M.S.P.B.). There is no basis for such an extension. Non-critical sensitive employees have enjoyed the due process protections allowed under the personnel laws of the United States as well as the rights afforded under national anti-discrimination laws. The critical fact in Egan was that that Mr. Egan had access to classified information and his position required him to have access to classified information. That fact is not present in any of the cases at issue before the MSPB. Furthermore, OFO does not anticipate that refusing to extend Egan's holding would result in a substantial increase in litigation because, as noted above, most employees and

applicants for employment in non-critical sensitive positions already have the right to pursue actions against employing agencies in the courts or administrative bodies.

EEO Directors from the intelligence community and law enforcement agencies have expressed to OFO that they are also concerned with the limitations placed on their review of discrimination complaints filed by individuals serving in, or applying for, sensitive positions. Although there is no question that Egan prohibits review of the substance of security clearance determinations or the validity of the security requirement itself, the Directors have expressed opposition to further limitations on their ability to conduct EEO investigations and protect employees in their respective agencies from discrimination in the workplace. An extension of the holding in Egan to all employees holding non-critical sensitive positions would effectively result in these employees losing their protections under the nation's anti-discrimination laws.

OFO understands and respects the need to protect classified information from disclosure. However, we urge the MSPB not to extend Egan to cases involving employees in non-critical sensitive positions due to the employee having been denied continued eligibility for employment in a sensitive position. Restricting the review of appeals filed by employees whose positions do not require a security clearance to access classified information would only serve to further truncate the protections afforded to employees covered by the anti-discrimination statutes the Commission enforces.

Sincerely yours,



Carlton M. Hadden
Director
Office of Federal Operations



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