



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

Office of  
Legal Counsel

February 1, 2013

TRANSMITTED VIA E-MAIL

William D. Spencer  
Clerk of the Board  
Merit Systems Protection Board  
1615 M Street, NW  
Washington, DC 20419

Dear Mr. Spencer:

The U.S. Equal Employment Opportunity Commission submits this letter in response to the Merit Systems Protection Board's request for comments on its Paperwork Reduction Act "Notice" proposing changes to MSPB Appeal Form 185. *See* 77 Fed. Reg. 71640 (Dec. 3, 2012). As described below, the EEOC suggests small changes to Part 2 and Appendix A of this form, to enhance its clarity for federal employees attempting to file a "mixed case" falling under the jurisdiction of both the MSPB and EEOC. We believe these edits also will increase government efficiency and avoid duplication of efforts by enhancing the MSPB's ability to identify "mixed" issues so that the MSPB, the EEOC, and federal agency EEO programs may apply the appropriate procedures unique to such claims from the outset.

The EEOC enforces the federal laws that prohibit employment discrimination on the basis of race, color, religion, sex, national origin, age, disability, and genetic information. *See* 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.; Titles I and V of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 et seq.; the Equal Pay Act of 1963, 29 U.S.C. § 206(d); and Title II of the Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff et seq. Further, the EEOC is charged with coordinating and leading the federal government's efforts to eradicate workplace discrimination.<sup>1</sup>

In a mixed case, a federal employee alleges that an agency personnel action appealable to the MSPB was based on unlawful discrimination otherwise subject to EEOC jurisdiction. In these cases, the employee must choose whether to pursue a "mixed case complaint" through the federal sector EEO process administered by EEOC, or a "mixed case appeal" subject to MSPB jurisdiction in the first instance. Special procedures exist for these claims, as defined in EEOC and MSPB regulations. *See* 29 C.F.R. § 1614.302 - .308 (EEOC regulations for the processing of mixed case complaints, EEOC review of MSPB discrimination findings, and the operation of

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<sup>1</sup> Under Executive Order 12067, the EEOC coordinates federal equal employment opportunity regulations, practices and policies. The Executive Order is available on the EEOC web site at: <http://www.eeoc.gov/abouteeoc/35th/thelaw/eo-12067.html>.

the Special Panel if disagreements arise between the agencies' findings on employment discrimination); 5 C.F.R. § 1201.151 - .175 (MSPB mixed case regulations). Most notably, the regulations provide a regime to avoid duplication of efforts, and also a method to ensure that a forum remains open for pursuing discrimination claims should the MSPB reject jurisdiction. *See* 29 C.F.R. § 1614.302(c) (providing procedures to hold EEO claims in abeyance pending MSPB jurisdictional decisions and to process claims as normal discrimination claims should MSPB reject jurisdiction).

### **Suggestions for Part 2 of the Proposed Form**

The regulatory safeguards to limit duplication of efforts and ensure that claims do not “fall through the cracks” will work only if the agencies know that the employee has elected a mixed case complaint or mixed case appeal. In the current MSPB Form 185, the MSPB gathers information necessary for these safeguards in Part 4. This part of the current form asks MSPB appellants to identify whether they believe that the agency’s action was the result of prohibited discrimination. It further requires employees to submit, if applicable, a copy of the formal discrimination complaint and final decision, which would help MSPB determine whether the employee elected a mixed case complaint or a mixed case appeal and whether it has jurisdiction.

The revised form, however, moves this information to Appendix A of the document, which the EEOC believes employees are less likely to read. While the instructions for Part 2 of the revised form instruct appellants to consult Appendix A if their claim involves an individual right of action under the Whistleblower Protection Act (WPA), or a veteran-related claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA) or the Veterans Employment Opportunities Act (VEOA), they do not similarly alert appellants to consult Appendix A for further information concerning discrimination claims. To increase the likelihood that appellants provide the information requested by MSPB so that it might identify whether a mixed case complaint or mixed case appeal has been filed and apply the appropriate procedures, the EEOC suggests inserting the following, or similar, language to the end of the instructions in Part 2 (page 3 of the revised form):

Please also consult Appendix A for further information if you allege that the agency’s action was the result of unlawful employment discrimination.

We believe this disclosure appropriately alerts appellants alleging employment discrimination of the need to read Appendix A without increasing the complexity of the form.

### **Suggestions for “Unlawful Discrimination” Bullet in Appendix A**

The EEOC has five suggestions for the information provided in the bullet point entitled “Unlawful Discrimination” in Appendix A of the proposed revisions to MSPB Appeal Form 185 (page 8 of the revised form). First, we suggest deleting references to discrimination on the bases of “marital status or political affiliation.” Regardless of whether other laws or executive orders prohibit discrimination against federal employees on these grounds, these bases are not protected by EEOC-enforced laws, and thus are not subject to mixed-case procedures. Including marital status and political affiliation in the list of EEOC-enforced discrimination prohibitions conflates

mixed case procedures with some other MSPB appeal procedures and may confuse stakeholders concerning the appropriate procedures to follow.

Second, the EEOC notes that the list of unlawful discrimination bases does not include “genetic information.” The Genetic Information Nondiscrimination Act of 2008 made it unlawful to discriminate against employees, including federal employees, on the basis of genetic information, which includes family medical history.<sup>2</sup> The MSPB has the same authority to consider discrimination based on genetic information as under other employment discrimination bases, at least for employees in Presidential Offices covered by chapter 5 of title 3 of the U.S. Code.<sup>3</sup>

Third, the EEOC suggests that MSPB add “retaliation for engaging in protected activity under federal anti-discrimination laws” to the end of its list of discrimination bases. EEOC-enforced laws all prohibit retaliation,<sup>4</sup> and a federal employee could create a mixed case by alleging that an agency’s personnel action otherwise within MSPB’s jurisdiction was based on unlawful retaliation in violation of EEOC-enforced law.

Fourth, the EEOC believes that the bullet would better inform the public by referencing the laws implicated in unlawful discrimination claims in its heading. It also would bring greater consistency to the headings in this section. Therefore, we suggest editing the heading to read as follows: **Unlawful discrimination in violation of Title VII of the Civil Rights Act, the Equal Pay Act, the Age Discrimination in Employment Act, the Rehabilitation Act, or the Genetic Information Nondiscrimination Act.**

Our fifth suggestion for the “unlawful discrimination” bullet in Appendix A concerns the reference to EEOC’s interpretive regulations on coverage under the Americans with Disabilities Act – 29 C.F.R. Part 1630 and its appendix. This regulation does not address mixed-case procedures; it concerns the EEOC’s positions on matters of substance under the ADA. Further, the MSPB has not identified any of the EEOC’s other regulations concerning substantive policy positions. Instead of referencing 29 C.F.R. Part 1630 and its appendix, we suggest that the MSPB include a reference to EEOC’s regulations concerning the procedures for mixed case complaints – 29 C.F.R. § 1614.302 - .308.

### **Suggestions for “Time Limits” Subsection in Appendix A**

The EEOC also suggests edits to the time limit information on the last page of Appendix A. To minimize duplication of efforts and conserve government resources, we suggest alerting

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<sup>2</sup> See generally 42 U.S.C. §§ 2000ff *et seq.*

<sup>3</sup> 42 U.S.C. § 2000ff-6(d) (“The powers, remedies, and procedures provided in chapter 5 of title 3, United States Code, to ... the [EEOC], the [MSPB], or any person . . . shall be the powers, remedies and procedures this title provides to ... the [EEOC], the [MSPB], or any person, respectively, alleging an unlawful employment practice in violation of this title....”)

<sup>4</sup> See Title VII, 42 U.S.C. § 2000e-3(a); ADEA, 29 U.S.C. § 623(d); ADA, 42 U.S.C. § 12203; GINA, 42 U.S.C. § 2000ff-6(f); *see also* Gomez-Perez v. Potter, 553 U.S. 474 (2008) (implying a prohibition against retaliation in federal sector age discrimination prohibition at 29 U.S.C. § 633a).

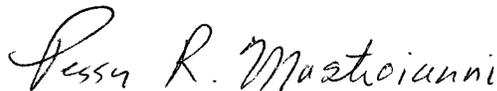
the public to the time frames for filing appeals to the MSPB, just as it does for IRA Appeals, USERRA Appeals, and VEOA Appeals. To make this change, we first recommend editing the heading on this page to read as follows: “Time limits for filing Unlawful Discrimination, IRA, USERRA, and VEOA Appeals.” Immediately after the title, we suggest adding the following language:

**Prohibited Personnel Practice with Unlawful Discrimination under Title VII, the Equal Pay Act, ADEA, Rehabilitation Act, or GINA.** If you have not elected to file a formal complaint of discrimination with your agency’s EEO office, you may file an appeal directly with the MSPB within 30 days of the allegedly discriminatory action. *See* 29 C.F.R. § 1201.154(a). If you have previously filed a timely formal complaint of discrimination on the same matter with your agency’s EEO office, you may appeal to the MSPB from the EEO office’s final decision within 30 days of receipt, or, if you have not yet received a final decision from the agency EEO office, you may appeal after at least 120 days have elapsed since filing your formal complaint of discrimination. *See* 29 C.F.R. § 1201.154(b)(1)-(2).

We hope this information is helpful to the MSPB as it assesses proposed changes to its appeal form. Given our agencies’ overlapping responsibilities, in the future it would assist all parties if the EEOC were consulted in advance of the MSPB posting such proposed changes in the Federal Register, so that the government may resolve concerns through inter-agency coordination.

Should you have any questions or otherwise wish to discuss, please feel free to contact Assistant Legal Counsel Corbett Anderson at (202) 663-4579, or Senior Attorney Advisor Raymond Peeler at (202) 663-4537.

Sincerely,



Peggy R. Mastroianni  
Legal Counsel