11-184

No. 11-_____

In The Supreme Court of the United States

CAROLYN M. KLOECKNER,

Petitioner,

v.

HILDA L. SOLIS,
Secretary of Labor,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

LARRY J. STEIN
4023 Chain Bridge Rd.
Suite 6
Fairfax, VA 22030
(703) 383-9090

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

QUESTION PRESENTED

The Merit Systems Protection Board (MSPB) is authorized to hear appeals by federal employees regarding certain adverse actions, such as dismissals. If in such an appeal the employee asserts that the challenged action was the result of unlawful discrimination, that claim is referred to as a "mixed case." The Question Presented is:

> If the MSPB decides a mixed case without determining the merits of the discrimination claim, is the court with jurisdiction over that claim the Court of Appeals for the Federal Circuit or a district court?

PARTIES

The parties are listed in the caption.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Blank Page

Petitioner Carolyn M. Kloeckner respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on May 13, 2011.

OPINIONS BELOW

The May 13, 2011 opinion of the Court of Appeals, which is reported at 639 F.3d 834 (8th Cir. 2011), is set out at pp. 1a-10a of the Appendix. The February 28, 2010 order of the District Court, which is unofficially reported at 2010 WL 582590 (E.D.Mo.), is set out at pp. 11a-22a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on May 13, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Subsection (a) of section 7702 of 5 U.S.C. provides in pertinent part:

> (a)(1) Notwithstanding any other provision of law, ... in the case of any employee or applicant for employment who –
>
> > (A) has been affected by an action which the employee or applicant may

appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by –

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), [or]

* * *

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (20 U.S.C. 631, 633a),

* * *

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and section.

* * *

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section....

Subsection (e)(1) of section 7702 of 5 U.S.C. provides in pertinent part:

> (e)(1) Notwithstanding any other provision of law, if at any time after –
>
> * * *
>
> (B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section),
>
> * * *
>
> an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c), [or] section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c))....

Subsection (a)(1) of section 7703 of 5 U.S.C. provides:

> (a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

Subsection (b) of section 7703 of 5 U.S.C. provides in pertinent part:

> (b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be

> filed in the United States Court of Appeals for the Federal Circuit....
>
> (b)(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), [and] section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c), ... as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

Section 1295(a) of 28 U.S.C. provides in pertinent part:

> (a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction –
>
> * * *
>
> (9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5....

STATEMENT OF THE CASE

The Statutory Scheme

The Civil Service Reform Act of 1978 ("CSRA") establishes a number of administrative remedies for

federal employees, including in certain circumstances a right to appeal a disputed action to the Merit Systems Protection Board. Employees aggrieved by the final action of the MSPB may seek judicial relief in the appropriate federal court. When a federal employee seeks judicial relief for a claim of unlawful discrimination, he or she faces a "jurisdictional 'mine field.'" *Donahue v. United States Postal Service*, 2006 WL 859448 at *3 (E.D.Pa.). This case presents the central problem and circuit conflict that has confounded litigants and lower courts alike.

The CSRA establishes a specific administrative scheme for federal employees who assert claims of discrimination violating statutes such as Title VII and the Age Discrimination in Employment Act. Individuals claiming such discrimination are entitled to present their claims to the Equal Employment Opportunity Commission. If an aggrieved employee is dissatisfied with the final action of the EEOC or of the employing agency, he or she can file suit in a district court under the relevant anti-discrimination statute. 5 U.S.C. § 7703(b)(2). In such a civil action the plaintiff is entitled to a trial de novo. 5 U.S.C. § 7703(c).

Under the CSRA a federal employee is also entitled to appeal to the MSPB certain adverse personnel actions[1] by a federal agency, such as a dismissal

[1] See 5 U.S.C. § 7512.

or a demotion. 5 U.S.C. §7513(d).[2] The challenged action will be overturned by the Board if it is not supported by substantial evidence. Following final action by the MSPB, an aggrieved employee may seek review of the Board's action by the Court of Appeals for the Federal Circuit. The Federal Circuit reviews the Board's decision, but does not decide the dispute de novo. 5 U.S.C. § 7703(c).

An employee may invoke both remedial schemes, for example by both appealing a disputed termination under section 7513(d) and alleging in that appeal that the dismissal was the result of unlawful discrimination.[3] Claims that combine both types of challenge are referred to as "mixed cases." Many if not most discrimination claims involve adverse actions that are sufficiently serious to be appealable under section 7513(d), and most employees with such claims invoke both remedial schemes. The procedural rules governing the administrative consideration of mixed cases are complex. Ultimately, however, an employee may seek review of a mixed case by the MSPB.

---

[2] Appeals under section 7513(d) are ordinarily referred to an administrative law judge, whose decisions are deemed the decision of the MSPB unless the claimant appeals to the MSPB.

[3] Technically the allegation of discrimination would be an alternative basis for the section 7513(d) appeal. An appellant could prevail either by showing the disputed adverse action lacked a substantial basis, or by demonstrating that that action (although perhaps supported by substantial evidence) was actually the result of unlawful discrimination.

The CSRA, however, establishes two different routes – described above – for judicial review of federal employment actions, one for claims that were before the MSPB as a section 7513(d) appeal and another for claims of unlawful discrimination. A mixed case, by definition, involves both, and it is that situation which has given rise to considerable confusion among lower courts and claimants alike, and has led to the circuit conflict at issue in this case. The interrelated jurisdictional provisions create "a minefield for the unwary." *Alfifi v. United States Dep't of Interior*, 924 F.2d 61, 62 (4th Cir. 1991).

If in addressing a mixed case the MSPB decides the discrimination claim on the merits, the lower courts agree that the court with jurisdiction over the controversy is a district court, as would be true for a discrimination claim that had not been the subject of an MSPB appeal. But the lower courts are sharply divided regarding whether a district court or the Federal Circuit has jurisdiction where the MSPB has rejected the discrimination claim on grounds other than the merits.

The Proceedings Below

(1) Petitioner Kloeckner is a former Senior Investigator for the Employee Benefits Security Administration in St. Louis, Missouri. On June 13, 2005, Kloeckner filed an administrative EEO complaint alleging that the agency had discriminated

against her based on age and sex by subjecting her to a hostile work environment.

On July 18, 2006, while that EEO complaint was pending before the EEOC, the defendant agency issued a decision dismissing[4] Kloeckner. At that point Kloeckner had the option of either immediately appealing that dismissal to the MSPB under section 7513(d), or including a challenge to the termination in her pending EEO proceeding. Kloeckner was required to file any immediate MSPB appeal within 30 days of the date on which the dismissal became final,[5] and on August 18, 2006 Kloeckner's attorney filed such an appeal. On September 10, 2006, counsel for both Kloeckner and the agency itself filed a joint motion to add the dismissal issue to Kloeckner's pending EEOC complaint. Plaintiff's attorney also moved to dismiss the MSPB appeal without prejudice, explaining that plaintiff and the defendant agency were filing the joint motion that would put the termination issue before the EEOC. (App. 2a-4a, 13a-14a). On September 18, 2006, an administrative law judge at the MSPB granted the motion to dismiss the MSPB appeal

> without prejudice to the appellant's right to refile her appeal either (A) within 30 days after a decision is rendered in her EEOC case;

---

[4] Under the CSRA the term of art for the dismissal of a non-probationary employee is a "removal."

[5] See 5 C.F.R. § 1201.22(b).

> or (B) by January 18, 2007 – whichever occurs first.

(App. 14a). The next day the EEOC granted the joint motion to amend plaintiff's EEO complaint.

The EEOC did not act within the period specified by the administrative judge's order. On about April 17, 2007, the EEOC terminated proceedings regarding Kloeckner's complaint, and referred the matter back to the agency. On October 23, 2007, the agency issued its Final Agency Decision, upholding the decision to dismiss Kloeckner and rejecting her discrimination claims. The Final Agency Decision advised Kloeckner that "you may appeal the matter to the MSPB ... within 30 days of receipt of this decision," or file a civil action in the district court. (App. 15). Kloeckner filed an appeal to the MSPB within that 30 day period.

An MSPB administrative law judge, however, ruled that the November 2007 appeal was untimely.[6] Although the employing agency had not issued its Final Agency Decision until October 2007, the

---

[6] The administrative law judge held that Kloeckner was not entitled to rely on the statement of the employing agency that she could appeal to the MSPB.

> Although the final decision on the discrimination claim stated the appellant had 30 days from her receipt of the final decision to file an MSPB appeal, such notice does not alter the deadline set by the initial decision dismissing the applicant's first MSPB appeal.

2008 MSPB LEXIS 1055 at *7.

administrative law judge held that Kloeckner was required to file any appeal regarding her termination no later than January 2007. Accordingly, the administrative law judge dismissed Kloeckner's appeal without reaching the merits of that appeal. (App. 16a).[7]

(2) On May 1, 2008, plaintiff filed a civil complaint in the District Court for the District of Columbia, represented by an attorney in the Washington, D.C. area. The government successfully moved for a change of venue, transferring the case to the federal district court in St. Louis.[8] After that change of venue, the government moved to dismiss the case for lack of jurisdiction.

The central issue presented by the government's motion, and the issue addressed in the decisions below, is whether in a mixed case which the MSPB has decided on procedural grounds – here, timeliness – the court with jurisdiction to resolve the plaintiff's discrimination claim is the Federal Circuit or a federal district court.

---

[7] The administrative law judge's decision advised Kloeckner that "[i]f you are dissatisfied with the Board's final decision, you may file a petition with ... [t]he United States Court of Appeals for the Federal Circuit." 2008 MSPB LEXIS 1055 at *11. Whether that statement was correct, or whether jurisdiction instead was in a district court, is the question presented by this case.

[8] In the District Court for the District of Columbia the government also moved to dismiss the case for lack of jurisdiction. The District of Columbia District Court did not rule on that aspect of the government's motion.

The district court noted that "[t]here appears to be a circuit split regarding the necessity that the MSPB reach a decision on the merits before a federal district court has jurisdiction." (App. 20a at n.6). The district judge noted that the Federal and Eighth Circuits had held that only the Federal Circuit has jurisdiction over such disputes; conversely, the district judge noted, decisions in the Second and Tenth Circuits have concluded that district courts – not the Federal Circuit – are to hear such claims. *Id.* The district court followed an unpublished Eighth Circuit decision which had held that the Federal Circuit alone has jurisdiction over these cases. *Id.* (citing *Brumley v. Levinson*, 1993 WL 128507 (8th Cir.)). Because the

> MSPB decision dismissed plaintiff's appeal as untimely filed, ... [any] appeal of such a threshold issue is properly filed with the Federal Circuit. The Court finds that the MSPB's decision based on the timeliness of plaintiff's appeal did not settle the merits of her discrimination claim, and therefore this Court is without jurisdiction.

(App. 22a).

The Eighth Circuit affirmed. Like the District Court, the Court of Appeals recognized that there is a circuit split on this issue, and it strongly criticized the decision of the Second Circuit. (App. 7a-8a, 10a). The Eighth Circuit candidly conceded that the meaning of the relevant statutes "is far from clear." (App. 9a). It concluded that district courts have jurisdiction

over a mixed case decided by the MSPB only if the MSPB has reached the merits of the employee's discrimination claim. (App. 6a). Thus where, as here, the MSPB has rejected an appeal on procedural grounds, the Eighth Circuit reasoned, "the Federal Circuit ha[s] exclusive jurisdiction to review the MSPB's dismissal." (App. 10a).

REASONS FOR GRANTING THE WRIT

I. THERE IS A WIDELY RECOGNIZED CONFLICT REGARDING WHETHER THE FEDERAL CIRCUIT OR DISTRICT COURTS HAVE JURISDICTION OVER CERTAIN "MIXED CASES"

A. The Circuit Courts Are Sharply Divided Regarding Which Federal Court Has Jurisdiction Over A Mixed Case Where the MSPB Did Not Determine The Merits of The Discrimination Claim

There is a sharp and deeply entrenched conflict among the courts of appeals regarding which federal court has jurisdiction over a mixed case where the MSPB did not determine the merits of the discrimination claim. The Sixth, Seventh, Eighth, Ninth, District of Columbia and Federal Circuits have concluded that the Federal Circuit has exclusive jurisdiction over such mixed cases. Conversely the Second and Tenth Circuits hold that these mixed cases should be filed in a district court.

The majority view derives from the decision of the Federal Circuit in *Ballentine v. Merit Systems Protection Board*, 738 F.2d 1244 (Fed. Cir. 1984). The MSPB had dismissed the mixed case discrimination appeal on the ground that it was premature. When Ballentine sought review in the Federal Circuit, the MSPB itself objected, insisting that only a district court could hear Ballentine's claim. 738 F.2d at 1245.[9] The MSPB's position in *Ballentine* appears to have been the opposite of the position taken by the government in later litigation, including the instant case. The Federal Circuit in *Ballentine* held that it had jurisdiction (necessarily exclusive jurisdiction) over Ballentine's appeal.

> When an appeal has been taken to the MSPB, until the discrimination issue and the appealable [adverse] action have been decided on the merits by the MSPB, an appellant is granted no rights to a trial de novo in a civil action under § 7702 or § 7703.... [U]ntil the *merits* of a "mixed" discrimination case are reached by the MSPB, procedural or threshold matters, not related to the merits of a discrimination claim before the MSPB, may properly be appealed to this court.... [O]ur exercise of jurisdiction over MSPB decisions until issues touching the merits of a

---

[9] 738 F.2d at 1245 ("We now have before us ... the MSPB's motion to transfer this case, for want of jurisdiction to consider any appeal in a discrimination-related case, to an appropriate district court.").

> discrimination are appealed comports with the intent of § 7703(b)(1) and (2)....

738 F.2d at 1246-47 (emphasis in original).

The Eighth Circuit in the instant case expressly adopted the holding in *Ballentine*.

> [U]ntil the merits of a "mixed" discrimination case are reached by the MSPB, procedural or threshold matters, not related to the merits of a discrimination claim before the MSPB, may ... be appealed to [the Federal Circuit].

(App. 6a) (quoting *Ballentine v. MSPB*, 738 F.2d 1244, 1247 (Fed. Cir. 1984)). The Eighth Circuit gave deference to the decision of the Federal Circuit in *Ballentine* because "the Federal Circuit is the court with the greatest experience when determining the intent of Congress as reflected in the CSRA." (App. 10a). The panel also relied on the earlier unpublished Eighth Circuit decision in *Brumley v. Levinson*, 1993 WL 128507 at *1 (8th Cir.) ("petitions to review the Board's final decisions must be filed in the Court of Appeals for the Federal Circuit unless the Board has decided discrimination issue on the merits").

Four other circuits have also followed the Federal Circuit's decision in *Ballentine*. In *Sloan v. West*, 140 F.3d 1255 (9th Cir. 1998), the Ninth Circuit endorsed *Ballentine's* holding that the Federal Circuit has "jurisdiction over MSPB decisions until issues touching the merits of a discrimination claim are appealed." 140 F.3d at 1261 (quoting *Ballentine*, 738 F.2d at

1247). In *Powell v. Department of Defense*, 158 F.3d 597 (D.C. Cir. 1998), the District of Columbia Circuit held that under *Ballentine* even "Board decisions based on procedural or threshold matters that are related to the merits should ... be reviewable in the Federal Circuit." 158 F.3d at 599 (emphasis omitted). Also relying on *Ballentine*, the Seventh Circuit holds that an employee may not file a complaint in district court if "an MSPB decision ... doesn't resolve the merits of an employee's claim of unlawful discrimination." *McCarthy v. Vilsack*, 322 Fed.Appx. 456, 458 (7th Cir. 2009). Relying in turn on *Sloan*, the Sixth Circuit holds that an MSPB decision dismissing a discrimination claim as frivolous can be reviewed only by the Federal Circuit, reasoning that such a decision by the Board is a determination that the Board lacked jurisdiction. *Burzynski v. Cohen*, 264 F.3d 611, 620-21 (6th Cir. 2001).

In *Downey v. Runyon*, 160 F.3d 139 (2d Cir. 1999), on the other hand, the Second Circuit expressly rejected the Federal Circuit's view that a mixed case could be heard in a district court only if the MSPB had reached the merits of the plaintiff's discrimination claim.

> [T]he Federal Circuit has supplied to the CSRA an unwritten substantive limitation. Namely, that in order for an MSPB decision concerning a mixed appeal to be considered "judicially reviewable" by the district courts, the MSPB decision must reach the merits of

> both the appealable action and the discrimination claim. *See Ballentine*....
>
> The CSRA does not express a requirement that the MSPB shall determine the merits of the discrimination claim in order for the decision to be "judicially reviewable." ... There is nothing in ... the CSRA that suggests that judicially reviewable actions under subsection (a)(3) of section 7702 are limited to decisions on the merits, or that a matter becomes a "[c]ase[ ] of discrimination" under subsection (b)(2) of section 7703 only after a merits decision.... [W]hen the MSPB issues an adverse "final decision" or "final order" concerning a "case" under section 7702(a)(1), the "case of discrimination shall be filed" in district court....

160 F.3d at 144-45 (footnote omitted).

The Tenth Circuit followed the holding of *Downey* and also disagreed with the Federal Circuit's construction of the CSRA.

> A decision need not be reached by the MSPB on the merits of the discrimination issue ... for the appeal to constitute a "case of discrimination." ... This court adopts the reasoning in *Downey* and holds that when the MSPB has jurisdiction over an appeal under § 7702(a)(1) but dismisses the appeal on procedural grounds, the federal district court has jurisdiction to review *de novo* the decision of the MSPB.

Harms v. Internal Revenue Service, 321 F.3d 1001, 1008 (10th Cir. 2003).

The Eleventh Circuit assumes that, following an MSPB decision, review of a discrimination claim can only be had in a federal district court.

> [A]ccording to the statutory scheme governing review of MSPB final orders, if a federal employee wants to pursue *any type* of discrimination claim on appeal the employee must file a complaint in a federal district court....

Chappell v. Chao, 388 F.3d 1373, 1375-76 (11th Cir. 2004) (emphasis added).

The conflict is well entrenched. In *Downey* the Second Circuit rejected the government's petition for rehearing en banc. 160 F.3d at 146.[10] In the Federal Circuit the government has emphatically opposed any suggestion that *Ballentine* be reconsidered. Brief for Respondent Merit Systems Protection Board, *Toyama v. Merit Systems Protection Board*, 481 F.3d 1361 (Fed. Cir. 2007), 2006 WL 2952347 at *11 n.7 ("To be clear, the government opposes any request by [appellant] that the panel in this case reconsider the Court's decision in *Ballentine* or order reconsideration en ban[c].")

---

[10] The government's Petition for Rehearing and Rehearing En Banc is available at 1998 WL 34309977.

B. The Circuit Conflict Is Well Recognized

The lower courts have long acknowledged this circuit conflict. The Eighth Circuit decision below expressly recognized the conflict at issue.

> For many years, every circuit to consider the issue followed the Federal Circuit's jurisdictional decision in *Ballentine*.... This unanimity ended with the Second Circuit's decision in *Downey v. Runyon*.... The Tenth Circuit followed th[e] reasoning [in *Downey*] in *Harms*....

(App. 7a-8a). The Court of Appeals criticized the Second Circuit's reasoning in *Downey* as based on a "bizarre notion" (App. 7a) and objected that "[t]he analysis in *Downey* ignored ... practical, functional considerations, substituting instead an unpersuasive textual analysis." (App. 10a).

Conversely, the Second Circuit, in rejecting the government's petition for rehearing and rehearing en banc in *Downey*, noted that "[a]s made clear in the panel opinion, we disagree with the *Ballentine* court's interpretation of 5 U.S.C. §§ 7702 and 7703." 160 F.3d at 146. The Tenth Circuit also disapproved of the holding in *Ballentine*.

> The circuits ... are split over whether the Federal Circuit has exclusive jurisdiction over the MSPB's dismissal of appeals filed under § 7702(a)(1) on procedural grounds. *Compare Ballentine ... with Downey*.... In *Downey*, the Court of Appeals for the Second

> Circuit rejected the reasoning in *Ballentine*....

Harms v. Internal Revenue Service, 321 F.3d 1001, 1008 (10th Cir. 2003).

The District Court decision in the instant case noted the "circuit split regarding the necessity that the MSPB reach a decision on the merits before a federal district court has jurisdiction" (App. 20a n.6), contrasting the Eighth Circuit decision in *Brumley* and the Federal Circuit decision in *Ballentine* with the decisions of the Second and Tenth Circuits in *Downey* and *Harms*. *Id.* Another district court noted that "there is a split in the circuits regarding whether the merits of the discrimination claim must be decided by the MSPB before an action may be brought in a district court." *Horn v. United States Department of Army*, 284 F.Supp.2d 1, 8 (D.D.C. 2003); see *id.* at 7 (noting that "*Downey* ... reject[ed] *Ballentine*"). "[T]he Second Circuit has rejected the Federal Circuit's position that an MSPB decision is not a judicially reviewable action if the MSPB dismisses the appeal for lack of jurisdiction. *Downey*.... " *Rendon v. Potter*, 2007 WL 1452932 at *5 (W.D.Tex.). "The Second Circuit [in *Downey*] rejected the Federal Circuit's holding in *Ballentine*.... " *Donahue v. United States Postal Service*, 2006 WL 859448 at *2 n.3 (E.D.Pa.).

> The statutory scheme addressing the scope of Federal Circuit review does not expressly state that a mixed case appeal dismissed for lack of jurisdiction must go to the Federal

> Circuit.... [T]he Federal Circuit has concluded ... that such a matter lies within its exclusive jurisdiction. *Ballentine*.... [A]t least one court has expressed its belief that a plaintiff can proceed directly to the district court pursuant to the express terms of section 7703(b)(2). *See Downey* ... (expressing disagreement with *Ballentine*). This seems to be the minority view, however.

Burrell v. United States Postal Service, 164 F.Supp.2d 805, 810 n.5 (E.D.La. 2001).

The government itself has repeatedly recognized the conflict. In its brief in the court of appeals below, the United States acknowledged that, "[a]s the District Court noted, there is a split on the circuits as to the *Ballentine* standard." Brief for Appellee, No. 10-2048 (8th Cir.), 2010 WL 3315496 at *21 n.4. In its brief in the District Court, the government made the same point.

> Plaintiff's reliance on the Second Circuit's decision in *Downey* ... and the Tenth Circuit's decision in *Harms* ... is misplaced because those decisions take an opposing view to the Federal Circuit in *Ballentine*, which decision the Eighth Circuit has followed. In *Downey*, the Second Circuit decided not to adopt *Ballentine's* holding and ... disagreed with ... *Ballentine* ... In *Harms*, the Tenth Circuit ... likewise refused to follow *Ballentine*.... [I]n contrast to the Second and Tenth circuits, the Eighth Circuit has instead followed and applied *Ballentine*....

Defendant's Reply in Support of Her Motion to Dismiss, or in the Alternative, for Summary Judgment, 5-6.

When the government asked the Second Circuit to grant rehearing en banc in *Downey*, it highlighted this same conflict.

> [T]he panel has gone into conflict with the four other circuits to have addressed this issue.... In conflict with th[e] prior unanimous view of the circuits, the panel here has held that the district court could maintain jurisdiction under the CSRA even though the MSPB had not reached the merits of the discrimination claim.

Petition for Rehearing and for Rehearing En Banc, *Downey v. Henderson*, No. 97-6239 (2d Cir.), 1998 WL 34309977 at *1.

> The panel's decision plainly conflicts with the prior unanimous view of the four circuits to have address this issue. The panel itself noted that its decision could not be reconciled with the Federal Circuit's reasoning in *Ballentine*.

Id. at *8 (footnote omitted); see *id.* at *9 ("the panel's ... analysis conflicts with the otherwise uniform approach of the other circuits"). The government took the same position in the Federal Circuit.

> Decisions from the Second and Tenth Circuits finding that there is no requirement that the Board address the merits of a

> discrimination claim for the underlying appeal to constitute a mixed case reviewable in district court ... contradict this Court's holding in *Ballentine*.

Brief for Respondent Merit Systems Protection Board, *Toyama v. Merit Systems Protection Board*, 481 F.3d 1361 (Fed. Cir. 2007), 2006 WL 2952347 at *10.

II. IT IS IMPORTANT THAT THIS CONFLICT BE DEFINITIVELY RESOLVED

In its rehearing petition in *Downey*, the government rightly observed that this conflict involves "an important aspect of the judicial review scheme of the Civil Service Reform Act." Petition for Rehearing and for Rehearing En Banc, *Downey v. Henderson*, No. 97-6239 (2d Cir.), 1998 WL 34309977 at *1. The United States correctly predicted that a conflict on this question would "confuse federal employees attempting to assert their CSRA and Title VII rights and the district courts addressing these issues." *Id.* at 15. That is precisely what has occurred. See *Donahue v. United States Postal Service*, 2006 WL 859448 at *3 (E.D.Pa.) (noting "the jurisdictional 'mine field' of the discrimination exception to the Federal Circuit's exclusive jurisdiction"); *Burrell v. United States Postal Service*, 164 F.Supp.2d 805, 809-10 ("The unwary plaintiff ... will face dismissal"), 810 ("the unsavvy plaintiff [may be] barred from ... raising [discrimination] claims") (E.D.La. 2001).

Clarity of the law is essential in this regard, because a plaintiff who seeks relief in the wrong court is likely to forfeit his or her claim. If the MSPB decides a mixed case, but does not reach the merits of the discrimination claim, it is critical that the federal employee know how the CSRA will be applied. If, as here, a plaintiff pursues redress in a district court, but the courts follow *Ballentine* and hold that only the Federal Circuit had jurisdiction, the plaintiff will lose any chance to obtain judicial relief. Conversely, if a decision of the MSPB regarding a mixed case is one that *could* be heard in a district court, "an employee waives discrimination claims by appealing to the Federal Circuit after an MSPB ruling on a mixed appeal." *Chappell v. Chao*, 388 F.3d 1373, 1377 (11th Cir. 2004); see *Smith v. Honer*, 846 F.2d 1521, 1523 (D.C. Cir. 1988) (same). "[A] federal employee cannot split a mixed case into discrimination and non-discrimination claims in order to pursue two separate appeals from an MSPB final order." *Chappell v. Chao*, 388 F.3d at 1377.

A federal employee in the First, Third, Fourth, Fifth or Eleventh Circuits cannot know with confidence where to pursue a mixed case in which the MSPB has not reached the merits. There is, moreover, uncertainty as to the scope of the rule in *Ballentine*. Several circuits take the position that an MSPB holding that a claim is frivolous – clearly a decision on the merits – can only be reviewed in the

Federal Circuit because such a holding means the Board has no jurisdiction, a "threshold" issue.[11] The Federal Circuit itself maintains that a decision of the MSPB denying counsel fees to a successful claimant – a decision that by definition occurs only in a case where the MSPB has reached the merits – is subject to review in the Federal Circuit (and, thus, not in a district court.). *Hopkins v. MSPB*, 725 F.2d 1368 (Fed. Cir. 1984).

As one court has noted, a prudent attorney might resort to filing two legal actions.

> We are aware that mixed-case complainants ..., to be absolutely safe, might see fit to file simultaneously in the Federal Circuit and in the district court. Otherwise, if the complainant chooses the wrong judicial forum for reviewing the Board's decision, he may be unable to obtain review because the time for appealing in the correct forum has passed.

Powell v. Department of Defense, 158 F.3d 597, 600 (D.C. Cir. 1998). A definitive resolution of this conflict would remove the incentive for such a precautionary tactic.

Clarification of this issue is particularly important because a substantial portion of the administrative discrimination claims of federal employees are mixed cases. "[A] significant percentage of appeals

---

[11] *McCarthy v. Vilsack*, 322 Fed.Appx. at 458-49; *Burzynski v. Cohen*, 264 F.3d at 620-21.

from the MSPB involve allegations of discrimination." *Williams v. Department of the Army*, 715 F.2d 1485, 1497 (Fed. Cir. 1983) (en banc) (Bennett, J., dissenting). Many of the litigants who seek judicial review of MSPB decisions are pro se, and ill-equipped to resolve on their own the complex issues presented in determining which court has jurisdiction to hear their claims.

III. THE DECISION OF THE EIGHTH CIRCUIT IS INCORRECT

The decision in *Ballentine* was based largely on section 7702(a)(1), which requires the MSPB to "decide both the issue of discrimination and the appealable action" within 120 days of the filing of an appeal. The Federal Circuit reasoned that this makes

> clear that the judicially reviewable action by the MSPB which makes an appeal a "case of discrimination" under § 7703(b)(2) that can be filed in district court is that the MSPB has decided "both the issue of discrimination and the appealable action.... " § 7702(a)(1).

738 F.2d at 1246.

This analysis is palpably mistaken. First, if, as the Federal Circuit reasoned, the phrase "decide ... the issue of discrimination" in section 7702(a)(1) means "decide the *merits* of the discrimination claim," the 120-day deadline in section 7702(a)(1) would require the MSPB within that time period to determine the merits of every discrimination claim. That would

preclude the MSPB from declining to reach the merits because, for example, a discrimination claim was untimely, premature, or outside the Board's jurisdiction. Section 7702(a)(1) cannot possibly mean that.

Second, section 7702(a)(1) requires the MSPB to "decide *both* the issue of discrimination and the appealable action." (Emphasis added). If this phrase defined the category of cases which could be brought in district court, a district court would not have jurisdiction over a case in which the MSPB did decide the merits of the plaintiff's discrimination claim, but for some reason did not also reach the merits of the plaintiff's companion section 7513(d) appeal. That surely cannot be what Congress intended.

The statutory provision governing which actions can be maintained in district court is section 7703(b)(2), not the administrative decision deadline in section 7702(a)(1). Section 7703(b)(2) provides that cases are to be "filed under section 717(c) of the Civil Rights Act of 1964 [and] section 15(c) of the Age Discrimination in Employment Act" – i.e., filed in district court – if they are "[c]ases of discrimination subject to the provisions of section 7702," which in turn references Title VII and the Age Discrimination in Employment Act. A lawsuit alleging that a plaintiff was discriminated against on the basis of age or sex is surely a "case[] of discrimination"

without regard to why the MSPB did not award the plaintiff redress.

The rule in *Ballentine* has the uniquely counter-productive effect of deterring federal employees from seeking relief from the MSPB. Under the terms of the CSRA, a federal employee asserting discrimination need not appeal to the MSPB at all, but may file suit once the employing agency itself has made a final decision on his or her claim. Kloeckner was afforded precisely that choice in the instant case. Under *Ballentine* an employee who does appeal to the MSPB runs the risk that, if his or her claim is rejected by the Board on some ground other than the merits, the employee will have judicial recourse only through the limited review in the Federal Circuit, rather than the de novo review in a district court. That risk is all the greater in circuits which hold that an MSPB determination that an employee's discrimination claim is not colorable is a decision regarding jurisdiction, and thus reviewable only by the Federal Circuit. A similar decision by the employing agency, if challenged at once without resort to the MSPB, would be subject to de novo review in district court. In the wake of *Ballentine* and its progeny, a federal employee might prudently choose to forgo appeal to the MSPB and proceed directly to federal district court, thus burdening federal district courts with cases that might have been resolved, or narrowed, had they been presented to and considered by the MSPB.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

LARRY J. STEIN
4023 Chain Bridge Rd.
Suite 6
Fairfax, VA 22030
(703) 383-9090

Counsel for Petitioner

**Counsel of Record*