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**Escaping the Labyrinth:  
Cutting Through the Maze of Federal Sector  
Employment Laws to Streamline Appeals,  
Allow Faster and More Consistent Decisions,  
and Level the Playing Field Between  
Agencies and Employees**

*Christopher Ligatti*

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## **Escaping the Labyrinth: Cutting Through the Maze of Federal Sector Employment Laws to Streamline Appeals, Allow Faster and More Consistent Decisions, and Level the Playing Field Between Agencies and Employees**

*Christopher Ligatti\**

*Federal employees and their job protections have gained increased media attention due to the current presidential administration. Criticism has long been aimed primarily at the property interest and accompanying due process protections that federal employees have in their employment. However, this Article argues that while the federal sector employment law system is badly in need of reform, the issue is not the constitutionally required due process protections afforded to employees, but rather the additional statutory and regulatory protections Congress has granted employees. Currently, federal employees have multiple overlapping forums in which they can bring employment actions, may cross-appeal negative decisions in one forum to another, and, in discrimination matters, have the right to a full and complete “do-over” before a federal court jury if unsuccessful in the administrative process. These procedures go well beyond the requirements of procedural due process. They create a lengthy and confusing process that takes years to navigate, confuses even experienced practitioners, contributes to government inefficiencies, and results in splits of law between executive agencies, such as the EEOC, and the federal courts.*

*This Article sets forth the intricacies of these procedures and the flaws in the system, before reviewing a series of proposed reforms, including the constitutional and practical issues that could arise from these reforms. As part of this analysis, the Article considers whether elimination of the right to a de novo hearing and the option for a jury trial in federal court in discrimination matters would violate the Seventh Amendment under current Supreme Court jurisprudence. Ultimately, the Article concludes that the best reforms would be to make an employee’s choice of forum more final, eliminate cross-appeals between forums, equalize the existing*

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*appellate options so that agencies and employees are on equal footing, and use appeals to the Federal Circuit to ensure consistency in law. The Article also suggests eliminating the right to a hearing in federal court in discrimination matters as most case law indicates that this is not required under the Seventh Amendment. The Article concludes that these reforms can make the system of federal sector employment law fairer and easier to navigate for both employees and management, while also creating a more efficient process that can provide the parties resolution in a reasonable timeframe.*

## I. INTRODUCTION

*When judges characterize a process as “unnecessarily elaborate and confusing” and even experienced practitioners cannot figure out what forum to proceed in, it is time to abandon the process. But until such time, the following is offered in an effort to alleviate some of the confusion, but at risk of adding to it.*<sup>1</sup>

Federal agencies and their employees, once considered an invisible branch of government, are now clearly in the public eye. From allegations that federal public servants constitute a deep state,<sup>2</sup> to employees repeating their pledges on social media,<sup>3</sup> being advised not to use the word “resist” at work,<sup>4</sup> and the flurry of executive orders at the beginning of President Trump’s second term,<sup>5</sup> public officials have unprecedented attention on them. President Trump has run two successful campaigns based, in part, on his vow to “drain the swamp,”<sup>6</sup> and has taken action to attempt to convert thousands of career public servants, whose jobs currently have certain statutory and constitutional protections, to political appointees who can be fired at will.<sup>7</sup>

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<sup>1</sup> NATANIA M. DAVIS & ERNEST C. HADLEY, A GUIDE TO FEDERAL SECTOR EQUAL EMPLOYMENT LAW AND PRACTICE 1575 (34th ed. 2021).

<sup>2</sup> See Ellen M. Gilmer & Parker Purifoy, *Trump’s Targeting of ‘Deep State’ Employees Set for Comeback*, BLOOMBERG GOV’T (Nov. 6, 2024, at 12:36 PT), <https://news.bgov.com/bloomberg-government-news/trumps-targeting-of-deep-state-employees-set-for-comeback> [<https://perma.cc/CDN2-KL5K>].

<sup>3</sup> See Joe Davidson, *Feds’ Charitable Giving Reflects Worry; Reciting Oath on Video Reflects Pride and Trump Counterpoint*, WASH. POST (Sep. 11, 2017), <https://www.washingtonpost.com/news/powerpost/wp/2017/09/11/feds-charitable-giving-reflects-worry-reciting-oath-on-video-reflects-pride/> [<https://perma.cc/CF8J-Z5UU>].

<sup>4</sup> Peter Overby, *Ethics Agency Warns Employees Not to Discuss Impeachment or ‘Resistance’*, NPR (Nov. 30, 2018, at 05:00 ET), <https://www.npr.org/2018/11/30/671954539/ethics-agency-warns-federal-workers-not-to-discuss-impeachment-or-resistance> [<https://perma.cc/3U9R-7ZXQ>] (embedding the Office of Special Counsel’s guidance from November 28, 2018).

<sup>5</sup> See *Presidential Actions*, THE WHITE HOUSE, <https://www.whitehouse.gov/presidential-actions/> [<https://perma.cc/3GFK-MLTE>] (last visited Oct. 5, 2025).

<sup>6</sup> Trevor Hughes, *Trump Calls to ‘Drain the Swamp’ of Washington*, USA TODAY (Oct. 18, 2016, at 17:25 ET), <https://www.usatoday.com/story/news/politics/elections/2016/2016/10/18/donald-trump-rally-colorado-springs-ethics-lobbying-limitations/92377656/> [<https://perma.cc/PT2W-XR9C>]; *Ahead of Debate, Trump Pledges to ‘Drain the Swamp’ in Wisconsin Speech*, WISN (Sep. 7, 2024, at 18:48 CT), <https://www.wisn.com/article/wisconsin-ahead-of-debate-trump-pledges-to-drain-the-swamp/62095554> [<https://perma.cc/YG2N-P56V>].

<sup>7</sup> See *Restoring Accountability to Policy-Influencing Positions Within the Federal Workforce*, THE WHITE HOUSE (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/restoring-accountability-to-policy-influencing-positions-within-the-federal-workforce/> [<https://perma.cc/EM7S-PZE3>]; *Executive Order on Creating Schedule F in the Excepted Service*, THE WHITE HOUSE (Oct. 21, 2020) [hereinafter *Exec. Order on Schedule F*],

However, while these issues get the most attention and implicate important ideas of public service and the history of the spoils system,<sup>8</sup> they ignore much more immediate and practical issues with agencies' abilities to conduct regular management actions, including the assignment of duties, the review of work product, and the discipline and removal of subpar or misbehaving employees. While the difficulty of firing federal employees has been a long-standing complaint of critics of the federal bureaucracy,<sup>9</sup> many of these simplistic analyses, such as the Trump administration's effort to convert career employees into political appointees,<sup>10</sup> blame the very concept of a property interest in federal employment and the accompanying due process protections.<sup>11</sup> However, there are clear dangers in returning to a politicized civil service that can be fired without procedural safeguards

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<https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-creating-schedule-f-excepted-service/> [<https://perma.cc/8JPB-UEQM>] (the original executive order seeking to implement schedule F); Improving Performance, Accountability and Responsiveness in the Civil Service, 90 Fed. Reg. 17182, 17182 (Apr. 23, 2025); Gabe Lezra & Diamond Brown, *FAQ: The Conservative Attack on the Merit-Based Civil Service*, CITIZENS FOR RESP. AND ETHICS IN WASH. (Jan. 25, 2024), <https://www.citizensforethics.org/news/analysis/faq-the-conservative-attack-on-the-merit-based-civil-service/> [<https://perma.cc/ELA5-3BFZ>]; Barry M. Mitnick, *Trump Revived Andrew Jackson's Spoils System, Which Would Undo America's 138-Year-Old Professional Civil Service*, THE CONVERSATION (Jan. 21, 2021, at 08:14 ET), <https://theconversation.com/trump-revived-andrew-jacksons-spoils-system-which-would-undo-americas-138-year-old-professional-civil-service-150039> [<https://perma.cc/9CUS-2HQK>] (quoting 1880s editorial cartoons in *Harper's* that describe the spoils system as a "vast public evil").

<sup>8</sup> See, e.g., Peter W. Schroth, *Corruption and Accountability of the Civil Service in the United States*, 54 AM. J. COMPAR. L. 553, 553–68 (2006) (providing a concise history of the spoils system, the laws creating it, and the laws designed to counter it); Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1613–17 (2008) (providing a less common perspective that stresses some of the benefits of the spoils system).

<sup>9</sup> See, e.g., Stephen Moore, *Firing Bad Federal Workers Is the Answer for a Better Government*, THE HERITAGE FOUND. (July 30, 2018), <https://www.heritage.org/conservatism/commentary/firing-bad-federal-workers-the-answer-better-government> [<https://perma.cc/F5Z2-XSEF>].

<sup>10</sup> See *Exec. Order on Schedule F*, *supra* note 7.

<sup>11</sup> See Eric Katz, *Firing Line*, GOV'T EXEC. (Jan. 21, 2015), <https://www.govexec.com/feature/firing-line/> [<https://perma.cc/859N-TBC2>] ("It is nearly impossible to remove an entrenched, poorly performing or even malfeasant federal employee. The red tape is too thick to penetrate. The bureaucracy protects itself."). While this is not an accurate description—as the article admits "more than two dozen federal workers are fired every day"—it does illustrate the common idea that the problem is due process protections and the accompanying red tape. *Id.*; see also Jeffrey Joseph Lorek, *Budget-Related Furloughs in Today's Federal Government: Making the Case for Reforming the Civil Service Reform Act of 1978*, 24 FED. CIR. BAR J. 537, 557–58 (2015) (explaining that the property interest of federal employees in their job is a statutory right and the Constitution does not require that property interests include public employment).

and at the whim of presidential administrations.<sup>12</sup> Proposals to remove due process rights miss that the issue is not due process for federal employees but the specific processes, especially the equal employment opportunity process, by which employees challenge managerial actions *after* the procedure required under due process. In other words, the problem is not the safeguards that apply to federal employment, but rather the statutory and administrative systems that have been established for employees to challenge management actions, even after receiving the procedures required by due process.

Under the current system, employee claims against the federal government typically begin at either the Equal Employment Opportunity Commission (EEOC), the Merit Systems Protection Board (MSPB), in a federal sector grievance arbitration, or with the Office of Special Counsel (OSC). These various forums, all with different jurisdictional requirements and procedures, combine to create a maze of various laws involving multiple separate forums, cross referencing regulations, duplicative processes, cross-appeals, false paths, and dead ends (for the federal agency at least). The complexity of, the confusion created by, and the time required to navigate these procedures make this a common cause of complaint.<sup>13</sup> Discrimination complaints can languish for years as they proceed through up to five levels of review, including a full trial at the administrative level before an administrative judge, and a “do-over” at federal court if the employee initially loses.<sup>14</sup> Removals can be overturned with years of back pay

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<sup>12</sup> See Ben L. Erdreich, *The Merit Systems Protection Board: Past, Present, and Future*, 6 FED. CIR. BAR J. 1, 2 (1996) (stating that President Lincoln “predicted that the long term consequences of the chaos in government created by the spoils system could be a greater danger to the republic than the Civil War”); Michael Wolraich, *How Donald Trump’s Plans Could Bring Back the Spoils System*, TIME (May 14, 2024, at 11:49 ET), <https://time.com/6968746/spoils-system-donald-trump/> [<https://perma.cc/VH27-QXQN>]; Max Stier, *The Patronage System Was Corrupt. It’s Threatening a Comeback.*, POLITICO (Aug. 2, 2022, at 04:30 ET), <https://www.politico.com/news/magazine/2022/08/02/trump-civil-service-public-safety-00048796> [<https://perma.cc/QJ6S-7SYF>] (“Such a policy would have a real chilling effect — discouraging federal employees from speaking out while simultaneously eroding public trust in our government. It also would tarnish the historic requirement of a merit-based system where well-qualified federal employees are given charge over our most sensitive capabilities, data and choices, and would undermine the role of civil servants as stewards of the public good.”).

<sup>13</sup> See discussion *infra* Section III.B.1.

<sup>14</sup> See discussion *infra* Section III.B.4; Charles B. Hernicz, *The Civil Rights Act of 1991: From Conciliation to Litigation—How Congress Delegates Lawmaking to the Courts*, 141 MIL. L. REV. 1, 13 (“Discrimination suits commonly languish in federal courts for years or even decades.”).

owed to the employee.<sup>15</sup> Most significantly, the system is tilted toward employees, giving them several chances to argue their cases and numerous avenues of appeal, without providing these same appellate options to federal agencies.<sup>16</sup> In essence, employees are given multiple bites at the apple, needing only to receive one favorable decision, while the agency needs to run the table, winning again and again in different forums over a number of years to reach a favorable resolution.<sup>17</sup>

This Article will first set forth the various avenues federal employees have for challenging management actions and explain the process and appellate options within each forum.<sup>18</sup> Then it will discuss the pre-deprivation due process protections for federal career, as opposed to political, appointees.<sup>19</sup> The Article will explain how these procedures satisfy the procedural due process requirements of the Constitution.<sup>20</sup> Then the Article will explain how the system is fundamentally unfair, promotes a split in law between the EEOC and federal courts, causes long delays in the resolution of cases, negatively impacts judicial economy, and leads to exaggerated damages, all while also deterring agencies from taking disciplinary or other action in the first place.<sup>21</sup> After explaining these issues with the current system, this Article will discuss potential solutions, suggesting multiple reforms including making an employee's choice of forum more final, streamlining the various appeal processes, and allowing the agency more appellate options to mirror those of the employee.<sup>22</sup>

While this Article will discuss each of the forums available to employees, the most complicated aspect of federal sector employment law is the process at the EEOC. Federal sector cases brought to the EEOC go through a lengthy process, developed over decades, but with some of the most significant issues arising from the Civil Rights Act of 1991 (CRA), which specifies that compensatory damages are available and that employees unsuccessful at the EEOC have the right to request a jury trial in fed-

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<sup>15</sup> See discussion *infra* Section III.B.4.

<sup>16</sup> See discussion *infra* Section III.B.2.

<sup>17</sup> See discussion *infra* Section III.B.2.

<sup>18</sup> See *infra* Sections I.A–E.

<sup>19</sup> See *infra* Section III.A.

<sup>20</sup> See *infra* Section III.A.

<sup>21</sup> See *infra* Section III.B.1–5.

<sup>22</sup> See *infra* Section III.C.

eral court.<sup>23</sup> Commentary at the time the CRA was enacted was split between those acclaiming the additional rights granted to employees and those concerned that the pendulum had swung too far, although most criticism was focused not on changes to the EEOC process but rather on fears of its provisions being applied retroactively and that the Act's provisions would encourage "quotas" to effectuate an affirmative action regime.<sup>24</sup> In one article, a commentator stated that the CRA's focus on litigation and the availability of compensatory damages meant that "litigation rules and dissatisfaction [sic] reigns."<sup>25</sup> In the years since the CRA, efficiency has not been a byword for the EEOC, with cases taking years to adjudicate before an administrative judge,<sup>26</sup> with do-overs in federal court for unsuccessful employees,<sup>27</sup> a backlog of hearing requests based on decades of underfunding,<sup>28</sup> a separate system of law diverging from that applied in federal court,<sup>29</sup> and where the bare allegations can lead to a decade-long process of adjudication.<sup>30</sup> Due to these issues, much of this Article will fo-

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<sup>23</sup> Katz, *supra* note 11; Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (amending 42 U.S.C. § 1981 to add 42 U.S.C. § 1981a).

<sup>24</sup> See Daniel Patrick Tokaji, *The Persistence of Prejudice: Process-Based Theory and the Retroactivity of the Civil Rights Act of 1991*, 103 YALE L.J. 567, 567–69 (1993); Scott M. Pearson, Note, *Canons, Presumptions and Manifest Injustice: Retroactivity of the Civil Rights Act of 1991*, 3 S. CAL. INTERDISC. L.J. 461, 463 (1993).

<sup>25</sup> Hernicz, *supra* note 14, at 82.

<sup>26</sup> Juliet Linderman, *At the EEOC, Harassment Cases Can Languish for Years*, FED. TIMES (Apr. 9, 2018), <https://www.federaltimes.com/federal-oversight/watchdogs/2018/04/09/at-the-eec-harassment-cases-can-languish-for-years/> [<https://perma.cc/SEP4-85K7>].

<sup>27</sup> See discussion *infra* Section II.A.

<sup>28</sup> See Drew Friedman, *EEOC's 20% Backlog of Discrimination Charges 'Alarming' to GOP House Lawmakers*, FED. NEWS NETWORK (May 18, 2023, at 10:00 PT), <https://federalnewsnetwork.com/congress/2023/05/eec-20-backlog-of-discrimination-charges-alarming-to-gop-house-lawmakers/> [<https://perma.cc/BZH2-25KA>] (describing a backlog of 51,399 complaints in 2022); Drew Friedman, *While Under Hiring Freeze, EEOC Facing 'Very Big Task,' Burrows Says*, FED. NEWS NETWORK (June 28, 2024, at 16:48 PT), <https://federalnewsnetwork.com/workforce/2024/06/while-under-hiring-freeze-eec-facing-very-big-task-burrows-says/> [<https://perma.cc/5MNV-PNCE>] (explaining that despite an increasing caseload, the EEOC has roughly 1,000 positions less than in the 1980s); *EEOC Budget and Staffing History 1980 to Present*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc-budget-and-staffing-history-1980-present> [<https://perma.cc/9E5S-QC3D>] (last visited Oct. 27, 2025). The 2023 EEOC Annual Report stated that the Agency received 8,669 federal sector hearing requests, 3,730 federal sector appeals, and conducted 471 federal sector mediations during the year. *2023 Annual Performance Report*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Feb. 23, 2024), <https://www.eeoc.gov/2023-annual-performance-report> [<https://perma.cc/2NPZ-S5ZE>].

<sup>29</sup> See discussion *infra* Section II.B.

<sup>30</sup> See Hernicz, *supra* note 14, at 13 ("Discrimination suits commonly languish in federal courts for years or even decades."); *Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1168 (5th Cir. 1978) ("The length of litigation in complex Title VII [cases] often rivals that of even the most notorious antitrust cases.").

cus on the problems of the EEOC process and needed reforms in this process, while also proposing necessary related reforms in the other forums.

## II. BACKGROUND: SUMMARY OF THE FORUMS IN FEDERAL SECTOR EMPLOYMENT LAW

The system for federal employee challenges to management decisions can confuse even experienced practitioners.<sup>31</sup> There are generally five forums in which employees can challenge agency action depending on the type of action at issue: the EEOC, the MSPB, federal sector arbitration, the OSC, and federal court. Each of these forums then has different avenues of appeal, some of which involve complete re-hearings of the claim in another forum.<sup>32</sup>

As an initial matter, employees face a choice of where to file their complaint based on where the type of complaint they wish to file would be jurisdictional. An employee cannot typically take their workplace issues straight to federal court as exclusive jurisdiction for federal employee claims lies within the aforementioned administrative agencies.<sup>33</sup> For instance, claims of discrimination based on a protected class can be filed with the EEOC,<sup>34</sup> as a grievance that goes to arbitration if covered by a collective bargaining agreement,<sup>35</sup> a complaint to the OSC,<sup>36</sup> or if the case involves a significant disciplinary action, the MSPB.<sup>37</sup> Disciplinary actions of a suspension over fourteen days, removal or reduction in grade may be appealed to the MSPB<sup>38</sup> or be filed as a grievance leading to arbitration,<sup>39</sup> and lesser disciplinary actions can be grieved and arbitrated.<sup>40</sup>

<sup>31</sup> See discussion *infra* Section III.B.1.

<sup>32</sup> See discussion *infra* Sections II.A–E.

<sup>33</sup> See 29 C.F.R. § 1614.407 (2025); *Overview of Federal Sector EEO Complaint Process*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/federal-sector/overview-federal-sector-eeo-complaint-process> [<https://perma.cc/ND77-9P45>] (last visited Aug. 6, 2025). An exception to the exhaustion requirement is claims under the Age Discrimination in Employment Act, which may be brought straight to federal court after giving the EEOC at least thirty-day notice of their intent to file in district court. 29 C.F.R. § 1614.201(a).

<sup>34</sup> 29 C.F.R. § 1614.103(a).

<sup>35</sup> See *id.* § 1614.301(a); U.S. FED. LAB. RELS. AUTH., GUIDE TO ARBITRATION UNDER THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE 6–7 (2016) [hereinafter GUIDE TO ARBITRATION], <https://www.flra.gov/system/files/webfm/Authority/AR%20Forms%2C%20Guide%2C%20Other/Arbitration%20Guide%209.30.16.pdf> [<https://perma.cc/UHY4-ESN5>].

<sup>36</sup> See 5 C.F.R. §§ 1800.2(a)(1), 1201.3(c)(1)(i) (2025).

<sup>37</sup> See GUIDE TO ARBITRATION, *supra* note 35, at 5.

<sup>38</sup> See 5 C.F.R. § 1201.3(a)(1).

<sup>39</sup> *Id.* § 1201.3(c)(1)(i), (c)(1)(ii)(B).

<sup>40</sup> U.S. MERIT SYS. PROT. BD., *Different Types of Adverse Actions Use Different Rules*, in ADVERSE ACTIONS: A COMPILATION OF ARTICLES 15, 16 (2016) (explaining that while

Regardless of where a claim is filed, the choice of forum does not necessarily involve a choice of law. For instance, if a claim of discrimination is brought to the MSPB or before an arbitrator, these adjudicators will look to EEOC caselaw.<sup>41</sup> Arbitrators will also look to MSPB caselaw in the event a disciplinary action is the subject of a grievance and subsequent arbitration.<sup>42</sup>

As explained below in this Article's description of these forums, if an employee is unsuccessful in the initial forum, at least one, and often two, additional forums are available on appeal, depending both on the type of claim and where the initial claim was filed.

### A. Equal Employment Opportunity Commission

The EEOC "is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, childbirth, or related conditions, transgender status, and sexual orientation), national origin, age (40 or older), disability or genetic information."<sup>43</sup> While the EEOC governs both public and private sector employers with at least fifteen employees,<sup>44</sup> it also handles equal employment matters involving federal agencies.<sup>45</sup> The EEOC "provides leadership and guidance to federal agencies," "assures federal agency . . . compliance with EEOC regulations, provides technical assistance to federal agencies . . . monitors and evaluates federal agencies' affirmative employment programs," develops educational materials and provides training, has administrative judges "who conduct hearings on EEO complaints, and adjudicates appeals from administrative decisions made by federal agencies on EEO complaints."<sup>46</sup>

The EEOC system is complex. EEOC regulations establish that every federal agency is to set up its own Equal Employment

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federal law and regulation do not address the standard of proof for challenges of suspensions under fourteen days, collective bargaining agreements or agency policies may do so).

<sup>41</sup> See Southerland, 2014 M.S.P.B. 88 ¶ 12 (2014) ("[T]he Board generally defers to the EEOC on issues of substantive discrimination law unless the EEOC's decision rests on civil service law for its support or is so unreasonable that it amounts to a violation of civil service law.").

<sup>42</sup> See GUIDE TO ARBITRATION, *supra* note 35, at 5.

<sup>43</sup> Overview, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/overview> [<https://perma.cc/YP8H-AKC3>] (last visited Aug. 6, 2025).

<sup>44</sup> See *id.*; 42 U.S.C. § 2000e(b).

<sup>45</sup> See 29 C.F.R. § 1614.101(a) (2025).

<sup>46</sup> Overview, *supra* note 43 (regarding the EEOC's non-adjudicatory roles); see also 29 C.F.R. § 1614.109 (regarding the EEOC's hearing role).

Opportunity office (EEO) that supports equal employment opportunity at the agency through trainings, evaluations of data, and communications with the public and within the agency.<sup>47</sup> Part of this office's remit within each agency is to administer a program by which employees may make complaints about employment discrimination, receive counseling from the EEO office, and have formal complaints investigated.<sup>48</sup>

Under the system set up by the EEOC, informal complaints (also known as consulting with an EEO counselor) are first made to an EEO office within each agency.<sup>49</sup> That agency then has the responsibility to counsel employees about their rights and the process, and engage in alternative dispute resolution (ADR) if selected by the employee.<sup>50</sup> Once this process is over, the employee is notified that they can file a formal complaint.<sup>51</sup> The complaint is then accepted if it is jurisdictional and a notice of accepted claims is sent to the employee.<sup>52</sup> The agency is then responsible for appointing a neutral EEO investigator who compiles a Report of Investigation (ROI) that includes documentary evidence as well as affidavits from the listed responsible management officials, the employee, and any witnesses listed by the parties.<sup>53</sup> The ROI is supposed to be completed within 180 days,<sup>54</sup> although many investigations take longer.<sup>55</sup> Once the ROI has been received by the employee, the employee has the option to either request a final decision by the agency, or proceed to the hearing process before an EEOC administrative judge.<sup>56</sup>

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<sup>47</sup> See 29 C.F.R. § 1614.102.

<sup>48</sup> See *id.* §§ 1614.102–108.

<sup>49</sup> *Id.* § 1614.105(a)(1).

<sup>50</sup> *Id.* § 1614.105(b)(1)–(2); see MARTIN J. DICKMAN & PATRICIA A. MARSHALL, EXAMINING THE INEFFICIENCIES OF THE FEDERAL WORKPLACE 4 (2002), <https://www.rrb.gov/sites/default/files/2017-05/secondineff.pdf> [<https://perma.cc/4W4G-BKQQ>].

<sup>51</sup> See 29 C.F.R. § 1614.105(d).

<sup>52</sup> See *id.* § 1614.106(e).

<sup>53</sup> See *id.* §§ 1614.106(e)(2), 1614.108(a)–(c); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEO-MD-110, EQUAL EMPLOYMENT OPPORTUNITY MANAGEMENT DIRECTIVE FOR 29 C.F.R. PART 1614 ch. 6, at 6-1 to -28 (2015) [hereinafter EEOC MD 110] (explaining an appropriate investigation consists of training requirements for investigators and types of evidence provided).

<sup>54</sup> See 29 C.F.R. § 1614.108(e).

<sup>55</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-105874, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: IMPROVED OVERSIGHT PROCESSES NEEDED TO HELP AGENCIES ADDRESS PROGRAM DEFICIENCIES 9, 21 (2024) (finding eight of twenty-four federal agencies deficient, with, as one example, the Department of Transportation taking an average of 298 days to complete an investigation).

<sup>56</sup> 29 C.F.R. § 1614.108(f).

If the employee chooses to receive a decision from the agency, the agency is required to issue this within sixty days.<sup>57</sup> If the employee disagrees with the agency's resolution, it can appeal to the EEOC Office of Federal Operations (OFO) or opt to refile the claim as a lawsuit *de novo* in federal court.<sup>58</sup> If the employee takes the OFO route and is still unsuccessful at the OFO or if the OFO is unable to make a decision within 180 days, the employee may then still file for a *de novo* process in federal court.<sup>59</sup>

However, if the employee chooses to proceed with the EEOC hearing process, an administrative judge assigned by the EEOC takes the case through discovery, potential settlement conferences, dispositive motions, and through a hearing, after which the administrative judge is supposed to issue a decision.<sup>60</sup> The entire process from the administrative judge's receipt of the case to the administrative judge's decision is supposed to occur within 180 days, but may be extended by the administrative judge for good cause.<sup>61</sup> Either the agency or the complainant may appeal the administrative judge's decision to the OFO and the complainant, but not the agency, also has the option to instead file a claim *de novo* in federal court.<sup>62</sup>

If under either of these procedures, the employee files a claim in federal court, the case goes through the full panoply of federal court litigation, including further, duplicative discovery, dispositive motions and hearings, and after resolution in the district court, the regular set of appeals in the federal system, up to the Supreme Court, are available.<sup>63</sup>

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<sup>57</sup> See *id.* § 1614.110(b).

<sup>58</sup> See *id.* §§ 1614.110(b), 1614.407(a).

<sup>59</sup> See *id.* § 1614.407(c)–(d), (f). Further, if a complainant simply wishes to abandon their appeal, they may do so and instead file their claim in federal court. See *id.* § 1614.407(e).

<sup>60</sup> *Id.* § 1614.109.

<sup>61</sup> *Id.* § 1614.109(i).

<sup>62</sup> See *id.* §§ 1614.110(a), 1614.407(c)–(d), (f); Michele E. Williams, *Getting the Fox Out of the Chicken Coop: The Movement Towards Final EEOC Administrative Judge Decisions*, ARMY LAW., July 1999, at 13, 22 (“Unlike complainants, federal agencies are not permitted to challenge an adverse EEOC decision in federal district court.”); Nancy M. Modesitt, *The Hundred-Years War: The Ongoing Battle Between Courts and Agencies over the Right to Interpret Federal Law*, 74 MO. L. REV. 949, 975 (2009) (“The final OFO decision is mandatory and binding on the agency; the agency cannot appeal the final OFO decision.”).

<sup>63</sup> See 3 EMP. DISCRIMINATION COORDINATOR ANALYSIS OF FED. L. § 105:46, Westlaw (database updated Oct. 2025) (citing *Nabors v. U.S.*, 568 F.2d 657 (9th Cir. 1978)) (explaining that a federal court errs when it bases its decision solely on the administrative record before the EEOC without allowing further development of the evidence); DICKMAN & MARSHALL, *supra* note 50, at 6.

To summarize, the EEOC mandates the establishment of EEO offices within each agency that engages in multiple levels of counseling and ADR before engaging in a long and costly fact-finding investigation before the claim goes to an administrative judge, where discovery, motion practice and a hearing occurs, and whose decision can then be appealed to the OFO. The length and complexity of the process is impressive, but curious considering that after these multiple determinations on the merits of the case, the employee (and only the employee) may then start from the beginning on *the exact same claim* in federal district court.

As explained above, once the employee is unsuccessful at the EEOC (or on appeal to the MSPB in a mixed case discussed below), the employee can go to federal court de novo—this means that the entire case would begin again, with a complaint filed in district court, discovery, dispositive motions, and an eventual trial in federal court, with all the potential appeals available in the federal court system after judgment. In a discrimination claim, for instance, by this time, the employee would have lost at least twice already (before an EEOC administrative judge and the OFO) before having a complete rehearing at district court with all of the appellate options within the federal courts still available if the employee is unsuccessful in district court. As one commentator put it: “the EEOC’s determination is final, unless a complainant is dissatisfied with the decision and seeks a trial de novo in federal court.”<sup>64</sup>

## B. Merit Systems Protection Board

The MSPB is an administrative agency authorized by statute to hear appeals of certain disciplinary and other actions against federal employees.<sup>65</sup> Unlike the arbitration forum discussed below, appeals of agency actions to the MSPB<sup>66</sup> are not limited to bargaining unit members, but can be filed by most employees, in-

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<sup>64</sup> Steven M. Ranieri, “*If at First You Don’t Succeed . . .*”: *An Argument Giving Federal Agencies the Ability to Challenge Adverse Equal Employment Opportunity Commission Decisions in Federal Court*, ARMY LAW., Sep. 2008, at 23, 23.

<sup>65</sup> See 5 U.S.C. § 1204(a)(1); *About MSPB*, U.S. MERIT SYS. PROT. BD., <https://www.mspb.gov/about/about.htm> [<https://perma.cc/C7W8-RPS9>] (last visited Oct. 29, 2025).

<sup>66</sup> In a confusing instance of terminology, all cases brought to the MSPB are called “appeals” of the agency action. For clarity, this Article will typically use the term “appeals” to refer to appeals of adjudications, not agency actions, nor cases within the MSPB’s original jurisdictions.

cluding managers, as long as they are not political appointees.<sup>67</sup> However, for the most part, only removals, reductions in grades, or suspensions of over fourteen days, are within the jurisdiction of the MSPB.<sup>68</sup>

Cases filed at the MSPB typically are heard by an MSPB administrative law judge.<sup>69</sup> Unlike litigation in the EEOC or federal forum, while discovery can take place, no motions for summary judgment are entertained by the MSPB.<sup>70</sup> Therefore, any appeal that is jurisdictional must go to a hearing. If either the agency or the employee are dissatisfied with the administrative judge's decision, they may petition for review by the MSPB Board.<sup>71</sup> If an employee does elect to go to the MSPB and is unsuccessful there, they may then appeal to the United States Court of Appeals for the Federal Circuit (Federal Circuit).<sup>72</sup> Unlike the EEOC, this is not a *de novo* re-hearing, but rather a typical appeal to a higher authority.<sup>73</sup> The agency has no such option if they disagree with the MSPB's determination, unless they convince the Director of the Office of Personnel Management (OPM) to appeal to the Federal Circuit based on an OPM determination "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."<sup>74</sup> This is rare,<sup>75</sup> and even

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<sup>67</sup> See 5 C.F.R. § 1201.3 (2025); *Appellant Questions and Answers*, U.S. MERIT SYS. PROT. BD., <https://www.mspb.gov/appeals/appellantqanda.htm> [<https://perma.cc/QXB3-9ZDP>] (last visited Oct. 29, 2025).

<sup>68</sup> See 5 C.F.R. § 1201.3(a)(1).

<sup>69</sup> See *id.* § 1201.4(a).

<sup>70</sup> See generally *id.* §§ 1201.71–75 (regarding discovery). See *Bommer v. Dep't of the Navy*, 1987 M.S.P.B. 453 ¶¶ 11–16 (1987) (holding that the statute requires a hearing on appeal and that the MSPB cannot consider motions for summary judgment); U.S. MERIT SYS. PROT. BD., *OPTIONS FOR REVISING THE BOARD'S REGULATIONS GOVERNING THE ESTABLISHMENT OF MSPB JURISDICTION OVER AN APPEAL* 13–16 (2013) (providing working group recommendations, one of which would allow summary judgment motions).

<sup>71</sup> See 5 C.F.R. § 1204.114(a), (c).

<sup>72</sup> See 5 U.S.C. § 7703; 5 C.F.R. § 1201.120.

<sup>73</sup> See 5 U.S.C. § 7703(c).

<sup>74</sup> *Id.* § 7703(d)(1).

<sup>75</sup> In the author's experience, this involves the concurrence not just of the agency and the OPM, but also the Department of Justice, which would be responsible for arguing the case in the Federal Circuit. In a review of available caselaw, only three instances of this were found: (1) where a decision had an impact on the eligibility requirements for a sensitive position within the Department of Defense, (2) a jurisdictional decision that would remove the right of appeal to the MSPB from a wide range of employees, and (3) where caselaw subsequent to the MSPB decision regarding whistleblowers necessitated review. See *James v. Von Zemenszky*, 284 F.3d 1310, 1314 (Fed. Cir. 2002); *Kaplan v. Conyers*,

where OPM makes the petition for review, the Federal Circuit has the discretion to grant or deny the hearing of the appeal from OPM.<sup>76</sup> In typical disciplinary cases before the MSPB, the agency simply has no realistic option to seek review of the MSPB decision.<sup>77</sup>

### C. Federal Sector Arbitration

The relationship between federal employees and management is governed by the Federal Service Labor-Management Relations Statute.<sup>78</sup> Under this law, collective bargaining agreements between agencies and unions must include negotiated grievance procedures that provide for binding arbitration for many workplace disputes.<sup>79</sup> In most cases, this involves the relevant union receiving complaints from members and then the union filing a grievance, that if not resolved informally, can be referred by the union to binding arbitration.<sup>80</sup> While the exact content of each collective bargaining agreement may differ, most allow grievances based on management disciplinary decisions,<sup>81</sup> prohibited personnel practices (including discrimination) set out by statute,<sup>82</sup> and have certain statutory, as well as negotiated, exclusions.<sup>83</sup>

Any party that is unsuccessful at arbitration may file an exception with the Federal Labor Relations Authority (FLRA) contending the arbitrator's decision was in error on narrow grounds, the most common of which are that the arbitrator's award was contrary to law; was incomplete, ambiguous, or contradictory; failed to take its essence from the collective bargaining agreement; was based on a non-fact; exceeded the arbitrator's authori-

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733 F.3d 1148, 1153 (Fed. Cir. 2013); *James v. Santella*, No. 689, 2002 WL 237761, at \*1 (Fed. Cir. Feb. 1, 2002).

<sup>76</sup> 5 U.S.C. § 7703(d)(1).

<sup>77</sup> See U.S. MERIT SYS. PROT. BD., *Implementing or Challenging Initial Decisions, in ADVERSE ACTIONS: A COMPILATION OF ARTICLES 59, 60* (2016) ("In contrast, the agency cannot appeal directly to the Federal Circuit at any stage.").

<sup>78</sup> 5 U.S.C. § 7101(b).

<sup>79</sup> *Id.* § 7121(a)(1), (b)(1)(C)(iii).

<sup>80</sup> See Stephen L. Wood, *Federal Employees, Federal Unions, and Federal Courts: The Duty of Fair Representation in the Federal Sector*, 64 CHI.-KENT L. REV. 271, 291 (1988).

<sup>81</sup> See 5 U.S.C. § 7121(e); GUIDE TO ARBITRATION, *supra* note 35, at 5–6.

<sup>82</sup> See 5 U.S.C. § 7121(b)(2)(a), (d) (referring to the prohibited personnel action provided in 5 U.S.C. § 2302(b)); GUIDE TO ARBITRATION, *supra* note 35, at 7–8.

<sup>83</sup> See 5 U.S.C. § 7121(c) (excluding grievances concerning prohibited political activity; retirement, life, or health insurance claims; claims involving suspensions or removals for national security reasons; claims involving examinations, certifications, or appointments; or the classification of a position that does not result in the reduction of grade or pay of an employee); GUIDE TO ARBITRATION, *supra* note 35, at 28–31.

ty; or demonstrated arbitrator bias or the lack of a fair hearing.<sup>84</sup> Such FLRA decisions are not subject to judicial review, unless they involved an unfair labor practice claim.<sup>85</sup> In many cases, review by the FLRA is the end of the line.

#### D. Office of Special Counsel

In addition to other responsibilities,<sup>86</sup> the OSC has the power to investigate and remedy prohibited personnel practices.<sup>87</sup> Specifically, the OSC can pursue disciplinary action against supervisors who have been found to have engaged in discriminatory personnel practices or in Hatch Act violations.<sup>88</sup> The OSC can also accept whistleblower complaints.<sup>89</sup> If the OSC finds a prohibited personnel practice to have taken place, it will seek corrective action and potential discipline with the federal agency and, if the agency resists, will take the issue to the MSPB.<sup>90</sup> Also, if the OSC closes the complaint or fails to file with the MSPB, the employee

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<sup>84</sup> See 5 U.S.C. § 7122(a); GUIDE TO ARBITRATION, *supra* note 35, at 26–29, 49–55 (“Although Congress specifically provided for Authority review of arbitration awards, Congress also made clear that the scope of that review is very limited.”).

<sup>85</sup> See 5 U.S.C. § 7123(a)(1); PETER BROIDA, A GUIDE TO FEDERAL LABOR RELATIONS AUTHORITY LAW AND PRACTICE ch. 9, *Review of Arbitration Awards* (38th ed. 2025) (“FLRA members review a lot of arbitration awards, in comparison with the number of cases percolating through exceptions to ALJ awards involving ULPs, negotiability, and representation disputes.”); National Treasury Employees Union, 72 F.L.R.A. 308, 314 (2021) (Chairman DuBester, dissenting) (explaining that unfair labor practices can either be filed with a Regional Office of the FLRA and brought before an administrative judge or be challenged through grievance arbitration).

Unfair labor practice is “conduct by agencies or unions that violates rights that the Statute protects or the rule that it establishes.” *Unfair Labor Practice*, U.S. FED. LAB. RELS. AUTH., <https://www.flra.gov/cases/unfair-labor-practice> [<https://perma.cc/Z62R-64JK>] (last visited Oct. 30, 2025).

<sup>86</sup> OSC Services, U.S. OFF. OF SPECIAL COUNS., <https://osc.gov/Services/Pages/default.aspx> [<https://perma.cc/N9BF-KUTT>] (last visited Aug. 6, 2025) (describing outreach, training, alternative dispute resolution, and certification duties, as well as complaints under USERRA).

<sup>87</sup> 5 C.F.R. § 1800.2 (2025).

<sup>88</sup> Robert G. Vaughn, *The Civil Service Reform Act of 1978 and Legal Regulation of Public Bureaucracies*, 31 HOW. L.J. 187, 194 (1988); *Your Rights as a Federal Employee*, U.S. OFF. OF SPECIAL COUNS., <https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/fedrights.pdf> [<https://perma.cc/3XMG-67JE>] (last visited Aug. 6, 2025); 5 C.F.R. § 1800.2 (describing additional inappropriate personnel practices the OSC investigates, such as political coercion, nepotism, and whistleblower retaliation).

<sup>89</sup> 5 C.F.R. § 1800.2(a)(8). For a description of whistleblower cases and the confusion over the process, see Devin Redding, Note, *A Road to Resolution for Federal Whistleblowers’ Mixed Case Claims*, 125 W. VA. L. REV. 751, 761 (2022).

<sup>90</sup> 5 U.S.C. § 1214(b)(2)(B)–(C); *Fact Sheet: How Complaints Are Investigated and Prosecuted*, U.S. OFF. OF SPECIAL COUNS. (Sep. 2018), <https://osc.gov/Documents/PPP/Processing%20Complaints%20of%20PPPs/How%20Complaints%20are%20Investigated%20and%20Prosecuted.pdf> [<https://perma.cc/8XWY-7NH4>].

has an individual right of appeal to the MSPB.<sup>91</sup> An employee disciplined by the MSPB based on an OSC charge of a prohibited personnel practice has a right of appeal to the Federal Circuit, while if the charge is regarding a Hatch Act violation, any appeal goes to the relevant district court.<sup>92</sup> The OSC has no right of appeal if the MSPB finds no discipline is warranted.<sup>93</sup>

#### E. Mixed Cases with the EEOC, MSPB, or in Federal Sector Arbitration<sup>94</sup>

The most labyrinthian part of federal sector employment law involves “mixed cases” and “mixed appeals.” The MSPB has jurisdiction over “mixed appeals”—challenges to agency actions that fall within their usual jurisdiction but where the employee is alleging that the reason for the action was discriminatory.<sup>95</sup> If the employee loses before an MSPB administrative judge in a mixed appeal and then is unsuccessful in an appeal to the MSPB Board, the employee may either appeal to the EEOC<sup>96</sup> or file the claim in the relevant federal district court to restart the litigation process de novo.<sup>97</sup> If the employee decides to appeal to the EEOC, and is unsuccessful there (after already being unsuccessful before an MSPB judge and the full MSPB), the employee can still file for a de novo hearing in the relevant federal district court.<sup>98</sup> In these circumstances, the federal district court would treat the case as any other civil litigation and allow the full civil procedure that entails—including discovery, motions, and an eventual trial in federal court—before the relevant possible federal appeals.<sup>99</sup> In the case where the MSPB decision is appealed to the EEOC and the EEOC disagrees with the MSPB, the MSPB must either concur in the EEOC decision or reaffirm its own decision.<sup>100</sup> If the MSPB disagrees with the EEOC and reaffirms its own decision,

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<sup>91</sup> 5 U.S.C. § 1214(a)(3).

<sup>92</sup> *Id.* § 1215(a)(4); 5 C.F.R. § 1201.127.

<sup>93</sup> *See* 5 C.F.R. § 1201.127.

<sup>94</sup> John P. Stimson, *Unscrambling Federal Merit Protection*, 150 MIL. L. REV. 165, 204–12 (1995) (explaining the history behind the creation of the current system, including the congressional concerns that led to the mixed appeal process).

<sup>95</sup> 5 U.S.C. § 7702(a); *Perry v. Merit Sys. Prot. Bd.*, 582 U.S. 420, 431–32 (2017).

<sup>96</sup> 29 C.F.R. § 1614.303 (2025) (EEOC regulation on MSPB appeals to the EEOC); 5 C.F.R. § 1201.161 (MSPB regulation on MSPB appeals to the EEOC).

<sup>97</sup> 5 C.F.R. § 1201.157; 29 C.F.R. § 1614.310(b).

<sup>98</sup> 29 C.F.R. § 1614.310(c)–(e).

<sup>99</sup> *See* 3 EMP. DISCRIMINATION COORDINATOR ANALYSIS OF FED. L. § 105:46, Westlaw (database updated Oct. 2025) (citing *Nabors v. U.S.*, 568 F.2d 657 (9th Cir. 1978)); DICKMAN & MARSHALL, *supra* note 50, at 6.

<sup>100</sup> 5 C.F.R. § 1201.162(a).

the case is referred to a Special Panel made up of MSPB and EEOC representatives as well as a chairman appointed by the president.<sup>101</sup> If the complainant disagrees with the Special Panel's decision, once again, the complainant can elect to restart the process de novo in federal district court.<sup>102</sup>

The EEOC may also take "mixed cases"—complaints where discrimination is alleged but which involve actions that the employee could have taken to the MSPB (explained above, but usually involving removal, downgrade, or a suspension of more than fourteen days).<sup>103</sup> While the decision to take the case to the EEOC, as opposed to the MSPB, is binding,<sup>104</sup> in these cases, the employee may appeal the EEOC decision to the MSPB.<sup>105</sup> Once again, the employee can petition the EEOC to review the decision of the MSPB, and the procedure described above, including the use of the Special Panel, is applicable.<sup>106</sup> After the MSPB decision, the complainant, again, but not the agency, has another option to still go to federal district court and file the case de novo if they are dissatisfied with the MSPB decision, the MSPB's adoption of the EEOC decision, or the decision of the Special Panel.<sup>107</sup> The complaint, discovery, motion practice, and the hearing would all be redone at the federal level, with the full panoply of federal court appeals available, up to and including potential review by the Supreme Court.<sup>108</sup> The agency has no such right.<sup>109</sup>

Mixed cases can also exist in the federal sector arbitration process.<sup>110</sup> However, instead of going to the FLRA, grievants

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<sup>101</sup> 29 C.F.R. § 1614.306; 5 C.F.R. § 1201.171; 5 U.S.C. § 7702(d)(6).

<sup>102</sup> 5 C.F.R. § 1201.175; 29 C.F.R. § 1614.310(f); Stimson, *supra* note 94, at 199 (explaining that even with cases that have gone to the special panel, discrimination claims can be brought de novo in federal court).

<sup>103</sup> 29 C.F.R. § 1614.302(a); Kloeckner v. Solis, 568 U.S. 41, 44 (2012).

<sup>104</sup> 29 C.F.R. § 1614.302(b).

<sup>105</sup> *Id.* § 1614.302(d)(3).

<sup>106</sup> *Id.* § 1614.303(a) ("Individuals who have received a final decision from the MSPB on a mixed case appeal *or on the appeal of a final decision on a mixed case complaint* under 5 CFR part 1201, subpart E and 5 U.S.C. 7702 may petition EEOC to consider that decision." (emphasis added)).

This is the first chance for the case to come before any part of the EEOC, as mixed cases before the EEOC cannot be assigned to an administrative judge but rather receive a final agency decision, which can then be appealed as described above. EEOC MD 110, *supra* note 53, app. D, at D-4.

<sup>107</sup> 29 C.F.R. § 1614.310.

<sup>108</sup> See 3 EMP. DISCRIMINATION COORDINATOR ANALYSIS OF FED. L. § 105:46, Westlaw (database updated Oct. 2025) (citing Nabors v. U.S., 568 F.2d 657 (9th Cir. 1978)); DICKMAN & MARSHALL, *supra* note 50, at 6.

<sup>109</sup> See Williams, *supra* note 62.

<sup>110</sup> GUIDE TO ARBITRATION, *supra* note 35, at 7.

must appeal an arbitration decision to the EEOC or MSPB if that body would have had jurisdiction from the beginning.<sup>111</sup> And from there, the complainant can obtain further review as usually available in those forums.<sup>112</sup> For example, if the employee's claim involved a disciplinary action that would have given the MSPB jurisdiction, the employee can appeal to the MSPB,<sup>113</sup> or directly to the Federal Circuit.<sup>114</sup> If the employee chooses to seek review at the MSPB, they then may still appeal to the Federal Circuit after the MSPB decision.<sup>115</sup> If discrimination was alleged as part of the initial grievance about an action that would fall under the MSPB's jurisdiction, the arbitrator's decision could be appealed by the employee to the EEOC, then appealed to the MSPB (with possible review by the Special Panel) before then being appealed either to a Federal Circuit Court of Appeal or for a *de novo* proceeding in the relevant federal district court.

### III. ANALYSIS

The current system as described above has countless flaws and complications and is patently unfair to the agencies that are responsible for advancing the public interest through the judicious use of taxpayer dollars. While employee rights are essential to the proper functioning of government and avoiding a system based on political allegiance and other improper considerations, the myriad of rights that exist even beyond the constitutionally

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<sup>111</sup> *Id.* at 5–7 (first citing U.S. Dep't of the Interior, Bureau of Indian Affs., Wapato Irrigation Project, 65 F.L.R.A. 5, 6–7 (2010); and then citing U.S. Dep't of Com., Pat. & Trademark Off., Arlington, Va., 61 F.L.R.A. 476, 477–78 (2006)).

<sup>112</sup> In performance or disciplinary actions, the statute provides that “judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.” 5 U.S.C. § 7121(f). Similarly, discrimination matters can be appealed to the EEOC. *Id.* § 7121(d); GUIDE TO ARBITRATION, *supra* note 35, at 6.

<sup>113</sup> 5 U.S.C. § 7121(d).

Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

*Id.*; GUIDE TO ARBITRATION, *supra* note 35, at 6.

<sup>114</sup> GUIDE TO ARBITRATION, *supra* note 35, at 6.

<sup>115</sup> 5 U.S.C. § 7121(f). An agency may also appeal to the Federal Circuit Court of Appeals in certain cases, but only if, as explained above in terms of the MSPB, the OPM determines that the arbitration decision will “have a substantial impact on a civil service law, rule, regulation, or policy directive.” *Id.* § 7703(d).

required due process create uncertainty for both agencies and employees and require the expenditure of taxpayer dollars on the navigation of a long, confusing system that employees and agencies have difficulty navigating.

#### A. The Existing Processes Are Not Required by Constitutional Due Process

In considering the flaws in the present system and potential ways to reform the federal sector employment law system, it is important to understand that the processes described above are not required by the Due Process Clause of the Constitution. While it is true that federal agencies must comply with the constitutional requirement of due process before the deprivation of property in cases involving an adverse action such as those appealable to the MSPB,<sup>116</sup> the present system has grown well beyond the procedural due process requirements in the Constitution.

To deprive a person of a property interest, the government must fulfill certain procedural due process requirements.<sup>117</sup> Due process in the employment area is composed of both pre-deprivation due process (the process the government must go through prior to an employee's termination) and post-deprivation due process (the processes by which the employee can challenge the action after the termination).<sup>118</sup> The focus of this Article is the post-deprivation systems established by Congress, but it is worth understanding these pre-deprivation processes to understand the system in which these post-deprivation processes exist.

While no constitutional provision has been interpreted to give federal government employees a property interest in their continued employment,<sup>119</sup> Congress has provided that federal employment comes with such an interest,<sup>120</sup> and the courts have ruled on what type of processes are required to meet the constitu-

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<sup>116</sup> Stephanie West, Comment, *Re-Balancing the Pendulum: A Recommendation for Civil Service Reform*, 68 ADMIN. L. REV. 359, 369 (2016).

<sup>117</sup> See U.S. Const. amend. XIV, § 1.

<sup>118</sup> See J. Michael McGuinness, *Procedural Due Process Rights of Public Employees: Basic Rules and a Rationale for a Return to Rule-Oriented Process*, 33 NEW ENG. L. REV. 931, 939, 956 (1999).

<sup>119</sup> *McMurtray v. Holladay*, 11 F.3d 499, 502 (5th Cir. 1993) (“The United States Constitution is not the source of property interests. Rather, it merely provides procedural protections against the invasion of an acquired property interest.”); *Stone v. FDIC*, 179 F.3d 1368, 1374–75 (Fed. Cir. 1999).

<sup>120</sup> *Stone*, 179 F.3d at 1375; U.S. MERIT SYS. PROT. BD., WHAT IS DUE PROCESS IN FEDERAL CIVIL SERVICE EMPLOYMENT? 3 (2015).

tional requirement of procedural due process.<sup>121</sup> In the landmark case of *Cleveland Board of Education v. Loudermill*, the Supreme Court ruled on the due process required for an employee whom the legislature made fireable for cause (as opposed to at will).<sup>122</sup> The Court held that if a cause requirement exists, then a property interest is created and due process protections apply.<sup>123</sup> The Court concluded that once the legislature specified that termination from government employment must be “for cause,” pre-deprivation notice and a chance to respond is required by due process.<sup>124</sup> However, the Court also held that the adequacy of due process protections is based on viewing the pre- and post-deprivation protections together and that notice and a chance to respond without a neutral third party was sufficient pre-termination in this case because a full adversarial hearing was available post-termination.<sup>125</sup> While *Loudermill* involved state government property interests, subsequent decisions have held that the same principles apply to federal employment and to the legislatively created property interest in federal employment.<sup>126</sup> Further cases, most notably *Farhat v. Jopke*, reiterated the *Loudermill* holding and the connection between pre- and post-deprivation procedures, explaining that when post-deprivation procedures include a subsequent full hearing and appellate review, a less formal pre-deprivation procedure can be used.<sup>127</sup>

The post-deprivation due process procedures afforded in the EEOC, MSPB, OSC, and in federal sector arbitration, as ex-

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<sup>121</sup> See U.S. MERIT SYS. PROT. BD., *supra* note 120, at 15–16.

<sup>122</sup> 470 U.S. 532, 535 (1985).

<sup>123</sup> *Id.* at 538–39 (holding that since the employees were “entitled to retain their positions ‘during good behavior and efficient service,’ [and] could not be dismissed ‘except . . . for . . . misfeasance, malfeasance, or nonfeasance in office,’” the legislature had created a property interest (omissions in original) (citation omitted)).

<sup>124</sup> *Id.* at 535, 545–46.

<sup>125</sup> *Id.* at 546–47.

<sup>126</sup> U.S. MERIT SYS. PROT. BD., *supra* note 120, at 18 (citing *Lachance v. Erickson*, 522 U.S. 262, 266 (1998) (citing *Loudermill*, 470 U.S. at 542, to explain the due process rights of a federal civil servant in their employment)); see *Stone v. FDIC*, 179 F.3d 1368, 1374–75 (Fed. Cir. 1999) (holding in the context of federal employment that the “process due a public employee prior to removal from office has been explained in *Loudermill*”).

<sup>127</sup> 370 F.3d 580, 597 (6th Cir. 2004); see also *Licari v. Ferruzzi*, 22 F.3d 344, 348 (1st Cir. 1994) (supporting that sufficient opportunity to be heard, adequate pre-deprivation procedures, and adequate post-deprivation judicial review satisfies due process); *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976) (demonstrating that when pre-deprivation procedures are sufficiently objective and professional, a further evidentiary hearing is not necessary to comport with due process); *West*, *supra* note 116, at 369 (explaining that pre-termination and post-termination procedures are “coupled” such that the quality of each will affect the sufficiency of the other).

plained above, are robust to say the least.<sup>128</sup> There is little chance that a pruning of the multiple appellate options from these forums would create any due process issues, especially considering the extensive pre-deprivation rights already granted to employees in adverse actions.<sup>129</sup>

Federal employees being disciplined for conduct issues have significant pre-deprivation rights. Like the state employees in *Loudermill*, federal employees who are suspended for over fourteen days, removed, or demoted first receive a proposed disciplinary action with thirty days' notice, then have at least seven days to respond both in writing and orally if they choose.<sup>130</sup> Then, they receive a decision document from a different, higher management official than the proposing official; that document must be based only on the materials in the proposal and the response.<sup>131</sup> If the deciding official receives new and material information or documentation about the conduct at issue or proposed penalty at any point, the employee gets another chance to provide a response to the new information.<sup>132</sup>

Federal employees faced with removal or demotion based on performance issues have even more significant pre-deprivation rights. The employee must receive notice that they are performing at an unsuccessful level, and then are provided a performance improvement plan that includes a precise description of the standards they must meet to be considered minimally successful and a time period to complete specific metrics to achieve this performance.<sup>133</sup> If they fail to meet the specified standards,

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<sup>128</sup> See *supra* Sections II.A–E.

<sup>129</sup> U.S. MERIT SYS. PROT. BD., ADDRESSING POOR PERFORMERS AND THE LAW 5 (2009) (“[The Due Process] requirement drives many of the procedures that exist in both Chapter 43 [Disciplinary Actions] and Chapter 75 [Performance-Based Actions].”).

<sup>130</sup> 5 U.S.C. §§ 7512–13.

<sup>131</sup> See *Stone*, 179 F.3d at 1376–77; *Ward v. USPS*, 634 F.3d 1274, 1279–82 (Fed. Cir. 2011); *Young v. Dep’t of Hous. & Urb. Dev.*, 706 F.3d 1372, 1376 (Fed. Cir. 2013); U.S. MERIT SYS. PROT. BD., *supra* note 120, at 19–22.

<sup>132</sup> *Adverse Actions Process — A Flowchart*, U.S. MERIT SYS. PROT. BD., [https://www.mspb.gov/studies/adverse\\_action\\_report/3\\_AdverseActionProcess\\_flowchart.htm](https://www.mspb.gov/studies/adverse_action_report/3_AdverseActionProcess_flowchart.htm) [<https://perma.cc/L68L-6MHC>] (last visited Aug. 6, 2025) (“If the deciding official obtains new information, [the] official will inform the employee of the new information being considered and provide an opportunity to respond.”).

<sup>133</sup> See 5 U.S.C. § 4303; U.S. MERIT SYS. PROT. BD., *supra* note 129, at 7–8; *West, supra* note 116, at 372–73. Poor performers can also be removed under the disciplinary procedures above without a performance improvement plan and opportunity to improve. U.S. MERIT SYS. PROT. BD., *supra* note 129, at 6–10. However, this is often not used because disciplinary penalties can be mitigated by the MSPB and the burden of sustaining the action is the higher standard of preponderance of the evidence as opposed to substantial evidence in performance actions. *Id.*

then they receive a proposal to remove with a chance to respond, as described above in disciplinary cases, and then a final decision.<sup>134</sup>

With such robust pre-deprivation procedures, the post-deprivation processes described above are well in excess of constitutional requirements. No constitutional provision requires a trial in federal court or even appeals to federal court. Neither *Loudermill* nor any other case has required post-termination proceedings beyond a full hearing before a neutral third party and possibly some avenue of appeal.<sup>135</sup> Therefore, as long as potential reforms still allow for an administrative hearing post-deprivation before an administrative agency, the elimination of other further appellate opportunities would not raise a due process issue.

## B. Flaws in the Current System of Federal Sector Employment Law

The current state of federal sector employment law has a myriad of flaws that have important practical consequences for both agencies and employees. In addition to the confusion created by the different forums and cross-appeals, the interminable delay in reaching a final resolution, and the consequences for good government and public trust, the system is also patently unfair.

### 1. The Current Landscape of Federal Sector Employment Law Is Confusing to Even Experienced Practitioners

The multiple forums available and the multiple avenues of appeals spelled out in multiple sets of regulations have created a system that even the premier secondary source on the EEOC process, *Hadley's Guide to Federal Sector Equal Opportunity Employment Law and Practice*, calls “confusing.”<sup>136</sup> The Guide goes on to state that “the Board, the Commission, and even the

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<sup>134</sup> 5 U.S.C. § 4303; U.S. MERIT SYS. PROT. BD., *supra* note 129, at 12.

<sup>135</sup> *See, e.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (demonstrating that merely “some form” of hearing procedure is required for post-deprivation due process); *Wojcik v. Mass. State Lottery Comm’n*, 300 F.3d 92, 102 (1st Cir. 2002); *Huimin Song v. Cnty. of Santa Clara*, 705 F. App’x 492, 494 (9th Cir. 2017) (finding binding arbitration is sufficient post-deprivation due process); *Hudson v. City of Highland Park*, 943 F.3d 792, 801 (6th Cir. 2019); *Purisch v. Tenn. Tech. Univ.*, 76 F.3d 1414, 1424 (6th Cir. 1996) (finding formal hearing before a committee sufficient); *Damiano v. Scranton Sch. Dist.*, 135 F. Supp. 3d 255, 274 (M.D. Pa. 2015) (finding post-deprivation administrative hearing met constitutional due process); *Clements v. Airport Auth. of Washoe Cnty.*, 69 F.3d 321, 332–33 (9th Cir. 1995) (holding that if post-termination proceedings are overseen by individuals who harbor malice for the employee’s whistleblowing activities, the process will fail to meet the due process requirements).

<sup>136</sup> DAVIS & HADLEY, *supra* note 1, at 1574.

courts occasionally misunderstand” this process.<sup>137</sup> As Hadley puts it in calling for reform, “[f]or years it has been clear that the process does not work and often leads to unreasonable delays while a case bounces back and forth between the Commission and the Board.”<sup>138</sup> In fact, Hadley cites a federal district court case that cites an early version of the Hadley book, where the judge states that “courts and commentators appear to be unanimous in their denunciation of this unnecessarily elaborate and confusing system of intertwined administrative jurisdiction and judicial review.”<sup>139</sup> Many commentators, including members of Congress, have acknowledged that the flaws inherent in such byzantine procedures (especially those within the EEOC) can affect employees’ ability to navigate the system and achieve relief.<sup>140</sup>

## 2. The Federal Sector Employment System Is Patently Unfair to Agencies

The most obvious flaw with the current system is simple unfairness. While employees should have an opportunity to have their claims heard, it is unclear why they should have so many repeated attempts to succeed in different forums. Complainants in a discrimination claim have three opportunities to develop a factual record to support their claims: in the EEO investigation, before the EEOC administrative judge, and in federal court.<sup>141</sup> Other claims outside the federal sector—including not only em-

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 1575.

<sup>139</sup> *Id.* (quoting *McAdams v. Reno*, 858 F. Supp. 945, 949 n.5 (D. Minn. 1994)).

<sup>140</sup> Courtney Bubl , *Watchdog Considers Review of Equal Employment Opportunity Complaint Process for Feds*, GOV’T EXEC. (Sep. 27, 2021), <https://www.govexec.com/oversight/2021/09/watchdog-considers-review-equal-employment-opportunity-complaint-process-feds/185648/> [<https://perma.cc/M9MU-PULP>] (explaining how two members of Congress described the federal employee complaint process as “convoluted, slow, costly and unjust”); Ranieri, *supra* note 64, at 24, 41 (describing it as an “elaborate” and “cumbersome administrative process [that] deters aggrieved persons from pursuing their claims”); Christina M. Royer, *West v. Gibson: Federal Employees Win the Battle, but Ultimately Lose the War for Compensatory Damages Under Title VII*, 33 AKRON L. REV. 417, 436 (2000) (“The EEOC process is a very complicated one for an average discrimination complainant, since these complainants often negotiate the system without counsel.”); *The Partnership for Public Service’s Vision for a Better Government*, P’SHP FOR PUB. SERV. (Aug. 15, 2024), <https://ourpublicservice.org/publications/vision-for-a-better-government/> [<https://perma.cc/KDR6-L3L3>] (describing the process as “complicated”); Redding, *supra* note 89, at 760 (referring to the processes of the MSPB, EEOC, and OSC as “byzantine administrative processes”).

<sup>141</sup> See *supra* Section II.A; DICKMAN & MARSHALL, *supra* note 50, at 17 (“Currently, parties to Federal employee EEOC proceedings are allowed to present their case to an investigator who makes findings, before an EEOC administrative judge and again in Federal Circuit court. There is no reason to allow Federal parties three different opportunities to develop a factual record.”).

ployment claims, but also fair housing, voting rights, and other civil rights matters—provide complainants only one opportunity to make their case.<sup>142</sup> And if the claims involve a full administrative hearing process, the complainants have only rights of appeal to federal court after completing that process.<sup>143</sup> No other type of federal claim involves an adjudicatory process where only one party has the right to a re-do. There is no reason a federal employee with an employment discrimination claim should have two opportunities to prove their case at hearing while a voting rights group focused on racial gerrymandering would only have one. While employees in the public sector are, of course, entitled to adequate due process, the current system already provides ample due process protections before even getting to the EEOC or MSPB.<sup>144</sup> There is no reason such an employee's claims should be judged in any more favorable environment than a simple contract dispute or tort action, especially considering the pre-deprivation protections that exist for major personnel actions.<sup>145</sup>

Further, while vindicating employee civil rights is important, so are multiple interests of the federal agency. The efficiency of the federal service, the ability of managers and employees to focus on their assigned duties, the cost to taxpayers, and the ability of managers to take appropriate action and exercise appropriate management functions are essential to the effective functioning of government and to maintaining public trust in government.<sup>146</sup>

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<sup>142</sup> Civil rights are typically enforced by suits in state or federal court brought by governmental entities, public interest groups, or individual plaintiffs. See 42 U.S.C. §§ 3612–3614 (regarding fair housing act claims); Aviva D. Kohn, Note, *At the Crossroads: Private Litigation and the Fate of Sections 2 and 208 of the Voting Rights Act*, 94 *FORDHAM L. REV.* 1555, 1563 (2026) (regarding voting rights claims); see also 42 U.S.C. § 1983 (providing for private parties to bring civil rights claims).

In these areas, there are no administrative processes similar to those available to federal sector employees. See 42 U.S.C. § 3612 (a–b) (demonstrating that bringing claims under the Fair Housing Act involves a choice of a hearing before an administrative judge or an election to federal court, but does not provide for both).

<sup>143</sup> And even when an administrative process exists, it is not an entire litigation process that mirrors the process in federal court. For instance, parties have the option to have a complaint filed in federal court under the Fair Housing Act, instead of an administrative hearing with the agency. *Id.* If parties elect to remain in the administrative process, there is an option of an appeal to federal court, but not a de novo hearing. *Id.* § 3612(i).

<sup>144</sup> See *supra* Section II.A.

<sup>145</sup> See *supra* Section II.A.

<sup>146</sup> *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 585 U.S. 878, 939 (2018) (acknowledging government interest in efficiency by explaining that “[t]he government . . . needs to run ‘as effectively and efficiently as possible’”); *United States v. Anderson*, 579 F.2d 455, 458–59 (8th Cir. 1978) (acknowledging government interest in avoiding waste).

Public trust in government is near historic lows. *Public Trust in Government: 1958-2024*, PEW RSCH. CTR. (June 24, 2024), <https://www.pewresearch.org/politics/2024/06/24/public-trust-in->

However, the current intertwined systems of the MSPB, EEOC, labor law, and federal procedure stymie these interests. And while it is true that employees also suffer from the confusion caused by such a highly technical and intertwined system,<sup>147</sup> it is notable that at virtually every step of this cumbersome procedure, employees are favored (for example, with further and more extensive appeal rights, investigations provided by the agency at no cost to the employee in EEOC cases, and the lack of dispositive motions in MSPB cases).

### 3. Current Federal Sector Employment Laws Create Splits in Law Between Federal Courts and Both the EEOC and Federal Sector Arbitrators

The current EEOC system allows—and in some ways encourages—a split in the law between the EEOC and federal courts. As explained above, an agency cannot appeal an EEOC administrative judge decision that is affirmed by the OFO.<sup>148</sup> Accordingly, if the EEOC sets a different standard or even contradicts federal precedent, the agency has no option to seek relief in federal court. However, if an employee receives an EEOC decision that contradicts federal precedent, the employee can go to federal court for a *de novo* hearing to ensure that federal law is followed.<sup>149</sup> Therefore, the EEOC can set a standard more generous to employees than that used in federal court without any fear of being overruled.

This has led to numerous small-sounding differences in the law with significant consequences. For example, while federal courts are split on whether an agency needs to make reasonable accommodations to assist an employee with their commute, the EEOC consistently holds that such accommodations are required.<sup>150</sup> Further, the EEOC considers every day a reasonable accommodation is not provided as a continuing violation,<sup>151</sup> while

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government-1958-2024/ [https://perma.cc/X4WE-3KBG]; Katz, *supra* note 11 (describing a “near-universal recognition that agencies have a problem getting rid of subpar employees”).

<sup>147</sup> See *supra* Section III.B.1.

<sup>148</sup> See *supra* text accompanying note 62.

<sup>149</sup> See *supra* text accompanying note 62.

<sup>150</sup> Dania S., EEOC Doc. 0120142114, 2016 WL 5349227, at \*9 (E.E.O.C. Sep. 15, 2016); *Regan v. Faurecia Auto. Seating, Inc.*, 679 F.3d 475, 480 (6th Cir. 2012); see *EEOC Informal Discussion Letter*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Apr. 27, 2007), <https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-47> [https://perma.cc/6NYP-HM63].

<sup>151</sup> Rolf K., EEOC Doc. 0120152946, 2017 WL 5107180, at \*2 (E.E.O.C. Oct. 24, 2017); Palomo, EEOC Doc. 0120103596, 2011 WL 121264, at \*2 (E.E.O.C. Jan. 5, 2011); see also Smith, EEOC Doc. 01A00309, 2000 WL 380147, at \*1 (E.E.O.C. Apr. 5, 2000) (recognizing

federal courts typically treat the denial of a reasonable accommodation as a discrete discriminatory act not suitable for continuing violation analysis.<sup>152</sup> In fact, the EEOC's Administrative Judge Handbook states that "When there is a conflict between the Commission's position and that of the Circuit Court in the jurisdiction where the Administrative Judge sits, an Administrative Judge must follow Commission policy, but may acknowledge that the Circuit Court has reached a different conclusion."<sup>153</sup> The EEOC has stated that it need not follow federal court precedent.<sup>154</sup> EEOC decisions are likewise not binding in federal court.<sup>155</sup> As seen in the examples above, EEOC decisions tend to be more favorable to employees and are noticeably less detailed and analytical<sup>156</sup> than federal court decisions. This creates a situation where there is "a two-tiered system of law, with public sector employees receiving more favorable interpretations of employment discrimination laws than private sector employees – an outcome at odds with the statutory language establishing the same anti-discrimination protections for both groups."<sup>157</sup> There-

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an "on-going failure" to provide accommodation as supporting a continuing violation theory); Arena, EEOC Doc. 01A02651, 2000 WL 1090411, at \*1 (E.E.O.C. July 12, 2000) (finding a continuing violation claim where an agency continued to deny requested reasonable accommodations).

<sup>152</sup> Tobin v. Liberty Mut. Ins. Co., 553 F.3d 121, 130 (1st Cir. 2009); Mercer v. SEPTA, 608 F. App'x 60, 63 (3d Cir. 2015); Hill v. Hampstead Lester Morton Ct. Partners LP, 581 F. App'x 178, 181 (4th Cir. 2014); Teague v. Nw. Mem'l Hosp., 492 F. App'x 680, 684 (7th Cir. 2012); Elmenayer v. ABF Freight Sys., Inc., 318 F.3d 130, 134–35 (2d Cir. 2003); Cherosky v. Henderson, 330 F.3d 1243, 1248 (9th Cir. 2003); Abram v. Fulton Cnty. Gov't, 598 F. App'x 672, 676 (11th Cir. 2015).

<sup>153</sup> U.S. EQUAL EMP. OPPORTUNITY COMM'N, HANDBOOK FOR ADMINISTRATIVE JUDGES 5 (2002), [https://deweypub.com/store/media/EEOC\\_Administrative\\_Judges\\_Handbook.pdf](https://deweypub.com/store/media/EEOC_Administrative_Judges_Handbook.pdf) [<https://perma.cc/KBH3-9VDG>].

<sup>154</sup> See generally Modesitt, *supra* note 62 ("Specifically, the EEOC has stated that, in deciding federal sector cases, the EEOC's policy and precedent controls over federal court precedent, except Supreme Court decisions. The EEOC's policy is most clearly articulated in its Administrative Judges' Handbook . . .").

<sup>155</sup> See Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277, 293–94 (2014); Camille Patti, Hively v. Ivy Tech Community College: *Losing the Battle but Winning the War for Title VII Sexual Orientation Discrimination Protection*, 26 TUL. J.L. & SEXUALITY 133, 138 (2017).

<sup>156</sup> See Modesitt, *supra* note 62, at 982–84, 992 (finding that nearly 30% of EEOC decisions lack citations or analysis).

<sup>157</sup> *Id.* at 992–93; see also Daniel Watson, *Standard of Causation for Retaliation in Federal Sector Title VII Cases After Nassar*, 65 FED. LAW. 30, 35 (2018) ("Because federal agencies are unable to appeal adverse rulings from the EEOC, the EEOC is free to construct the secondary regulatory scheme . . .").

Even where no actual conflict exists, the federal sector system can create the perception of inconsistent decisions. Anthony W. Cummings, *The Mixed-Case Dilemma in Federal Sector Employment Appeals*, ARMY LAW., Apr. 2008, at 17, 22 ("The perception of

fore, an employee with a claim that would be rejected in federal court can go to the EEOC and have no fear that the agency will appeal an EEOC decision to federal court.<sup>158</sup> In essence, “[the EEOC] is able to maintain its own body of law, and there is no mechanism through which its decisions can be directly criticized.”<sup>159</sup>

Similarly, while employees in federal sector arbitrations are able to appeal serious adverse actions to federal court,<sup>160</sup> the agency must meet a higher standard to appeal to federal court, involving multiple concurrences between federal agencies.<sup>161</sup> Because arbitration decisions are often unpublished,<sup>162</sup> it is difficult to understand the scope of this problem of arbitrators ignoring federal precedent, but it is another way in which employees have favorable treatment and a unique right to federal court that agencies do not.

#### 4. The Current Federal Sector System Causes Significant Delays to the Resolution of Cases

The multiple appellate avenues, and especially the *de novo* review available in discrimination cases, create a scenario where both employees and agencies wait years, and sometimes over a decade, for the resolution of their cases.<sup>163</sup> This contributes to what even OPM acknowledges is a “pervasive sense that firing a fed is difficult” and involves “a lengthy process.”<sup>164</sup> As one report put it:

The agencies processing claims are bound by few statutory or regulatory time frames in which to complete their work. Generally, the ad-

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inconsistent judgments is created between different forums when those forums reach different conclusions after having been presented with essentially the same set of facts.”)

<sup>158</sup> See Modesitt, *supra* note 62, at 992 (“This situation establishes the EEOC as the sole and final arbiter of what Title VII means as to federal employees unless the employee sues in federal court.”); Watson, *supra* note 157, at 35 (“[S]ince federal agencies cannot appeal adverse EEOC decisions, EEOC interpretive rules practically have the weight of law for federal agencies.”).

<sup>159</sup> Modesitt, *supra* note 62, at 995.

<sup>160</sup> See 5 U.S.C. §§ 7703(c), 7703(d)(1).

<sup>161</sup> See discussion *supra* note 75.

<sup>162</sup> Meredith Goldich, *Throwing Out the Threshold: Analyzing the Severability Conundrum Under Rent-A-Center, West, Inc. v. Jackson*, 60 AM. U. L. REV. 1673, 1681 (2011) (“Arbitration opinions are typically unpublished and are not made available to the public.”); Lara M. Pair & Paul Frankenstein, *The New ICC Rule on Consolidation: Progress or Change?*, 25 EMORY INT’L L. REV. 1061, 1070 (2011); see James H. Carter, *The International Commercial Arbitration Explosion: More Rules, More Laws, More Books, So What?*, 15 MICH. J. INT’L L. 785, 786 (1994) (describing books or articles for arbitration practitioners as combining published materials, unpublished decisions, and general arbitration “lore”).

<sup>163</sup> See *supra* Section III.B.1–5.

<sup>164</sup> Katz, *supra* note 11.

ministrative process is lengthy and duplicative. It may take several years for the complaint to be adjudicated if either the employee or Agency elects to appeal the claim through all available routes and waits until the deadline to file each appeal.<sup>165</sup>

A review of the time to discipline or take performance actions against an employee shows that this is not just a perception but a reality—a reality that begins with extensive pre-deprivation processes that take weeks to months and then post-deprivation options for the employee that take months, years, or in extreme EEOC cases, over a decade for final resolution.<sup>166</sup>

As described above, the process for significant discipline or removals requires that the employee have an opportunity to review a proposed action from a supervisor, respond to it in writing and/or in person, and then receive a final decision from another management official.<sup>167</sup> If any new information comes to the deciding official or the deciding official considers any information (either evidentiary or aggravating or mitigating the penalty) that was not provided in the proposal, another delay must take place as due process requires the employee be made aware of this information and be given a chance to respond.<sup>168</sup> And this formal process only occurs after an already lengthy process in which a supervisor determines that discipline should occur, the proposal is drafted, evidence is assembled, and legal reviews are complete.<sup>169</sup> For conduct, as opposed to performance issues, two thirds of removal actions take at least six weeks to process from learning of the misconduct through the proposal and decision process.<sup>170</sup> A quarter of such actions take more than twenty-

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<sup>165</sup> DICKMAN & MARSHALL, *supra* note 50, at 11.

<sup>166</sup> See *supra* Section III.A (explaining the pre-deprivation process); Lacey v. Carson, No. 17-10834, 2019 WL 1170348, at \*1 (E.D. Mich. Mar. 13, 2019) (illustrating that plaintiff suffered alleged adverse actions committed from 2009 to 2011 and denying the final appeal in federal court in 2021), *appeal denied*, No. 20-1209, (6th Cir. filed Apr. 13, 2021); McFarland-Lawson v. Todman, No. 23-2633, 2024 WL 3534695, at \*3 (7th Cir. July 25, 2024) (illustrating that plaintiff filed an EEOC complaint in 2012 and that the final court of appeals decision was issued in 2024).

<sup>167</sup> See *supra* Section III.A.

<sup>168</sup> See *supra* note 132 and accompanying text.

<sup>169</sup> See Mary E. Jones, *Think Before You Fire: Dispelling the Myths and Re-Evaluating a Supervisor's Need to Terminate Civilian Employment*, ARMY LAW., July–Aug. 2018, at 40, 42 (finding that rather than the legally required timeframes, “how much time passes before an agency removes an employee depends more on the decisions made by agency officials”).

<sup>170</sup> OFF. OF POL’Y & EVALUATION, U.S. MERIT SYS. PROT. BD., ADVERSE ACTIONS: THE RULES AND THE REALITY 4 (2015), [https://www.mspb.gov/studies/researchbriefs/Adverse\\_Actions\\_The\\_Rules\\_and\\_the\\_Reality\\_1205509.pdf](https://www.mspb.gov/studies/researchbriefs/Adverse_Actions_The_Rules_and_the_Reality_1205509.pdf) [<https://perma.cc/539A-PTQ9>].

seven weeks.<sup>171</sup> This is before the employee begins any process with the administrative agencies or courts.

For performance issues leading to removal, the process of getting through appropriate pre-deprivation due process safeguards is 170 to 370 days.<sup>172</sup> This includes approximately 80 to 200 days to observe performance issues, conduct counseling sessions, and monitor and provide regular performance feedback; 50 to 110 days to create and implement a Performance Improvement Plan; and 40 to 60 days to prepare a proposed notice of removal, notify the employee, review the employee's response to the proposed removal, and provide the deciding official's decision to the employee.<sup>173</sup> This is all before the performance action is ever challenged by the employee.

If the employee challenges the action before the MSPB, an initial decision is expected within 120 days, and the entire MSPB process, including an appeal of the initial decision to the Board, takes at least a few more months.<sup>174</sup> Consequently, the entire removal process, including an initial appeal to the MSPB, can take 410 to 610 days.<sup>175</sup> Further, continuances for parties to discuss settlement or obtain counsel are not uncommon and may lengthen the time for an administrative judge decision.<sup>176</sup> The EEOC can take even longer. The agency EEO investigation must be completed within 180 days but often takes longer.<sup>177</sup> Then if a hearing is requested, the case is assigned to an administrative

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<sup>171</sup> *Id.*

<sup>172</sup> West, *supra* note 116, at 377.

<sup>173</sup> *Id.*

<sup>174</sup> See U.S. MERIT SYS. PROT. BD., JUDGES' HANDBOOK 1 (2019), <https://www.mspb.gov/appeals/files/ALJHandbook.pdf> [<https://perma.cc/4QMS-RWGG>] (describing the 120 day policy of the MSPB); U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-191, FEDERAL WORKFORCE: IMPROVED SUPERVISION AND BETTER USE OF PROBATIONARY PERIODS ARE NEEDED TO ADDRESS SUBSTANDARD EMPLOYEE PERFORMANCE 25 (2015) (showing that the average time for an MSPB claim from initiation through the initial appeal of affirmed dismissals was 243 days in 2013).

More recent data on MSPB processing times was not available despite the provision of a plethora of other types of data in MSPB's 2022 Annual Report. See generally U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2023 (2024), [https://www.mspb.gov/About/annual\\_reports/MSPB\\_FY\\_2023\\_Annual\\_Report.pdf](https://www.mspb.gov/About/annual_reports/MSPB_FY_2023_Annual_Report.pdf) [<https://perma.cc/2RBA-CM5X>] (providing no recent information on MSPB processing times).

<sup>175</sup> West, *supra* note 116, at 377.

<sup>176</sup> See U.S. MERIT SYS. PROT. BD., *supra* note 174, at 1. In the author's experience, MSPB administrative judges attempt to provide expeditious decisions, and such continuances are for thirty to sixty days.

<sup>177</sup> See 29 C.F.R. § 1614.108(e) (2025); U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-105874, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: IMPROVED OVERSIGHT PROCESSES NEEDED TO HELP AGENCIES ADDRESS PROGRAM DEFICIENCIES 9, 21 (2024).

judge and a decision is supposed to be issued within 180 days, but often does not.<sup>178</sup> Further, the EEOC process is swamped by a deluge of cases overseen by overworked and underpaid administrative judges.<sup>179</sup> With the option of a *de novo* hearing at federal court, these claims can take more than a decade for a final resolution.<sup>180</sup>

These delays serve neither employees nor agencies, whose responsibilities for planning, staffing, and budgeting may be complicated by such pending cases. In addition, such delays can lead to extremely high damages. In removal claims brought in any of the relevant forums, employees can receive back pay if the removal is determined not to be for good cause or if it violated some principle of due process fairness.<sup>181</sup> Any uncertainties or speculation regarding the proper amount of back pay is resolved, at least according to the EEOC, in favor of the employee.<sup>182</sup> A removal action before the EEOC that takes years to resolve, if resolved in favor of the employee, may lead to years of back pay for

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<sup>178</sup> In the author's experience, while 29 § C.F.R. 1614.109(i) requires a decision be made within 180 days unless there is good cause for an extension, the actual process often takes longer. It will usually take a month or so for a judge to be assigned after the completion of the investigation and request for a hearing. Discovery is usually completed within two or three months, at which point the briefing schedule for summary judgment motions opens. It usually takes around one month for briefing to be done. Then in the author's experience, summary judgment decisions can take usually between three and twelve months. If summary judgment is not granted, then the case goes to hearing, with all the attendant pre-hearing conferences and disclosures, as well as post hearing briefing. Therefore, from the filing of a formal complaint to a final decision from an administrative judge will be between one and three years. This is supported by the experience of other practitioners. See *Appearing Before an Administrative Judge at the EEOC*, DC BAR, <https://www.dcbar.org/for-lawyers/communities/join-a-community/labor-and-employment-law/appearing-before-an-administrative-judge-at-the-ee> [<https://perma.cc/BY7R-LWTD>] (last visited Aug. 6, 2025) (“[T]he Equal Employment Opportunity Commission’s federal-sector process frustrates parties because it often lasts too long.”).

<sup>179</sup> See ELIZABETH JOUN, DAVID LYONS & DELVIN TURNER, REDUCING DELAY TO PROMOTE CIVIL RIGHTS: HOW ADMINISTRATIVE JUDGES AT THE EEOC CAN RESOLVE EMPLOYMENT DISCRIMINATION COMPLAINTS IN A FAIR YET EFFICIENT MANNER 18 fig. 3, 18–20 (2018), [https://luskin.ucla.edu/wp-content/uploads/2018/06/5EEOCJusticeMP.FINAL\\_.pdf](https://luskin.ucla.edu/wp-content/uploads/2018/06/5EEOCJusticeMP.FINAL_.pdf) [<https://perma.cc/34MV-BGJM>] (regarding workload); *id.* at 36, 45–47 (describing the lack of funding to hire clerk or paralegal staff and the understaffing of administrative judges themselves); Shawn Zeller, *Justice Delayed*, GOV'T EXEC. (June 15, 2004), <https://www.govexec.com/magazine/features/2004/06/justice-delayed/16983/> [<https://perma.cc/6K9A-7VEF>] (explaining that EEOC administrative judges are paid less than their counterparts at other agencies and are suffering from a lack of paralegals and clerical staff).

<sup>180</sup> See *supra* text accompanying note 166; DICKMAN & MARSHALL, *supra* note 50, at 12.

<sup>181</sup> 5 U.S.C. § 5596(b)(1)(A) (applying the Back Pay Act to the discussed forums); EEOC MD 110, *supra* note 53, at 11-2 (“The purpose of a back pay award is to restore to the complainant the income he would have otherwise earned but for the discrimination.”).

<sup>182</sup> EEOC MD 110, *supra* note 53, at 11-3 (“The Commission has held that uncertainties involved in a back pay determination should be resolved against the agency that has already been found to have committed acts of discrimination.” (citing *Hanns v. USPS*, EEOC Petition No. 04960030 (Sep. 18, 1997))).

time the employee did not actually work. Such back pay damages and interest on back pay,<sup>183</sup> are not limited by the \$300,000 compensatory damages cap at the EEOC,<sup>184</sup> and therefore, such compensatory damages can come on top of back pay awards. These high damages can lead to increased litigation by employees (as well as increased damages expectations), be a burden on agencies' budgets, and lead agencies to be hesitant to take necessary removal actions.

##### 5. The Current System Deters Federal Managers from Taking Necessary Actions

The plethora of options employees have for challenging management actions and the time it takes to reach a final resolution in these cases is perhaps meant to make management think twice before taking improper actions, but it also creates a demonstrable disincentive for federal agency managers to do their jobs and manage employees.<sup>185</sup> Management can be paralyzed and unwilling to take appropriate disciplinary or performance actions due to confusion over the process,<sup>186</sup> fear of being named as a responsible management official in even a frivolous EEOC case,<sup>187</sup> or inability to devote the time to the lengthy process of even getting to the point of issuing a disciplinary or performance ac-

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<sup>183</sup> *Id.* at 11-2 (“Interest on back pay shall be included in the back pay computation.”).

<sup>184</sup> 42 U.S.C. § 1981a(b)(2) (excluding back pay from compensatory damages in these cases); EEOC MD 110, *supra* note 53, at 11-2, 11-20 (detailing the \$300,000 cap on compensatory damages in a separate section from back pay).

<sup>185</sup> *See* Katz, *supra* note 11 (“Undoubtedly, there are major hurdles to removing an employee from federal service; federal workers are guaranteed levels of due process not typically provided to employees in the private sector.”); P’SHP FOR PUB. SERV., *supra* note 140 (“More than 40% of respondents to the 2023 Federal Employee Viewpoint Survey, the annual nationwide survey of federal employees, reported that poor performers usually remain in their work unit and continue to underperform.”); Ann Boehm, *The Federal EEO Process is Broken: Can We Help Fix It?*, FED. EMP. L. TRAINING GRP. (Oct. 20, 2021), <https://feltg.com/the-federal-eeo-process-is-broken-can-we-help-fix-it/> [<https://perma.cc/7MLJ-SRU6>] (highlighting that “employers who assign work to their employees are getting claims of hostile work environment filed against them”).

<sup>186</sup> *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-48, FEDERAL EMPLOYEE MISCONDUCT: ACTIONS NEEDED TO ENSURE AGENCIES HAVE TOOLS TO EFFECTIVELY ADDRESS MISCONDUCT 23 (2018) (explaining that a 2016 MSPB survey found that 64% of managers and supervisors surveyed stated that they did not fully understand the process to remove an employee for misconduct); West, *supra* note 116, at 375 (noting that many managers complain that the system is too complex); U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-191, FEDERAL WORKFORCE: IMPROVED SUPERVISION AND BETTER USE OF PROBATIONARY PERIODS ARE NEEDED TO ADDRESS SUBSTANDARD EMPLOYEE PERFORMANCE 20 (2015); Jones, *supra* note 169, at 42 (stating that supervisors may not fully understand the processes involved).

<sup>187</sup> *See* West, *supra* note 116, at 376.

tion.<sup>188</sup> Management may avoid even more typical and necessary duties (such as providing critical feedback and assigning work) for fear of retaliation claims that need not be based on an actual adverse action,<sup>189</sup> or hostile workplace claims, which will be accepted, investigated and assigned to an EEOC judge based on little more than allegations about a manager's tone or editing of work product.<sup>190</sup>

Federal managers are already tasked with navigating the federal bureaucracy and their higher management while trying to achieve agency goals amidst high workloads and budgets that

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<sup>188</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-191, FEDERAL WORKFORCE: IMPROVED SUPERVISION AND BETTER USE OF PROBATIONARY PERIODS ARE NEEDED TO ADDRESS SUBSTANDARD EMPLOYEE PERFORMANCE 20 (2015).

<sup>189</sup> Retaliation claims, as opposed to other discriminatory acts, do not need to be materially adverse actions but use the rather nebulous concept of whether the employer's action would deter a reasonable person from asserting their rights. See *Enforcement Guidance on Retaliation and Related Issues*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Aug. 25, 2016), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues> [<https://perma.cc/F89Z-S7Y5>] ("An action need not be materially adverse standing alone, as long as the employer's retaliatory conduct, considered as a whole, would deter protected activity."); PETER M. PANKEN, RETALIATION: THE NEW TSUNAMI IN EMPLOYMENT LITIGATION, ALI-CLE COURSE MATERIALS 1, 9 (2015), Westlaw SY002 ALI-CLE 2137 (stating that retaliation has become the most frequently alleged type of federal sector violation raised with EEOC).

Management fear of retaliation complaints from the employees they supervise is real and extensively documented. See U.S. Gov't Accountability Off., GAO-18-48, Federal Employee Misconduct: Actions Needed to Ensure Agencies Have Tools to Effectively Address Misconduct 23 (2018); West, *supra* note 116, at 376; *The Boss as a Target: Recognizing and Stopping Upward Bullying*, Pub. Sector HR Ass'n (May 1, 2021), <https://pshra.org/the-boss-as-a-target-recognizing-and-stopping-upward-bullying/> [<https://perma.cc/3N3D-D7WG>] ("Even if accusations are eventually dismissed, the investigative process damages the target's reputation and inflicts harm. The target is subjected to questioning and inevitable gossip. Effectively, the bully's rights are protected while the targeted manager is left with little if any recourse. As a result, even legitimate attempts to manage performance can give rise to allegations of retaliation."); Boehm, *supra* note 185 ("One attendee recently told me a complainant blatantly revealed she was filing a complaint to ensure she could claim retaliation for anything the agency might do to her in the future. According to the EEOC's 2019 Annual Report, employees claimed retaliation in 7,176 cases. There's either a lot of retaliation going on, or it's just easy to claim.").

<sup>190</sup> See *Hill v. Nicholson*, 383 F. App'x 503, 513 (6th Cir. 2010) (admitting there is a relatively low bar for harassment claims to survive dispositive motions in a case about a "nitpicking" supervisor).

Cases based solely on a supervisor's tone or body-language may not survive summary judgment at the EEOC or federal court. See, e.g., Warren, EEOC Doc. 01A42507, 2004 WL 1810504, at \*1-2 (E.E.O.C. Aug. 3, 2004). However, it is apparent from the number of these cases at the EEOC that these cases are still accepted by agency EEO offices, are fully investigated with affidavits and documents sought from management staff, and may still progress through the same interminable process of multiple appeals and a de novo hearing in federal court as a matter of right. See *id.*

can vary greatly based on administration.<sup>191</sup> Adverse employment actions or even just innocent management actions weaponized by disgruntled employees can add hundreds of hours of required work over a period of multiple years. Managers must prepare for EEO interviews, search for documentary evidence, review notes and documents to refresh their recollection, and prepare for depositions and hearings.<sup>192</sup> This can distract managers both from focusing on their agency's mission and from providing support or supervision to other subordinates.<sup>193</sup>

### C. Potential Solutions to Increase Efficiency and Fairness in Federal Sector Employment Law by Equalizing Appeal Options

The most common-sense reform would be to equalize appellate options and take steps to make an employee's choice of forum more final. As the employee is already making the initial choice of forum when they file,<sup>194</sup> they should not have the further benefit of multiple appeals or re-hearings until they get their desired result, especially not appeal options that are unavailable to the agency.

Some of the simplest reforms that could alleviate the problems described above would be to make the initial choice of forum more permanent and allow agency appeals to the same extent as employee appeals. A right of appeal for both parties from an arbitration, MSPB, or EEOC decision to the Federal Circuit Court of Appeals is more than sufficient to ensure a robust hearing for employee rights, without the wasted time and expense of a duplicative *de novo* procedure. Under such a system, the parties could still appeal the initial decision to the MSPB or EEOC, but with-

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<sup>191</sup> See generally COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY & EFFICIENCY, TOP MANAGEMENT AND PERFORMANCE CHALLENGES FACING MULTIPLE FEDERAL AGENCIES (2023), <https://www.ignet.gov/sites/default/files/files/993-087CIGIE-TMPCReport9-12.pdf> [<https://perma.cc/AX8R-2V2C>] (identifying widespread management and performance challenges across federal agencies); U.S. MERIT SYS. PROT. BD., A CALL TO ACTION: IMPROVING FIRST-LEVEL SUPERVISION OF FEDERAL EMPLOYEES (2010), [https://www.mspb.gov/studies/studies/A\\_Call\\_To\\_Action\\_Improving\\_First\\_Level\\_Supervision\\_of\\_Federal\\_Employees\\_516534.pdf](https://www.mspb.gov/studies/studies/A_Call_To_Action_Improving_First_Level_Supervision_of_Federal_Employees_516534.pdf) [<https://perma.cc/6PU9-3WJ9>] (finding deficiencies in first-level supervision and urging improved managerial training); OFF. OF MERIT SYS. OVERSIGHT & EFFECTIVENESS, U.S. OFF. OF PERS. MGMT., SUPERVISORS IN THE FEDERAL GOVERNMENT: A WAKE-UP CALL (2001), <https://ourpublicservice.org/wp-content/uploads/2001/01/a37809c9945f5a8acb5471266c316241-1414081579.pdf> [<https://perma.cc/3ZAU-C3MX>] (describing a variety of management challenges in the federal sector).

<sup>192</sup> See DICKMAN & MARSHALL, *supra* note 50, at 11–12.

<sup>193</sup> See Katz, *supra* note 11 (quoting a former OPM deputy director as stating that when “it takes an inordinate amount of time for the manager to focus his or her attention on one employee,” it is at the expense of other employees).

<sup>194</sup> See *supra* Part II.

out the cross-appeals between the agencies and the EEOC right to a de novo hearing. The Federal Circuit then would be responsible for ensuring a consistent body of law and correcting errors in the EEOC and MSPB's primary fields as well as in mixed cases. Allowing both parties to appeal to the Federal Circuit (instead of only allowing appeals by unsuccessful employees), would help prevent splits in law by having the court ensure consistency,<sup>195</sup> all while providing a more appropriate balance between employee rights and agency interests.<sup>196</sup> While this would potentially increase the appeals docket in the Federal Circuit, it would reduce the more time-intensive and costly de novo cases available in an unsuccessful EEOC claim.

Another, less desirable, option would be to retain the current system of cross-appeals but to equalize the appeal opportunities between the agency and employee. The agency should have the same right as an employee to appeal a decision by a federal sector arbitrator to the MSPB. Similarly, the agency should have an equal right to appeal an MSPB claim involving discrimination to the EEOC or an EEOC claim involving MSPB issues to the MSPB. Such agencies should be the final authority within the administrative law system on the matters within their own purview.<sup>197</sup> Further, a reformed system would require that such reviews are not opportunities to relitigate facts or the weighing of evidence, but rather will only be overturned by the other forum when the legal holdings clearly contradict established precedent of that body within that body's established expertise. Each forum's review would also be strictly and expressly confined to those issues on which it is the expert. For instance, an appeal of an arbitrator's decision regarding removal to the MSPB could not rule on contract interpretation as that is the arbitrator and FLRA's responsibility (not the MSPB's). Similarly, the appeal of an MSPB judgment in a case also alleging discrimination could only have the rulings on discrimination issues appealed to the EEOC, as opposed to issues such as the sufficiency of the removal

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<sup>195</sup> See Modesitt, *supra* note 62, at 996. For an interesting, if complicated, stroll through of one case involving these inconsistencies, see Cummings, *supra* note 157, at 17, 22.

<sup>196</sup> See Watson, *supra* note 157, at 35 ("[A]gencies should be allowed to challenge EEOC determinations to an uninterested, neutral forum where the correct balance between protecting federal employees and the efficiency of the civil service can be achieved.").

<sup>197</sup> See Richard J. Ericson, *Reasonable Accommodation of the Handicapped Federal Employee: Extending the Legal Duty of the Employer*; Ignacio v. United States Postal Service, 10 GEO. MASON U. L. REV. 267, 273 (1987) (explaining that the Special Panel has acknowledged the MSPB and EEOC's expertise in their respective areas).

process. This way there would be no need for the Special Panel created by law to harmonize such decisions.<sup>198</sup>

While either of these changes would need regulatory and statutory changes, they are both common-sense solutions that would not completely reinvent the federal sector process but rather promote uniformity and accountability for agency adjudicatory decisions.<sup>199</sup> However, any proposals to reform the federal sector employment system must deal with the right of employees to a de novo federal court process in any claims involving discrimination. As detailed below, when seeking to equalize appeal options or streamline the process in the EEOC system, additional complications, both statutory and constitutional, come into play.

### 1. Eliminating the De Novo Trial in Federal Court

As stated above, the proposed equalization of the appeal rights would involve the elimination of complainant's right to a de novo trial in federal court for any employee dissatisfied with the EEOC's resolution of their claim as this is the most frustrating, time consuming, and inefficient aspect of federal sector employment law.<sup>200</sup> Although statutory changes could remove the right to file a complaint in federal court, this is complicated by the CRA's requirement that any employee seeking compensatory damages have a right to a jury trial. If the right to a jury trial were removed statutorily, the inclusion of compensatory damages raises further constitutional issues discussed below. While perhaps the simplest and most straightforward reform would be to remove the compensatory damages provision from the CRA and avoid these issues, this is highly unlikely considering the importance of compensatory damages in remedying civil rights violations and the availability of compensatory damages for other civil rights violations.<sup>201</sup>

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<sup>198</sup> See Stimson, *supra* note 94, at 242 (explaining that with the elimination of cross-agency appeal, there will be no reason for the Special Panel to exist).

<sup>199</sup> See Modesitt, *supra* note 62, at 995–96.

<sup>200</sup> See *supra* text accompanying notes 166, 180; Modesitt, *supra* note 62, at 995 (“The first and best solution would be to amend Title VII to remove the right to a trial de novo in the federal courts.”).

<sup>201</sup> See Ivan E. Bodensteiner, *Limiting Federal Restrictions on State and Local Government*, 33 VALPARAISO U. L. REV. 33, 40 (1998) (explaining how civil rights claims can result in compensatory damages, although awards are often small); Caprice L. Roberts, *Ratios, (Ir)rationality & Civil Rights Punitive Awards*, 39 AKRON L. REV. 1019, 1038–39 (2006); Ranieri, *supra* note 64, at 30 (“The issue of Title VII remedies, however, dominated the debate that culminated in the passage of the 1991 CRA.”); see generally Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the*

Instead, this Article will look at the possibility of removing the real problem—the jury trial provision in the CRA which presupposes and requires an employee’s ability to file in federal court as jury trials are not available in the administrative forums.<sup>202</sup> If there is a right to a jury trial of federal sector discrimination claims, regardless of the removal of any other statutory provision regarding the ability to file in federal court after losing before the EEOC, then the employee will still have the opportunity for a *de novo* hearing in federal court.<sup>203</sup> The removal of the right to a jury trial implicates constitutional questions involving the Seventh Amendment and sovereign immunity, but based on established precedent, Congress would likely be found to have the power to do so as analyzed below.

a. Congress’s Waiver of Sovereign Immunity to Allow Suit in Federal Court Creates a Statutory Right that Can be Withdrawn

Relevant to the processes at issue in this Article, a jury trial must be made available when constitutionally required by the Seventh Amendment<sup>204</sup> or when Congress has expressly waived sovereign immunity to allow such trials.<sup>205</sup> The doctrine of sovereign immunity prevents governments from being sued without their consent.<sup>206</sup> However, Congress can waive sovereign immunity to allow claims against the government to proceed.<sup>207</sup> Waivers of sovereign immunity can be broad or narrow and may only authorize certain types of proceedings against the government or authorize certain types of damages.<sup>208</sup>

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*Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1 (1993) (explaining the history of the CRA, the debates over compensatory damages, and the administration’s “abhorrence” of compensatory and punitive damages and resulting cap on such damages).

<sup>202</sup> See Ranieri, *supra* note 64, at 38 (“The court then recognized that a ‘trial by jury’ cannot occur in an administrative proceeding.” (citing *Gibson v. Brown*, 137 F.3d 992, 996 (7th Cir. 1998))).

<sup>203</sup> *Id.*

<sup>204</sup> U.S. CONST. amend. VII.

<sup>205</sup> See *Dombrowski v. United States*, 524 F. Supp. 3d 723, 728 (E.D. Mich. 2021).

<sup>206</sup> See *Rothe Dev., Inc. v. U.S. Dep’t of Def.*, 666 F.3d 336, 338 (5th Cir. 2011); *Immunity*, BLACK’S LAW DICTIONARY (12th ed. 2024) (defining “sovereign immunity”).

<sup>207</sup> *United States v. Miller*, 604 U.S. 518, 527 (2025) (“Waivers of sovereign immunity are jurisdictional provisions that empower courts to hear claims against the Government.”).

<sup>208</sup> See Ugo Colella & Adam Bain, *The Burden of Proving Jurisdiction Under the Federal Tort Claims Act: A Uniform Approach to Allocation*, 67 FORDHAM L. REV. 2859, 2863–64 (1999) (providing examples of the limited waiver and process authorized by the Federal Tort Claims Act); see generally 14 WRIGHT & MILLER’S FEDERAL PRACTICE & PROCEDURE § 3654 (4th ed. 2025) (discussing the difficulties of bringing suits against the United States).

The CRA specified that compensatory and punitive damages would be available (although both were capped), and that “[i]f a complaining party seeks compensatory or punitive damages . . . any party may demand a trial by jury.”<sup>209</sup> Therefore, the CRA, by its very text, waived sovereign immunity as to both the right to a jury trial in claims against federal agencies and the availability of compensatory damages. These two waivers do not need to be connected. Legislation, like the Federal Tort Claims Act, may waive sovereign immunity to provide compensatory damages to litigants without waiving sovereign immunity as to the availability of a jury trial.<sup>210</sup> In other words, the waiver of sovereign immunity as to compensatory damages does not necessarily also create a right to a jury trial. Legislation could simply remove the right to a jury trial from the statute. However, if compensatory damages are made available by statute without the corresponding statutory right to a jury trial, the question becomes whether a jury trial (and therefore, a complaint in federal court) must be an option for claimants under the Seventh Amendment. The removal of the statutory right to a *de novo* hearing and to a jury trial as a statutory right under the CRA would be a dead letter if there is a constitutional right to request a trial by jury in these cases.

b. If the Statutory Right to a Jury Trial is Removed, the Seventh Amendment Does Not Require a Jury Trial

The Seventh Amendment guarantees the right to a jury trial in “[s]uits at common law, where the value in controversy shall exceed twenty dollars.”<sup>211</sup> This constitutional provision was based, like the concept of sovereign immunity,<sup>212</sup> on long-standing principles of British common law making a distinction between claims “at law” or “in equity.”<sup>213</sup> The Supreme Court has held that legal matters or matters “at law,” are covered by the

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<sup>209</sup> 42 U.S.C. § 1981a(c)(1); *but see* HERNICZ, *supra* note 14, at 71 (explaining punitive damages are not available against the federal government).

<sup>210</sup> *See* COLELLA & BAIN, *supra* note 208, at 2873 (explaining that there is no jury trial under the Federal Tort Claims Act); CYRUS B. RICHARDSON, III, *Understanding the Limited Effect of Molzof v. United States on Wrongful Death Damages Under the Federal Tort Claims Act*, 20 N. ILL. U. L. REV. 69, 70 (2000) (stating that actual and compensatory damages are available under the Federal Tort Claims Act).

<sup>211</sup> U.S. CONST. amend. VII.

<sup>212</sup> KATHERINE FLOREY, *Sovereign Immunity's Penumbra: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 785 (2008).

<sup>213</sup> *See* GRANFINANCIERA, S.A. v. NORDBERG, 492 U.S. 33, 41–42 (1989).

Seventh Amendment’s right to a jury trial while matters “in equity” are not.<sup>214</sup> In determining whether a certain claim is one of equity or law, the Supreme Court has held that the most important factor is the type of remedy sought.<sup>215</sup> Equitable remedies, such as injunctive relief or back pay, would not require a jury, whereas compensatory damages, punitive damages, or damages going beyond restoring the status quo would.<sup>216</sup>

Traditionally, claims under Title VII were not considered “at law” as the remedies were entirely equitable. Title VII, as originally crafted in the Civil Rights Act of 1964, did not allow for compensatory damages but only back pay, front pay, reinstatement, injunctive relief, and other equitable relief.<sup>217</sup> The text made no provision for compensatory or punitive damages<sup>218</sup> and most courts analyzing the question therefore found no right to a jury trial under Title VII.<sup>219</sup> While claims could be brought to federal court after exhausting administrative remedies, no jury trials were available, and judges were limited to equitable remedies in the relief they could order.<sup>220</sup>

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<sup>214</sup> See generally Samuel L. Bray, *Equity, Law, and the Seventh Amendment*, 100 TEX. L. REV. 467 (2022) (distinguishing equity from law and proposing reform).

<sup>215</sup> See *id.* at 468, 477–78; Anthony DiSarro, *When a Jury Can’t Say No: Presumed Damages for Constitutional Torts*, 64 RUTGERS L. REV. 333, 343 (2012).

<sup>216</sup> See Sec. & Exch. Comm’n v. Jarkesy, 603 U.S. 109, 123–25 (2024) (holding that damages meant to compensate, remedies designed to punish, or remedies that go beyond “restor[ing] the status quo” are legal remedies, not equitable in nature, and require a jury trial); Michael A. Labriola & Lisa C. Scolieri, *Title VII and the “Right” of Trial by Jury*, 30 DUQ. L. REV. 961, 963 (1992) (“Thus, those cases that recognized equitable rights and where equitable remedies were administered were not entitled to trial by jury.”).

Courts have held that “back pay” is an equitable remedy with the purpose of restoring victims to the status they would have enjoyed but for the discrimination.” *Id.* at 962.

<sup>217</sup> Ranieri, *supra* note 64, at 33; Hernicz, *supra* note 14, at 68; Manuel Martínez-Herrera, *Punitive Damages in the Employment Discrimination Context: “A General Overview and Analysis of Whether They Effectively Deter from Discriminating in the Workplace,”* RACO (2006), <https://raco.cat/index.php/IUSLabor/article/view/57964/68032> [<https://perma.cc/3EHG-VB84>] (“Title VII of the Civil Rights Act of 1964 provided only for the award of equitable relief: injunctions, back pay, and the award of attorney’s fees.” (footnote omitted)).

<sup>218</sup> See Hernicz, *supra* note 14, at 63–64, 72.

<sup>219</sup> Michael D. Moberly, *Title VII Trials – and Tribulations: Examining the Divergent Roles of Judge and Jury Under the Act’s Enhanced Remedial Scheme*, 39 HOFSTRA LAB. & EMP. L.J. 331, 339 n.43 (2022); Kerry R. Lewis, *A Reexamination of the Constitutional Right to a Jury Trial Under Title VII of the Civil Rights Act of 1964*, 26 TULSA L.J. 571, 571 (1991).

<sup>220</sup> The CRA did not create the option to file a claim in federal court but added the damages and jury trial provisions. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072–74 (codified as amended at 42 U.S.C. §§ 1981–1981a); Moberly, *supra* note 219, at 378 (“Prior to the Civil Rights Act of 1991, only equitable relief, including back pay, was available to prevailing plaintiffs under Title VII.” (quoting *Bledsoe v. Emery Worldwide Airlines, Inc.*, 635 F.3d 836, 844 n.9 (6th Cir. 2011))). See generally *Brown v. Gen. Servs. Admin.*, 425 U.S. 820 (1976) (finding that a plaintiff could

This inclusion of a jury trial provision in the CRA squares with the traditional understanding of the Seventh Amendment as requiring the option of a jury trial where a plaintiff seeks compensatory damages.<sup>221</sup> Congress likely assumed that, under the Seventh Amendment, a jury trial was required.<sup>222</sup>

However, the Seventh Amendment right to a jury trial is not absolute. First, the Seventh Amendment right to a jury trial does not apply when claims are against the United States.<sup>223</sup> As the Supreme Court put it in a 1943 case, such cases are equitable, not legal, in nature, as “[i]t hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign.”<sup>224</sup> Therefore, while Congress can waive sovereign immunity and create a right to a jury trial, it is a statutory right, not a constitutional one.<sup>225</sup>

Second, the Supreme Court has held that cases involving “public rights” are not subject to the Seventh Amendment’s right to a jury trial.<sup>226</sup> Here there is a strong argument that the treatment of federal employee employment discrimination claims is a matter of “public” rights. Where a claim involves a “public” right, “Congress may assign the matter for decision to an agency without a jury, consistent with the Seventh Amendment.”<sup>227</sup> “Essentially, Congress can employ this legislative technique for statutory rights that are ‘closely intertwined with a federal regulatory

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file in federal court within the relevant statute of limitations contained in the pre-1991 CRA).

<sup>221</sup> See Margaret Raymond, *The Unconstitutionality of the Victim and Witness Protection Act Under the Seventh Amendment*, 84 COLUM. L. REV. 1590, 1615 (1984) (awarding compensatory damages without a jury trial may violate the Seventh Amendment).

<sup>222</sup> See Govan, *supra* note 201, at 95 (explaining that proposals to increase equitable damages without compensatory damages was a way to avoid the Seventh Amendment right to a jury trial).

<sup>223</sup> Lehman v. Nakshian, 453 U.S. 156, 168 (1981).

<sup>224</sup> See Galloway v. United States, 319 U.S. 372, 388 (1943). For a description of various courts’ interpretation of the Seventh Amendment in cases involving the government and naming the concept the “historically immune defendants” test, see Jason Weeden, *Historically Immune Defendants and the Seventh Amendment*, 74 TEX. L. REV. 655 (1996).

<sup>225</sup> Dombrowski v. United States, 524 F. Supp. 3d 723, 728 (E.D. Mich. 2021) (citing *Galloway*, 319 U.S. at 388); see *Brott v. United States*, 858 F.3d 425, 436 (6th Cir. 2017).

<sup>226</sup> *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989) (“Unless a legal cause of action involves ‘public rights,’ Congress may not deprive parties litigating over such a right of the Seventh Amendment’s guarantee to a jury trial.”).

<sup>227</sup> *Sec. & Exch. Comm’n v. Jarkesy*, 603 U.S. 109, 127 (2024); *Atlas Roofing v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442, 443 (1977) (“[W]hen Congress creates new statutory ‘public rights,’ it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment’s injunction that jury trial is to be ‘preserved’ in ‘suits at common law.’”).

program' or where the 'right . . . belongs to [or] exists against' the federal government."<sup>228</sup>

The Supreme Court has stated that in determining whether a right is public or private, one factor is whether the government is necessarily a party, but that the main focus is on whether a private cause of action for the right existed in English common law.<sup>229</sup> As the Court has repeatedly put it, the question is whether the claim "is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.'"<sup>230</sup> While an exhaustive review of English common law is beyond the scope of this Article, issues such as the granting of public benefits, immigration, customs, and the use of public land have been held to involve public rights.<sup>231</sup> Significantly, Occupational Safety and Health Administration enforcement actions against private parties have been found to involve public rights, and therefore, it was constitutional for Congress to commit the matter to resolution within an administrative agency.<sup>232</sup> However, some actions, such as where the Securities and Exchange Commission seeks civil money penalties for securities fraud, have been found to involve a private right, as it was analogous to common law fraud.<sup>233</sup>

The private-public right distinction is not precise,<sup>234</sup> and it is not entirely certain how the Supreme Court would rule on the application of this to Title VII matters, but it seems apparent that no action for employment discrimination, especially against the sovereign, existed in Westminster in 1789. This, along with the fact that an employment discrimination claim is not neatly analogizable to common law employment law claims<sup>235</sup> (such as wrongful discharge),<sup>236</sup> would likely mean that Congress has the

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<sup>228</sup> DiSarro, *supra* note 215, at 349 (citing *Granfinanciera*, 492 U.S. at 51–52, 54).

<sup>229</sup> See *Granfinanciera*, 492 U.S. at 41–42.

<sup>230</sup> *Jarkesy*, 603 U.S. at 127.

<sup>231</sup> *Id.* at 152–53 (Gorsuch, J., concurring).

<sup>232</sup> See *Atlas Roofing*, 430 U.S. at 442.

<sup>233</sup> *Jarkesy*, 603 U.S. at 124–25. *Jarkesy* distinguished *Atlas Roofing* as it involved an analogous private cause of action (fraud) and involved civil penalties. See *id.* at 136 (citing *Atlas Roofing*, 430 U.S. at 442).

<sup>234</sup> Much like the federal sector employment system, the private-public right is an "area of 'frequently arcane distinctions and confusing precedents.'" *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985) (quoting *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982)).

<sup>235</sup> Discrimination suits do not fit well within a common law framework. Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 3 (2013).

<sup>236</sup> See Paul Rose, *Developing a Market for Employment Discrimination Claims in the Securities Industry*, 48 UCLA L. REV. 399, 414 (2000) (describing common law employ-

authority to eliminate the trial by jury provision of the CRA while retaining the right to compensatory damages and refer federal sector employment discrimination claims solely to the administrative process with appeals only to the Federal Circuit.

## 2. Providing Both Parties with a Right to a De Novo Trial in Federal Court

Another option would be to preserve the jury trial provision but apply it to both parties. Based on the compensatory damages provision of the CRA, the Supreme Court in *West v. Gibson* held that an employee could seek compensatory damages before the EEOC, and that, if unsuccessful, the employee, and only the employee could opt for a de novo hearing in federal court.<sup>237</sup> Major Steven M. Ranieri's summary of the arguments in this case is worth quoting in whole:

Gibson argued what appeared obvious: parties cannot receive a jury trial before the EEOC and may only receive one in court. To Gibson this meant the EEOC could not award compensatory damages, because the EEOC could not meet a required condition of the damages provision, i.e., provide the government with a jury trial if it demanded one.

The government conceded that the EEOC was without the power to grant jury trials. However, it interpreted the jury trial provision differently. Namely, it asserted that if a federal-sector employee was dissatisfied with either the administrative agency's or the EEOC's award and subsequently sought a trial *ne [sic] novo* in district court, either party could *then* request a jury trial. In other words, the jury trial provision only became operative if the aggrieved person utilized the other provisions of Title VII enabling her to file a civil action.<sup>238</sup>

The government's view was adopted by the court and the lack of an appeal mechanism for agencies was justified by the fact that while the CRA said "any party may demand a trial by

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ment claims as including wrongful termination, defamation, negligent supervision, invasion of privacy, tortious interference with economic opportunity, and intentional infliction of emotional distress).

While there are discrimination claims that seem to be at common law, these involve the concept that businesses offering services to the public at large cannot arbitrarily refuse service, not employment relationships. See Adam J. MacLeod, *The Jury Trial Right in Discrimination Cases*, LAW & LIBERTY (Nov. 4, 2024), <https://lawliberty.org/the-jury-trial-right-in-discrimination-cases/> [https://perma.cc/7UAJ-PEB2].

<sup>237</sup> See 527 U.S. 212, 221 (1999).

<sup>238</sup> Ranieri, *supra* note 64, at 42 (footnotes omitted).

jury” the operative part of Title VII only gave the employee (the complaining party) the ability to go to federal court at all.<sup>239</sup>

However, it could be argued, as Ranieri does, that “demanding a jury trial” should be “read to be synonymous with initiating a civil action” with a jury, and that the provision should have been interpreted to apply to both sides so that either the employee or employer could challenge the EEOC determination de novo in federal court.<sup>240</sup> Such an interpretation, or a statutory change to more clearly state this, would increase the fairness of the system and would also prevent any splits in the law between EEOC and the federal courts. In addition, Ranieri makes the case that doing so would provide an incentive for complainants to mediate or settle their complaints as the current system provides an incentive to complainants to pursue their complaints through the entire administrative system without settling their complaints because they can always get a “second bite at the apple in federal court (in the form of a trial de novo) if they lose in the administrative process.”<sup>241</sup>

While this solution would be helpful, it would not assist with matters of judicial efficiency, and would, in fact, likely double the number of EEOC decisions being reheard completely in federal court. It would also likely dissuade many employees from taking legitimate discrimination claims through the EEOC process as they realize that even after a full trial at the EEOC they will then likely go through the same process in federal court, a process that would likely take years. It also seems unlikely that the Court would reconsider an argument that was rejected in *Gibson* both in the Supreme Court and at the Seventh Circuit.<sup>242</sup>

While solving some problems, like the fundamental unfairness of the process and the divergent caselaw between federal courts and the EEOC, this proposal would serve to lengthen and further complicate the EEOC process. Therefore, while better than the current system, this proposal would still involve a long, complicated process that would still take years for both employees and agencies to navigate.

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<sup>239</sup> See *id.* at 39–40. Ranieri aptly described the government’s argument adopted by the court: “In other words, the jury trial provision only became operative if the aggrieved person utilized the other provisions of Title VII enabling her to file a civil action.” *Id.* at 42.

<sup>240</sup> *Id.* at 43.

<sup>241</sup> *Id.* at 44.

<sup>242</sup> See *West*, 527 U.S. at 221; *Gibson v. Brown*, 137 F.3d 992, 997–98 (7th Cir. 1998).

### 3. Creating Parallel and Separate Tracks in the EEOC and Federal Court

One option that has not yet been proposed would be to require a choice between federal court and the EEOC process at the beginning of the Agency EEO process. As explained above, under the CRA, employees may seek compensatory damages under Title VII, and under both the CRA and, possibly, the Constitution, this requires that they be offered a jury trial.<sup>243</sup> However, the Supreme Court has also held that the EEOC administrative process can award compensatory damages.<sup>244</sup> By eliminating the administrative exhaustion requirement for employees, claimants seeking compensatory damages could decide at the outset whether to go to federal court or the EEOC. Under this proposal, if employees go directly to federal court, they will be taking these cases out of the administrative forum, leaving EEOC with a reduced caseload and the ability to make good on its purpose of effectively and quickly resolving such disputes. This would in turn create a strong incentive for employees to go to the EEOC with their claims as resolution could be quicker and more efficient. Employees deciding on the EEOC path would have already had an opportunity to have their claim heard by a jury and would have rejected this in favor of remaining at the EEOC, thereby satisfying any potential constitutional requirement for an opportunity for a jury trial. Under this proposal, either party at the EEOC could then appeal to the Federal Circuit, as opposed to the option for a *de novo* hearing, to still maintain a consistent body of employment discrimination law. Further, claims not seeking compensatory damages, but rather just seeking remedies such as back pay, attorney fees, reinstatement, or promotion would only be eligible to go through the more efficient EEOC process, as without compensatory damages and only equitable remedies, there is no arguable right to a jury trial.<sup>245</sup>

#### IV. RECOMMENDATIONS FOR RESTORING THE BALANCE BETWEEN FEDERAL AGENCIES AND EMPLOYEES IN FEDERAL SECTOR EMPLOYMENT CASES

All the recommendations above would require legislation. However, there is a strong argument to be made to Congress to

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<sup>243</sup> See *supra* Section III.C.1.

<sup>244</sup> *West*, 527 U.S. at 222–23.

<sup>245</sup> See Nancy L. Pirkey, *The Availability of Jury Trials in ERISA Section 510 Actions: Expanding the Scope of the Seventh Amendment*, 27 VALPARAISO U. L. REV. 139, 146 (1992).

streamline the process to equalize rights between government employees and their agencies. While the perception that federal workers cannot be fired is incorrect, it is clear that the process of federal sector employment actions and the various appeals available to employees dissuades managers from taking action and creates a process that is confusing to employees, unfairly disadvantages agencies, and has other ill effects such as splits in law and the delayed resolution of cases.<sup>246</sup>

As an initial matter, the best option would be the first given in Section III.C.1 above, namely, streamlining EEOC, MSPB, and FLRA processes to continue with appeals solely in their own forum, and with employees with mixed cases making a meaningful choice of forums, while also eliminating any *de novo* trial as suggested in Section III.C.1.i. This would still acknowledge the expertise of each forum (discrimination matters, merit systems principles, and bargaining and contract interpretation)<sup>247</sup> while still ensuring consistency through appeals to the Federal Circuit. While the EEOC may still formally retain its obdurate policy of ignoring federal precedent, the availability of an appeal to the Federal Circuit by any party would incentivize EEOC administrative judges to look to federal law in crafting decisions. Similarly, the misapplication of law in a mixed case could be corrected at the Federal Circuit without the overlapping set of appeals that confuse both employees and practitioners. Further, an appeal avenue to the Federal Circuit would benefit both agencies and employees by eliminating conflicting law; while such conflicts have traditionally favored employees, there is no guarantee that future appointees to the EEOC would not be of a more conservative tilt and refashion federal precedent that benefits employers. The fairest and most logical solution is to ensure consistency regardless of forum.

However, to the extent courts find a constitutional reason to require the availability of jury trials or to the extent there is insufficient political will to amend the CRA, the likely least controversial reform to the EEOC process would be the last given above as it would need the least statutory and regulatory changes. By granting the choice early in the process of (1) whether to seek compensatory damages and (2) whether to proceed to federal

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<sup>246</sup> See generally *supra* Section III.B.1–5 (analyzing the issues surrounding federal sector employment law).

<sup>247</sup> Some proposals would eliminate the EEOC hearing process entirely. See Stimson, *supra* note 94, at 170; DICKMAN & MARSHALL, *supra* note 50, at 13–19.

court or stay within the administrative process, this option would give employees the option for the jury trial the CRA allows. This would mean that by opting for the administrative process, the employee would be waiving their right to a jury trial, something that already sometimes occurs in Title VII cases in federal court.<sup>248</sup> In some ways this would be similar to the process in Fair Housing Act claims, where a complainant has an option to proceed in federal court (with the availability of a jury trial) or remain in an administrative process with hearings before administrative law judges, and then only an appeal avenue to the Federal Circuit.<sup>249</sup> This would provide compliance with the CRA as well as allowing compensatory damages in either forum, with either side having an appeal to the Federal Circuit. The largest issue with this proposal is that it is unclear whether it provides enough of an incentive for employees to remain in the administrative process, as opposed to federal court. As a policy matter, the EEOC is already underfunded and overworked.<sup>250</sup> While transferring some of this burden to federal court would help, policy makers would need to not cut the EEOC further<sup>251</sup> or the EEOC dysfunction would continue and push even more cases into an already burdened federal court.<sup>252</sup> However, even this would be preferable to the intersecting and duplicative procedures that currently govern the law in this area.

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<sup>248</sup> See Moberly, *supra* note 219, at 378–83. Plaintiffs do sometimes waive the right to a jury trial and compensatory damages in general. See, e.g., *Busby v. City of Tulsa*, No. 11-CV-447-JED-JFJ, 2018 WL 7286180, at \*1 (N.D. Okla. Oct. 23, 2018) (noting that the plaintiff in a Title VII disparate treatment case “waived jury trial and any claim for compensatory damages”); *McColm v. Cal. State Univ. Trs.*, No. 92-16913, 92-16934, 1996 WL 380484, at \*1 (9th Cir. July 5, 1996) (“[The plaintiff’s] attorney waived jury trial on the record at a pretrial conference, noting that [the plaintiff] was requesting only equitable relief, including back pay.”). Moberly cited both cases. Moberly, *supra* note 219, at 399 n.456.

<sup>249</sup> See *supra* note 143.

<sup>250</sup> See *supra* text accompanying note 179.

<sup>251</sup> *Trump Is Making It Easier for Employers to Discriminate. This Stifles Equity and Hurts Economic Growth.*, ECON. POLY INST.: BLOG (May 27, 2025, at 11:18 PT), <https://www.epi.org/blog/trump-is-making-it-easier-for-employers-to-discriminate-this-stifles-equity-and-hurts-economic-growth/> [<https://perma.cc/FYH9-5PPS>] (“When adjusted for inflation (2024 dollars), the EEOC’s budget declined slightly in the 2000s (-1.7%) before falling significantly in the 2010s (-11.9%) . . . . While staffing levels increased between 2020 and 2024, the budget declined by 3.6%.”).

<sup>252</sup> See Jon O. Newman, *The Current Challenge of Federal Court Reform*, 108 CALIF. L. REV. 905, 911–12 (2020) (“[C]aseload volume has risen, and with increases in population, not to mention new grounds for litigation, it will continue to increase.”).

## V. CONCLUSION

The current processes and procedures for federal sector employment law are a tangled mess that is patently unfair to federal agencies, while also creating a system where employees, even when successful, have dedicated years of their lives to litigation. While the promise of less formal agency procedures may seem appealing to employees who want to represent themselves, the procedures involved are so complicated as to almost require professional legal representation with expertise in this area. As multiple commentators have stated, this state of the law cannot continue, and in reforming the system, legislators and agencies should focus on pruning off unnecessary appellate branches, the equalization of appeal rights, and the establishment of the Federal Circuit as the primary authority (under the Supreme Court) responsible for hearing appeals. Until such reforms are made, both agencies and employees will continue to wander through the labyrinth knowing that, no matter how long it takes, the only way out is through.

