No. 02-460

In the Supreme Court of the United States

DAVID SCHNEIDER, PETITIONER

v.

GORDON R. ENGLAND, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
MARLEIGH D. DOVER
WENDY M. KEATS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Petitioner filed this action in the district court, alleging that he was wrongfully removed from federal employment both because of employment discrimination and in retaliation for whistleblowing. The question presented is whether the courts below properly concluded that petitioner's nondiscrimination whistleblower-retaliation claim should be dismissed because he never presented that claim to the Merit Systems Protection Board.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

No. 02-460

DAVID SCHNEIDER, PETITIONER

v.

GORDON R. ENGLAND, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter, but is reprinted in 40 Fed. Appx. 575. The order of the district court (Pet. App. 24-28) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2002. The petition for a writ of certiorari was filed on September 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. From 1990 to 1996, petitioner worked for the aircraft maintenance department of a Navy facility in

California. In January 1996, he was removed for medical inability to perform his duties and for the use of foul and abusive language in the workplace. C.A. Suppl. Excerpts of Record (SER) 7-11. In February 1996, petitioner filed an administrative complaint with the Equal Employment Opportunity (EEO) component of his agency, alleging that the Navy discriminated against him because of a mental disability (depression) and fired him in retaliation for reporting safety violations. *Id.* at 14-16. In June 1996, the Navy notified petitioner that it accepted and would investigate his claim of discrimination and retaliatory removal. *Id.* at 23-32.

The Navy's notice stated that petitioner's administrative complaint was a "mixed case complaint," because it raised a claim of employment discrimination together with a personnel action—petitioner's removal—that is appealable to the Merit Systems Protection Board (MSPB). C.A. SER 29; see 29 C.F.R. 1614.302(a) ("A mixed case complaint is a complaint of employment discrimination filed with a Federal agency * * * related to or stemming from an action that can be appealed to the Merit Systems Protection Board."). The notice also quoted at length from regulations governing administrative processing and judicial review of mixed case complaints. See C.A. SER 29-30 (quoting 29 C.F.R. 1614.302(a), (b) and (d); 5 C.F.R. 1201.154(a)).

2. In September 1996, after more than 120 days elapsed without a decision on petitioner's formal EEO complaint, he filed this action against the Secretary of the Navy in district court. See 5 U.S.C. 7702(a)(2) and (e)(1). The complaint alleged that petitioner was wrongfully discharged in retaliation for reporting safety violations, in violation of the Whistleblower Protection Act of 1989, 5 U.S.C. 2302(b)(8), and based

on disability, in violation of the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq*. Pet. App. 10-11.

The district court dismissed petitioner's disability claim for failure to establish a prima facie case of discrimination, and dismissed his whistleblower-retaliation claim for lack of subject matter jurisdiction because petitioner failed to exhaust his administrative remedies before the Office of Special Counsel (OSC). See 5 U.S.C. 1211. The court of appeals affirmed the dismissal of the discrimination claim, but vacated the dismissal of the whistleblower claim and remanded. Pet. App. 14-16. The court noted that the Navy conceded that petitioner was not required to exhaust his administrative remedies with the OSC, but emphasized that on remand the district court would be free to consider other factors affecting the existence of subject matter jurisdiction over the whistleblower claim. *Id.* at 15-16.

3. On remand, the district court held that, although petitioner's discrimination claim was dismissed, this action still qualified as a mixed case for purposes of conferring subject matter jurisdiction over a proper nondiscrimination claim, because petitioner's discrimination claim (though meritless) was not frivolous. Pet. App. 17-23. But in a subsequent ruling (*id.* at 24-28), the district court held that this case does *not* present a proper nondiscrimination claim, because petitioner "failed to exhaust his administrative remedies with respect to his nondiscrimination claim" by not "appeal-[ing] to the MSPB before filing this case in the District Court." *Id.* at 25; see *id.* at 27. Accordingly, the court dismissed the action. *Id.* at 25, 28.

4. The court of appeals affirmed in an unpublished decision. Pet. App. 1-2. The court stated: "There can be no doubt that [petitioner] failed to present his

whistleblower retaliation claim to the [MSPB] before he brought his mixed claim action in the district court. Thus, he has not preserved that claim for judicial review." *Id.* at 2. The court further noted that "when an employee bypasses the MSPB, federal courts cannot possibly apply the proper deferential standard of review to the agency's action on a nondiscrimination claim." *Ibid.* (footnote omitted).

ARGUMENT

The court of appeals correctly concluded that petitioner's whistleblower-retaliation claim should be dismissed. Its unpublished decision presents no conflict of authority warranting review by this Court. The petition should be denied.

1. a. The Civil Service Reform Act of 1978 (CSRA) forbids an agency from engaging in certain personnel practices, including unlawful discrimination and reprisal against so-called whistleblowers. 5 U.S.C. 2302. When an alleged prohibited practice involves certain "major" adverse personnel actions, such as removal, see 5 U.S.C. 4303, 7512, an employee has a right to appeal the action to the MSPB. 5 U.S.C. 7513(d); 5 C.F.R. 1201.3. For less severe personnel actions, such as reassignments, see 5 U.S.C. 2302(a)(2), the employee must petition the Office of Special Counsel (OSC) to investigate and seek corrective action. See 5 U.S.C. 1211-1216. If the OSC concludes that there is a prohibited personnel practice and the employing agency does not take timely corrective action, the Special Counsel may then petition to the MSPB. 5 U.S.C. 1214(b)(2)(C); 5 C.F.R.1201.2(a); see also 5 C.F.R. 1201.121-1201.129.

An employee who is adversely affected or aggrieved by a final order or decision of the MSPB may seek judicial review of that order. 5 U.S.C. 7703(a)(1). In

most, but not all, cases, the employee may obtain such judicial review in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703(b)(1). The Federal Circuit reviews the administrative record, and may not overturn the decision of the MSPB unless it is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise contrary to law. 5 U.S.C. 7703(c).

Whistleblowers have certain additional options. For a whistleblower-retaliation claim involving a nonappealable personnel action, the employee must petition the OSC first, but if the Special Counsel does not seek corrective action or act within 120 days, the employee himself may seek corrective action before the MSPB. 5 U.S.C. 1214(a)(3); 5 U.S.C. 1221(a); 5 C.F.R. 1209.2(b)(1); 5 C.F.R. 1209.5(a). An employee claiming whistleblower retaliation involving an *appealable* personnel action may go to the OSC first, or appeal directly to the MSPB. 5 U.S.C. 1221(b); 5 C.F.R. 1209.2(b)(2). An employee adversely affected by a final order or decision of the MSPB under the whistleblower provisions may obtain judicial review by a petition for review "as provided under [5 U.S.C. 7703(b)]." 5 U.S.C. 1221(h).

b. Typically when a federal employee claims employment discrimination, he must exhaust administrative remedies as a precondition to filing suit in district court by filing a formal complaint with his agency's Equal Employment Opportunity office. See 42 U.S.C. 2000e-16(c); 29 C.F.R. 1614.105-1614.108; *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 832 (1976). The employee may seek judicial review of a final agency decision, 42 U.S.C. 2000e-16(c), 29 C.F.R. 1614.407(a) and (b), which a district court considers de novo. *Chandler* v. *Roudebush*, 425 U.S. 840 (1976). Alternatively, the employee

may appeal the agency decision to the Equal Employment Opportunity Commission (EEOC). 29 C.F.R. 1614.401(a). The employee may then seek de novo review in the district court following a final decision of the EEOC, 29 C.F.R. 1614.407(c), or if the EEOC fails to issue a final decision within 180 days of the appeal. 29 C.F.R. 1614.407(d).

Mixed cases blend the administrative and judicial review procedures for personnel actions that are appealable to the MSPB, and the procedures for employee discrimination claims. Congress specifically designed mixed-case procedures to ensure that the MSPB "will continue to consider all actions appealable under the other provisions of [the CSRA], even if the appeal also involves issues of discrimination." S. Rep. No. 969, 95th Cong., 2d Sess. 53 (1978). As one Committee Report explains:

> Any provision denying the Board jurisdiction to decide certain adverse action appeals because discrimination is raised as an issue would make it impossible for the government to have a single unified personnel policy which took into account the requirements of all the various laws and goals governing Federal personnel management. In the absence of full Board jurisdiction, forum shopping and inconsistent decisions, perhaps arising out of the same set of facts, would result.

Ibid. "At the same time," the mixed-case provisions preserve the EEOC's authority to set "general policy rules and directions" over "questions of discrimination." *Ibid.*; see also H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 139 (1978).

Congress also has preserved a federal employee's existing right to de novo review in district court of

proper discrimination claims that are administratively exhausted. See H.R. Conf. Rep. No. 1717, *supra*, at 139 (the conference bill "protects the existing rights of an employee to trial de novo under the Civil Rights Act after a final agency action or if there is no administrative decision after a specified number of days"); *id.* at 141 (the conference bill "fully protects the existing rights of employees to trial de novo under title VII of the Civil Rights Act of 1964 or other similar laws after a final agency action on the matter").

c. Under the mixed-case procedures, an employee alleging that a personnel action appealable to the MSPB (*e.g.*, removal) was based on prohibited discrimination may initiate administrative review either by filing a "mixed case complaint" with his agency's EEO office, or by filing a "mixed case appeal" with the MSPB. 5 U.S.C. 7702; 29 C.F.R. 1614.302(a) and (b); see 5 C.F.R. 1201.151.

(i). When the employee elects to file a "mixed case appeal" with the MSPB, the MSPB is required to decide both the issue of discrimination and the appealable personnel action within 120 days. 5 U.S.C. 7702(a)(1); 5 C.F.R. 1201.156(a). The employee may then either seek immediate judicial review of an adverse MSPB decision in district court, 5 U.S.C. 7702(a)(3), 7703(b)(2), or first ask the EEOC to review the discrimination issue, 5 U.S.C. 7702(a)(3) and (b), and issue a decision that may become final and judicially reviewable. When the mixed-case decision reaches district court (with or without intermediate presentation to the EEOC), the court reviews the discrimination claim de novo, and the personnel claim based on the administrative record, in the same manner that it would be reviewed by the Federal Circuit in an unmixed case. 5 U.S.C. 7703(c)(1)-(3).

The employee's right to seek *prompt* de novo judicial review of a discrimination claim under the civil rights laws is preserved if there is no final, judicially reviewable administrative decision within 120 days of filing a mixed-case appeal with the MSPB, or within 180 days of filing a petition asking the EEOC to review the MSPB decision (if a petition is filed). In such a case, after the passage of the relevant time period, the employee "shall be entitled to file a civil action to the same extent and in the same manner as provided in" Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), and certain other antidiscrimination laws. 5 U.S.C. 7702(e)(1)(B) and (C).

(ii). If—instead of initiating the administrative process with a "mixed case appeal" to the MSPB—the employee elects to begin with a "mixed case complaint" to his employing agency, 29 C.F.R. 1614.302(a), as petitioner did here, the agency processes the complaint in the same manner as EEO complaints generally. See 29 C.F.R. 1614.302(d). However, unlike an "unmixed" EEO claim, which the employee may appeal to the EEOC for an administrative hearing, the employee may appeal a mixed-case action to the MSPB if there is either an adverse decision or no judicially reviewable agency action on the complaint within 120 days. 5 U.S.C. 7702(e)(2); 29 C.F.R. 1614.302(d)(2); cf. 29 C.F.R. 1614.108(f). The MSPB considers both the appealable personnel action and the EEO allegation in accordance with the procedures described above for mixed-case appeals (including the procedures for a petition to the EEOC on disputed discrimination issues). A final MSPB decision is judicially reviewable as above; the district court reviews the personnel action on the administrative record and the discrimination claim de novo.

If the employee elects not to appeal the agency's decision on a mixed-case complaint to the MSPB, the agency decision becomes final and reviewable in district court. 5 U.S.C. 7702(a)(2) ("[T]he decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board."). However, because there has been no administrative exhaustion of the nondiscrimination personnel claim, if the employee elects to bypass the MSPB and go directly to court at this point, the personnel claim is abandoned and the district court has jurisdiction only over the discrimination claim, which it reviews de novo. The same rule applies if the agency fails to issue a final, judicially reviewable decision within 120 days from the filing of a mixed-case complaint and the employee brings suit on his discrimination claim directly in district court. 5 U.S.C. 7702(e)(1)(A).

2. Under the foregoing principles, the courts below properly concluded that the district court lacked subject matter jurisdiction over petitioner's whistleblower-retaliation claim.

As discussed, petitioner brought a mixed case claiming that he was discharged for whistleblowing and because of disability discrimination. Termination in retaliation for whistleblowing is a personnel action that is appealable to the MSPB. 5 U.S.C. 7702(a)(1)(A); 5 U.S.C. 1221. Petitioner elected to file a "mixed case complaint" with his agency EEO office, and when he received no final, judicially reviewable action on the complaint within 120 days, he filed this suit in district court. This case thus falls within 5 U.S.C.

7702(e)(1)(A),[1] the only provision that authorizes suit in such circumstances, and the only claim over which the district court had subject matter jurisdiction was petitioner's disability discrimination claim. By electing to file suit in district court on his discrimination claim, petitioner waived his nondiscrimination claim.

The provision on which the courts and parties focused below—5 U.S.C. 7702(a)(2)—does not authorize this suit because that provision is triggered by "[t]he decision of the agency," and there was no agency decision in this case. The courts below did not consider the applicability of Section 7702(e)(1)(A). Nevertheless, the plain language of that provision, and the statutory scheme governing mixed cases as a whole, make clear that the courts below correctly held that petitioner's failure to present his whistleblower-retaliation claim to the MSPB before filing this suit deprived the district court of jurisdiction to entertain it.

Petitioner's discrimination claim arises under the Rehabilitation Act of 1973. See Pet. App. 3. Section

---

[1] 5 U.S.C. 7702(e)(1)(A) provides in pertinent part:

> (e)(1) Notwithstanding any other provision of law, if at any time after—
>
> > (A) the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is not judicially reviewable action under this section or an appeal [to the MSPB under § 7702(e)(2)]
> >
> > * * * * *
>
> an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)).

505 of that Act, 29 U.S.C. 794a, incorporates the judicial review provisions of Title VII, 42 U.S.C. 2000e-16(c). Accordingly, petitioner's right under 5 U.S.C. 7702(e)(1)(A) to file a civil action when his agency did not act within 120 days following the filing of his mixed-case complaint exists only "to the same extent and in the same manner as provided in" Section 2000e-16(c). Section 2000e-16(c) does not confer subject matter jurisdiction over personnel actions appealable to the MSPB under the CSRA. Nor does anything in the CSRA contemplate *de novo* judicial review (*i.e.*, the kind of judicial review provided by Title VII) for a personnel action appealable to the MSPB, which under the CSRA is judicially reviewable only on an *administrative record*.

Instead, in establishing mixed-case procedures within the comprehensive and exclusive remedial scheme of the CSRA, Congress intended that "[u]nder the procedures adopted," the MSPB "will continue to consider *all*" appealable personnel actions, "even if" the case "also involves issues of discrimination," to preserve the MSPB's assigned role of ensuring that the government will "have a single unified personnel policy which [takes] into account the requirements of all the various laws and goals governing Federal personnel management." S. Rep. No. 969, *supra*, at 53 (emphasis added). In providing an option for a mixed-case complainant to take his *discrimination* claim to district court without awaiting exhaustion on the personnel action in an appeal to the MSPB, Congress sought to preserve the employee's existing judicial review rights *under the civil rights laws*, not to displace the role of the MSPB under the CSRA to adjudicate disputes concerning major personnel actions and thus establish a uniform federal personnel policy.

In a case such as this in which the employee's right to obtain prompt judicial review of a discrimination claim is in tension with the policy favoring review of ordinary personnel actions on the agency record, the statute gives the employee the option of pressing his personnel-action claim or obtaining prompt review of the discrimination claim. Having chosen the latter, and having had the discrimination claim rejected by the courts, petitioner cannot resurrect the personnel-action claim. Accordingly, petitioner's whistleblower-retaliation claim was properly dismissed for lack of subject matter jurisdiction, where petitioner failed to seek MSPB review of that claim, and thus did not create the necessary administrative record for judicial review of that claim.

3. The result would be no different if 5 U.S.C. 7702(a)(2) were applicable here. Section 7702(a)(2) provides that when an employee elects to bring his claims as a mixed-case complaint to his agency EEO office, "the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the [MSPB]." Pointing to *Doyal* v. *Marsh*, 777 F.2d 1526, 1530 n.1 (11th Cir. 1985), and *Wells* v. *Shalala*, 228 F.3d 1137, 1142-1143 (10th Cir. 2000), petitioner argues (Pet. 7-8) that the plain language of Section 7702(a)(2) provides that following the agency decision, the employee "may *either* immediately file suit in a district court *or* pursue an administrative procedure." But nothing in Section 7702(a)(2) speaks to which *issues* are preserved if the employee elects immediate district court review without first presenting his nondiscrimination claims to the MSPB.

Petitioner and the decisions on which he relies assume that district court review in these circum-

stances must encompass *both* the discrimination claim, which has been administratively exhausted under CSRA, *and* the personnel action, which has *not* been exhausted as required under the CSRA. Petitioner reasons (Pet. 9) that if judicial review did not extend to both of those components the employee would be forced "to bifurcate his case and return to the administrative process for further consideration of his [nondiscrimination] claim." See *Wells*, 228 F.3d at 1143; *Doyal*, 777 F.2d at 1536-1537; *Quinn* v. *West*, 140 F. Supp. 2d 725, 734 (W.D. Tex. 2001). But properly viewed, the employee's mixed case is never bifurcated in these circumstances. Rather, if he elects not to exhaust administrative review before the MSPB of his appealable personnel action in order to pursue his right to immediate judicial review under the civil rights laws, he has waived further review of the personnel action *in any forum*. See *Sloan* v. *West*, 140 F.3d 1255, 1260 (9th Cir. 1998); *Nater* v. *Riley*, 114 F. Supp. 2d 17, 24 (D.P.R. 2000).

That is the necessary implication of the entire CSRA statutory scheme for mixed cases, considered as a whole. As discussed, Congress intended that in order to maintain uniform federal personnel policy, the MSPB would consider "*all*" appealable personnel actions, "even if" issues of discrimination are involved. S. Rep. No. 969, *supra*, at 53 (emphasis added); see 5 U.S.C. 7513(d); 5 U.S.C. 7702(a)(1). That includes appealable personnel actions involving whistleblower claims. 5 U.S.C. 1221.

Moreover, Congress provided that judicial review of final decisions of the MSPB would be subject to deferential review on the MSPB record, and that the decision of the MSPB would not be overturned unless it is arbitrary, capricious, unsupported by evidence, or

contrary to law. 5 U.S.C. 7703. And, while Congress preserved an employee's right under the civil rights laws to seek immediate de novo district court review of a *discrimination* claim that has been administratively exhausted, Congress did *not* confer subject matter jurisdiction in such cases over a *non*discrimination claim brought as part of a "mixed case" that has not been exhausted before the MSPB. See 5 U.S.C. 7702(e)(1)(A), (B) and (C) (authorizing employee to file a civil action "to the same extent and in the same manner as provided in" Title VII where there is no administrative action within a specified time).

The decisions cited by petitioner from other courts of appeals do not address the statutory arguments discussed above and, in particular, do not discuss what standard of review the district court could apply in reviewing a personnel action without the benefit of the record of an adjudication by the MSPB or indeed, as in this case, without the benefit of any administrative record. See *Wells*, 228 F.3d at 1142-1143; *Doyal*, 777 F.2d at 1535-1537; *Quinn*, 140 F. Supp. 2d at 734. Thus, even if those decisions were on point, they would create no direct conflict with the decision in this case warranting this Court's review. In any event, the court of appeals' per curiam decision in this case was unpublished (see Pet. App. 1 n.*) and therefore could not contribute to any alleged conflict. Further review in this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
MARLEIGH D. DOVER
WENDY M. KEATS
Attorneys

DECEMBER 2002