WestVirginiaUniversity
THE RESEARCH REPOSITORY @ WVU

Law Faculty Scholarship WVU College of Law

3-2024

Is the Statutory 60-Day Deadline for Filing a Petition for Review of a Final MSPB Order Jurisdictional?

Anne Marie Lofaso
West Virginia University College of Law, anne.lofaso@mail.wvu.edu

Follow this and additional works at: https://researchrepository.wvu.edu/law_faculty

Part of the Administrative Law Commons, Courts Commons, Jurisdiction Commons, and the Labor and Employment Law Commons

Custom Citation
Anne Marie Lofaso, *Does Title VII Prohibit Discrimination in Employment-Transfer Decisions Only if They Cause Materially Significant Disadvantages for Employees?*, 52 PREVIEW of United States Supreme Court Cases 36 (2023).

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in Law Faculty Scholarship by an authorized administrator of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.

EMPLOYMENT LAW

Is the Statutory 60-Day Deadline for Filing a Petition for Review of a Final MSPB Order Jurisdictional?

CASE AT A GLANCE

The Department of Defense (DOD) furloughed employee Stuart R. Harrow in 2013. Harrow timely challenged DOD's decision before an administrative judge, who affirmed it. Harrow timely appealed the judge's decision to the Merit System Protection Board (MSPB or "Board"), which could not act on the appeal for over five years because it lacked a quorum. On May 11, 2022, the MSPB issued a final order, affirming the judge's decision. However, Harrow did not learn of the decision until August 30. Harrow promptly filed a petition to review the Board's order with the Federal Circuit, which denied the petition on grounds that Harrow missed the statutory 60-day filing deadline. This case presents the question of whether the statute's filing deadline is jurisdictional and therefore not subject to equitable tolling.

Harrow v. Department of Defense
Docket No. 23-21

Argument Date: **March 25, 2024** From: **The Federal Circuit**

by Anne Marie Lofaso
West Virginia University College of Law, Morgantown, WV

Introduction

Article III, Section 1, of the Constitution vests "[t]he judicial Power of the United States…in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. Art. III, § 1. The Supreme Court has interpreted this constitutional provision as meaning that "[a]ll federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts." *Lockerty v. Phillips*, 319 U.S. 182 (1943). That authority includes the power to grant those courts with limited, concurrent, or exclusive jurisdiction and even to withhold jurisdiction from them "in the exact degrees and character" that Congress deems "'proper for the public good.'"

The Federal Courts Improvement Act of 1982 (FCIA) is a federal law whereby Congress exercised its Article III, Section 1 constitutional power to establish the United States Court of Appeals for the Federal Circuit. By this act, Congress granted the Federal Circuit jurisdiction over certain kinds of appeals from the Merit Systems Protection Board (MSPB or "Board"), an independent agency that adjudicates federal employment disputes. FCIA § 127(a), 5 U.S.C. § 1204. In particular, Congress granted the Federal Circuit "exclusive jurisdiction…of an appeal from a final order or final decision of the [MSPB], pursuant to [5 U.S.C. § 7703(b)(1)…]." 28 U.S.C. § 1295(a)(9).

As amended by FCIA, Section 7703(b)(1) provided that "a petition to review a final order or final decision of the Board shall be filed in" the Federal Circuit "within 30 days after the date the petitioner received notice of the final order or decision of the Board." 5 U.S.C. § 7703(b)(1) (1982). Three years later, in *Lindahl v. OPM*, 470 U.S. 768 (1985), the Supreme Court reviewed "the jurisdictional framework" established by Sections 1295(a)(9) and 7703(b)(1). In that case, the Court was asked to decide whether

 © 2024 American Bar Association

that Federal Circuit "ha[d] jurisdiction directly to review MSPB decisions" in certain cases, or whether claimants were first required to "file a Tucker Act claim in the United States Claims Court or a United States district court." In that context, the Court held that Sections 1295(a)(9) and 7703(b)(1) were the relevant "jurisdictional grants" and that "Section 7703(b)(1) confers the operative grant of jurisdiction—the 'power to adjudicate.'" Both before and relatively soon after the Supreme Court issued its decision in *Lindahl*, the Federal Circuit had held that Section 7703(b)(1)'s time limit was "jurisdictional" and therefore not subject to equitable tolling. *Monzo v. Department of Transp.*, 735 F.2d 1335 (Fed. Cir. 1984); *Pinat v. OPM*, 931 F.2d 1544 (Fed. Cir. 1991).

In 1998, Congress amended Section 7703(b)(1) by extending the time to file a petition to review a final MSPB decision from 30 to 60 days. In 2012, Congress once again amended Section 7703(b)(1), changing the trigger for the 60-day clock to begin running when "the Board issues notice" of the final MSPB decision, rather than when the petitioner receives notice. Section 7703(b)(1) now reads, in relevant part, that "…a petition to review a final order or final decision of the Board shall be filed in the…Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board." 5 U.S.C. § 7703(b)(1)(A).

This case presents the question of whether the statute's 60-day filing deadline is a jurisdictional requirement and therefore not subject to equitable tolling. If so, then the petitioner's claim is jurisdictionally barred because his petition for review was filed after this 60-day filing period.

Issue

Is the statutory 60-day deadline for filing a petition for review of a final MSPB order jurisdictional?

Facts

Petitioner Stuart R. Harrow, a longtime employee of the Department of Defense (DOD), was furloughed in 2013 when the federal government sequestrated funds mandated by the Balanced Budget and Emergency Deficit Control Act. The DOD denied Harrow's request for a financial hardship exemption, and the DOD furloughed Harrow for six days as part of the department-wide sequestration order.

Harris, acting *pro se*, timely challenged DOD's furlough decision before an administrative judge, who in July 2016 affirmed the agency's decision. In August 2016, Harrow timely appealed the administrative judge's decision to the MSPB. In January 2017, while that petition for review was pending, the MSPB lost its quorum and therefore could not act on the appeal until March 2022, over five years later, when its quorum was restored. On May 11, 2022, the MSPB issued a final order, affirming the judge's decision. The MSPB emailed the decision to Harrow's old email address because Harrow had failed to notify the MSPB about the address change.

When Harrow learned of the MSPB's decision on August 30, 2022, he promptly attempted to appeal the Board's order. In particular, on September 8, 2022, Harrow moved the Board for an extension of time in which to file its petition for review in the Federal Circuit. By letter dated September 12, the Board's acting clerk explained that "the Board cannot extend the deadline for seeking review in another forum, such as a court." On September 16, Harrow filed a petition to review the Board's final order with the Federal Circuit. That court, in a *per curiam* decision, denied the petition because Harrow missed the 60-day deadline. Citing in-circuit authority, *Fedora v. Merit Sys. Prot. Bd.*, 848 F.3d 1013 (Fed. Cir. 2017), the court explained that "[t]he timely filing of a petition from the Board's final decision is a jurisdictional requirement and 'not subject to equitable tolling.'" Citing Fed. R. App. Proc. 26(b)(2), the court further explained that it could not extend the time for filing the petition for review, even if excusable, "unless specifically authorized by law." Shortly thereafter, the court also denied Harrow's petition for rehearing.

The Supreme Court granted *certiorari* on the question of whether the statutory 60-day filing period is jurisdictional and therefore not subject to equitable tolling.

Case Analysis

This case asks the Court to decide whether the statutory 60-day period for filing a petition for review of a final MSPB order under 5 U.S.C. § 7703(b)(1)(A) is jurisdictional and therefore not subject to equitable tolling. This case turns on the meaning of 28 U.S.C. § 1295(a)(9)'s grant of exclusive appellate jurisdiction to the Federal Circuit to review MSPB final orders outlined in Section 7703(b)(1)(A).

Petitioner argues that Section 7703(b)(1)'s time limit is not jurisdictional and therefore it is subject to equitable tolling. To frame the question, petitioner relies on the Supreme Court's recent case law, which aims "'to bring some discipline' to use of the jurisdictional label," *Boechler v.*

 © 2024 American Bar Association

Comm'r, 596 U.S. 199 (2022). Petitioner upfront reminds the Court that—"the distinction between limits on 'the classes of cases a court may entertain (subject-matter jurisdiction)' and 'nonjurisdictional claim-processing rules, which seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times'"—matters. *Wilkins v. U.S.*, 598 U.S. 152 (2023). This is because jurisdictional rules "cannot be waived or forfeited, must be raised by courts *sua sponte*, and…do not allow for equitable exceptions." Such rules, therefore, carry "unique and sometimes severe consequences," *MOAC Mall Holdings LLC v. Transform HoldCo LLC*, 598 U.S. 288 (2023), that "alter[] the normal operation of our adversarial system," *Henderson v. Shinseki*, 562 U.S. 428 (2011). "[T]o be confident Congress took that unexpected tack" of making a claim-processing rule jurisdictional, the Court "would need unmistakable evidence, on par with express language addressing the court's jurisdiction." *Santos-Zacaria v. Garland*, 598 U.S. 411 (2023). The law professor's amicus brief elaborates on this point, noting that while the transfer of jurisdiction between Article III courts is jurisdictional, all other transfers between tribunals, such as an appeal of an administrative final order to an Article III court, are not jurisdictional but instead "fit[] within the claim-processing category," absent a clear statement from Congress. *Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17 (2017).

Having established that for at least the past two decades, the Court has been willing to take a deeper look at this jurisdictional–nonjurisdictional line, petitioner proceeds to argue that there is no "unmistakable evidence" that the filing deadline in Section 7703(b)(1)(A) is jurisdictional. Petitioner makes both textual and extratextual arguments to bolster its claim.

Petitioner starts with the text, which reads: "[A]ny petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board." Petitioner points out this is not the type of language that Congress would be expected to use to mark Section 7703(b)(1) as jurisdictional, adding that nothing in the text points to "subject-matter jurisdiction," *Musacchio v. U.S.*, 577 U.S. 237 (2016), or refers to "the power of the court," *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010). Rather, the language "'reads like an ordinary, run-of-the-mill statute of limitations,' spelling out a litigant's filing obligations without restricting a court's authority," *U.S. v. Wong*, 575 U.S. 402 (2015), indistinguishable from the language of other statutory deadlines that the Court has held to be nonjurisdictional.

Petitioner next turns to statutory context, specifically Section 1295(a)(9)'s grant to the Federal Circuit of exclusive appellate jurisdiction to review final MSPB orders. arguing that it, too, fails to indicate that Congress wished to transform Section 7703's filing deadline into a jurisdictional prerequisite. Rather, it separates that statutory filing deadline from the jurisdictional grant, a drafting choice that the Court has repeatedly recognized as "indicat[ing] that the time bar is not jurisdictional." Petitioner acknowledges that Section 1295(a)(9) cross-references Section 7703 but explains that "a nonjurisdictional provision does not metamorphose into a jurisdictional limitation by cross-referencing a jurisdictional provision." *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843 (2019). This is a point on which the Federal Circuit Bar, as amicus, elaborates, explaining that Section 1295(a)'s text and structure reflect the unique nature of the Federal Circuit's jurisdiction and that the numerous cross-references merely reflect which cases may come to that unique court of appeals.

The government also puts forth textual and extratextual arguments that Congress's grant of "exclusive jurisdiction" of an appeal from an MSPB final order under Section 7703(b)(1) to the Federal Circuit is jurisdictional. 28 U.S.C. § 1295(a)(9). At the outset, the government contends Section 1295's text incorporates Section 7703(b)(1)'s 60-day time limit as a jurisdictional prerequisite. To support that contention, recall that Section 1295(a)(9) grants the Federal Circuit "exclusive jurisdiction… of an appeal from a final order or final decision of the [MSPB], *pursuant to* [Section 7703(b)(1)]." The government explains that any petition filed "pursuant to" Section 7703(b)(1) means that those petitions must be in conformance to Section 7703(b)(1)'s requirements. Because a petition for review filed after the 60-day limit does not conform to Section 7703(b)(1), the Federal Circuit is without jurisdiction to hear that appeal.

The government also utilizes extratextual arguments. First, it relies on the Supreme Court's earlier interpretation of Sections 1295(a)(9) and 7703(b)(1) in *Lindahl v. OPM*, 470 U.S. 768 (1985), as definitively deciding the question. There, Wayne Lindahl, a retired federal employee, appealed an MSPB final order denying Lindahl certain benefits to the Federal Circuit. In reversing the lower court's dismissal of Lindahl's case, the Supreme Court rejected the government's argument that the Federal Circuit did not have jurisdiction over *Lindahl*'s appeal because Lindahl was a retiree and not an employee, as

 © 2024 American Bar Association

required by Section 7703(a), which grants a right of judicial review only to an "employee or applicant for employment." The Court explained that the Federal Circuit's jurisdiction over appeals from the MSPB is defined not by Section 7703(a)(1), but instead by "Sections 1295(a)(9) and 7703(b)(1) together." Understood together, Section 7703(b)(1) establishes the "jurisdictional perimeters" of that grant of power to adjudicate those appeals. Moreover, *Lindahl*, which operates as a limit on the Federal Circuit's subject-matter jurisdiction, is controlling on *stare decisis* principles.

The government next presents a second extratextual argument—that the history of both the type of limitation and Section 7703(b)(1) itself reinforces Section 7703(b)(1) as jurisdictional. The government explains that the type of limitation—"statutory deadlines for filing appeals" in an Article III court, is treated as jurisdictional. To support that claim, the government relies on the fact that federal courts of appeals have uniformly treated as jurisdictional statutory deadlines for seeking review of agency decisions under the Hobbs Act. To bolster that argument, the government adds that the jurisdictional framework of the Hobbs Act is similar to that of Sections 1295(a)(9) and 7703(b)(1). The government also argues that the history of Section 7703(b)(1) itself reinforces that the statute's time limit is jurisdictional, explaining that the Federal Circuit merely inherited a statutory deadline that was already understood to be jurisdictional.

In the alternative, the government argues that even if Section 7703's filing limit is not jurisdictional, it is mandatory and therefore not subject to equitable tolling. The government explains that nonjurisdictional, claim-processing rules that are mandatory are not subject to equitable tolling. *See Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019) (holding that Fed. R. Civ. Proc. 23(f) time limit for filing an appeal of a district court's order granting or denying a class-action certification is not subject to equitable tolling because it is a mandatory, claim-processing rule even though it is nonjurisdictional). To bolster this argument, the government explains that Congress enacted Section 7703 against the background of Fed. R. App. Proc. 26, which prohibits courts from extending the time for filing "a petition to…review…an order of an administrative agency" or "board," except as "specifically authorized by law." Here, Section 7703(b)(1)'s time limit, which states that "a petition to review a final [MSPB] order…*shall* be filed in the…Federal Circuit" and "*shall* be filed within 60 days after the Board issues notice of the [MSPB] final order," 5 U.S.C. § 7703(b)(1)(A), is by its plain terms mandatory. Therefore, the court has no authority to equitably toll the time limit because there is no legal authority that expressly allows for equitable tolling.[1]

Significance

This case once again presents dueling textualist claims. However, these claims appear to turn more on whether the Court thinks that appellate filing deadlines are claim-processing or jurisdictional by default. If claim-processing by default, as petitioner contends, petitioner is likely to prevail because the statutory language here does not expressly state that Section 7703's time limitations are jurisdictional. If, however, such filing deadlines are jurisdictional by default, then the government is likely to prevail because the statutory language fails expressly to clarify that the deadline in this case is not jurisdictional.

This case is further complicated by the Court's relatively recent retreat from its past interpretation of statutory filing deadlines as jurisdictional and with its articulation of the jurisdictional–nonjurisdictional line. This allows the Court to forgo previous case law without violating the basic principles of *stare decisis*. The Court could also simply distinguish those cases as not focusing on the precise questions now being presented because of subsequent amendments and further judicial development of this line of cases.

There are also significant policies that the Court may wish to consider in deciding this case. As several amici point out, many claimants before the MSPB are *pro se* or veterans (who tend to be disproportionately cognitively impaired). An unforgiving appellate deadline without the possibility of equitable tolling contravenes Congress's goal of ensuring fair and equitable treatment to veterans and is at odds with the informal nature of the MSPB.

1 As of the publication of this article, petitioner had not yet responded to this argument. However, petitioner's policy argument for why the Court should conclude that the filing deadlines are nonjurisdictional—that inflexible deadlines "clash sharply" with the MSPB's policy of being flexible with technical requirements that are routinely excusable because nearly half of its claimants proceed *pro se*—would work here as well. *Henderson v. Shinseki*, 562 U.S. 428 (2011).

© 2024 American Bar Association

Anne Marie Lofaso is the Arthur B. Hodges Professor of Law at the West Virginia University College of Law in Morgantown, West Virginia. She can be reached at 304.293.7356 or anne.lofaso@mail.wvu.edu.

PREVIEW of United States Supreme Court Cases 51, no. 6 (March 18, 2024): 35–39. © 2024 American Bar Association

ATTORNEYS FOR THE PARTIES

For Petitioner Stuart R. Harrow (Scott William Dodson, 925.285.1445)

For Respondent Department of Defense (Elizabeth B. Prelogar, Solicitor General, 202.514.2217)

AMICUS BRIEFS

In Support of Petitioner Stuart R. Harrow

American Federation of Government Employees (Andres Myles Grajales, 202.639.6426)

Federal Circuit Bar Association (William Henry Burgess IV, 202.389.5000)

Law Professors (Stanley E. Blackmon, 202.997.8562)

National Treasury Employees Union (Julie Marie Wilson, 703.352.3325)

National Veterans Legal Services Program (Benjamin C. Block, 202.662.5205)

 © 2024 American Bar Association