

MOTIONS PRACTICE BEFORE THE MERIT SYSTEMS PROTECTION BOARD AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

By Ernest C. Hadley and Sarah S. Tuck

TABLE OF CONTENTS

PREFACE

CHAPTER ONE - FEDERAL RULES OF CIVIL PROCEDURE

- A. Federal Rules and Motion Practice
 - 1. Form of Motions
 - a. Form of MSPB Motions
 - b. Form of EEOC Motions
 - 2. Signature of Motions
 - 3. Motions to Dismiss
 - 4. Motions for More Definite Statement
 - 5. Motions to Strike
 - 6. Motions for Protective Orders
 - 7. Motions to Compel Discovery
 - 8. Motions for Summary Judgment
 - 9. Other Federal Rules

CHAPTER TWO - BASIC MOTION PRACTICE BEFORE THE MSPB

- A. Definitions
- B. Form of Motions
 - 1. Case Captions
 - 2. Certificates of Service
- C. Statements of Representatives
- D. Rulings on Motions

CHAPTER THREE - PREHEARING MOTION PRACTICE—MSPB

- A. Motions to Dismiss—Lack of Jurisdiction
 - 1. Ineligible Employees
 - 2. Uncovered Personnel Actions
 - 3. *Sample Acknowledgment/Show Cause Order*
 - 4. Mootness
 - 5. "Whistleblowing" Appeals
 - a. IRA Appeal Criteria
 - b. Actions Prior to WPA

- c. Timeliness of Appeal
 - d. Premature Appeals
 - e. Late Appeals
 - f. Personnel Actions Within WPA
 - g. OSC Pleading Requirement
 - h. Protected Disclosures
 - 6. *Res Judicata* and Collateral Estoppel
 - a. *Res Judicata*
 - b. Collateral Estoppel
 - 7. Last Chance Settlements
 - a. *Sample Motion to Dismiss—Last Chance Agreement*
- B. Motions to Dismiss—Timeliness
 - 1. Role of Administrative Judge
 - 2. Time Limits for Initial Appeals
 - 3. Showing of Good Cause
 - a. *Sample Motion to Dismiss Appeal as Untimely*
 - b. *Sample Motion to Waive Time Limit for Appeal*
 - 4. Filing With the Wrong Agency
 - 5. Individual Right of Action Appeals
- C. Motions for Extensions of Time
 - 1. *Sample Motion to Extend Time to File Agency Response*
 - 2. *Sample Motion to Extend Time for Discovery*
 - 3. Unnecessary Motions for Extensions
 - 4. Joint Motion for Extension of Time
 - a. *Sample Joint Motion—Extension of Time*
 - 5. Proposed Orders
 - a. *Sample Proposed Order*
 - 6. Opposing Extension Motions
 - a. *Sample Opposition to Extension of Time*
- D. Motions to Dismiss Without Prejudice
- E. Motions for Protective Orders
 - 1. Protective Orders—Abusive Discovery
 - a. *Sample Motion for Protective Order—Abusive Discovery*
 - 2. Witness Protection
 - 3. Joint Motions for Protective Orders
 - a. *Sample Joint Motion for a Protective Order*
 - 4. Motion to Seal Record
 - 5. Method of Discovery
 - 6. Protective Orders in OSC and IRA Cases
- F. Motions to Compel Discovery
 - 1. Scope of Discovery
 - 2. Procedure for Filing
 - 3. Judge's Role in Discovery Disputes
 - a. Rulings
 - b. Orders
 - 4. Drafting the Motion
 - 5. *Sample Motion to Compel Discovery*
 - 6. Compelling Deposition Testimony
 - a. *Sample Motion to Compel Deposition Testimony*
- G. Motions for Subpoenas

1. Witness Fees
2. Obtaining Discovery Through Subpoenas
3. *Sample Motion for Nonparty Deposition Subpoena*
4. *Sample Motion for Subpoena Duces Tecum*
5. Issuance of Subpoenas
6. Serving the Subpoena
7. Motions to Quash or Limit Subpoenas
- H. Motions for Disqualification of Judge
 1. *Sample Motion for Disqualification of Judge*
- I. Motions for Interlocutory Appeal
 1. Allegations of Bias
 2. Intervention Requests
 3. *Sample Certification Motion—Bias*
 4. *Sample Certification Motion—Question of Law*
- J. Motions to Change Venue or Hearing Site
 1. Criteria for Change
 2. *Sample Motion—Change in Hearing Site*
- K. Motions *in Limine*
 1. *Sample Motion in Limine*
- L. Motions to Strike Evidence
 - a. Untimely Submissions
 - b. Failure to Comply with Board Order
 - c. Frivolous Allegations
 - d. Responding to Motions to Strike
- M. Motions for Sanctions
 1. Mixed Cases
 2. *Sample Motion for Discovery Sanctions*
 3. *Sample Motion for Sanctions—Bad Faith Response*
 4. *Sample Motion for Sanctions—Failure to Defend Appeal*
- N. Motion to Use Deposition at Hearing
 1. *Sample Motion to Admit Deposition Testimony*
 2. *Sample Consented to Motion to Admit*
- O. Motions for Substitution of Executor
- P. Motions to Supplement Prehearing Submission
 1. *Sample Motion to Supplement—New Affirmative Defense*
 2. *Sample Motion to Supplement—Late Discovery Responses*

CHAPTER FOUR - POSTHEARING MOTION PRACTICE—MSPB

- A. Motions to Supplement or Reopen the Record
 1. Supplementing Record Prior to Initial Decision
 2. Supplementing Record After Initial Decision
 3. New Evidence
 4. Material Evidence
 5. Criteria for Admission
 6. *Sample Motion to Reopen Record*
 7. *Sample Opposition to Motion to Reopen Record*
- B. Motions to Intervene
 1. Intervenors
 2. *Amicus Curiae*

3. *Sample Motion File Amicus Curiae Brief*
- C. Motions for Attorney Fees
 1. Prevailing Party Status
 2. Attorney-Client Relationship
 3. Interest of Justice Standard
 4. Reasonable Hourly Rate
 - a. Time Reasonably Expended
 5. Costs
 - a. *Sample Fee Affidavit*
 6. Opposing Fee Motions
 7. *Sample Motion for Attorney Fees*

CHAPTER FIVE - BASIC MOTION PRACTICE BEFORE THE EEOC

- A. Definitions
- B. Form of Motions
 1. Case Captions
 2. Certificates of Service
- C. Statements of Representatives

CHAPTER SIX - PREHEARING MOTION PRACTICE—EEOC

- A. Motions to Dismiss
 1. Failure to State a Claim
 - a. *Sample Motion to Dismiss—Failure to State a Claim*
 - b. *Sample Response to Agency Motion to Dismiss*
 2. Untimely Complaints
 - a. *Sample Motion to Dismiss-Timeliness*
 3. Matters Not Raised with Counselor
 4. Identical Complaints
 - a. *Res Judicata* and Collateral Estoppel
 5. Election of Remedies
 6. Mootness
 7. Offers of Full Relief
 8. Failure to Prosecute
- B. Motions for Extensions of Time
 1. *Sample Joint Motion—Extension of Time*
 2. Opposing Extension Motions
- C. Motions to Remand to Agency
- D. Motions for Protective Orders
 1. Discovery Agreements
 2. Abusive Discovery
 - a. *Sample Motion for Protective Order*
 3. *In Camera* Review
 4. Motion to Seal Record
- E. Motions to Compel Discovery
 1. Scope and Methods of Discovery
 2. Procedure for Filing
 3. Judge's Role in Discovery Disputes
 4. Discovery Costs

- a. *Sample Motion for Discovery Costs*
 - 5. Evidence of Damages
 - a. Psychotherapist Privilege
 - 6. Motions for Subpoenas
- F. Motions for Sanctions
 - 1. Attorney Fees as Sanctions
 - a. *Sample Motion for Fees as Sanction*
- G. Motions for Disqualification of Judge
- H. Motions for Interlocutory Appeal
- I. Motions to Change Venue or Hearing Site
 - 1. *Sample Joint Motion—Change in Hearing Site*
- J. Motions *in Limine*
- K. Motions to Strike Evidence
- L. Motions for Summary Judgment
 - 1. Summary Judgment Standard
 - a. Genuine Dispute of Material Fact
 - b. Judgment as a Matter of Law
 - 2. Burdens of Proof
 - 3. Partial Summary Judgment
 - 4. Uses of Summary Judgment
 - a. No *Prima Facie* Case
 - b. Rehabilitation Act Cases
 - 5. *Sample Agency Motion for Summary Judgment*
 - 6. *Sample Complainant Motion for Summary Judgment*
- M. Motions to Substitute Executor

CHAPTER SEVEN - POSTHEARING MOTION PRACTICE—EEOC

- A. Motions to Supplement or Reopen Hearing Record
 - 1. Prior to Recommended Decision
- B. Motions to Intervene
- C. Motions for Attorney Fees
 - 1. Prevailing Party Status
 - 2. Attorney-Client Relationship
 - 3. Reasonable Hourly Rate
 - 4. Time Reasonably Expended
 - 5. Age Discrimination Cases
 - 6. Costs
 - 7. Opposing Fee Motions