APPENDIX A

United State Court of Appeals
For the District of Columbia Circuit

No. 18-5234 **September Term, 2018**
1:13-cv-00008-RMC
Filed On: March 1, 2019

Darin Jones,
Appellant

v.

United States Department of Justice and
Federal Bureau of Investigation,
Appellees

BEFORE: Henderson, Srinivasan, and Millett,
Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance and the opposition thereto, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court did not abuse its discretion in denying appellant's motion for relief under Fed. R. Civ. P. 60(b). See Smalls v. United States, 471 F.3d 186,

191 (D.C. Circ. 2006). With respect to the Title VII claims that were raised in district court, appellant failed to demonstrate either a mistake warranting relief under Rule 60(b)(1), or "extraordinary circumstances" meriting relief under Rule 60(b)(6). With respect to the claims that were raised in the appeal to the Federal Circuit, the district court lacks jurisdiction to review decisions of the Federal Circuit. See Smalls, 471 F.3d at 192; see also 28 U.S.C. § 1254 (providing for review by the Supreme Court of cases in the courts of appeals).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for hearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRCIT OF COLUMBIA

DARIN JONES,

Plaintiff,

v. Civil Action No. 13-08 (RMC)

U.S. DEPARTMENT OF JUSTICE, *et al.*,

Defendants.

MEMORANDUM OPINION

Before the Court is Darin Jones' *pro se* Motion to Reopen Based on Change in Law, or in the Alternative, Based on Oversight, which, for reasons explained below, the Court construes as a Motion for Reconsideration Under Rule 60(a), or in the Alternative, Under Rule 60(b) ("Mot. for Reconsideration") [Dkt. 38]. This Court ordered the Government to respond to Mr. Jones' Motion by December 6, 2017. Apparently disinclined to do so, the Government did not file a response. Undeterred, Mr. Jones filed a Reply to Defendants Failure to Respond to Judge Collyer's 11/8/2017 Minute Order on December 20, 2017 (Def.'s Reply), which the Court will construe as a reply in support of Mr. Jones Motion for Reconsideration. For the reasons below, Mr. Jones' motion will be denied.

I. FACTS

On January 4, 2013, Mr. Jones filed a Complaint against the Federal Bureau of Investigation (FBI), alleging retaliation and discrimination on the basis of gender and age in violation of Title VII, 42 U.S.C. §2000(e) et seq. After intervening events examined in the Court's prior Opinion, the Court dismissed the suit without prejudice on July 1, 2015 because Mr. Jones had failed to exhaust his administrative remedies with respect to any of his claims and provided no basis to excuse that failure. *See* Memorandum Opinion [Dkt. 33]. A full recapitulation of the facts is not necessary, as they are laid out in this Court's prior Opinion. *See id.*

In the instant motion, Mr. Jones asks this Court to consider four cases in revisiting its dismissal of his case without prejudice vacate the dismissal, and "issue an opinion distinguishing the conflicts between the controlling precedents and the July 1 decision, and remand for further proceedings." Mot. for Reconsideration at 4.[1] Mr. Jones followed his motion with a reply. As the government submitted no response to the motion, this Court considers only the arguments made in Mr. Jones' motion and reply. For the reasons explained below, the motion will be denied.

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[1] The cases cited in Mr. Jones motion are *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015); *Perry v. Merit Systems Protection Board*, 137 S. Ct. 1975 (2017); *McCarthy v. Merit Systems Protection Board*, 809 F. 3d 1365 (Fed Cir. 2010); and *Jones v. Dep't of Health and Human Services*, 834 F.3d 1362 (Fed. Cir. 2016).

II. LEGAL STANDARD

Mr. Jones filed a Motion to Reopen Based on Change in Law, or in the Alternative, Based on Oversight, which is terminology unknown to this Court. Based on the relief requested, the Court finds that Mr. Jones' motion should be construed as a Motion of Reconsideration under Rule 60(b)(6).

The Federal Rules of Civil Procedure do not specifically address motions for reconsideration. *See Estate of Klieman v. Palestinian Auth*, 82 F. Supp. 3d 237, 241-42 (D.D.C. 2015). However, the Rules provide three pathways for those seeking reconsideration of judicial decisions. Rule 54(b) permits reconsideration of interlocutory judgments. Fed R. Civ. P. 54(b). Rule 59(e) permits a party to seek reconsideration of a final judgment within 28 days of that judgment. Fed. R. Civ. P. 59(e). Rule 60 permits a party to seek reconsideration of a final judgment either (a) to correct a mistake arising from an oversight or omission or (b) to seek relief from a judgment or order due to: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or other misconduct; (4) void judgment; (5) satisfied, released, or discharged judgment; or (6) "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(a), (b); *see also Gates v. Syrian Arab Republic*, 646 F. Supp. 2d 79, 83 (D.D. C. 2009). Rule 60(b) requires that a motion alleging excusable neglect, newly discovered evidence, or fraud be filed within one year of the judgment, while motions

under other grounds must be filed "within reasonable time." Fed. R. Civ. P. 60(b).

"The granting of a Rule 60(b) motion is discretionary, and need not be granted 'unless the district court finds that there is an intervening change of controlling law, the availability of new evidence or the need to correct a clear error or prevent manifest injustice.'" *Mitchell v. Samuels*, 255 F. Supp. 3d 212, 214 (D.D. C. 2017) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 19960). More specifically, the granting of motions under Rule 60(b)(6) should be limited to "extraordinary circumstances." *See Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) ("[O]ur cases have required a movant seeking relief under Rule 60(b)(6) to show 'extraordinary circumstances' justifying the reopening of a final judgment.") The D.C. Circuit has echoed that sentiment in observing that Rule 60(b)(6) motions "should be only sparingly used," *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980), and are not an opportunity for unsuccessful parties to "take a mulligan." *Kramer v. Gates*, 481 F.3d 788, 792 (D.C. Circ. 2007).

III. ANALYSIS

Mr. Jones moves this Court to reconsider its ordering granting Defendants' Motion to Dismiss, or in the Alternative for Summary Judgment. *See* 7/1/15 Order [Dkt. 34]. Because that order adjudicated all of Mr. Jones' claims in this case, he is foreclosed from relief under Rule 54(b), which permits reconsideration and revision of orders or decisions adjudicating fewer than all the claims at

issue in a case. *See* Fed. R. Civ. P. 54(b). Having filed his motion for reconsideration more than 28 days after the entry of the dismissal order, the relief Mr. Jones seeks is also prohibited by Rule 59(2) ad must be considered solely under Rule 60. *See* Fed. R. Civ. P. 59 (e), 60. *See McMillian v. District of Columbia*, 233 F.R.D. 179, 180 n. 1 (D.D.C. 2005) (holding that motions to reconsider filed within ten days of judgment are reviewed under Rule 59(e) and those filed after ten days are treated under Rule 60(b)).[2]

Mr. Jones does not assert in his motion or reply that a mistake, excusable neglect, newly discovered evidence, or fraud are at issue here. Nor does he argue that this Court's judgment is void, has been satisfied, released, discharge, or was based on an earlier judgment that was reversed or vacated. Instead, Mr. Jones bases his motion on "change in law" or "oversight." Mr. Jones does not move under an established rule, but his motion suggests arguments similar to those often raised under Rule 60(b)(6), which permits reconsideration for "other" reasons. The Court therefore will assess his motion for reconsideration under that Rule, in keeping with the well-recognized principle that *pro se* litigants are "allowed more latitude than litigants represented by counsel," which includes applying less stringent standards to *pro se* pleadings than formal pleadings drafted by lawyers. *Moore v. Agency for Intern.*

[2] The 2009 Amendment to Rule 59(e) extended the filing deadline from ten days to 28 days.

Development, 999 F.2d 874, 876 (D.C. Cir. 1993) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)).[3]

A. Change in Controlling Law

Mr. Jones argues that the four cases cited in his motion and accompanying reply necessitate reconsideration of this Court's prior dismissal of the case without prejudice. The Court interprets this as an argument for reconsideration under Rule 60(b)(6) based on a change in controlling law. *See Firestone*, 76 F.3d at 1208. Unfortunately, the cases cannot bear the weight of Mr. Jones' argument.

In *United States v. Kwai Fun Wong*, the Supreme Court held that the time limitations applicable to suits brought pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2401(b), were non-jurisdictional and were therefore subject to equitable tolling. 135 S. Ct. 1625 (2015). This case is inapposite because Mr. Jones' case was neither brought under the FTCA nor did it suffer from a deficiency that could be cured by equitable tolling.[4]

Jones v. Dep't of Health and Human Services was a decision issued by the Federal Circuit, and is therefore not binding on this Court. *See* 834 F.3d 1361 (Fed. Cir. 2016). In that case, the Federal Circuit treated an appellant's prematurely filed notice of appeal from a non-final Merit Systems

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[3] Though Mr. Jones is, in fact, an attorney, the Court reviews his pleadings under the more forgiving *pro se* standards.

[4] The Supreme Court has previously held that equitable tolling of statutory time limits is available in Title VII suits against the United States. *See Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89 (1990).

Protection Board (MSPB) decisions as "effectively stayed until the underlying agency order bec[ame] final." *Id.* at 1365. In contrast, the D.C. Circuit, which issues decisions binding on this Court, has limited its interpretation of "judicially reviewable action" to an action that is subject to judicial review as of the time the plaintiff files suit. *Butler v. West*, 164 F.3d 634, 639 (D.C. Cir. 1999) (addressing 5 U.S.C. § 7702(e)(1)(B)). Therefore, Jones offers no support for Mr. Jones' assertion of a change in controlling law.

Similarly, *McCarthy v. Merit Systems Protection Board* is a Federal Circuit case, which does not provide this Court with a change in controlling law to consider. *See* 809 F.3d 1365 (Fed. Cir. 2016).

Mr. Jones also asserts that his case was "unlawfully bifurcated between the Federal Circuit and the district court," Def.'s Reply at 2, in a contravention of the Supreme Court's later decision in *Perry v. Merit Systems Protection Board*. *See* 137 S. Ct. 1975 (2017). In *Perry*, the Supreme Court held that judicial review of a mixed-case MSPB dismissal based on jurisdiction lies with the district court. *Perry* is mandatory authority, but it has no bearing on the dismissal of Mr. Jones' case for failure to exhaust his administrative remedies.[5] Mr. Jones chose to file suit under Title VII in this Court on January 4, 2013, alleging discrimination on the basis of gender and age. Compl. ¶¶19-31. His claims were dismissed because they were not filed according to

[5] It should be noted that Mr. Jones has provided no basis, and this Court finds none, to construe the *Perry* holding as applying retroactively.

the simple rule: "file in the time allotted, and neither before nor after." *Hooker-Robinson v. Rice*, No. 05-321, 2006 WL 2130652, at *3-4 (D.D.C. July 27, 2006). Mr. Jones' argument that his claims were "unlawfully bifurcated" fails. The fact that the district court may have been a proper forum for all of his claims does not change the fact that Mr. Jones was required to exhaust the administrative remedies available before the MSPB before filing a complaint in federal court. *See Williams v. Munoz*, 106 F. Supp. 2d 40, 43 (D.D. C. 2000) ("A plaintiff is required to exhaust [his] claims in the forum he has chosen before filing a civil action."). Because Mr. Jones failed to do so, his case was dismissed.

None of the four decisions cited by Mr. Jones provides a change in controlling law applicable to his case that would support a motion for reconsideration under Rule 60(b)(6).

B. Federal Circuit

Mr. Jones alleges that the Federal Circuit's decision affirming MSPB's dismissal of his MSPB appeal for lack of jurisdiction is contrary to law and should be "reopened." The Supreme Court denied Mr. Jones' petition for a writ of certiorari on appeal from the Federal Circuit. *Jones v. MSPB*, No. 2016-1711 (Fed. Cir. January 10, 2017), *cert. denied* (October 2, 2017). Mr. Jones argues that this Court should "reopen the Federal Circuit's [...] ruling,", due to several alleged errors in that holding. Mot. for Reconsideration at 4-14. This Court does not sit to review decisions of the Federal Circuit; there are

no grounds for this Court to reconsider its dismissal of Mr. Jones' case without prejudice.

IV. CONCLUSION

For the reasons articulated above, the Court will deny Mr. Jones' Motion for Reconsideration [Dkt. 38]. A memorializing Order accompanies this Memorandum Opinion.

Date: May 25, 2018

/s/
ROSEMARY M. COLLYER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRCIT OF COLUMBIA

DARIN JONES,

Plaintiff,

v. Civil Action No. 13-08 (RMC)

U.S. DEPARTMENT OF JUSTICE, *et al.*,

Defendants.

ORDER

For the reasons stated in the Memorandum Opinion issued simultaneously with this Order, it is hereby

ORDERED that Plaintiff's Motion for Reconsideration [Dkt. 38] is **DENIED**.

This is a final appealable order. *See* Fed. R. App. P. 4(a).

Date: May 25, 2018

/s/
ROSEMARY M. COLLYER
United States District Judge

APPENDIX C

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5246 **September Term, 2016**
FILED ON: JULY 14, 2017

DARIN JONES,
APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE AND FEDERAL BUREAU OF INVESTIGATION,
APPELLEES

Appeal from the United States District Court for the District of Columbia
(No. 1:13-cv-00008)

Before: ROGERS, BROWN, and GRIFFITH, Circuit Judges.

J U D GM E N T

This appeal was considered on the record from the district court and was briefed and fully argued by the parties. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the judgment of the district court be affirmed. It is well-

established that a federal employee must exhaust his administrative remedies before filing suit in a federal court. *See Butler v. West*, 164 F.3d 634, 638 (D.C. Cir. 1999). This Court has recently applied federal exhaustion requirements to the statute at issue in this case—5 U.S.C. § 7702(e)(1)(B)—in *Morris v. McCarthy* and held that an appeal must be actively pending before the Merit Systems Protection Board ("MSPB") for 120 days before a litigant may file suit in federal court. 825 F.3d 658, 667 (D.C. Cir. 2016). Here, Jones appealed his termination by the FBI to the MSPB on September 20, 2012 and filed a complaint in the district court on January 4, 2013. Thus, Jones filed his complaint two weeks earlier than the 120-day period required by law. Because Jones did not wait the 120 days required by the statute and this Court's precedent, his suit was untimely, and the district court correctly dismissed the case for failing to exhaust administrative remedies.

Also, the fact that the MSPB had issued an initial decision prior to Jones filing his suit in the district court has no bearing on this case because only a final MSPB decision constitutes judicially reviewable action under 5 U.S.C. § 7702(e). *Butler*, 164 F.3d at 640–42. Under the MSPB's regulations, an initial decision "becomes a final decision if neither party, nor the MSPB on its own motion, seeks further review within [35] days." *Id.* at 638–39. Here, the MSPB released its initial opinion on December 6, 2012. Therefore, its initial decision was scheduled to automatically become final on January 10, 2013. However, instead of waiting until January

10, Jones filed his suit on January 4, six days before the Board's decision became final. Because Jones seeks review on a decision that was not final, his claim is not judicially reviewable.

As to Jones's argument that his suit ripened for review once it was pending before the district court after the 120-day period required by statute, this Court has already rejected similar arguments that a failure to exhaust may somehow be cured. *See Murthy v. Vilsack*, 609 F.3d 460, 465 (D.C. Cir. 2010) (holding "the filing of an amended complaint after the 180-day period [required by statute] expired cannot cure the failure to exhaust"). Therefore, Jones filed his suit in the district court prematurely, and the district court's dismissal was appropriate.

Finally, Jones has failed to show he is entitled to equitable avoidance of the FBI's exhaustion defense. While this Court does recognize that plaintiffs are entitled to an opportunity to "plead[] and prov[e] facts supporting equitable avoidance" of affirmative defenses like failure to exhaust administrative remedies, *Bowden v. United States*, 106 F.3d 433, 437 (D.C. Cir. 1997), Jones has failed to show he is entitled to such avoidance. The Board's initial decision clearly stated it would "become final on **January 10, 2013**, unless a petition for review [was] filed by that date." GA 31. Below this notice, the Board provided detailed instructions regarding the process for seeking further review from the Board or judicial review of the Board's decision. Because Jones was put on notice about the proper procedures for appealing the Board's decision, he has

not met his "burden of pleading and proving facts supporting equitable avoidance." *Bowden*, 106 F.3d at 437. Nor has he shown that the FBI waived its right to raise exhaustion as a defense. *See id.* at 438–39; *Brown v. Marsh*, 777 F.2d 8, 15–16, 18 (D.C. Cir. 1985). The FBI raised exhaustion as a defense in its Answer and not moving immediately to dismiss the complaint falls short of precluding the FBI from now raising the exhaustion doctrine, *see id.* at 15.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for hearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. RULE 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRCIT OF COLUMBIA

DARIN JONES,

Plaintiff,

v. Civil Action No. 13-08 (RMC)

U.S. DEPARTMENT OF JUSTICE, *et al.*,

Defendants.

OPINION

Plaintiff Darin Jones, who presently proceeds pro se, brings this action against Defendants U.S. Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI), seeking damages pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, for retaliation and gender and age discrimination. Before the Court is Defendants' Motion to Dismiss or in the Alternative for Summary Judgment, Mr. Jones' Motion to Amend Complaint to Add Race Discrimination, Mr. Jones' Surreply, which the Court construes as a Motion for Default Judgment, and Defendants' Motion to Strike Mr. Jones' Surreply. For the reasons below, the motion to dismiss or for summary judgment will be granted, and the motion to strike will be denied. Mr. Jones' motions will be denied.

I. FACTS

Starting in August 2011, Mr. Jones was employed by FBI as a Supervisory Contract Specialist and was assigned to work at DOJ. Comp. [Dkt. 1] ¶11; Answer [Dkt. 3] ¶11. Mr. Jones believed that he was promised a financial incentive- a pay-match based on a private sector job offer- to come work for FBI. *See* Mot. to Dismiss or For Summ. J. [Dkt. 21] (Defs. Mot.) Report of Counseling [Dkt. 21-1] at 3. After he had already begun working for FBI, however, Mr. Jones was informed that he was not entitled to matching pay. *Id.* In July 2012, Mr. Jones complained of race, sex, and age discrimination based on the denial of matching pay and retaliation for pursuing the matching pay issue. *Id.* at 2-3. Mr. Jones filed a formal equal employment opportunity (EE0) complaint on August 15, 2012, alleging race, sex, and age discrimination and reprisal due to FBI's failure to match pay and FBI's denial of his application for student-loan repayment assistance. *See* Defs. Mot., Formal EEO Complaint [Dkt. 21-2] at 1-2. By letter dated August 22, 2012, one week before the end of Mr. Jones' probationary period, DOJ notified Mr. Jones that his employment would be terminated effective August 24, 2012 for failure to meet FBI suitability standards. *Id.*, Termination Letter [Dkt. 21-3]. Apparently, the letter dated August 22, 2015 was given to Mr. Jones on August 24, 2015, his termination date. *See* Opp. To Def. Statement of Facts [Dkt. 27-1] at 2.[1]

[1] Mr. Jones states that he "had no knowledge whatsoever of the existence of this [termination] letter until it was given to him

Mr. Jones appealed his termination to the Merit Systems Protection Board (MSPB) on September 20, 2012, alleging that he was terminated "because of either: (1) the filing of an EEO Complaint in August 2012; or (2) disclosures that were protected under whistleblower protection." Defs, Mot., MSPB Form 185 [Dkt. 21-4] at 3 (MSPB Appeal). Before MSPB, Mr. Jones argued that (1) he was entitled to appeal his termination to MSPB because his prior military service qualified him as preference-eligible and (2) his prior federal service with another agency meant that he was not a probationary employee and, therefore, had appeal rights as a regular employee. *See* Compl., Ex. 1 (MSPB Initial Decision) at 2.

MSPB dismissed Mr. Jones' appeal for lack of jurisdiction on December 6, 2012. *Id.* at 1,2 ("Employees of the FBI who are not preference-eligible do not have the right to appeal adverse actions to the Board."). MSPB concluded that the dates of Mr. Jones' service in the Navy did not qualify him as preference- eligible to appeal his discharge to MSPB. *Id.* at 4. MSPB's Initial Decision specified that it was an "initial decision" that would "become final on **January 10, 2013**, unless a petition for review is filed by that date." *Id.* at 4 (emphasis in original). Further, MSPB's Initial Decision clearly directed that Mr. Jones could ask for Board review of the Initial Decision by filing a petition for review or could seek judicial review of the Board's Final Decision by filing a petition with

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on August 24, 2012." Opp. to Def. Statement of Facts at 2. The date on which Mr. Jones received the termination letter is not material to this Opinion.

the United States Court of Appeals for the Federal Circuit. *Id.* at 5, 8.

In response to Mr. Jones' August 2012 Formal EEO Complaint, FBI's Office of Equal Employment Opportunity Affairs (FBI OEEOA) notified Mr. Jones by letter dated December 7, 2012 that it would investigate his race, sex, and age claims regarding the denial of matching pay and his race, sex, age, and retaliation claims regarding the rejection of his student loan repayment application. *See* Defs. Mot., OEEOA Letter [Dkt. 21-5] at 1-2. FBI OEEOA rejected Mr. Jones' retaliation claim based on the failure to match private-sector pay because he had alleged he was retaliated against due to comments made in a January 2012 meeting with supervisors and others, which does not constitute EEO-protected activity. *Id.* By letter to FBI OEEOA dated December 21, 2012, Mr. Jones' counsel tried to add a claim for discriminatory discharge to his Formal EEO Complaint. *See, id.* Jones Ltr. [Dkt. 21-6] at 1.

Mr. Jones filed this lawsuit on January 4, 2013, alleging retaliation and discrimination on the basis of gender and age in violation of Title VII. Compl. ¶¶19-31.[2] Defendants filed an Answer to the Complaint on April 18, 2013 and asserted the affirmative defenses that Mr. Jones failed to state a claim upon which relief may be granted and that he had failed to exhaust his administrative remedies.

[2] At that time and until March 31, 2014, Mr. Jones was represented by counsel. He is currently proceeding *pro se*. *See* Mot. to Withdraw as Att'y [Dkt. 12]. Mr. Jones is licensed to practice law in both Florida and the District of Columbia, but states that he has not practiced law since being admitted to either Bar. *See* Mot. to Amend [Dkt. 13] at 1 n.1.

See Answer at 1. The Court held an initial scheduling conference on May 5, 2013 and set a fact-discovery deadline of December 5, 2013, which was extended until December 31, 2014.[3] *See* Scheduling Order [Dkt. 6]; Minute Order 10/24/13; Minute Order 6/10/14; Minute Order 9/29/14.

On October 28, 2013, MSPB affirmed its Initial Decision dismissing Mr. Jones' appeal for lack of jurisdiction. *See* Opp'n at 3 n. 3. Mr. Jones appealed MSPB's decision to the U.S. Court of Appeals for the Federal Circuit, which affirmed MSPB on March 18, 2015. *See Jones v. MSPB*, No. 2014-3050 (Fed. Cir. March 18, 2015), *reh'g denied* (April 8, 2015).

By letter dated April 4, 2013, FBI OEEOA advised Mr. Jones that it could not amend his Formal EEO Complaint to add a claim based on his discharge because he had already filed suit here alleging the same claim. *See* Defs. Mot., OEEOA Ltr. [Dkt. 21-7] at 1.

On April 15, 2014, Mr. Jones moved to amend his Complaint to add a claim for "termination based on age." *See* Mot. to Amend [Dkt. 13] at 2. Defendants did not oppose and the Court granted the motion. *See* Minute Order 5/9/14.

Defendants filed their motion to dismiss or for summary judgment on October 10, 2014. *See* Defs. Mot. In addition, currently pending before the Court

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[3] On October 8, 2013, the case was temporarily stayed due to the unanticipated length of the lapse of government appropriations. *See* Minute Order 10/2/13; Minute Order 10/8/13. Discovery has been stayed since October 22, 2014 pending briefing and resolution of Defendants' motion to dismiss or for summary judgment. *See* Order [Dkt. 25].

are Mr. Jones' motion to amend his complaint to add a claim for race discrimination, Mr. Jones' two motions to compel production of documents, Mr. Jones' Surreply, which the Court construes as a Motion for Default Judgment, and Defendants' Motion to Strike Mr. Jones' Surreply. *See* Mot. to Amend Complaint [Dkt. 16]; Mots. To Compel [Dkts. 17 and 19]; Response to Defendants' Reply [Dkt. 29] (Default Mot.); Mot. to Strike [Dkt. 30].

II. LEGAL STANDARD

Defendants styled their motion as a Motion to Dismiss or for Summary Judgment. Because Defendants had already filed an Answer to Mr. Jones' Complaint, *see* Ans. [Dkt. 3], a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is untimely. *See* Fed. R. Cv. P. 12(b) ("A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed."). "[C]ourts routinely treat motions to dismiss that are filed after a responsive pleading has been made as a motion for judgment on the pleadings." *Langley v. Napolitano*, 677 F. Supp. 2d 261, 263 (D.D. C. 2010).

However, the Court finds that Defendants' motion should be construed as a motion for summary judgment. FBI attached various exhibits, including affidavits, to its motion, some of which are not referenced in the Complaint and are therefore outside the scope of the pleadings. The Court has considered these materials in ruling on Defendants' motion.

Under Federal Rule of Civil Procedure 56, summary judgment shall be granted "if the movant

shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). On summary judgment, the burden on a moving party who does not bear the ultimate burden of proof may be satisfied by making a showing that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In ruling on a motion for summary judgment, a district court must draw all justifiable inferences in the nonmoving party's favor. *Anderson*, 477 U.S. at 255. A nonmoving party, however, must establish more than "the mere existence of a scintilla of evidence" in support of its position. Id. at 252. In addition, the nonmoving party may not rely solely on allegations for conclusory statements. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999).

III. ANALYSIS

The first problem in this case is that Mr. Jones admittedly filed his complaint before he had a final MSPB decision. The second problem is that Mr. Jones never raised his claims of discrimination due to race, age, or gender to MSPB before bringing them to this Court. Therefore, Mr. Jones has not exhausted his administrative remedies with respect to any of his claims and the Court will dismiss his Complaint without prejudice. Because Defendants timely answered the Complaint, the Court will deny Mrs. Jones' motion for default judgment.

A. Mr. Jones Failed to Exhaust His Administrative Remedies

Before bringing suit under Title VII in federal court, a federal employee must exhaust his administrative remedies. *See Butler v. West*, 164 F.3d 634, 638 (D.C. Cir. 1999). "Exhaustion is required in order to give federal agencies an opportunity to handle matters internally whenever possible and to ensure that the federal courts are burdened only when reasonably necessary." *Brown v. Marsh*, 777 F. 2d 8, 14 (D.C. Cir. 1985).

Failure to exhaust is not a jurisdictional bar to bringing suit under Title VII.[4] *See Bowden v. United States*, 106 F. 3d 433, 437 (D.C. Cir. 1997); *Brown v. Marsh*, 777 F. 2d 8, 14 (D.C. Cir. 1985) ("Exhaustion under Title VII, like other procedural devices, should never be allowed to become so formidable a demand that it obscures the clear congressional purpose of 'rooting out...every vestige of employment discrimination within the federal government.") (internal citation omitted). Rather, "untimely exhaustion of administrative remedies is an affirmative defense," which "the defendant bears the burden of pleading and proving." *Bowden*, 106 F.3d at 437; *Proctor v.*

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[4] Defendants cite *Hooker-Robinson v. Rice*, 2006 WL 2130652 (D.D.C. 2006) and *Doe v. U.S. Dep't of Justice*, 660 F. Supp. 2d 31 (D.D.C. 2009) for support of their argument. Both cases treated failure to exhaust as a jurisdictional defect. The recent trend in this district is to treat failure to exhaust under Title VII as a failure to state a claim rather than as a jurisdictional defect. *See, e.g., Williams-Jones v. Lahood*, 656 F. Supp. 2d 63, 66 (D.D.C. 2009); *Hicklin v. McDonald*, 2015 WL 3544449, at *2 (D.D.C. June 8, 2015); *Proctor*, 2014 WL 6676232, at *11.

District of Columbia, 2014 WL 6676232, at *11 (D.D. C. Nov. 25, 2014). If a defendant meets that burden, "the plaintiff then bears the burden of pleading and providing facts supporting equitable avoidance of the defense." *Bowden*, 106 F.3d at 437; *Proctor*, 2014 WL 6676232, at *11. Courts may excuse failure to exhaust administrative remedies under the equitable doctrines of waiter, estoppel or tolling. *See Bowden*, 106 F.3d at 437.

A claimant must navigate complex requirements for processing employment discrimination claims. Generally, an employee must seek relief from the Equal Employment Opportunity department of his employing agency, as detailed in Section 717(c) of the Civil Right Act of 1964, 42 U.S.C. § 2000e-16(c). In certain cases, a federal employee affected by an adverse employment action, such as discharge, may instead bring any related Title VII claims in connection with an appeal of the adverse employment action to MSPB. *See* 5 U.S.C. § 7512;[5] 5 U.S.C. § 7513(d); *Chappell v. Chao*, 388 F.3d 1373, 1375 (11th Cir. 2004) ("Although the MSPB does not have jurisdiction over discrimination

[5] MSPB only has jurisdiction over certain adverse employment actions affecting federal employees, such as discharges, suspensions, and demotions. *See* 5 U.S.C. § 7512. Probationary employees are not afforded the full rights that tenured employees have to appeal adverse employment actions to MSPB. *See, e.g., id.* § 4303(e); *U.S. Dept. of Justice, I.N.S. v. Fed. Labor Relations Auth*, 907 F.2d 724, 728 (D.C. Cir. 1983) ("The substantial protections that Congress made available only to tenured employees indicate that Congress recognized and approved of the inextricable link between the effective operation of the probationary period and the agency's right to summary termination.").

claims that are not related to adverse actions, it can entertain appeals in 'mixed cases.'"). MSPB is an independent, quasi-judicial federal administrative agency that was established by the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 1101 *et seq.*, to review civil service decisions. See 5 U.S.C. § 7701. Supplemented by EEOC and MSPB regulations, the CSRA sets forth the statutory framework for "addressing the procedural path of a mixed case- an adverse personnel action subject to appeal to the MSPB coupled with a claim that the action was motivated by discrimination." *Butler*, 164 F. 3d at 637-38 (citing 5 U.S.C. § 7702). A plaintiff may file a mixed-case complaint with his agency's EEO office or with MSPB, but not both. See 29 CF.R. § 1614.302(b). "Whichever is filed first shall be considered an election to proceed in that forum," *id.*, and a plaintiff must then exhaust his remedies in that forum. *See Tolbert v. United States*, 916 F.2d 245, 248 (5th Cir. 1990) (holding that a federal employee must exhaust chosen avenue of administrative relief prior to bringing a Title VII action); *Williams v. Munoz*, 106 F. Supp. 2d 40, 43 (D.D.C. 2000) ("A plaintiff is required to exhaust [his] claims in the forum []he has chosen before filing a civil action.").

Where, as here, a plaintiff first elects to file an appeal to MSPB, an Administrative Judge is assigned to the case and "take evidence an eventually makes findings of fact and conclusions of law." *Butler*, 164 F.3d at 638. Within 120 days of the filing of the mixed-case appeal, the Board is to "decide both the issue of discrimination and the appealable action." 5 U.S.C. § 7702(a)(1). An initial

decision of an Administrative Judge "becomes a final decision if neither party, nor the MSPB on its own motion, seeks further review within thirty-five days." *Butler*, 164 F.3d at 638; 5 C.F.R. § 1201.113. "However, both the complainant and the agency can petition the full Board to review an initial decision. Should the Board deny the petition for review, the initial decision becomes final, *see* 5 C.F.R. § 1201.113(b); if the Board grants the petition, its decision is final when issued. *See* 5 C.F.R. § 1201.113(c)." *Butler*, 164 F.3d at 639. A plaintiff may file a civil suit in district court within thirty days after a final MSPB decision. *See* 5 U.S.C. § 7703(b). Alternately, "if the MSPB fails to render a judicially reviewable decision within 120 days from the filing of a mixed case appeal, the aggrieved party can pursue [his] claim in federal district court." *Butler*, 164 F.3d at 639; 5 U.S.C. § 7702(e)(1)(B).

1. Retaliation Claim

Mr. Jones has not exhausted his administrative remedies with regard to his retaliation claim because there has been no *final* MSPB decision on this claim. Mr. Jones sues here on the basis of MSPB's Initial Decision. The D.C. Circuit has explained the difference between an MSPB initial decision and an MSPB final decision:

> While an initial decision can convert to a final decision with either the passage of thirty-five days or the denial of all outstanding

> petitions for review, it can also be overturned or modified by the Board, in which case it will never be reviewable by the courts in its Initial form. Furthermore, throughout the thirty-five-day period following the issuance of an initial decision, the parties can each petition for another round of review from the Board. *Once a decision becomes final, however, a losing party's only recourse lies in the courts.*

Butler, 164 F.3d at 640 (emphasis added). Plainly, only a *final* MSPB decision is judicially reviewable. *See also* 5 CF.R. § 1201.113 ("Administrative remedies are exhausted when a decision becomes final in accordance with this section."). MSPB's Initial Decision, rendered on December 6, 2012, would only have become a final decision subject to judicial review on January 10, 2013 if neither party, nor MSPB, sought further review by that date-6 days *after* Mr. Jones filed his complaint here on January 4, 2013. *See Butler*, 164 F.3d at 638; 5 C.F.R. § 1201.113. Because MSPB's Initial Decision had not converted to a final decision at the time he filed suit here, Mr. Jones did not exhaust his administrative remedies with respect to his retaliation claim.

Although 5 U.S.C. § 7702(e)(1)(B) may provide an alternative avenue to district court, Mr. Jones cannot avail himself of it. Under 5 U.S.C. § 7702(e)(1)(B), a claimant can seek judicial review if, "after filing a missed case appeal with the MSPB, *120 days elapse without final* MSPB action." *Butler*, 164 F.3d at 643 (emphasis added). Mr. Jones filed

his mixed-case appeal with MSPB on September 20, 2012. *See* MSPB Appeal at 2. Therefore, absent a final MSPB decision, Mr. Jones would have been entitled to file suit here on January 18, 2013, but he filed his Complaint 14 days earlier. *See id.* Mr. Jones has not abided by the fundamental directive governing exhaustion of administrative remedies: "The rule is simple: file in the time allotted, and neither before nor after." *Tolbert*, 916 F.2d at 249.

Mr. Jones concedes that he has filed here without a final MSPB decision. *See* Opp'n [Dkt. 27] at 4 n.4 ("Plaintiff's Complaint was filed six(6) days early" and "Plaintiff admits this him Complaint [Dkt. 1] was filed by his former attorney on January 4, 2013, seventeen days before January 21, 2013.").[6] Because Mr. Jones failed to exhaust administrative remedies, his retaliation claim will be dismissed.

2. Discrimination Claims

Defendants argue that Mr. Jones also failed to exhaust administrative remedies with respect to his claims of discriminatory discharge on the bases of gender, age, or race because he never raised them in front of MSPB. For that reason, Defendants argue that Mr. Jones' Motion to Amend Complaint to add a claim for discharge based on race should be denied as futile and his claims for gender and age discrimination should be dismissed. *See* Defs. Mot. at 16. The Court agrees.

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[6] The Court calculates that January 18, 2013 and not January 21, 2013 is 120 days after Mr. Jones filed his MSPB appeal on September 20, 2012.

Mr. Jones appealed his discharge from FBI to MSPB on September 20, 2012, arguing that he was fired "because of either: (1) the filing of an EEO Complaint in August 2012 [i.e., retaliation];[7] or (2) disclosures that were protected under whistleblower protection." MSPB Appeal at 3. Mr. Jones chose MSPB over the EEO process for all discrimination claims behind his discharge. *See* 29 C.F.R. § 1614.302(b) ("Whichever is filed first shall be considered an election to proceed in that forum"); *Tolbert*, 916 F.2d at 248 (holding that a federal employee must exhaust chosen avenue of administrative relief prior to bringing a Title VII action); *Williams*, 106 F. Supp. 2d at 43. Mr. Jones then attempted to amend his Formal EEO Complaint to add a claim for discriminatory discharge by letter dated December 21, 2012, three months after he filed his MSPB appeal. *See* Jones Ltr. at 1.[8] However, because he elected to appeal his termination to MSPB first, Mr. Jones elected to purse all of his claims for wrongful termination in that forum.

Mr. Jones' MSPB Appeal included only his allegation of retaliatory discharge for protected EEO activity. *See generally* MSPB Appeal. His current argument that he "*would have* added his wrongful termination claims of discrimination based on

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[7] The "filing of an EEO Complaint" is protected EEO activity for which retaliation is unlawful. *See* 42 U.S.C. § 2000e-3(a).

[8] Mr. Jones' Formal EEO complaint, filed on August 15, 2012--prior to his discharge--alleged race, sex, age and reprisal discrimination arising from the denial of matching pay and rejection of his student loan repayment application. *See* Formal EEO Complaint at 1-2. None of these claims is a subject of the instant suit.

gender, race, and age" to his MSPB appeal is unavailing. *See* Opp'n at 5 (emphasis added). The rules for exhaustion are not expressed in the conditional. Mr. Jones cannot avoid the fact that he failed to raise any claims of gender, race, and age discrimination in the MSPB Appeal. Accordingly, the Court will dismiss his claims for gender and age discrimination and will deny his motion to amend his Complaint to add a claim of race discrimination as futile.[9]

B. Mr. Jones' Failure to Exhaust Administrative Remedies is Not Excused

Despite admitting that he filed suit here too early, Mr. Jones argues that Defendants have failed to demonstrate that his premature filing has "prejudiced their defense in any manner or caused an undue burden." Opp'n at 4. He maintains that "the conduct of the parties for twenty-two months [between the filing of the Complaint on January 4, 2013 and the filing of Defendants' motion for summary judgment on October 10, 2014] demonstrates a properly filed Complaint where the administrative remedies were exhausted." *Id.* at 5. Prejudice is not an element of proving failure to exhaust administrative remedies. The Court

[9] "[F]utility of amendment" is a reason to deny leave to file an amended complaint. *Forman v. Davis*, 371 U.S. 178, 182 (1962). An amendment is futile if it "could not withstand a motion to dismiss." *Pietsch v. McKissack & McKissack*, 677 F. Supp. 2d 325, 328 (D.D. C. 2010). Since Mr. Jones did not exhaust his race discrimination claim before MSPB, his proposed amendment would not survive a motion to dismiss.

construes Mr. Jones' argument as a request that the Court use its equitable discretion to excuse the requirement of administrative exhaustion.

The Court recognizes that the parties have expended resources litigating this suit, as evidenced by the fact that they have engaged in discovery for over 15 months--from June 5, 2013 until October 22, 2014, excluding a temporary stay during the lapse of government appropriations in October 2013. *See* Minute Order 10/2/13; Minute Order 10/8/13; Order [Dkt. 25] at 2. Nonetheless, Mr. Jones presents no reason why he filed suit here before he had obtained a final agency decision from MSPB on his retaliation claim and why he never presented MSPB with his other discrimination claims. Mr. Jones' current *pro se* status provides no basis to excuse his failure to exhaust administrative remedies because he was represented by counsel when he filed suit. In addition, the Court notes that Defendants raised failure to exhaust administrative remedies as an affirmative defense in their Answer filed on April 18, 2013, and thus did not waive their right to assert the argument now. *See* Answer [Dkt. 3} at 1. Mr. Jones has not met his "burden of pleading and proving facts supporting equitable avoidance of the defense" of failure to exhaust administrative remedies. *Bowden*, 106 F.3d at 437; *Proctor*, 2014 WL 6676232, at *11.

C. Mr. Jones' Motion for Default Judgment Will be Denied

Mr. Jones filed a surreply, in which he argues that he is entitled to a default judgment because

Defendants failed to timely respond to the January 4, 2013 Summons. *See* Default Mot. at 1. The Court construes Mr. Jones' surreply as a motion for default judgment. Defendants move to strike the surreply. *See* Mot. to Strike at 3.

Mr. Jones argues that he is entitled to default judgment because Defendants filed an Answer on April 18, 2013, more than 60 days after the Summons was issued on January 4, 2013. *See* Default Mot. at 1. He is incorrect. Service was perfected on the United States Attorney's Office on February 21, 2013, *see* Mot. to Strike, Attachment 1, thus Defendants' Answer was timely. *See* Fed. R. Civ. P. 12(a)(2) (the federal government must file a responsive pleading within 60 days after service of process on the United States attorney). Mr. Jones' motion for default judgment and Defendants' motion to strike will be denied.

IV. CONCLUSION

For the reasons above, the Court will grant Defendants' Motion to Dismiss or for Summary Judgment, Dkt. 21, and will deny Mr. Jones' Motion to Amend Complaint to Add Race Discrimination, Dkt. 16. The Court will deny Mr. Jones' motion for default judgment, Dkt. 29, and deny Defendants' Motion to Strike Plaintiff's Surreply, Dkt. 20. The Court will dismiss this case without prejudice because Mr. Jones failed to exhaust his administrative remedies with respect to any of his claims. A memorializing Order accompanies this Opinion.

Date: July 1, 2015

_____/s/_____
ROSEMARY M. COLLYER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRCIT OF COLUMBIA

DARIN JONES,

Plaintiff,

v. Civil Action No. 13-08 (RMC)

U.S. DEPARTMENT OF JUSTICE, *et al.*,

Defendants.

ORDER

For the reasons stated in the Opinion issued simultaneously with this Order, it is hereby

ORDERED that Defendants' Motion to Dismiss or in the Alternative for Summary Judgment, Dkt. 21, is **GRANTED**; and it is

FURTHER ORDERED that Plaintiff's Motion to Amend Complaint to Add Race Discrimination, Dkt. 16, is **DENIED**; and it is

FURTHER ORDERED that Plaintiff's Motion for Default Judgment, Dkt. 29, is **DENIED**; and it is

FURTHER ORDERED that Defendants' Motion to Strike Plaintiff's Surreply, Dkt. 30, is **DENIED**; and it is

FURTHER ORDERED that Plaintiff's Motions to Compel, Dkts. 17 and 19, are **DENIED** as moot; and it is

FURTHER ORDERED that this case is **DISMISSED WITHOUT PREJUDICE** and this case is closed.

This is a final appealable order. *See* Fed. R. App. P. 4(a).

Date: July 1, 2015

_____/s/_____
ROSEMARY M. COLLYER
United States District Judge

APPENDIX E

United State Court of Appeals
For the District of Columbia Circuit

No. 18-5234 **September Term, 2018**
1:13-cv-00008-RMC
Filed On: July 10, 2019

Darin Jones,
Appellant

v.

United States Department of Justice and
Federal Bureau of Investigation,
Appellees

BEFORE: Henderson, Srinivasan, and Millett,
Circuit Judges

ORDER

Upon consideration of the petition for rehearing, which contains a request to publish the panel's decision, it is

ORDERED that the petition be denied. It is

FURTHER ORDERED that the request to publish the panel's decision be denied. See D.C. Cir. Rule 36(f) (motions to publish "are not favored and will be granted only for compelling reasons").

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

APPENDIX F

United State Court of Appeals
For the District of Columbia Circuit

No. 18-5234 **September Term, 2018**
1:13-cv-00008-RMC
Filed On: July 10, 2019

Darin Jones,
Appellant

v.

United States Department of Justice and
Federal Bureau of Investigation,
Appellees

BEFORE: Garland, Chief Judge, and Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

APPENDIX G

United State Court of Appeals
For the District of Columbia Circuit

No. 15-5246 **September Term, 2017**
1:13-cv-00008-RMC
Filed On: September 12, 2017

Darin Jones,
Appellant

v.

United States Department of Justice and
Federal Bureau of Investigation,
Appellees

BEFORE: Rogers, Brown*, and Griffith,
Circuit Judges

ORDER

Upon consideration of appellant's petition for panel rehearing filed on August 27, 2017, it is

ORDERED that the petition be denied.

Per Curiam

* Circuit Judge Brown was a member of the panel but retired prior to disposition of the petition for panel rehearing.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

APPENDIX H

United State Court of Appeals
For the District of Columbia Circuit

No. 15-5246 **September Term, 2017**
1:13-cv-00008-RMC
Filed On: September 12, 2017

Darin Jones,
Appellant

v.

United States Department of Justice and
Federal Bureau of Investigation,
Appellees

BEFORE: Garland, Chief Judge; Henderson, Rogers, Brown*, Tatel, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

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* Circuit Judge Brown was a member of the en banc court but retired prior to disposition of the petition for rehearing en banc.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

APPENDIX I

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

January 11, 2016

Mr. Darin A. Jones
5117 Dudley Lane
Apt. 303
Bethesda, MD 20814

Re: Darin A. Jones
v. Merit Systems Protection Board
No. 15-670

Dear Mr. Jones:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris, Clerk

APPENDIX J

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

October 2, 2017

Mr. Darin A. Jones
5117 Dudley Lane
Apt. 303
Bethesda, MD 20814

Re: Darin A. Jones
v. Merit Systems Protection Board
No. 16-1471

Dear Mr. Jones:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris, Clerk

APPENDIX K

5 U.S.C. § 7702(e)(1)(B) provides:

(e)
(1) Notwithstanding any other provision of law, if at any time after—

(A) ... ;

(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section); or

(C) ... ;

> 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)).