CHAPTER 1
FEDERAL RULES OF CIVIL PROCEDURE

This book is designed to show the litigator how to craft and file motions and, it is hoped, prevail in litigation through motion practice. (The authors' hope here extends only to those who are not our opponents in litigation.) The text encompasses motions in both Merit System Protection Board and Equal Employment Opportunity Commission cases. There are similarities and differences, both procedurally and substantively, in MSPB and EEOC motions. One of the main similarities is that the MSPB and the EEOC each look to the Federal Rules of Civil Procedure, not as binding precedent, but for guidance in ruling on motions. It is, therefore, appropriate that the discussion of motion practice begin with the Federal Rules.

I. FEDERAL RULES AND MOTION PRACTICE

The Federal Rules of Civil Procedure (Fed. R. Civ. P.) form the basis of all civil practice in the federal courts. The rules attempt to bring a degree of uniformity to practice in the federal courts. The rules have served as a model for the rules of civil procedure that govern litigation in most state courts and, as noted above, are frequently looked to by the MSPB and the EEOC for guidance. Some of the regulations adopted by the Board and Commission have been drafted with an eye toward the Federal Rules of Civil Procedure.

Every litigator before the MSPB and the EEOC, lawyer and nonlawyer alike, should have at least a passing familiarity with the Fed. R. Civ. P. Likewise, every litigator should have a copy of those rules. Several annotated versions of the Fed. R. Civ. P. are available in paperback form. The rules are also available through an Internet search.

References to motions are frequent throughout the Fed. R. Civ. P. and, collectively, they form the basis for virtually all motion practice.

A. FORM OF MOTIONS

The most basic of all the motion rules is Fed. R. Civ. P. 7 which addresses the form of motions:

> (b) *Motions and Other Papers.*
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> (1) *In General*. A request for a court order must be made by motion. The motion must:
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> (A) be in writing unless made during a hearing or trial;
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> (B) state with particularity the grounds for seeking the order; and
>
> (C) state the relief sought.
>
> (2) *Form*. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

The rule abolished all the formal pleadings, adopted largely from the English common law, that had plagued lawyers and judges alike. In their place was left the motion. (Does anyone really remember what a *demurrer* is?) The rule itself indicates what should be included in a motion: (1) the result that the moving party desires; and (2) the legal and factual basis—*i.e.*, the "grounds therefore"—for granting that result. The only other requirement is that the motion be in writing.

Through "local" rules which supplement the Fed. R. Civ. P., each federal court has set its own specific requirements with regard to the format and, sometimes, substance of motions. In effect, the courts have turned a uniform set of rules into a not so uniform set of rules. As a result, the Fed. R. Civ. P. must be read in conjunction with the local rules of the court in which the motion is being filed. The same is true with motion practice before the MSPB and the EEOC. Because the Fed. R. Civ. P. are only used as guidance by the Board and the Commission, the rules must be read in conjunction with the regulations and policy guidance issued by each body.

Even in the absence of formal rules governing the form of motions, there are some general rules that apply. The rules are not hard and fast, but should be adapted to suit the particular motion:

- *Case Captions.* At the beginning of every motion there should be a case caption. At a minimum, the case caption should contain the names of the parties and the docket number of the case. Additional information, such as the name of the tribunal, the date of filing, the name of the judge, and the title of the motion can be included. Even when a motion is in letter form—a form that is entirely acceptable—it should contain a reference line with the case caption. For specific examples of case captions, see Chapter Two, below. When a motion is filed through an e-filing system, that system will show the information associated with a case caption, which may become superfluous—depending on the e-filing system. Some e-filing systems, e.g., courts, will allow only completed documents (complete with captions), to be uploaded.

- *Introduction.* It is not necessary that a motion include a section formally labeled "Introduction." However, each motion should begin with an introductory paragraph that sets forth succinctly the relief sought through the motion and states, in summary form, the basis for seeking that relief. For example, the following introduction was used in a joint motion to extend the discovery deadline in a case:

  > Appellant and the Agency, by and through the undersigned counsel, hereby respectfully request that the Board grant a continuance in the above-referenced matter until January 2, 2023. In support of this motion, counsel for both Appellant and the Agency have confronted several matters which preclude completion of discovery on the schedule originally contemplated by the Parties.

  The introduction tells the judge what the party or parties desire and why. The reasons can then be flushed out in detail in the body of the motion.

- *Statement of Facts.* A statement of facts, sometimes referred to as a statement of the case, is a necessary part of any motion. In most cases, the statement of facts is set apart from the rest of the motion by a heading, but such a heading is not specifically required. What is required is a succinct statement of the facts that are relevant and material to the particular motion. The facts set forth should be referenced either to the existing case record or to exhibits attached to the motion. References should show where in the record (or attachments to the motion) the fact asserted is support, and the reference will follow the statement of fact by a parenthetical or bracketed entry, or by footnote.

  The statement of facts should be drafted to suit the particular motion. The statement need not necessarily be lengthy. In the above example concerning a joint motion to extend the discovery deadline in an MSPB case involving a demotion, it was not necessary to give a recitation of the facts leading up to the demotion. Those facts simply had no relevancy to the motion. It was, however, necessary to set forth the facts that resulted in the need for an extension of the deadline. Those facts included, e.g., a government-wide shutdown, for budgetary reasons, that included a furlough of the administrative judge assigned to the case. As a result, the necessary witness subpoenas could not be obtained for depositions.

  In other cases, a lengthier statement of facts is necessary. When a lengthier statement of facts is required and both the substantive facts of the case and its procedural history are relevant to the motion, it may be helpful to break the statement of facts into two segments: (1) The facts of the case; and (2) the procedural history of the case.

- *Argument.* The argument should contain a recitation of the applicable law—i.e., statutes, regulations and case law—necessary to decide the motion. It also should contain a discussion of how and why that law applies to the particular facts of the case. When an issue is complicated, or more than one issue is involved, it may be helpful to break the argument into separate points using headers to separate each point.

  As with the statement of facts, it is not necessary that the argument section be lengthy. For a simple motion, the argument may consist of no more than a few sentences. What is important is to bring the relevant law to the judge's attention and explain why that law applies in the particular case.

- *Conclusion.* A conclusion is entirely optional. Usually, it merely restates what was already set forth in the introduction.

- *Signature Block.* Each motion should contain a signature block that identifies the person filing the motion, and the address and telephone number of that person. If the person filing the motion is a representative, the signature block should also identify the party that person represents. While the address and telephone number are optional, their addition takes only a few seconds and places those items at the fingertips of the judge, without referring elsewhere in the file to find them. In this electronic age, an email address is seemingly universal. And for electronic

filings, no handwritten signature will ordinarily be required; instead, the signature is shown by "/s/" followed by the name of the person who submits the motion.

- *Date.* Every motion should be dated. The date may be included as part of the case caption, or in a motion by letter, at the top of the letter. Some representatives prefer to put a separate line item for the date immediately after the signature block.
- *Certificate of Service.* Every motion should contain a certificate of service that indicates upon whom, by what method and when the motion was served on the opposing party or parties. It is not necessary to include the judge on the certificate of service. But even a joint or uncontested motion should show service by the party filing the motion upon the other party. When motions are filed through electronic filing systems, the e-filing system may accomplish the required service and may itself serve as a certificate of service for the parties who are registered to that case in the e-filing system.
- *Exhibits.* Not every motion contains exhibits. When exhibits are included with a motion, they should be attached to the end of the motion. Exhibits should be numbered or lettered. Lengthy exhibits also should be paginated. Although it is not required, when dealing with a motion that has numerous exhibits attached, it is a good idea to tab the exhibits for ease of reference. For e-filing, exhibits will often be entered as scanned PDF files (rules may require that they be "machine readable" when they are uploaded).

Each of the above rules must be tailored to the particular motion being filed. The basic rule of thumb to follow is that the motion should be put together in a way that makes it easy for the judge to grant the motion; that is, assuming the motion is supported by the law and the facts. Motions that are unclear on the relief sought, muddle the facts with the law, are overly long or short, or do not document the factual assertions made, have little chance of success. They do, however, present substantial opportunity to annoy the judge, which is no way to win a case.

Most motions are written and filed within strict time limits. Those limits are imposed not only by the rules of the forum in which the case is being processed, but the real life time limits of the representatives. There are other cases requiring attention, discovery needs to be completed, preparation for the hearing needs to take place and, sometimes, life beyond work intrudes. Given these time limits, it is surprising that motions often tend to ramble on for pages deftly eluding the point.

Newspaper reporters starting out their careers are given the "ABC's" of reporting. Those "ABC's" can readily be applied to motion practice. They are:

- *Accuracy.* Motions should accurately set forth both the facts and the applicable law. There is nothing wrong with setting down the facts in the way that most favorably reflects on one's client, provided the facts used are accurate representations of the facts as established by the evidence of the case. Likewise, it is one thing to argue that a case can be favorably interpreted for one's client; it is another thing to misrepresent the holding of a case to reflect what would most benefit the client.

  Accuracy in motion practice is imperative. Misrepresenting the facts or the law undermines the credibility of the advocate and potentially, the client. This is not an effective strategy for winning a case in front of any judge.

- *Brevity.* Motions should be no longer than they have to be. No judge likes to wade through pages of purple prose to extract the few salient facts or the limited case law he or she needs to know in order to decide a motion. Get to the point and get to it quickly, with relevant citations to the evidence.
- *Clarity.* No motion is likely to be successful when it is not clear what is being requested and why. The request for relief in a motion should be specific as should the reasons why the moving party is entitled to that relief.

The foregoing rules are not dependent on the forum in which the motion is being filed. They are the fundamentals of good motion practice. As noted at the outset, litigation is about winning. Victory seldom comes to those who confuse hyperbole and verbosity with good motion practice.

1. Form of MSPB Motions

The MSPB regulation regarding the form of motions is relatively simple. The regulation, at 5 CFR 1201.55(a), states:

> (a) *Form.* All motions, except those made during a prehearing conference or a hearing, must be in writing. All motions must include a statement of the reasons supporting them. Written motions must be filed with the

judge or the Board, as appropriate, and must be served upon all other parties in accordance with § 1201.26(b)(2) of this part. A party filing a motion for extension of time, a motion for postponement of a hearing, or any other procedural motion must first contact the other party to determine whether there is any objection to the motion, and must state in the motion whether the other party has an objection.

The regulation is not that much different, in essence, than Fed. R. Civ. P. 7(b). The motion must be in writing and must include a statement of the reasons why the motion should be granted. Although not specifically set forth as a requirement in section 1201.55(a), the motion also must set forth what is requested. (The MSPB definition of a motion is "[a] request that a judge take a particular action." 5 CFR 1201.4(c).) The regulation also requires that the motion be served on all other parties to the appeal.

The Board's regulation imposes another requirement on procedural motions. The party filing the motion must contact his or her opponent and determine whether there is any objection to the motion. The opponent's objection, or lack of one, must be set forth in the motion. Aside from the fact that it is required, contacting the other party on procedural motions is good litigation practice. Particularly with scheduling motions, getting the opposing party's consent does not guarantee the motion will be granted, but it does significantly enhance the chances of a favorable result. The contact between the representatives could be by email, phone, Zoom or any other communications system. The motion should recite the efforts to contact the other side and the result, e.g., the motion is agreed to, not agreed to, or agreed to in part. If reasonable efforts are made to confer with the other side, but there is no response, that too should be explained in the motion.

The Board's regulations, at 5 CFR Part 1201, also address the requirements of a few specific types of motions. There are additional requirements for motions to compel discovery, *see* 5 CFR 1201.73(c), and motions to quash a subpoena, *see* 5 CFR 1201.82. These requirements are explained, in depth, in the specific sections of the book addressing those motions, below. They are mentioned here to make one simple point. No practitioner, no matter how experienced, should file a motion without first consulting the most recent edition of the adjudicating body's regulations. Good motion practice starts with familiarity with the governing regulations and procedures. There is no quicker way for a representative to identify himself or herself as a novice in Board or Commission practice than to file a motion that does not comply with the respective regulations and procedures of those bodies.

2. Form of EEOC Motions

The EEOC has not issued any rules relating to the form of motions. Still, any EEOC motion must contain the three basic elements reflected in Fed. R. Civ. P. 7(b), that is: (1) the motion must be in writing; (2) the motion must set forth the desired result and (3) the motion must set forth the reasons why the moving party believes that result is required under the law and facts of the case. The motion can be designed as a formal pleading, or it may take the form of a letter to the administrative judge. Since EEOC also has an e-filing system, motions will often be filed using that process.

B. SIGNATURE OF MOTIONS

Judges who are assigned to MSPB appeals and EEOC hearing requests issue their own case-processing orders, and those orders may require that submissions be signed. A representative's signature on a document is an implicit attestation that the pleading is submitted in good faith.

Fed. R. Civ. P. 11 governs the signing of motions, as well as other pleadings, in federal courts. Rule 11 envisions that each party is represented by an attorney, which is not always the case in litigation before the MSPB and the EEOC. Neither the Board nor the Commission has any real counterpart in their respective regulations to Rule 11. That does not mean, however, that the rule has no applicability to MSPB and EEOC proceedings. Rule 11 provides, in part:

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) *Signature.* Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) *Representations to Court.* By presenting to the court a pleading, written motion, or other paper—whether by

signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

The rule further provides for sanctions against those who choose to violate it.

Although not directly applicable to Board and Commission proceedings, Rule 11 is noted here for two reasons. First, the simple admonition of section (a) that any motion should contain the representative's signature, address, e-mail address, and telephone number. Opposing representatives, to say nothing of administrative judges, do not like flipping through the massive files that federal sector employment cases tend to generate for the sole purpose of finding the address or telephone number of the representative who filed the motion. No rule is necessary; simple common sense dictates that representatives should try to make the work of the judges easier, not harder.

Second, Rule 11 is noted here because of the requirements of subsection (b). Whether or not a representative is an attorney, he or she should be able to meet the four requirements of subsection (b): (1) the motion is not being submitting for an improper purpose; (2) the contentions of the motion are supported by existing law or by a nonfrivolous argument that the existing law is incorrect; (3) the factual contentions of the motion have support in the actual evidence of the case; and (4) denials of fact likewise have support in the evidentiary record of the case.

The federal courts have extensive power to sanction those who choose to violate any of the four tenets of Rule 11. The Board and Commission lack that power, although both have regulations governing the conduct of representatives with respect to conflicts of interest. *See* 5 CFR 1201.31 and 29 CFR 1614.605. *See also* 5 CFR 1201.31(d) (permits "a [MSPB] judge may exclude a representative from all or any portion of the proceeding before him or her for contumacious conduct or conduct prejudicial to the administration of justice."). But, motions that do not adhere to the basic requirements of Rule 11 have little chance for ultimate success. And success is the purpose of litigation. Moreover, the last thing a representative needs is to have his or her credibility called into question with the administrative judge. Representatives who submit motions that do not adhere to the tenets of Rule 11 run that risk.

C. MOTIONS TO DISMISS

In the courts, litigation commences when the plaintiff files a complaint. That complaint makes certain factual allegations, usually in numbered paragraphs, and also makes certain legal allegations—e.g., that the defendant has violated the law and is, therefore, liable to the plaintiff. The defendant must then file an answer. The defendant must admit or deny each factual allegation. In the alternative, the defendant may state that he or she does not have sufficient knowledge to form a belief as to the accuracy of the allegation. With respect to the legal allegations, the defendant is required to assert any defenses he or she has in the answer.

There is, however, an important exception to asserting defenses in an answer. Fed. R. Civ. P. 12(b) provides that certain defenses may be raised by motion:

Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or motion.

Cases before the Board and the Commission do not start with a complaint and an answer, *per se*. In a Board case, the employee initiates the process by filing an "appeal." The agency is then required to file a response. The Board largely dictates the contents of both the appeal and the response. *See* 5 CFR 1201.24–1201.25. In a Commission case, because of the agency investigation stage, the proceedings before the EEOC are started with a request for a hearing.

Still, Fed. R. Civ. P. 12(b) is not entirely irrelevant to MSPB and EEOC proceedings. The rule embodies one very simple premise—there is no point in going forward with all the discovery and other preparation for litigation, if the case can be dispensed with because of some fundamental flaw.

The most common bases for dismissal of cases before the MSPB and the EEOC are set forth, in general terms, in Rule 12, though not all of the bases apply. Both the Board and the Commission can dismiss cases for lack of subject matter or failure to state a claim upon which relief can be granted. The Board and the Commission do not always speak in the language of Rule 12, but nonetheless, each follows the rule in its own way. In addition, both the Board and the Commission routinely dismiss cases on the basis that they are untimely filed.

Motions to dismiss in Board cases are discussed in Chapter Three, below. Motions to dismiss in Commission cases are discussed in Chapter Six, below. Judges can challenge jurisdiction or timeliness through the equivalent of a motion: an order to show cause why an appeal or complaint should not be dismissed.

D. MOTIONS FOR MORE DEFINITE STATEMENT

Though not much used in Board and Commission litigation, Fed. R. Civ. 12(e) provides a device for a party to obtain more information about a claim or defense through a motion for a more definite statement. Rule 12(e) provides:

(e) *Motion for More Definite Statement.* A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that a party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

Particularly with *pro se* appellants and complainants, agencies can use motions for a more definite statement to obtain greater specificity on the claims or affirmative defenses asserted. It is true that much of the information sought in a motion for a more definite statement could be obtained through discovery. However, the motion provides a vehicle to obtain more specific information about a claim or defense without engaging in discovery that may prove costly.

As an example, a Board appellant may file an appeal alleging both discrimination and retaliation for whistleblowing as affirmative defenses. If neither of these defenses has been raised before the agency prior to the Board appeal, the agency can deny the allegations in its response and prepare to elicit information about the defenses through interrogatories or deposition. As an alternative, prior to filing its response, the agency could file a motion for a more definite statement requesting that the appellant be ordered to set forth, with particularity, the basis of alleged discrimination and the nature, substance and timing of the alleged protected disclosures. The agency would then be in a better position to respond to the allegations, as well as to determine what discovery, if any, may be necessary to defend against them.

This is not to suggest that motions for more definite statements only can be used by agencies. They also can be used by appellants and complainants. It is important to note that motions for a more definite statement are not a substitute for discovery. They are properly used, as the rule notes, only when a responsive pleading is required and an intelligent response cannot be formulated based on the original pleading.

E. MOTIONS TO STRIKE

Motions to strike are more commonly used in Board and Commission proceedings than the motion for a more definite statement. Fed. R. Civ. P. 12(f) provides:

> (f) *Motion to Strike*. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:
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> (1) on its own; or
>
> (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

The motion to strike, although used in Board and Commission proceedings more than the motion for a more definite statement, is still rare. One effective use of motions to strike frequently overlooked by appellants and complainants is to eliminate negative, but gratuitous, evidence contained in agency responses and reports of investigation. For example, it is not uncommon for an agency, in responding to a Board appeal, to place evidence in the file relating to misconduct with which the employee was never charged. In Board proceedings, this can now result in reversal of the action under *Stone v. FDIC*, 179 F.3d 1368, 1377 (Fed. Cir. 1999). Likewise, it is not uncommon for an agency to place negative information about a complainant in an EEO report of investigation. For example, the agency may place negative information about the employee into the record that was not known by the selecting official in a disputed promotion. In either example, a motion to strike is an effective method of dealing with that evidence.

Motions to strike often can be successful even when denied. Once evidence is placed into the record, many administrative judges have a great reluctance to strike it from the record. The reason is simple: if the judge is in error, an appeal may result in a remand of the case. However, a motion to strike may prompt a ruling that the evidence is not relevant and will not be considered by the judge. That type of a ruling is a victory even if the motion is technically denied. The ruling also insulates the judge from remand because, if erroneous, the evidence can be considered on appeal.

As with the motion for a more definite statement, the motion to strike is not restricted to use by one party. Agencies also can make effective use of a motion to strike duplicative or clearly irrelevant material entered by an appellant or complainant in the MSPB or EEOC record.

F. MOTIONS FOR PROTECTIVE ORDERS

Discovery disputes abound in Board and Commission litigation. In many MSPB and EEOC cases, motions to compel discovery and motions for sanctions for failure to respond to discovery orders fly back and forth between the parties. Much of the discovery litigation is unnecessary and engendered by parties who are unaware, or refuse to acknowledge, the proper use and scope of discovery and the corresponding obligation to cooperate and respond.

Still, there are times when legitimate discovery disputes arise in Board and Commission litigation. Many such disputes involve the Privacy Act rights of federal employees and supervisors who are not parties to the appeal or complaint. Other disputes involve the chosen method of discovery and whether there is a more efficient and economical means of obtaining the information sought.

The Federal Rules provide a device for resolving legitimate discovery disputes without one party unilaterally deciding to stonewall the discovery requests. Fed. R. Civ. P. 26(c) provides:

> (c) *Protective Orders.*
>
> (1) *In General*. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery*. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses*. Rule 37(a)(5) applies to the award of expenses.

Under 5 CFR 1201.72, an administrative judge may limit discovery:

(d) *Limitations*. The judge may limit the frequency or extent of use of the discovery methods permitted by these regulations. Such limitations may be imposed if the judge finds that:

(1) The discovery sought is cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(2) The party seeking discovery has had sufficient opportunity by discovery in the action to obtain the information sought; or

(3) The burden or expense of the proposed discovery outweighs its likely benefit.

Motions for protective orders are particularly useful where there is no dispute that the information sought through discovery is relevant but the party in possession of the information has concerns about how the information will be used. For example, an agency may agree that the applications of the candidates for a promotion are relevant to a discrimination claim but it has concerns about releasing that personal information to the complainant. Similarly, a complainant in an EEO case may acknowledge that evidence of past psychiatric treatment is relevant to his or her claim for compensatory damages but has concerns over how that information could be used by the agency. In either scenario, a motion for a protective order can resolve the dispute. A motion for a protective order can also be used to attempt to bar all discovery when a party engages in overbearing or harassing discovery tactics.

A motion for a protective order need not be adversarial. The parties can come to their own agreement over the terms of providing and protecting the sought-after information. A joint motion for a protective order can be filed.

G. MOTIONS TO COMPEL DISCOVERY

Fed. R. Civ. P. 37 provides for motions to compel discovery, as well as motions for sanctions against a party who fails to comply with a discovery order. The rule is not reproduced here for two reasons. First, the rule is lengthy and contains many provisions that are not readily applicable to Board and Commission proceedings. Second, the Board and Commission both have promulgated regulations concerning motions to compel discovery and motions for sanctions. *See* 5 CFR 1201.73(c), 1201.74, 1201.43; 29 CFR 1614.109(d). Rule 37 can still be looked to for guidance in Board or Commission discovery disputes.

Rule 37 makes clear that motions to compel discovery apply not only to situations where a party fails to respond at all, but also to situations where a party gives evasive or incomplete responses. *See* Fed. R. Civ. P. 37(a)(4).

Board motions to compel discovery and for sanctions are discussed in Chapter Three and Commission motions are discussed in Chapter Six.

H. MOTIONS FOR SUMMARY JUDGMENT

Motions for summary judgment are provided for in Fed. R. Civ. P. 56, which states:

(a) *Motion for Summary Judgment or Partial Summary Judgment*. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment 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. The court should state on the record the reasons for granting or denying the motion.

(b) *Time to File a Motion*. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) *Supporting Factual Positions*. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence*. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited*. The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations*. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) *When Facts Are Unavailable to the Nonmovant*. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) *Failing to Properly Support or Address a Fact*. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) *Judgment Independent of the Motion*. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) *Failing to Grant All the Requested Relief.* If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) *Affidavit or Declaration Submitted in Bad Faith*. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Motions to dismiss and motions for summary judgment often are confused by the Board and, to a lesser degree, by the Commission. Board procedures do not provide for summary judgment. The Board also has held that summary judgment is not available to either agencies or appellants. *See Copeland v. Community Serv. Admin.*, 6 MSPR 280 (1981) (agency not entitled to summary judgment because appellant has statutory right to hearing); *Cavanaugh v. USPS*, 34 MSPR 670, 673–74 n.2 (1987) (summary judgment not available to appellant). Still, in deciding motions to dismiss, the Board routinely considers evidence beyond that contained in the appeal. Under Fed. R. Civ. P. 12(b), whenever evidence outside of the pleadings is submitted with a motion to dismiss, the motion is converted to one for summary judgment under Fed. R. Civ. P. 56. Technically speaking, the Board does, in fact, use summary judgment to dispose of cases. It refuses to acknowledge the fact. As a result, Rule 56 is of limited application in Board proceedings.

The Commission's rules provide for summary judgment at 29 CFR 1614.109(g):

(g) *Summary judgment.*

(1) If a party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility, the party may, at least 15 days prior to the date of the hearing or at such earlier time as required by the administrative judge, file a statement with the administrative judge prior to the hearing setting forth the fact or facts and referring to the parts of the record relied on to support the statement. The statement must demonstrate that there is no genuine issue as to any such material fact. The party shall serve the statement on the opposing party.

(2) The opposing party may file an opposition within 15 days of receipt of the statement in paragraph (d)(1) of this section. The opposition may refer to the record in the case to rebut the statement that a fact is not in dispute or may file an affidavit stating that the party cannot, for reasons stated, present facts to oppose the request. After considering the submissions, the administrative judge may order that discovery be permitted on the fact or facts involved, limit the hearing to the issues remaining in dispute, issue a decision without a hearing or make such other ruling as is appropriate.

(3) If the administrative judge determines upon his or her own initiative that some or all facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue an order limiting the scope of the hearing or issue a decision without holding a hearing.

There are two separate prongs to a motion for summary judgment. The party moving for summary judgment must show: (1) there are no genuine disputes of material fact; and (2) the party is entitled to judgment as a matter of law. The Commission does not strictly adhere to the first prong of Rule 56. In the federal court system, the parties are entitled to discovery. In the EEO administrative process, discovery is not permitted until the complaint reaches the hearing stage. The agency has an immense amount of control over the contents of any report of investigation, as well as other evidence not included in the report. Because of the advantage that agencies have in the process, the Commission has held that it will look to Rule 56 for guidance but will not strictly apply to complainants the first prong which requires a party alleging a genuine dispute of material fact to support that allegation with specific evidence. The Commission has acknowledged that complainants must be given greater latitude in alleged factual disputes under section 1614.109(e) because of the lack of compulsory discovery in the investigation process. *See Roland v. Sec'y of VA*, 01882726 (1988).

I. OTHER FEDERAL RULES

There are other Federal Rules of Civil Procedure that may come into play in Board and Commission cases. For example, Fed. R. Civ. P. 30(d) provides for motions to terminate or limit the examination of a witness during a deposition and Fed. R. Civ. P. 35 provides for motions to conduct physical or mental examinations of persons, though it should be noted