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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF GUAM**

ANTHONY B. SAN NICOLAS,

Plaintiff,

vs.

**UNITED STATES POSTAL SERVICE,
and PATRICK DONAHOE, Postmaster
General,**

Defendants.

Civil Case No. 10-00034

**ORDER AND OPINION
RE: MOTION TO DISMISS**

Before the court is a Motion to Dismiss for Failure to Timely File Complaint (“the Motion”) filed by Defendants United States Postal Service and Patrick R. Donahoe, Postmaster General (“Defendants”). *See* Dkt. No. 9. Without reaching the merits of the Motion, the court hereby **DISMISSES** the case for lack of subject matter jurisdiction on grounds not raised by the parties,¹ and issues the following order and opinion.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On May 6, 2008, Anthony B. San Nicolas (“Plaintiff”), a former United States Postal Service (“USPS”) employee, filed a formal Equal Employment Opportunity (“EEO”) complaint against Defendants. *See* Dkt. No. 14-6 at 2. In the EEO complaint, Plaintiff alleged that he was subjected to discrimination and forced to retire. *Id.* On July 14, 2009, the agency issued a “Final Agency Decision-Mixed Case” on Plaintiff’s EEO complaint and found no discrimination. *Id.* The Final

¹ Pursuant to Federal Rule of Civil Procedure 12(h)(3), the court must dismiss an action if it “determines at any time that it lacks subject-matter jurisdiction.” FED. R. CIV. P. 12(h)(3); *see also Fleck & Assocs. v. Phoenix*, 471 F.3d 1100, 1107 n. 4 (9th Cir. 2006) (finding that the district court was free to go beyond the scope of the motion to reach an issue of subject matter jurisdiction *sua sponte*).

1 Agency Decision advised Plaintiff of his right to appeal the claim to the Merit Systems Protection
2 Board (“MSPB” or “the Board”). *Id.* at 2–3.

3 On September 1, 2009, Plaintiff filed an appeal with the MSPB. *Id.* at 3. Shortly thereafter,
4 the MSPB notified Plaintiff that the MSPB might not have jurisdiction to hear his claim. *Id.* A
5 jurisdiction hearing was scheduled for March 25, 2010, but on that same date Plaintiff withdrew his
6 request for a hearing. *Id.* On April 9, 2010, MSPB Administrative Judge Grace Carter (“Judge
7 Carter”) issued an Initial Decision and found that the appeal had to be dismissed for lack of
8 jurisdiction. *See id.* at 1,17. Judge Carter did not entertain the merits of Plaintiff’s Title VII
9 discrimination claims because of the lack of jurisdiction. *See id.* at 7, 17. The Initial Decision
10 informed Plaintiff of his right to petition the MSPB for a review of the decision. *Id.* at 18.

11 Plaintiff filed a timely petition with the MSPB requesting reconsideration of the Initial
12 Decision. *See* Dkt. No. 10-1 at 1. On November 24, 2010, the MSPB issued a Final Order denying
13 Plaintiff’s petition and stating that Judge Carter’s Initial Decision was final. *See id.* at 4. Again, the
14 MSPB declined to review the merits of Plaintiff’s discrimination claims because it did not have an
15 independent basis for jurisdiction. *See id.* at 3 n.1. The Final Order notified Plaintiff of his right
16 to petition the United States Court of Appeals for the Federal Circuit to review the MSPB’s Final
17 Order. *See id.* at 4–5. On December 29, 2010, Plaintiff filed a complaint in this court. *See* Dkt. No.
18 1. In the complaint, Plaintiff asserts claims of Title VII discrimination, wrongful termination, and
19 constructive discharge. *See id.*

20 **II. DISCUSSION**

21 Plaintiff alleges that this court has jurisdiction over his “mixed case” because the complaint
22 was timely filed within thirty days after he received a final decision from the MSPB. *See id.* ¶ 3.
23 However, Plaintiff’s mere assertion that the court has jurisdiction over his “mixed case” is not
24 enough to confer jurisdiction on this court.

25 The MSPB has limited appellate jurisdiction and may only entertain appeals as “authorized
26 by law, rule, or regulation,” which for the most part, provides the Board with jurisdiction over
27 adverse employment action appeals. *See Sloan v. West*, 140 F.3d 1255, 1259 (9th Cir. 1998) (citing
28 5 U.S.C. § 7701(a)). Pursuant to 5 U.S.C. § 7702, the MSPB has jurisdiction to hear enumerated
discrimination claims that form the basis of an adverse employment action. *See* § 7702(a)(1); *see*
also Sloan, 140 F.3d at 1259 (stating that the MSPB has “pendent jurisdiction over discrimination
claims brought in connection with an appealable ‘adverse action.’”).

Jurisdiction to review a final decision of the MSPB generally lies with the Court of Appeals
for the Federal Circuit. 5 U.S.C. § 7703(b)(1). However, petitions to review mixed cases of
discrimination, as set forth in 5 U.S.C. § 7702, shall be filed in the appropriate district court. *See*
§ 7703(b)(2). Merely stating that a case is a “mixed case,” though, is insufficient to establish
jurisdiction in a district court.

In *Sloan*, the plaintiff filed an EEO complaint, and the Army EEO rendered a final decision

1 with a finding of no discrimination. *Id.* at 1257–58. The plaintiff then filed an appeal of the EEO
2 decision with the MSPB. *Id.* at 1258. The MSPB administrative law judge issued an initial decision
3 finding that there was no adverse action over which the MSPB could exercise jurisdiction. *Id.* The
4 plaintiff petitioned the MSPB to review the initial decision, and the MSPB denied the request. *Id.*
5 Although the MSPB decision advised plaintiff that he had the right to request review from the Court
6 of Appeals for the Federal Circuit, the plaintiff filed a complaint in the District Court of Hawaii
7 alleging that the court had jurisdiction over it because it was a “mixed case.” *Id.*

8 The *Sloan* court distinguished between a “mixed case complaint” and a “mixed case appeal.”
9 *See id.* A “mixed case complaint” is “a complaint which alleges the employee suffered an adverse
10 action that was affected, in whole or in part, by unlawful discrimination.” *Id.* at 1259. If the MSPB
11 determines that it has jurisdiction over the “mixed case complaint,” then it becomes a “mixed case
12 appeal.” *Id.* The court then explained that “as a general rule, ***an MSPB determination that it lacks***
13 ***jurisdiction to hear a claim is appealable only to the United States Court of Appeals for the***
14 ***Federal Circuit,***” whereas, “a ‘mixed case appeal,’ in which the MSPB decides the merits of both
15 the non-discrimination claim and the discrimination claim, is appeal[able] to the appropriate district
16 court.” *Id.* at 1261 (emphasis added) (footnote omitted). The court held that because the MSPB
17 dismissed the plaintiff’s claim for lack of jurisdiction and did not reach the merits of the
18 discrimination claim it was not a “mixed case appeal,” and thus the district court lacked jurisdiction.
19 *See id.* at 1261–62.

20 The facts in this case are strikingly similar to those in *Sloan*. Here, like *Sloan*, the MSPB
21 determined that it did not have jurisdiction over Plaintiff’s case and never decided the merits of his
22 discrimination claim. Thus, as was the case in *Sloan*, Plaintiff’s case is not a “mixed case appeal,”
23 over which the court has § 7703 jurisdiction. *See id.* at 1262; *see also Synan v. Merit Sys. Protection*
24 *Bd.*, 765 F.2d 1099, 1101(Fed. Cir. 1985) (“When an appeal has been taken to the MSPB, until the
25 discrimination issue and the appealable action have been decided on the merits by the MSPB, an
26 appellant is granted no rights to a trial de novo in a civil action under § 7702 or § 7703.”).

27 **III. CONCLUSION**

28 As discussed in the foregoing, the court lacks subject matter jurisdiction. Accordingly, the
court hereby **DISMISSES** the case without prejudice.

SO ORDERED.



/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Jul 13, 2011