

NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

JOHN DOE,
Petitioner,

v.

DEPARTMENT OF JUSTICE,
Respondent.

2012-3204

Petition for review of the Merit Systems Protection Board in No. CH0752090404-I-1.

ON MOTION

Before LOURIE, BRYSON, and MOORE, *Circuit Judges.*

LOURIE, *Circuit Judge.*

O R D E R

In light of John Doe's and the Department of Justice's responses to this court's show cause order, we consider whether this case should be dismissed or transferred to a district court pursuant to 28 U.S.C. § 1631.

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John Doe previously moved for a stay of the remand proceedings ordered by the Merit Systems Protection Board or, in the alternative, for a writ of mandamus to direct the Board to reinstate him and to award back pay and attorney fees. The Department of Justice opposed and moved to dismiss Doe's petition for review for lack of jurisdiction. Doe replied and opposed dismissal. The Department of Justice replied.

In response to those motions, this court ordered the parties to respond why this case should not be dismissed or transferred to a district court, in light of the Supreme Court's recent decision of *Kloeckner v. Solis*, ___ U.S. ___, 133 S. Ct. 596 (2012). In *Kloeckner*, the Supreme Court held that a federal employee who claims that an agency action appealable to the Merit Systems Protection Board violates an antidiscrimination statute listed in 5 U.S.C. § 7702(a)(1) should seek judicial review in district court, not in the Federal Circuit. *Id.* This case involves an agency action removal that the employee "may appeal to the Merit Systems Protection Board," and in which the applicant "alleges that a basis for the action was discrimination[.]" 5 U.S.C. § 7702(a)(1). Judicial review is therefore assigned to the district court. *See Conforto v. Merit Sys. Prot. Bd.*, ___ F.3d ___, No. 2012-3119 (Fed. Cir. Apr. 18, 2013) (Federal Circuit has jurisdiction if underlying action would not be appealable to the Merit Systems Protection Board).

The Department of Justice argues that dismissal is required because judicial review is only appropriate for a final board order, and it argues that the order from which Doe appeals is not final. Doe argues that transfer is appropriate, in light of *Kloeckner*.

Because *Kloeckner* is clear that judicial review of a Board decision in a mixed case, such as this, that includes a discrimination claim, is assigned to the district court, rather than this court, we agree with Doe that transfer is

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the appropriate remedy. The Department of Justice may raise its arguments regarding the finality of the Board decision in the district court.

Upon consideration thereof,

IT IS ORDERED THAT:

- (1) This appeal is transferred to the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1631.
- (2) The motions to stay the remand proceedings and for writ of mandamus are moot.
- (3) All other pending motions are moot.

FOR THE COURT

/s/ Jan Horbaly
Jan Horbaly
Clerk

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