

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

THOMAS F. DAY, Appellant,	)	
	)	
v.	)	MSPB Docket Number
	)	DC-1221-12-0528-W-1
	)	
DEPARTMENT OF HOMELAND SECURITY, Agency	)	
	)	

**BRIEF ON BEHALF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS  
*AMICUS CURIAE***

**STATEMENT OF INTEREST**

The National Employment Lawyers Association (“NELA”) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 circuit, state, and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. To ensure that the rights of working people are protected, NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court, other federal appellate courts as well as before the Merit Systems Protection Board (MSPB) regarding the proper interpretation of federal civil rights and worker protection laws, in addition to undertaking other advocacy actions on behalf of workers throughout the United States. Among the employees NELA members represent are whistleblowers in administrative, state, and federal proceedings, including in matters before the MSPB.

## **STATEMENT OF THE ISSUE**

Whether the provisions of Section 101 of the Whistleblower Protection Enhancement Act of 2012 (“WPEA”), 112 Public Law 199, which provides in relevant part that a disclosure made to an alleged wrongdoer or during an employee’s normal course of duties is not excluded from protection against reprisal under 5 U.S.C. 2302(b)(8), may be applied retroactively to pending cases involving conduct occurring prior to its effective date.

## **SUMMARY**

Congress made clear that it intended the Whistleblower Protection and Enhancement Act of 2012 (“WPEA”) to apply to pending cases and, as the WPEA does not make any substantive changes to the standards for protected disclosures, but rather clarifies what the law has always been and overturns decisions that did not correctly interpret it, retroactive application is appropriate.<sup>1</sup> When determining whether a disclosure made prior to the enactment of the WPEA is protected by 5 U.S.C. § 2302(b)(8), the Board must therefore apply the standards set forth in Section 101 of the WPEA, and must not apply the erroneous standard established by the Federal Circuit in *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352 (Fed. Cir. 2001), or any of the other decisions that the WPEA overturned.

## **BACKGROUND**

Congress’ attempt to protect public employees from retaliation for disclosing wrongdoing dates back to the Civil Service Reform Act of 1978 (“CSRA”), which stated in relevant part that a public employer could not:

---

<sup>1</sup> NELA concurs with the *amicus* brief filed by the Office of Special Counsel (“OSC”), both in heeding its input and on the goal of avoiding future judicial narrowing of whistleblower protections. NELA urges the Board to carefully consider the OSC’s positions, paying particular attention to the fact that Congress granted mandatory *amicus* authority to the OSC so that its “unfiltered views” would be available to the Board to “help shape the law.” S. REP. NO. 112-155 at 14 (2012) (“The Committee believes that granting this authority to the OSC is necessary to ensure the OSC’s effectiveness and to protect whistleblowers from judicial interpretations that unduly narrow the WPEA’s protections, as has occurred in the past.”).

take or fail to take a personnel action with respect to an employee or applicant for employment as a reprisal for –

- (A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences –
  - (i) a violation of any law, rule, or regulation, or
  - (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

5 U.S.C. § 2302(b)(8).<sup>2</sup> Through the inclusion of this protection for whistleblowers, Congress intended the CSRA to prohibit “reprisals against employees who divulge information to the press or the public (generally known as “whistleblowers”) regarding violations of law, agency mismanagement, or dangers to the public’s health and safety.” H.R. REP. NO. 95-1403 at 4 (1978). This protection extended to “*all* employees” and was intended to prevent “discrimination, political coercion or unfair, arbitrary, or illegal actions regarding appointments and advancements within the civil service.” *Id.* (emphasis added).

However, despite this strong statement of Congressional intent, within just a few years the MSPB and Federal Circuit had dramatically narrowed the application of the CSRA’s whistleblower protection. Decisions by the MSPB and the Federal Circuit created numerous exceptions that denied protection for large swaths of disclosures made by federal employees. For example, the MSPB almost immediately undermined the intent of the CSRA’s whistleblower protections by ignoring the statutory prohibition on retaliation for a protected disclosure and instead applying the Supreme Court’s decision in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977) to find that an agency could take a personnel action that was motivated by retaliation for making a protected disclosure, so long as the action could also be upheld on other, unrelated grounds. *Gerlach v. FTC*, 9 M.S.P.R. 268, 276 (1981). In another case, *Fiorello v. Department of Justice*, 795 F.2d 1544, 1550 (Fed. Cir. 1986), the Federal

---

<sup>2</sup> “Mismanagement” was later modified to “gross mismanagement” in the 1989 WPA amendments. See Pub.L. 101-12 at § 11 (1989).

Circuit held that an employee's disclosures were not protected because the employee's "primary motivation" was personal and not for the public good.

In response to these and other cases, Congress passed the Whistleblower Protection Act of 1989 ("WPA"). In passing that law, Congress reaffirmed its intent to protect *all* disclosures that an employee reasonably believes evidence a violation of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety. In articulating this intent, Congress specifically declared that it:

intends that disclosures be encouraged. The OSC, the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue . . .

S. REP. NO. 100-413 at 13 (1989). Congress emphasized its intent to protect all such disclosures by rephrasing the statutory definition of a protected disclosure in 5 U.S.C. § 2302(b)(8)(A) from "a disclosure" to "any disclosure." *See id.* Congress' purpose in making this clarification was "simply to stress that *any* disclosure is protected (if it meets the requisite reasonable belief test and is not required to be kept confidential)." *Id.* (emphasis in original).

Congress again expressed its frustration with the MSPB and the Federal Circuit in its 1994 "update" to the WPA. As the House Report noted:

Perhaps the most troubling precedents involve the [MSPB's] inability to understand that 'any' means 'any.' The WPA protects 'any' disclosure evidencing a reasonable belief of specified misconduct, a cornerstone to which the MSPB remains blind. The only restrictions are for classified information or material the release of which is specifically prohibited by statute. Employees must disclose that type of information through confidential channels to maintain protection; otherwise there are no exceptions.

H.R. REP. NO. 103-769 at 19 (1994). The Senate concurred, noting that "the plain language of the Whistleblower Protection Act extends to retaliation for 'any disclosure', regardless of the setting of the

disclosure, the form of the disclosure, or the person to whom the disclosure is made. S. REP. NO. 103-358 at 10 (1994).

However, the next seventeen years saw still further erosion of the types of disclosures that could receive protection under the WPA, consistently focusing on the circumstances of the disclosure as opposed to the statutory test of whether the employee reasonably believed that the disclosure evidenced wrongdoing. For example, shortly after the 1994 amendments, the Federal Circuit held that disclosures that would otherwise be protected by the WPA, are not protected if they were made to the alleged wrongdoer. *Horton v. Department of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995) (holding that such disclosures were not “viewable as whistleblowing.”) In another case, in deciding that the disclosure was not protected, the Federal Circuit took into account that the employee had violated agency procedures by making his disclosure after going off duty. *Watson v. Department of Justice*, 64 F.3d 1524, 1530-31 (Fed. Cir. 1995). The Court also held that disclosures are not protected if the disclosed information is already known by the agency. *Meuwissen v. Department of Interior*, 234 F.3d 9, 12 (Fed. Cir. 2000).

In another decision that has nothing to do with whether the employee reasonably believed that he was disclosing wrongdoing, the Federal Circuit held that disclosures that are part of an employee’s ordinary job duties are not protected. *Willis v. Department of Agriculture*, 141 F.3d 1139, 1143 (Fed. Cir. 1998). The precedent relied upon by the Administrative Judge in the instant case, *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001), itself relied upon the precedent in *Horton* and *Willis* to once again conclude that disclosures made to supervisors or as part of an employee’s normal duties are not protected. *Huffmann*, 263 F.3d at 1349-53.

In response to these cases, Congress passed the WPEA, “[making] clear, once and for all, that Congress intends to protect ‘any disclosure’ of certain types of wrongdoing in order to encourage such disclosures.” S. REP. NO. 112-155 at 5 (2012). As discussed below, the WPEA explicitly overrules the

various exceptions created by prior MSPB and Federal Circuit decisions, and makes clear Congress' intent that "the protection for disclosing wrongdoing [be] extremely broad" and to encourage whistleblowers to come forward by guaranteeing that this protection "will not be narrowed retroactively by future MSPB or court opinions." *Id.*

The legislative history of the CSRA and WPA make clear that the amendments in Section 101 of the WPEA are simply clarifications that reiterate what Congress has always intended the law to be: to protect from retaliation any employee who makes any disclosure of a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

### **ARGUMENT**

As a rule, a court or administrative agency must "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Bd. of Richmond*, 416 U. S. 696, 711 (1974). The law presently in effect is the WPEA, and no injustice will result from applying the WPEA retroactively. Indeed, given Congress' unambiguous declaration that the MSPB and Federal Circuit have consistently erred by denying protection to certain types of disclosures, such as those made by an employee in the course of performing his or her job duties, it would be an injustice to *not* apply the WPEA to pending cases.

To determine whether to apply a law retroactively, a court must first examine whether, as in this case, Congress unambiguously declared this to be its intent. *Scott v. OPM*, 69 M.S.P.R. 211, 238 (1995) (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994)). If so, then no further analysis is needed. *Id.* However, even if Congressional intent is ambiguous, a law may still have retroactive application if, as in this case, it merely clarifies an existing law and does not "impair rights a

party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* (quoting *Landgraf*, 511 U.S. at 280).<sup>3</sup>

#### **A. Congress Intended to Make the WPEA Retroactive**

To make it clear that it intended to make a statute, or provision thereof, retroactive, Congress must assure the reviewing court that it has already "considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Landgraf*, 511 U.S. at 272-73.<sup>4</sup> Congress has clearly done this.

In S. REP. NO. 112-155, the WPEA's authors explicitly state their intention to apply the law to all "pending" actions:

The Committee expects and intends that the Act's provisions shall be applied in OSC, MSPB, and judicial proceedings initiated by or on behalf of a whistleblower and pending on or after that effective date. Such application is expected and appropriate because the legislation generally corrects erroneous decisions by the MSPB and the courts; removes and compensates for burdens that were wrongfully imposed on individual whistleblowers exercising their rights in the public interest; and improves the rules of administrative and judicial procedure and jurisdiction applicable to the vindication of whistleblowers' rights.

S. REP. NO. 112-155 at 52 (2012). While the House of Representatives did not produce a report for S.743, the fact that it had the opportunity to amend the WPEA (and indeed, struck the "Intelligence Committee Whistleblower Protections" provision from the Senate's bill), and then passed it by unanimous consent indicates it concurred with the Senate's intent that the WPEA should apply to pending cases. As such, because Congress clearly indicated its intent that the WPEA should apply retroactively, the Board must apply it to pending cases.

---

<sup>3</sup> As noted in the *Landgraf* opinion, this is an ancient test that dates back to the judiciary's earliest days. 511 U.S. at 269 (citing *Soc. for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (Story, J.)).

<sup>4</sup> The *Landgraf* court instructs that this analysis is done provision by provision when analyzing a given statute, rather than merely assuming that the entire statute is to be construed as a single whole for purposes of retroactivity analysis. See *Landgraf*, 511 U.S. at 260-61, 261 fn.12, 280. This Brief accordingly limits its analysis to Section 101 of the WPEA, rather than the WPEA *in toto*.

**B. Section 101 of the WPEA Merely Clarifies the Existing Rules Governing Protected Disclosures**

Even if, for the sake of argument, Congress did not make clear its intent to make the WPEA apply retroactively, the Board must still apply the WPEA to pending cases because it merely clarifies what the law has always been. Where a new statute merely clarifies an existing law, rather than changing it in a substantive way, then its retroactive application is presumed. *See Cookeville Reg'l Med. Ctr. v. Leavitt*, 531 F.3d 844, 849 (D.C. Cir. 2008) (finding “no problem of retroactivity” where new statute “did not retroactively alter settled law,” but “simply clarified an ambiguity in the existing legislation”); *Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 506-08 (3d Cir. 2008) (citing decisions “finding retroactivity to be a non-issue with respect to new laws that clarify existing law”); *Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004); *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689 (9th Cir. 2000) (holding that “[n]ormally, when an amendment is deemed clarifying rather than substantive, it is applied retroactively.”); *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) (holding that “concerns about retroactive application are not implicated when an amendment . . . is deemed to clarify relevant law rather than effect a substantive change in the law.”); *Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993) (“A rule simply clarifying an unsettled or confusing area of the law . . . does not change the law, but restates what the law according to the agency is and has always been: ‘It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.’” (quoting *Manhattan Gen. Equip. Co. v. Comm’r*, 297 U.S. 129, 135 (1936))), *overruled on other grounds by Johnson v. Apfel*, 189 F.3d 561, 563 (7th Cir. 1999). The Fifth Circuit recognized that a 1992 amendment to the whistleblower protection in the Energy Reorganization Act made its prior limitation “incorrect.” *Willy v. Administrative Review Bd.*, 423 F.3d 483, 489, n. 11 (5th Cir. 2005). Accordingly, where an amendment merely clarifies an existing law,



“the court applies the law as set forth in the amendment to the present proceeding because the amendment accurately restates the prior law.” *Piamba Cortes*, 177 F.3d at 1284.

While these decisions recognize that “there is no bright-line test” for determining whether an amendment clarifies existing law, *Levy*, 544 F.3d at 506, they consistently point to several factors for a court to consider: (1) whether the enacting body declared that it was clarifying a prior enactment; (2) whether a conflict or ambiguity existed prior to the amendment; and (3) whether the amendment is consistent with a reasonable interpretation of the prior enactment and its legislative history. *Middleton v. City of Chicago*, 578 F.3d 655, 663-65 (7th Cir. 2009). Thus, the fact that “an amendment alters, even ‘significantly alters,’ the original statutory language . . . does ‘not necessarily’ indicate that the amendment institutes a change in the law.” *Brown*, 374 F.3d at 259 (quoting *Piamba Cortes*, 177 F.3d at 1283). Rather, the test is whether Congress declared it to be a clarification, which reasonably resolved prior conflicts or ambiguities, and thus “make what was intended all along even more unmistakably clear.” *Id.* (citation omitted).

Retroactive application of a clarifying law makes intuitive sense. Unlike the situation in *Landgraf*, where an employee sought a retrial to take advantage of a statute that created new remedies and damages during the pendency of her appeal, a clarification does not “take[] away or impair[] vested rights acquired under existing laws, or create[] a new obligation, impose[] a new duty, or attach[] a new disability in respect to transactions or considerations already past . . . .” *Landgraf*, 511 U.S. at 269. Therefore, unlike the retroactive application of a substantive change, applying a clarification does not upset the “familiar considerations of fair notice, reasonable reliance, and settled expectations.” *Id.* at 270.

Indeed, the amendments to the disclosure rules in Section 101 of the WPEA do not substantively change the rights, obligations, or liabilities implicated by a public employee’s disclosure of information. As the legislative history makes clear, so long as an employee reasonably believes that

his or her disclosure concerns a violation of law, mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, the disclosure is, and has always been, protected.

1. *Congress unambiguously stated that it intended Section 101 of the WPEA to be a clarification of the CSRA*

In enacting the WPEA, Congress stated several times that its intent was to clarify the existing law. For example, Section 101 of the Act is entitled “Clarification of Disclosures Covered.” Moreover, the title page of the Senate Report accompanying the WPEA states that the purpose of the Act is “to *clarify* the disclosures of information protected from prohibited personnel practices . . . .” S. REP. NO. 112-155 at 1 (emphasis added); *accord id.* at 4 (section title “A. *Clarification of what constitutes a protected disclosure*”). The drafters then stated that “Section 101 of [the WPEA] amends the WPA to overturn decisions narrowing the scope of protected disclosures by *clarifying* that a whistleblower is not deprived of protection [under circumstances held ineligible by the MSPB and Fed. Circuit].” *Id.* at 5 (emphasis added). A clearer declaration of Congressional intent is difficult to imagine.

2. *Congress enacted the WPEA to remedy the conflict between its intent and the Federal Circuit and MSPB’s application*

As explained above, for more than thirty years, Congress has explicitly stated that the CSRA protects *any* disclosure of a violation of law, mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *See* H.R. REP. NO. 95-1403 at 4 (1978); S. REP. NO. 100-413 at 13 (1988); H.R. REP. NO. 103-769 at 19 (1994); S. REP. NO. 112-155 at 5. (2012). Nevertheless, the MSPB and the Federal Circuit have created exceptions that deny protection to otherwise covered disclosures. *See, e.g., Fiorello*, 795 F.2d at 1550; *Horton*, 66 F.3d at 282; *Watson*, 64 F.3d at 1530-31; *Meuwissen*, 234 F.3d at 12; *Huffman*, 263 F.3d at 1352. The fact that Congress enacted the WPEA to overturn these decisions and resolve the conflict over which disclosures are protected is evidenced throughout the legislative history, as well as in the text of the WPEA itself.

The Senate begins its discussion of its amendments to the disclosure requirements by stating that:

Unfortunately, in the years since Congress passed the WPA, the MSPB and the Federal Circuit narrowed the statute's protection of 'any disclosure' of certain types of wrongdoing, with the effect of denying coverage to many individuals Congress intended to protect . . .

These holdings are contrary to congressional intent for the WPA. The court wrongly focused on whether or not disclosures of wrongdoing were protected, instead of applying the very broad protection required by the plain language of the WPA. The merits of these cases, instead, should have turned on the factual question of whether personnel action at issue in the case occurred 'because of' the protected disclosure.

S. REP. NO. 112-155 at 4-5 (2012).

Thus, "Section 101 of [the WPEA] amends the WPA to overturn decisions narrowing the scope of protected disclosures . . ." *Id.* at 5. Accordingly, Section 101 of the WPEA adds a new paragraph, (f), to 5 U.S.C. § 2302, which explicitly codifies that each of the exceptions created by the Federal Circuit and MSPB "shall not be excluded" from protection:

- (f)(1) A disclosure shall not be excluded from subsection (b)(8) because—
  - (A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);
  - (B) the disclosure revealed information that had been previously disclosed;
  - (C) of the employee's or applicant's motive for making the disclosure;
  - (D) the disclosure was not made in writing;
  - (E) the disclosure was made while the employee was off duty; or
  - (F) of the amount of time which has passed since the occurrence of the events described in the disclosure.
- (2) If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure.

Pub. Law. 112-199, § 101. While Congress does not call out each case that it is overturning by name, paragraph (f) nevertheless exhaustively lists and reverses the various exclusions created by the Federal Circuit and MSPB since the enactment of the CSRA. Congress does, however, go out of its way to state

that it is reversing *Willis v. Dept. of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998), which is the authority relied upon by the court in *Huffman*. 263 F.3d at 1349-53.

As such, it is clear that Section 101 of the WPEA was enacted specifically to resolve the conflict between Congress' expansive intent and the MSPB and Federal Circuit's attempted limitation of the definition of 'protected activity.'

3. *The amendments to the disclosure requirements are consistent with a reasonable interpretation of the prior enactment and its legislative history*

To determine whether the amendments in Section 101 of the WPEA are consistent with a reasonable interpretation of the pre-WPEA statute, *i.e.*, that the amendment does not substantively change the law, we look to "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). The legislative history of the CSRA, WPA, and WPEA makes abundantly clear that the amendments in Section 101 are completely consistent with the original language of the CSRA and WPA.

As described above, the whistleblower protection in the original CSRA was intended to prohibit "reprisals against employees who divulge information to the press or the public (generally known as "whistleblowers") regarding violations of law, agency mismanagement, or dangers to the public's health and safety." *See* H.R. REP. NO. 95-1403 at 4 (1978). This purpose was reinforced with the passage of the WPA. *See* S. REP. NO. 100-413 at 13 (1989). The amendments in the WPEA were also specifically intended to realize this purpose. S. REP. NO. 112-155 at 5 (2012) (explaining that Congress was adding 5 U.S.C. § 2302(f) to overrule the various exceptions created by prior MSPB and Federal Circuit decisions, and making it clear that "the protection for disclosing wrongdoing is extremely broad" and guaranteeing that this protection "will not be narrowed retroactively by future MSPB or court opinions.").

The amendments in Section 101 of the WPEA do not expand or reduce the scope of protected disclosures, rather they serve to highlight Congress' repeated admonishments to the MSPB and Federal Circuit that “*any* disclosure is protected.” See S. REP. NO. 100-413 at 13 (1989) (emphasis in original). When Congress crafts statutory language, the inclusion or exclusion of certain language is presumptively purposeful and intended. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994). Because Congress enumerated an explicit list of factors as its definition of protected disclosures, courts should not have inferred the existence of exceptions to that definition. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 376 (1958) (holding that Congress' decision to define a general term with a list meant the list was exclusive). Having stated that the CSRA protects *any* disclosure an employee reasonably believes meets the factors in 5 U.S.C. § 2302(b)(8), Congress should not have needed to statutorily specify that there were no exceptions. The fact that Congress has now added 5 U.S.C. § 2302(f) to overrule the exceptions improperly created by the Federal Circuit and MSPB in no way changes which disclosures are protected.<sup>5</sup>

Indeed, it goes without saying that, even without the broad construction require by *Tcherepnin*, the phrases “a disclosure” (from the original CSRA) and “any disclosure” (from the 1989 WPA) may be reasonably interpreted to include disclosures to supervisors, disclosures of information already known to the government, disclosures for personal gain, oral disclosures, disclosures while off duty, and any other imaginable disclosure that meets the belief and content requirements of 5 U.S.C. § 2302(b)(8). The amendments in Section 101 of the WPEA are thus entirely consistent with the text and legislative history of the law prior to its enactment.

---

<sup>5</sup> Congress further expressly rejected the future use of an artificially-narrowed definition for protected disclosures to provide cover for disposing of whistleblower reprisal claims. “[T]he Committee has concluded that the strong national interest in protecting good faith whistleblowing requires broad protection of whistleblower disclosures, recognizing that the responsible agencies and courts can take other steps to deter and weed out frivolous whistleblower claims.” S. REP. NO. 112-155 at 6 (2012).

### C. The MSPB has Given Retroactive Effect to Previous Amendments of the WPA

The instant case is not the first time the Board has considered the retroactive effect of an amendment to the WPA. In *Scott v. Dept. of Justice and OPM*, 69 M.S.P.R. 211, 238-41 (1995), the Board applied *Landgraf* to the 1994 WPA amendments, which established “a ‘per se’ rule that an employee may demonstrate that the disclosure was a contributing factor through circumstantial evidence . . . .” *Id.* at 238. (citing Pub. L. No. 103-424, § 4(b) (codified at 5 U.S.C. § 2302(e)(1) (1994)). In *Scott*, like in the instant case, the conduct at issue predated the pertinent amendment. *Id.*<sup>6</sup>

To determine whether it could apply the 1994 amendment and permit the employee to rely on circumstantial evidence, the Board considered whether the amendment would “impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” *Id.* (quoting *Landgraf*, 511 U.S. at 280). The Board concluded that the amendment did not, since it was

not directed at regulating the primary conduct of the parties; rather, it is a procedural change that affects our analysis of the appellant’s burden of proving that a disclosure was a contributing factor in a personnel action. Both before and after the amendment, the primary conduct of the parties has been regulated by 5 U.S.C. § 2302(b)(8), which prohibits the taking of personnel actions based on whistleblowing. Like intervening statutes that confer or oust jurisdiction, we find that section 4(b) of the Act speaks more “to the power of the court, rather than to the rights or obligations of the parties.”

*Id.* at 239 (quoting *Landgraf*, 511 U.S. at 274). The Board therefore found that “applying the amendment retroactively does not raise concerns about fair notice, reasonable reliance, and settled expectations,” and therefore should be applied retroactively to conduct that occurred before its enactment. *Id.* at 240. The Board also distinguished this situation from its decision in *Caddell v. Department of Justice*, 66 M.S.P.R. 347 (1995), as the amendment at issue in *Caddell* created a new

---

<sup>6</sup> Like the Administrative Judge’s decision below, the Board in *Scott* found that Congress had not “expressly prescribed the statute’s temporal reach” and therefore proceeded directly to the question of whether the amendment had “retroactive effect.” Compare *Scott*, 69 M.S.P.R. at 239 to Order and Certification for Interlocutory Appeal in the instant matter at 9.

class of prohibited personnel actions that “attache[d] new legal consequences to events completed before its enactment.” *Caddell*, 66 M.S.P.R. at 354 (citing *Landgraf*, 511 U.S. at 269-270).

The same analysis applies to the case at bar. Like the 1994 amendments at issue in *Scott*, Section 101 of the WPEA is not directed at the primary conduct of the parties, *i.e.* retaliation against whistleblowers for making protected disclosures. That conduct is regulated by 5 U.S.C. § 2302(b)(8), which the WPEA leaves unaltered. Pub. L. 112-199, § 101. Nor is the primary conduct at issue affected by the new proscriptions codified at 5 U.S.C. § 2302(f) since, as described above, they do not attach any new legal consequences to the conduct—the prohibition on retaliation for making a protected disclosure remains the same. Rather these provisions correct errors in the analysis of the Board and Federal Circuit, making clear what the law has always been. As a result, the instant case—like *Scott*—is distinct from *Caddell*, and the Administrative Judge erred below in applying *Caddell* rather than the controlling precedent of *Scott*.

Both before and after the enactment of the WPEA, the same disclosures were protected from retaliation and the employee had the same right to file an Individual Right of Action if retaliation did occur and the same burden of proof applied to show that the disclosure was protected. Similarly, the employer had the same responsibility not to retaliate for protected disclosures and could present the same defenses against claims of retaliation, *e.g.* proving by a preponderance of the evidence that it would have taken the same action absent the protected disclosure. As such, the amendments in Section 101 of the WPEA do not “impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed” and should be applied retroactively. *Scott*, 69 M.S.P.R. at 240.

**D. Applying the WPEA to Pending Cases will Further the Remedial Purpose of the Law**

The Whistleblower Protection Act makes clear that whistleblowing provides an important public benefit that must be encouraged when necessary by taking away fear of retaliation. *Horton v. Dep't of the Navy*, 66 F.3d 279, 282 (Fed.Cir.1995) (“The purpose of the Whistleblower Protection Act is to encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it, either directly by management authority, or indirectly as in disclosure to the press.”). “In a high-performing workplace, federal employees must be able to pursue the missions of their organizations free from discrimination and should not fear or experience retaliation or reprisal for reporting—blowing the whistle on—waste, fraud, and abuse.” GAO Report, “The Federal Workforce: Observations on Protections From Discrimination and Reprisal for Whistleblowing”, GAO Report No. GAO-01-715T (May 9, 2001), *available at* <http://www.gao.gov/assets/110/108818.pdf>.

Disclosures of fraud and waste increase transparency and prompt official investigations. Empirical analyses of whistleblower cases note the importance of employee disclosures in prosecuting fraud. A study conducted at the Booth School at the University of Chicago noted that 19.2% of corporate fraud is detected by the employees, compared to 14.1% detected by auditors. Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, *The Journal of Finance*, Vol. 65, Issue 6 (December 20, 2010), Table 2 at p. 54.<sup>7</sup> The Association of Certified Fraud Examiners (“ACFE”) has conducted biennial reports on occupational fraud since 2002. ACFE’s *2010 Report to the Nations* finds that employee tips detected 40.2% of reported frauds, compared to 1.8% detected by law enforcement.<sup>8</sup> By forcing potential whistleblowers to choose between their careers and the truth, denying protection to whistleblowers risks losing the 40% of fraud cases disclosed by employees.

---

<sup>7</sup> *Available at* <http://www.nber.org/papers/w12882.pdf>

<sup>8</sup> *Available at* <http://www.acfe.com/rtn/2010-highlights.asp>.



The public benefit of providing a remedy to whistleblowers suffering retaliation was recognized by Congress even in the earliest legislative history for federal whistleblower protections:

Often, the whistle blower's reward for dedication to the highest moral principles is harassment and abuse. Whistle blowers frequently encounter severe damage to their careers and substantial economic loss.

Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.

[...] For the first time, and by statute, the Federal Government is given the mandate--through [...] the Merit Systems Protection Board--to protect whistleblowers from improper reprisals.

S. REP. NO. 95-969 at 8 (1978). That same remedial purpose, squarely grounded in strong public policy considerations, continues to the present. As the Board itself has taught, “[i]t is well established that the Whistleblower Protection Act of 1989, which authorized the filing of IRA appeals, is remedial legislation. Remedial statutes are to be ‘interpreted liberally, to embrace all cases fairly within their scope, so as to effectuate the purpose of the statute[s].’” See, e.g., *Glover v. Dept. of the Army*, 94 M.S.P.R. 534 (2003) at ¶ 8; accord *Pastor v. Dept. of Veterans Affairs*, 87 M.S.P.R. 609 (2001) at ¶ 13. “[T]he remedial intent of the law favors inclusion, not exclusion.” *Morrison v. Dept. of the Army*, 77 M.S.P.R. 655 (1998) at \*8. Accordingly, the MSPB should give the WPEA its broadest reading as a remedial statute, and apply Congress’ clarifications to the preexisting WPA definition of protected disclosures to cases presently pending before the Board and OSC.

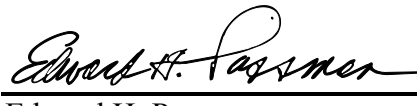
CONCLUSION

Congress' marching orders to the MSPB were unmistakable: "the intentionally broad scope of protected disclosures should be clear. The Committee emphasizes that the Board and the courts should not create new exceptions to protected disclosures in place of those overturned by S. 743." *See* SEN. R. No. 112-155 at 8 (2012). Consistent with Congress' direction, NELA urges the MSPB to remand this case to the Administrative Judge with instructions to allow Appellant's claim to proceed under the standards set forth in the WPEA.

Respectfully submitted by:



Erik D. Snyder



Edward H. Passman



Richard R. Renner



Joseph V. Kaplan

Tate & Renner  
921 Loxford Terrace  
Silver Spring, MD 20901  
[erikdsnyder@gmail.com](mailto:erikdsnyder@gmail.com)  
[rrenner@igc.org](mailto:rrenner@igc.org)



Andrew J. Perlmutter



Rebecca Hamburg Cappy  
National Employment Lawyers Association/  
417 Montgomery Street, Fourth Floor  
San Francisco, CA 94104  
(415) 296-7629  
(866) 593-7521, fax  
[rcappy@nelahq.org](mailto:rcappy@nelahq.org)

Passman & Kaplan, P.C.  
1828 L Street NW, Suite 600  
Washington, DC 20036  
(202) 789-0100  
(202) 789-0101, fax  
[ehpassman@passmanandkaplan.com](mailto:ehpassman@passmanandkaplan.com)  
[jkaplan@passmanandkaplan.com](mailto:jkaplan@passmanandkaplan.com)  
[aperlmutter@passmanandkaplan.com](mailto:aperlmutter@passmanandkaplan.com)