

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

BARBARA R. KING,)	
)	
Appellant,)	
)	
v.)	Docket No. <u>DA-0752-09-0604-P-1</u>
)	
DEPARTMENT OF THE)	
AIR FORCE,)	
)	
Agency.)	
)	

AMICUS BRIEF
SUBMITTED BY THOMAS C. DANIELS

IDENTITY OF THE AMICUS

Amicus, Thomas C. Daniels, is a whistleblower appellant whose Petition for Review (PFR) is currently pending before this honorable Board in the case of *Thomas C. Daniels v. Social Security Administration*, Docket No. SF-1221-12-0426-W-1. Amicus is a similarly situated appellant insofar as the issue of retroactivity of the Whistleblower Protection Enhancement Act of 2012 (WPEA), 112 P.L.199, may have some applicability to the Board’s determination in his Individual Right of Action (IRA) appeal. Among the many issues pending before the Board in Amicus’ PFR is the Administrative Judge’s reliance on *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001) and *Meuwissen v. Department of the Interior*, 234 F.3d 9 (Fed. Cir. 2000), and whether the WPEA should be applied retroactively to cases currently pending before the Board.¹

¹ Indeed, in applying the erroneous *Huffman* standard of the Federal Circuit to the Amicus’ disclosures, the AJ stated,

Accordingly, the issue of retroactivity of the WPEA is of keen interest to the Amicus herein. Since §108(b)(1)(B) of the WPEA may grant Amicus the right to appeal his final MSPB decision to the 9th Circuit Court of Appeals, the Board's decision to apply or reject the WPEA retroactively must apply a standard that can be adopted by circuit courts around the nation. The Board's decision herein cannot simply reflect a position that Board members feel the Federal Circuit will sustain.

STATEMENT OF THE ISSUE

The issue pending before the Board in the case at bar is whether the provisions of the WPEA with regard to damages may be applied retroactively to cases pending prior to the effective date of the Act. Of particular relevance is the question of whether, specifically, §107(b) of the WPEA should be applied retroactively.

POSITION OF THE AMICUS

Amicus asserts that the Office of Special Counsel (OSC) has established properly and effectively to the Board in its Amicus Brief posited in *Day v. Dept. of Homeland Security*, MSPB Docket No. DC-1221-12-0528-W-1, that the Congressional record adequately indicates that the authors of the WPEA “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.” S. Rep. No. 112-155, at 52 (2012). Notwithstanding the clear intent of the authors of S.743, the enacted bill now known as the WPEA, the Board has shown a hesitance at following the clearly stated Congressional intent.

Accordingly, if indeed the Board is unwilling to apply the Senate authors’ stated intent to the whole Act, Amicus encourages the Board to apply the clarifying law standard to the WPEA

“I find the appellant was acting within the course of his normal or assigned duties and he made the disclosure within normal channels; therefore, the appellant has failed to raise a non-frivolous allegation of jurisdiction that he made a protected disclosure.”

and to retroactively apply only those portions of WPEA that are clearly intended to remedy past judicial errors and that clarify Congressional intent concerning the rights originally granted in the WPA. The Board may decide that sections of the WPEA that grant new rights and protections, and not solely clarifying in nature, need not be applied retroactively. Section 107(b) of the WPEA adds new remedies in the form of compensatory damages not previously available to federal whistleblowers under the WPA. Accordingly, the Board may choose not to apply § 107(b) retroactively, but it must find valid reasons separate and apart from *Landgraf* and the Congressional record of failed bills.

ARGUMENTS AND AUTHORITIES

I. THE BOARD SHOULD HONOR CONGRESS' CLARIFICATION LABEL.

Unquestionably, U.S. courts “have long recognized that clarifying language is not subject to any presumption against retroactivity and is applied to all cases pending as of the date of enactment.” *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689 (9th Cir. 2000). Indeed, new laws that merely alter the rules of prior Acts, rather than modify substantive rights, are not operating retroactively when applied to pending cases. *Republic of Iraq v. Beaty*, 556 U.S. 848, 864 (2009). This concept is perhaps no better explained than when the 9th Circuit Court stated: “Given the extraordinary difficulty that the courts have found in divining the intent of the original Congress, a decision by the current Congress to intervene by expressly clarifying the meaning of [the statute] is worthy of real deference We therefore honor Congress’ ‘clarification’ label and accept [the new] provisions as a statement of what [the statute] has meant all along.” *Beverly Community Hosp. Ass'n. v. Belshe*, 132 F.3d 1259, 1266 (9th Cir. 1997).

The Congressional record associated with the passage of the WPEA is replete with examples of how and why Congress felt the need to clarify its previous intent under the WPA of 1994.

Despite the clear legislative history and the plain language of the 1994 amendments, the Federal Circuit and the MSPB have continued to undermine the WPA's intended meaning by imposing limitations on the kinds of disclosures by whistleblowers that are protected under the WPA. S. 743 makes clear, once and for all, that Congress intends to protect "any disclosure" of certain types of wrongdoing in order to encourage such disclosures. It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court opinions. (S. Rep. No. 112-155, at 4-5).

Indeed, there can be no doubt whatsoever, that at least portions of the WPEA were intended solely to clarify Congressional intent adulterated by the Federal Circuit and its progeny of MSPB case law. Congress also made clear in the record that it did not intend for ANY future MSPB or Court opinion to narrow the protections or definitions clarified in the WPEA.

Given these clear statements of intent, it is almost unfathomable that now the Board is in a quandary about making decisions that might once again narrow the stated intent of Congress. It seems unthinkable to parse language that is plain and simple: [Congress] "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." *Id.* at 52. Indeed, even where new rights to compensation are granted, such as under § 107(b), Congress declared that immediate "application is expected and appropriate because the legislation generally corrects erroneous decisions by the MSPB and the courts; [and] removes and compensates for burdens that were wrongfully imposed on individual whistleblowers exercising their rights in the public interest." *Id.*

By plain and simple language, Congress placed into the record of its enacted Bill (S.743) its acknowledgement that it was adding compensation “for burdens that were wrongly imposed,” and intended this addition for immediate application. Section 107(b) of the WPEA does just that in granting an appellant compensatory damages.

II. THE AJ ERRONEOUSLY RELIES ON THE CONGRESSIONAL RECORD OF FAILED LEGISLATION -- H.R.3289.

In the Order and Certification of Interlocutory Appeal (*Order*), the AJ in the case at bar highlights the fact that the Congressional record for the House of Representatives differs from the intent of the authors of S.743, and the AJ concludes that these differences are dispositive of Congressional intent. However, the AJ’s reliance on the record of a House bill (H.R. 3289) that did not pass both houses, nor ever become enacted is both misleading and erroneous. *Order* at 3. Indeed, in H.R.3289 and its associated Congressional record (H.R. Rep. No 112-508), there is no mention whatsoever of adding compensatory damages as a remedy for a prevailing whistleblower in a case before the MSPB. With the issue not even present in the House bill, it is entirely disingenuous to rely, even as a rebuttal argument, on the House’s Congressional record for guidance on intent concerning retroactivity.

Indeed, the AJ in the case at bar used the same faulty logic and rationales to rely on the Congressional Record of the failed H.R. 3289 that the Special Counsel so persuasively debunked in her Amicus Brief filed in *Day*. The Board simply cannot rely on the record of a failed bill to indicate Congressional intent in another law. *United States v. Craft*, 535 U.S. 274, 287 (2002).

III. CONGRESS CHOSE TO INCREASE PUBLIC, NOT PRIVATE, LIABILITY IN THE WPEA.

Moreover, the Board must remain cognizant of the fact that when Congress passed the WPEA, it did not do so to impair the rights of federal whistleblowers. Rather, Congress did so to limit the actions of managers and increase the liability of the very Government whose agents' actions have been used to wrongfully retaliate against whistleblowers who acted in the nation's best interests. There are no private parties at risk in the WPEA, as discussed in *Landgraf v. USI Film Products*, 511 U. S. 244 (1994). In fact, in the context of expanding or contracting the liability of a state, or even the Federal Government, *Landgraf* is far less helpful than other cases.

Landgraf's antiretroactivity presumption, while not strictly confined to cases involving private rights, is most helpful in that context. Cf. 511 U. S., at 271, n. 25 ("[T]he great majority of our decisions relying upon the antiretroactivity presumption have involved intervening statutes burdening private parties"). The aim of the presumption is to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct.

Republic of Austria v. Altmann, 541 U.S. 677, 696 (2004). What the WPEA reveals, if anything, is that Congress has chosen, for political reasons, to increase its own liability for retaliatory behavior of its nation's managers. No part of *Landgraf* prohibits Congress from placing retroactive burdens upon itself. Accordingly, if Congress wants to increase its financial liability for the actions of the nation's managers, it certainly has the political prerogative to do so.

The Supreme Court has deferred to the political branches when it seeks to make such politically driven changes that reflect current intent. As the Court stated in *Republic of Austria v. Altmann*, "we think it more appropriate, absent contraindications, to defer to the most recent such [political] decision ... than to presume that [political] decision inapplicable merely because it postdates the conduct in question." 541 U.S. at 696.

In the end, the Board is left with the same dilemma it found itself in *Day*. Does the Board

accept the stated intent of Congress as contained in S. Rep. No. 112-155 and apply it throughout, or does it parse the language of the WPEA and force itself to apply the WPEA unevenly and unpredictably? There has long been the conflict between legal certainty and equity, *ius strictum* and *ius aequum*. But such concern is an extreme fallacy in the current context. There has never been any justice or equity involved in a manager retaliating against a whistleblowing employee. Indeed, there is no fairness or justice when a whistleblower is victim of reprisal. So how then does the Board seek to balance predictability under the law with the justice or equity sought by the whistleblower? Amicus believes this is only achievable through a firm adherence to Congressional intent “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.” S. Rep. No. 112-155 at 52.

IV. ALTHOUGH §107(b) IS NOT CLARIFYING OF THE WPA, CONGRESS BUDGETED FOR THE NEW REMEDIES IT ESTABLISHED IN THE WPEA.

Nevertheless, regarding the immediate question pending before the Board, it is apparent to the Amicus that § 107(b) of the WPEA adds new remedies in the form of compensatory damages not previously available to federal whistleblowers under the WPA.² While the Amicus reiterates his position that Congress is capable of placing additional financial burdens upon itself in a retroactive fashion, and that the courts should give deference to that decision, such a pronouncement is obviously not clarifying of the WPA, as the prior act was silent on this issue.

Much like the situation in *Landgraf*, the provision of §107(b) of the WPEA authorizing

² Amicus contends that Congress recognized the additional costs that would incur with the passage of these new remedies in a retroactive fashion, but found that such costs would be “less than \$500,000” for FY2012. That Congress found the need to justify the applicability of the WPEA remedies to FY2012 is evidence of Congressional intent concerning retroactivity. See S. Rep. No. 112-155, at 53-54. Instead, the WPEA actually was enacted in FY2013, and Congress fully planned for the fiscal ramifications of its new remedies to the tune of an additional \$7m in costs for FY2013, with amounts decreasing for the following two years of FY14 and FY15. *Id.*

the recovery of compensatory damages is not easily classified. It does not make unlawful conduct that was lawful when it occurred; §107 only applies to retaliatory conduct already prohibited by the WPA. See *Landgraf*, 511 U.S. at 281-282. Using a word for word analysis and substitution of §102 of the Civil Rights Act of 1991 (CRA) reviewed in *Landgraf* with §107 of the WPEA, it is simple to see why the AJ in the case at bar was hesitant to apply §107(b) of the WPA retroactively. However, in reality, the two cases are fundamentally different and distinguishable. The ultimate issue is private impact vs. public impact, and Congress already prepared for the public impact. See Fn. 2.

Highlighting the issue concerning the source of funds, the *Landgraf* court stated:

Unlike certain other forms of relief, compensatory damages are quintessentially backward looking. Compensatory damages may be intended less to sanction wrongdoers than to make victims whole, but they do so by a mechanism that affects the liabilities of defendants. They do not “compensate” by distributing funds from the public coffers, but by requiring particular employers to pay for harms they caused. The introduction of a right to compensatory damages is also the type of legal change that would have an impact on private parties' planning.

511 U.S. at 282.

Undeniably, in the case at bar, there are no private parties that would have necessitated a consideration of impact planning. There are no private funds at issue, and just as the *Landgraf* Court recognized as possible, §107(b) actually **does** aim to “make victims whole” **and** distribute “funds from the public coffers.” *Id.* Because the Supreme Court did not consider the public coffers as the source of funds in *Landgraf*, the cases are not analogous, and the Board should be leery to use *Landgraf* as a rationale for not following the stated intent of Congress. Amicus thus proposes that *Republic of Austria v. Altmann*, 524 U.S. 677, is much more analogous to the present case, and should be instructive to the Board.

CONCLUSION

For the reasons discussed herein, Amicus encourages the Board to accept the clearly stated intent of the authors of the WPEA and apply the Act to “MSPB, and judicial proceedings initiated by or on behalf of a whistleblower and pending on or after that effective date.” S. Rep. No. 112-155, at 52. In the alternative, Amicus encourages the Board to apply the clarifying law standard to the WPEA and to retroactively apply those portions of WPEA that are clearly intended to remedy past judicial errors and clarify Congressional intent concerning the rights originally granted in the WPA. Sections of the WPEA that grant new rights and protections, and not solely clarifying in nature, may be decided by the Board not to apply retroactively. Section 107(b) of the WPEA adds new remedies in the form of compensatory damages not previously available to federal whistleblowers under the WPA. Accordingly, the Board may choose not to apply § 107(b) retroactively, but it should not rely on *Landgraf* or the Congressional record in H.R. 3289 in making that decision.

Respectfully Submitted,

this 25th day of March, 2013.



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