UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF THE CLERK OF THE BOARD

BARBARA R. KING,
Appellant,

DOCKET NUMBER
DA-0752-09-0604-P-1

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

AMICUS BRIEF SUBMITTED BY THOMAS F. DAY

Thomas F. Day is the Appellant in the matters before the Board in *Thomas F. Day v. Department of Homeland Security* docket number DC-1221-12-0528-W-1. Because the Board's decision in the *King* case has a potential impact on my ability to be awarded compensatory damages I have a keen interest in the outcome of this matter. Of specific concern for the items that may be addressed in the Board's decisions are: 1) whether or not the Board views the Whistleblower Protection Enhancement Act of 2012 (WPEA) as a clarifying statute in its entirety with ordinary provisions that are excluded from retroactive application, or whether the Board views the WPEA as an ordinary statute with clarifying provisions; 2) whether the Board views a matter that has continued beyond the initial decision by the Administrative Judge (AJ) as a "pending case" in compliance with the intent of the WPEA, and 3) whether the Board will view the matter of compensatory damages as a clarification of Congressional intent based on the changing definitions of damages by the Courts and the Board.

The Appellant reminds the Board that he is not an attorney and has no formal educational training other than basic business law courses taken prior to 1971. Furthermore, I have no direct access to legal resources other than the Internet and as a result, I have liberally cut and pasted case

and other references from the various briefs and other documents associated with this case into this document. Therefore, references to "amicus" in this document refers to the submittals by various submitters in *Day*.

WHETHER THE WPEA IS A CLARIFYING

Let me introduce my comments with those presented by *amicus* National Employment Lawyers Association (NELA);

> *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 272-73.4 Congress has clearly done this.*
> [Emphasis added, NELA at 7]

I submit that Congress has complied by clearly and unambiguously identifying the purpose of the Act;

> *An ACT*
> *To amend chapter 23 of title 5, United States Code, to* ***clarify*** *the disclosures of information protected from prohibited personnel practices, require a statement in non-disclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.*
> *[Emphasis Added]*

As represented in my comments previously submitted to the Board, I believe there is sufficient information before the Board to conclude that the WPEA is a clarifying stature with those provisions that were not intended to be retroactively applied, such as the TSA provisions, so identified in the statute. I also submit that the clarifications to extend the time for reporting infractions regardless of the amount of time which has passed since the occurrence of the events described in the disclosure and the provision to make a disclosure protected even if it had been previously disclosed are additional indications that Congress has considered the costs and benefits of whistleblowing inclusive of all of the provisions of the WPEA. The changes incorporated

into the WPEA have been driven by the improperly narrowed decisions by previous Boards and Courts that necessitated a clarification by Congress of what it has intended for decades. Therefore, I once again submit that the WPEA is retroactively enforceable in all parts other than the TSA provisions.

WHAT CONSITUTES A PROCEEDING

The AJ in *King* has answered this question:

> *"SUMMARY OF STATUS CONFERENCE*
> *On February 6, 2013, I held a telephonic conference with the appellant, her representative, and the agency's representative. During the conference, the following matters were discussed.*
> ***PENDING MATTERS** – I identified the two **proceedings** before the Board:(1) a motion for consequential damages, MSPB Docket No. DA-0752- 0604-P-1; and (2) a motion for attorney fees, MSPB Docket No. DA-0752-0604- A-1.1"*
> *[Emphasis added, WhistleWatch, Exhibit D, at 1]*

The process of appeals has been well established in the courts and in the history of the Board. The number of MSPB decisions where the Board has reversed a decision by an AJ sufficiently indicated that a matter is not concluded merely by the issuance of an initial decision. Therefore, the matters in King are appropriately before the Board as a pending case within the Congressional intent of the WPEA.

COMPENSATORY DAMAGES AS A CLARIFYICATION NECESSITATED BY CHANGING DEFINITIONS IMPOSED BY THE BOARD AND THE COURT

I became aware of the issues of consequential damages and compensatory damages because of the brief submitted by *amicus* WhistleWatch. I realized that the issue could have a direct impact on any relief that might be granted if I prevail in my case. With this awareness, I began to look more carefully at the issues raised by *amicus* WhistleWatch. As I checked one cite and then another and viewed them on a timeline, I realized that there were different descriptions of what was

being awarded or not awarded and it flip-flopped back and forth. I then compared the timeline of for the inclusion of damages in any of the whistleblower protection legislation and discovered the history of damages dating back to the Civil Service Reform Act (CSRA). This is when it dawned on me that the inclusion of "compensatory" damages is not something new, but is required as a clarification of what was intended by Congress years ago. There was no reference to "consequential" anything in the CSRA. It was not until the adoption of PL 103-424 on October 29, 1994, that a provision for "consequential" damages was added to the WPA:

> *"(a) IN GENERAL.--Section 1214 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:*
>
> *"(g) If the Board orders corrective action under this section, such corrective action may include--*
>
> *"(1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and*
>
> *"(2) reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and* ***foreseeable consequential damages****."*
>
> [Emphasis added, PL 103-424]

From the time that I became an unwitting whistleblower in 1989 through my involvement with the efforts to enact the 1994 amendments to the WPA, there was a genuine excitement that retaliation was going to be a distant memory. The statute speaks for itself attesting that there were no other foreseeable damages that needed to be identified because it was expected that MSPB and OSC were sufficiently empowered to provide the protections needed to encourage whistleblowers to step forward. However, the Courts were already in the process of defining and/or redefining the definitions of "consequential" and "compensatory" damages. Two days after the enactment of PL 103-424, the Courts identified consequential damages as:

> *"… consequential damages arising from a shipowner's failure to provide maintenance and cure, including lost wages and pain and suffering, are generally recoverable. 54 F.3d at 1082-84."*
> [Deisler v. McCormack Aggregates Co 1994]

In 2001, MSPB and the Federal Circuit continued to define/redefine the application of consequential damages as addressed by *amicus* WhistleWatch;

> *"Instead of the common meaning of consequential damages, which includes pain and suffering and emotional distress, the court's applying the WPA referred to these damages as "compensatory damages" even though they are a consequence of the prohibited action. Bohac v Department of Agriculture, 239 F. 3d 1334 (Federal Circuit 2001), where the court strained to find a way to exclude emotional pain and suffering from the list of damages that were a consequence of the wrongful conduct."*
> [WhistleWatch at 18]

Still, in 2009, the Courts were inconsistent with what constituted either consequential damages or compensatory damages;

> *"In almost all other jurisdictions, pain and suffering damages are included within the general category and scope of "consequential" damages when they result from wrongful conduct. Delaware River & Bay Authority v Kopacz, 584 F 3d 622 (3rd Cir 2009)."*
> [WhistleWatch at 18-19]

Quoting from Delaware River & Bay Authority v Kopacz, 584 F 3d 622 (3rd Cir 2009),

> *"… citing our statement in Deisler v. McCormack Aggregates Co., that such relief is "merely an element of a plaintiff's complete compensation." 54 F.3d 1074, 1087 (3d Cir.1995)*
>
> *In Deisler, we held that consequential damages arising from a shipowner's failure to provide maintenance and cure, including lost wages and pain and suffering, are generally recoverable. 54 F.3d at 1082-84."*

Therefore, based on the information available to me, there is adequate case references to document that the Courts were inconsistent in their definitions and applications of damages such that Congress was obliged to clarify its intent with regard to what could be awarded as damages to a whistleblower. Furthermore, by the inclusion of compensatory damages in the WPEA, Congress

has clearly given consideration to the cost of making such awards. This analysis and the arguments in the amicus briefs submitted in *Day* is more than adequate for the Board to determine that the matter of compensatory damages is a clarifying provision of the WPEA and is not a "new" benefit of damages to be awarded. This language was provided by *amicus* Office of Special Counsel (OSC):

> *"The **differences between imposing liabilities on the government and imposing liabilities on individuals** was discussed in Lyons v. United States, 99 Fed. Cl. 552, 556-60 (Fed. Cl. 2011). In Lyons, the Court of Federal Claims stated that Supreme Court precedent on retroactivity focused on private parties and, therefore, was inapposite as to Congressional changes to government liability. Id. at 556 (comparing Landgraf v. USI film Prods., 511 U.S. 244, 271 n.25 (1994), with Republic of Austria v. Altmann, 541 U.S. 677, 696 (2004). The Lyons Court applied the three-factor test established by the Federal Circuit in Princess Cruises v. United States, 397 F.3d 1358, 1362-63 (Fed. Cir. 2005), to determine whether the Justice for All Act had retroactive effect. Id. at 558. First, the court held that the increase in the government's liability did not impose any new duties or create new prohibitions since the government had accepted liability before and after the enactment of the statute. Id. Second, the court held that government officials would not have refrained from committing violations if they had been aware of the impending changes in the statute. Id. at 559. Third, the court stated that the third factor focused on individual rights, and because the government bore the burden, no burden on individual rights was implicated. Id."*
> [Emphasis added, OSC at footnote on 18]

Simply put, the Courts have acknowledged a difference between the application of damages upon the government and on an individual. Continuing with remarks made by amicus OSC;

> *"As we noted earlier**, the government is not a private employer and its interests cannot be equated with the interests of the nations' employers** in Landgraf. The government's primary interest here, as expressed in the WPA and the WPEA, is to create a work environment that makes it safe for employees to blow the whistle, even in the course of their duties and even to the wrongdoer. In order to further this important interest, Congress determined over three decades ago that the government will protect whistleblowers and make them whole if officials, acting beyond the limits of their legal authority, cause them harm because of whistleblowing activity. If this remedial process causes minor disturbances to personnel management, they are more than offset by savings to the taxpayers from increased government efficiency and accountability through an effective whistleblower protection program."* [Emphasis added, OSC at 18]

Another quote from *amicus* OSC;

> *"Thus, the issue of retroactivity cannot he viewed solely through the lens that the Court employed in Landgraf Instead, the Board should look to the Court's decision in Ziffrin to determine which law to apply. The Board is not merely adjudicating a past dispute between the appellant and his employer. Although the personnel actions at issue have already occurred,* ***the government's final administrative determination of whether those actions should stand has yet to occur.*** *The final resolution of these actions must await the Board's final administrative decision, and that certainly will occur after the effective date of the WPEA."*
> [Emphasis added, OSC at 13]

If the Board had focused its actions on protecting whistleblowers through a policy of zero tolerance for acts of retaliation and the immediate termination from federal service for those wrongdoers, it would be reasonable to conclude that any damages, under any category, would be minimal due to the fact that cases of retaliation would be minimized. However, through decisions that demonstrated a clear lack of understanding of its Congressionally mandated mission or what constitutes an act of whistleblowing, MSPB opened the door to managers at all levels of government to sneer at any rule, regulation, or law and to impose unbridled acts of retaliation of persons who simple did was called for them to do to report allegations of infractions. When MSPB decides to implement a zero tolerance policy for acts of retaliation, then management at all levels will place a higher level of scrutiny on any claim of retaliation and will act with due haste to end, and correct, any act of retaliation long before it might have come to the attention of OSC or the Board. When senior management comes to appreciate that their career could be ended because of their failure to take preventive and/or corrective action acts of retaliation will evaporate or those who venture to hold themselves above the law will find themselves looking for a new career. The benefits of such a policy go far beyond the efficient expenditure of funds and will encourage a

quality of management in the federal government that will be envied instead of one which is repudiated in every election.

While these words characterize my opinion, I assert that this was the view of those in Congress who passed the Whistleblower Protection Act of 1989 (WPA) and they did not feel compelled to spell out damages that they did not believe would be forthcoming. When the Board and the Courts rendered erroneous decision after erroneous decision creating the opportunity for flagrant acts retaliation and the incurred damages, they created the need for Congress to reassert its intention through a clarifying statute that whistleblowers were to be protected and that they should be made whole.

I have not seen anything in the record to indicate that Congress had any intention to permit any harm to come to persons who disclosed infractions. It is only due to the failures of the Board and the Courts to implement the intended protections that whistleblowers have sustained damages. Therefore, and as explained by *amicus* Government Accountability Project (GAP) et al, the inclusion of compensatory damages is not something "new", it simply addresses what has been intended that whistleblowers shall not be damaged for stepping forward with their allegations:

> *Applying a clarifying statute to pending cases is not retroactive application of the law. As the D.C. Circuit explained in Baptist Memorial-Golden Triangle v. Sebelius 566 F.3d 226, 229 (D.C. Cir. 2009),*
>
> *A change in statutory language need not ipso facto constitute a change in meaning or effect. Statutes may be passed purely to make what was intended all along even more unmistakably clear....An amendment containing new language may be intended to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases. (internal quotation marks and citations omitted)*

> *See also Brown v. Thompson, 374 F.3d 253, 259 (4th Cir. Va. 2004); Cortes v. American Airlines, Inc., 177 F.3d 1272, 1283 (11th Cir. Fla. 1999); Liquilux Gas Corp. v. Martin Gas Sales, 979 F.2d 887, 890 (1st Cir.1992); Boddie v. American Broadcasting Cos., 881 F.2d 267, 269 (6th Cir.1989).*
> [GAP at 6]

There is another aspect of the King case that bears consideration in a Board decision. Based on the information provided, it appears that the case is still pending in various aspects and that the Agency in this particular case has not fully complied with the decision of the AJ. All compensatory damages which may have been awarded at the time of the AJ's decision must be viewed as continuing, compounding, and cumulative as the result of actions and/or inactions of the Department of the Air Force. After years of retaliatory practices as confirmed in the AJ decision, a person does not become cured of the affects from these retaliatory practices at the moment of an AJ's decision. Even after a victory, waiting for the next shoe to fall to see if the agency will comply with a Board Order, is no less damaging then it was the day before the decision. When an agency fails to comply with an Order, they have "continued" the issue of compensatory damages, they have "compounded" the compensatory damages with additional penalties that should be imposed by the AJ, and the damages incurred are "cumulative" with all damages incurred.

There have been those occasions where a court has decided to use a particular case to make an example of one kind or another. Since there has already been a finding of retaliation in *King,* I see this case as presenting the Board with the remarkable opportunity to make it clear to all agency management that MSPB is on a new path and continuing acts of retaliation will be costly.

Since the proceedings have continued, the Board has the authority to make a decision affirming or denying the request of commensurate damages, and because such a decision will be made after the effective date of the WPEA, the damages are appropriately before the Board. It is understood that the AJ's decision in *King* was made prior to the effective date of the WPEA, but the key language in this matter is the attention to the "proceedings" as stated in the Senate Report for S.743:

> *"By contrast, retroactivity is suggested by comments in the Senate's version, which provides in relevant part:*
>
> *This section states the Act would take effect 30 days after the date of enactment. 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)…."*
>
> [WhistleWatch, Exhibit D, at 5]

Even *amicus* OSC has been able to parse the text of the Senate Report based on a plain reading of the text:

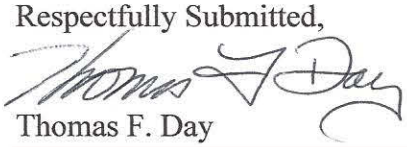
> *"In S. 743, Congress has met its burden. The WPEA's principal authors state clearly and unambiguously that the law applies to proceedings . . . pending on the Act's effective date]." S. Rep. No. 112-155, at 52 (2012). The Senate authors' complete statement reads as follows:*
>
> *The Committee expects and intends that the Act's provisions shall be applied in ()SC, 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."
[OSC at 5]

CONCLUSION

I submit that proceedings, to include deliberations by the Board, is the appropriately broadened view of the intent of Congress, and the Board is rightfully encouraged to adopt and apply the broadening of its powers here and now. Therefore, the Board must recognize that it has the authority in the matter immediately before the Board to issue a decision sweeping away past inequities and it must make a finding in the affirmative by awarding compensatory damages requested by the Appellant in the King case – and in all other pending cases.

Respectfully Submitted,



Thomas F. Day

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