UNITED STATES MERIT SYSTEMS PROTECTION BOARD
OFFICE OF REGIONAL OPERATIONS

Barbara R. King Appellant, v. **Department of the Air Force** Agency.	)	Docket No. DA-0752-09-0604-P-1 April 12, 2013

AMICUS BRIEF OF THE DEPARTMENT OF HOMELAND SECURITY

Amici, the U.S. Department of Homeland Security (DHS), is an interested organization in the above-captioned matter. DHS is a party to *Thomas F. Day v. Department of Homeland Security*, MSPB Docket No. DC-1221-12-0528-W-1, which was certified for interlocutory review on December 14, 2012, and is pending a decision by the Board. The question in *Day* concerns whether the provisions of the Whistleblower Protection Enhancement Act ("WPEA") of 2012, 112 Public Law 199, may be applied retroactively to pending cases involving conduct occurring before its effective date. Specific to *Day* is Section 101(b)(2)(B) of the WPEA. Because the issue to be decided in *Day* is similar to the issue to be decided in the instant appeal, DHS submits an amicus brief reiterating the agency's arguments made in *Day* in support of prospective application.

ISSUE

Whether the provisions of the WPEA of 2012, 112 Public Law 199, with regard to damages may be applied retroactively to cases pending prior to its effective date. The specific question in *King* is related to the retroactive effect of Section 107(b) of the

WPEA, which revised the law to include compensatory damages as one of the remedies to which individuals may be entitled. Prior to passage of the WPEA, individuals were entitled to reasonable and foreseeable consequential damages, but not compensatory or non-pecuniary damages.

SUMMARY OF THE ARGUMENT

For the reasons set forth below, this Board should affirm the Administrative Judge's March 6, 2013, Order and Certification for Interlocutory Appeal, which concluded that the WPEA should not be applied retroactively to cases pending before the MSPB at the time of enactment.

First, the plain language of the statute is clear. The WPEA's effective date provision expressly commands that, with the exception of a provision immediately effective as applied to the Transportation Security Administration ("TSA"), the statute will take effect within 30 days of enactment. Because Congress prescribed the WPEA's temporal reach within the statute, there is no need to look further.

Second, if we are to assume the plain language of the statute does not clearly prescribe the statute's proper reach, this Board should apply the well-established presumption against retroactive construction of new statutes. The specific provision at issue in the instant appeal and the remaining provisions within the WPEA are not clarifying in nature. Rather section 107(b) read alone, and the WPEA in its entirety, creates new rights, liabilities, and duties which would have an impermissible retroactive effect absent clear congressional intent otherwise.

Third, although recourse to the legislative history of the WPEA is unnecessary, that history confirms that there is no clear congressional intent to depart from the plain

language of the statute. While a single Senate committee report contains language that contemplates retroactive application, such an isolated reference to retroactivity cannot be used to create ambiguity where none exists. Moreover, such language is insufficient as a matter of law to constitute evidence of "clear Congressional intent" to depart from the default presumption against retroactive application of new legislation.

Finally, the Board is authorized to apply the presumption against retroactivity and the governing case law does not distinguish between public and private parties when applying the presumption, as was so argued by several amici in *Day v. DHS*.

As explained in more detail below, this Board should affirm the decision of the Administrative Judge and rule that the WPEA may not be applied retroactively to conduct occurring prior to its effective date. And, specifically, this Board should not apply the WPEA retroactively to Section 107(b).

ARGUMENT

I. The Plain Language of the Statute is Clear as to Congress's Intent.

A. The act of delaying the effective date, coupled with the time-neutral language in the remaining provisions, is clear indication of Congress's intent for prospective application.

In *Landgraf v. USI Film Products, et al.*, the Supreme Court set forth a legal road map for determining whether a federal statute applies to past conduct. *Landgraf*, 511 U.S. 244 (1994). "[T]he court's first task is to determine whether Congress has expressly prescribed the statute's proper reach," *Id.* at 280, or, "in the absence of any language as helpful as that," determine whether a "comparably firm conclusion" based on "normal rules of [statutory] construction" can be reached. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (quoting *Lindh v. Murphy*, 521 U.S. 320, 326 (1997)).

The WPEA's effective date provision simply states: "Except as otherwise provided in section 109, this Act shall take effect 30 days after the enactment of this Act." Pub. L. No. 112-199, § 202, 126 Stat. 1465. Section 109 of the Act provides certain rights to TSA employees and was effective immediately upon enactment.

Administrative Judge Malouf found support for prospective application in the fact that Congress created two separate effective dates, one for TSA and another for the remaining provisions. (*Day v. DHS*, DC-1221-12-0528-W-1, Order and Certification for Interlocutory Appeal dated March 6, 2013, at p.4, n.2). As Administrative Judge Malouf points out, if Congress intended retroactive application of the WPEA, "there was seemingly no reason to include a separate provision making it effective in TSA cases 30 days sooner than other cases." (*Id.*) This same position was taken by Administrative Judge Weiss in the matter of *Day v. DHS* (*Day* Order and Certification for Interlocutory Appeal dated Dec. 14, 2012 at p. 10, no. 1). Amicus in *Day*, the Office of Special Counsel (OSC), dismissed this argument, claiming the "point. . . trades on fallacy." (OSC brief in *Day* at 8). OSC claimed there are a number of "rational grounds to treat TSA employees differently." We agree. One very rational reason is that Congress intended the WPEA to be prospective. It is a cardinal rule of statutory construction, that, if possible, effect shall be given to every clause and part of statute. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). If Congress did not intend for prospective application, the provision requiring a 30-day delay in effecting the Act and the provision requiring immediate application to TSA employees are both rendered meaningless.

Persuasive authority also supports the position that the statute is clear on its face. In analyzing another federal statute governing the rights of employees, the Americans

with Disabilities Amendment Act of 2008 ("ADAAA"), the D.C. Circuit deemed the existence, within, of a delayed effective date, as is the case with the WPEA, as clear indication of Congress's express determination of prospective application. In *Lytes v. D.C. Water and Sewer Authority*, 572 F.3d 936 (D.C. Cir. 2009), the D.C. Circuit considered whether the 2008 amendments to the ADA applied retroactively to a former employee of the District of Columbia. Similar to the effective date provision in the WPEA, the effective date for the ADAAA was delayed. The applicable provision stated, "[t]his Act and the amendments made by this Act shall become effective on January 1, 2009." ADAAA § 8, Pub. L. No. 110-325, 112 Stat. 3553, 3559. In finding that the amendments applied prospectively, the D.C. Circuit, applying step one of *Landgraf*, held that "[b]y delaying the effective date of the [ADAAA], the Congress clearly indicated the statute would apply only from January 1, 2009 forward." *Lytes*,572 F.3d at 940; *see also, AT & T Corp. v. Hulteen*, 556 U.S. 701, 129 S. Ct. 1962, 1971-72 (2009) (looking at the delayed effective date of the Pregnancy Discrimination Act, the Supreme Court concluded that Congress had used "the language of prospective intent" in enacting the law).

Amici in *Day* argued that Congress explicitly stated its intentions for retroactive application by noting in the preamble of the Act that its purpose is "to clarify the disclosures of information." (*See, e.g.* Government Accountability Project ("GAP") brief in *Day* at 7). The D.C. Circuit considered and disregarded similar arguments in *Lytes* when determining whether the ADAAA called for retroactive application. The Court acknowledged that "a statute may be ambiguous if, notwithstanding a delayed effective date, it has a provision that seems to call for its retroactive application." *Lytes*, 572 F.3d

at 941. Similar to the provisions of the WPEA, Congress titled the ADAAA, "An Act [t]o restore the intent and protections of the [ADA]" and its general purpose was to "reinstate a broad scope of protection" under the ADA and to "reject" the holdings in two major Supreme Court cases. ADAAA §2(b), Pub. L. No. 110-325, 122 Stat. 3553, 3554. However, the D.C. Circuit noted that those "indicia of purpose are actually time-neutral, and do not countermand the clear indication of intent inherent in the deferred effective date," and that a "'restorative purpose may be relevant' to the retroactivity question but the choice to overrule a judicial decision 'is quite distinct' from the choice to do so retroactively." *Lytes*, 572 F.3d at 941 (*citing Rivers v. Roadway Express Inc.*, 511 U.S. 298, 305, 311 (1994).

Congress used time-neutral language in the WPEA preamble. Further, while other provisions of the WPEA, specifically Section 101(b)(2)(B), act to effectively overturn earlier court decisions [1], given the delayed effective date and in the absence of clear retroactive language, the general rules of statutory construction govern, thus we are left to the same conclusion as the D.C. Circuit in *Lytes*. When Congress "delay[s] the effective date of a substantive statute," here the WPEA, that "in principle [applies] to conduct completed before its enactment," it is "presume[d] the statute applies only prospectively." *Lytes*, 572 F.3d at 941.

B. Further support of Congress's intent for prospective application can be found by considering statutes in which Congress has unambiguously called for retroactive application.

In other employment related statutes, Congress has acted in the past to unambiguously specify the retroactive effect of legislation within the body of a statute.

[1] In addition to *Huffman*, s*ee, e.g.*, *Willis v. Department of Agriculture*, 141 F.3d 1139, 1143 (Fed. Cir. 1998) and *Horton v. Department of Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995).

By failing to include similar language within the statutory language of the WPEA, statutory construction rules support the notion that Congress intended prospective application.

For example, when Congress amended Title VII in the Equal Employment Opportunity Act of 1972, it explicitly provided: "The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter." *Landgraf*, 511 U.S. at 257, n. 10, *citing to* Pub. L. 92-261, §14, 86 Stat. 113.

When Congress enacted the Lilly Ledbetter Fair Pay Act of 2009, it very clearly indicated, "This Act, and the amendments made by this Act, take effect as if enacted on May 28, 2007 and apply to all claims of discrimination …that are pending on or after that date." Pub. L. No. 111-2, 123, § 6, 123 Stat. 1457, January 29, 2009. Indeed, Amicus in *Day*, the Department of Veteran's Affairs (VA), points to additional statutes in which Congress created retroactive application by using express statutory language. (*See* VA Brief in *Day* at 7-9).

In contrast to Lilly Ledbetter and other laws in which Congress has used express statutory language to demonstrate clear congressional intent, there are a number of laws that do not contain such express language. For example, the 1994 WPA amendments were construed by the Federal Circuit as insufficient to convey express congressional intent to apply WPA amendments retroactively. *See Caddell v. Department of Justice*, 96 F.3d 1367, 1371 (Fed. Cir. 1996) (holding that a statutory provision stating "the amendments made by this Act shall be effective on and after the date of the enactment of

this Act" was insufficient to evidence congressional intent to apply WPA amendments retroactively).

As the Court noted in *Landgraf*, "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf*, 511 U.S. at 257. The Supreme Court has gone so far as to say that, "the 'effective-upon-enactment' formula" is an "especially inapt way to reach pending cases." *Id.* at n. 10 (the Court, in comparing prior amendments to the Civil Rights Act of 1964, noted that when Congress used explicit language in the text of the statute, the courts interpreted the law to be retroactive and when Congress failed to do so, but rather used language indicating simply when the law becomes effective, the courts did not find the law to be retroactive in nature).

Unless Congress uses clear terms to express its intent that a statute be applied retroactively, the statute will not be given such effect. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 237 (1995) (noting that "statutes do not apply retroactively unless Congress expressly states that they do"); *see also Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 299 (1994) ("an intent to act retroactively in such cases must be based on clear evidence and may not be presumed."); *see also Johnson v. United States*, 529 U.S. 694, 701, 702 (2000) ("The Government offers nothing indicating congressional intent to apply § 3583(h) retroactively…In sum, there being no contrary intent, our longstanding presumption directs that § 3583(h) applies only to cases in which that initial offense occurred after the effective date of the amendment, September 13, 1994."); *see also Vartelas v. Dep't of Justice*, 132. S. Ct. 1479, 1481 (2012)(under the principle against

retroactive legislation, courts read laws as prospective in application unless Congress has unambiguously instructed retroactivity).

Thus, at the time the WPEA was passed, Congress was well aware that it would need to "unambiguously specify the retroactive effect of [whistleblower] legislation if it decide[d] to do so." *Caddell*, 96 F.3d at 1371. Congress did not so specify and, in fact, the language explicitly states otherwise. Section 202 means what it says: the WPEA "shall take effect 30 days after the enactment of this Act." Pub. L. No. 112-199 § 202.

Given the delayed effective date and the absence of any clear congressional specification of retroactivity, the Administrative Judge correctly concluded that the statute here does not apply retroactively.

II. There Is a Well-Established Presumption Against Retroactive Construction of Statutes and Retroactive Application of the WPEA Would Have an Impermissible "Retroactive Effect" Under Governing Supreme Court and Federal Circuit Precedent.

Given the plain language of the WPEA, it is unnecessary to jump to the default rules set forth in *Landgraf;* however, we address these arguments below in anticipation that they will be raised by other Amici. The Supreme Court set forth the following test to be used in deciding whether a statute that is silent with respect to the date of its application should be given retroactive effect:

> [T]he court must determine whether the new statute would have retroactive effect, *i.e.* whether it 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. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 511 U.S. at 280 (emphasis added).

If the WPEA's numerous substantive provisions are deemed to govern pre-enactment conduct, the legislation would impose an impermissible "retroactive effect"

that functionally alters—after-the-fact—the rights, duties, liabilities, and expectations of individual parties.

Congress is presumed to legislate prospectively and statutes are not construed to govern pre-enactment conduct when doing so attaches new legal consequences to events that preceded a law's enactment. *See, e.g.*, *Vartelas v. Holder*, 132 S. Ct. 1479, 1491 (2012) ("The operative presumption, after all, is that Congress intends its laws to govern prospectively only."); *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 951-52 (1997) (holding that an amendment expanding permissible *qui tam* whistleblower suits under the False Claims Act ("FCA") could not apply to pre-enactment conduct because it would alter the settled rights and expectations of parties).

Acknowledging that there had been a tension between the judicial principle that, on the one hand, a court should apply the law in effect at the time it renders its decision and, on the other hand, the well-established rule that retroactive application of statutes is not favored in the law, the Supreme Court affirmatively resolved the tension in favor of the latter. *Landgraf*, 511 U.S. at 277. "Although [previous] language suggests a categorical presumption in favor of *all* new rules of law, we now make it clear that [the principle requiring a court to apply the law as it exists at the time of its decision] did not alter the well-settled presumption against application of the class of new statutes that would have genuinely 'retroactive' effect." *Id.* Thus, absent express congressional intent to the contrary, the *Landgraf* presumption against retroactivity applies whenever application of a statute to pre-enactment conduct would have a retroactive effect.

In *Landgraf*, the Supreme Court emphasized that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal

doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. The Supreme Court's formulation stated that a law has a retroactive effect when it would "impair the 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." *Landgraf*, 511 U.S. at 280. The Court noted that the "presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." *Landgraf*, 511 U.S. at 271. Consequently, the *Landgraf* framework is broad in its application and has been consistently reapplied by the Supreme Court, the Federal Circuit, and this Board.

For example, the Federal Circuit applied the *Landgraf* framework when it analyzed the retroactive effects of earlier amendments to the WPA. In *Caddell v. Department of Justice*, the Federal Circuit affirmed this Board's decision to give prospective construction to a WPA amendment that expanded the definition of a "personnel action" to include a fitness-for-duty psychiatric evaluation: "[T]he amendment clearly imposes new duties on government officials wishing to utilize fitness-for-duty examinations . . . and arguably the amendments could increase a government official's liability for past conduct." 96 F.3d at 1370. Thus, the Federal Circuit has already construed prior WPA amendments prospectively when they imposed new liabilities on government supervisors.

This Board has likewise adopted the *Landgraf* presumption as an important rule of statutory construction with respect to other WPA amendments. For example, in *Roman v. Department of the Army*, 72 M.S.P.R. 409 (1996), *aff'd*, 1997 WL 636608 (Fed. Cir. 1997), this Board found that a WPA consequential

damages amendment "attached a new legal burden to conduct that took place before its enactment[,]" and applied the *Landgraf* framework to reject retroactive application of the new law. *Id.* at 415. In keeping with federal court precedent, this Board recognized that "even though retroactive application of [the amendment] might vindicate the purpose of the WPA more fully, this consideration is not sufficient to rebut the presumption against retroactivity." *Id.* Put differently, this Board has acknowledged that the presumption against retroactivity is firmly established as a rule of statutory construction and may not be cast aside, absent an unambiguous statutory mandate, even when doing so would arguably further the overall policy aims of the new law as is argued by Amici.

The term "retroactive effect" has developed a functional meaning over time. The Supreme Court clarified this definition when it refused to retroactively apply a jurisdictional amendment to the FCA that expanded the ability of whistleblower plaintiffs to bring *qui tam* actions in federal court. *Hughes*, 520 U.S. at 951-52. The Court reasoned that extension of FCA causes of action to private plaintiffs where none had previously existed would have had a "retroactive effect" if applied to pre-enactment conduct. *Id.* at 949-50.

Importantly, the *Hughes* Court rejected respondents' argument that the new FCA provision merely re-allocated the ability to bring enforcement actions between the Government and private parties:

> As a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good. . . . In permitting actions by an expanded universe of plaintiffs with different incentives, the [new] amendment essentially creates a new cause of action[.]

Id. at 950. As a result, jurisdictional amendments fall within the *Landgraf* presumption when they create new causes of action (*i.e.*, by expanding the universe of plaintiffs who can bring suit) as opposed to amendments that merely reallocate existing causes of action between forums. *Id.* at 951.

A. Section 107(b) of the WPEA creates new rights and liabilities for the parties and is a substantive change from previous law.

The changes in Section 107(b), those relevant in the instant appeal, clearly increases a party's liability for past conduct as it expands the damages to which an individual may be entitled to include uncapped compensatory damages, which have never been available to a prevailing party. In *Landgraf*, the Supreme Court found that the imposition of compensatory damages before the effective date of the Civil Rights Act of 1991, "undoubtedly impose[s] on employers found liable a 'new disability' in respect to past events." See *Landgraf*, 511 U.S. at 283. "The *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored." *Landgraf*, 511 U.S. at 283-84.

In *Day*, amicus OSC argued that the Board's decision in *Scott v. Department of Justice*, 69 M.S.P.R. 211, 239 - 40 (1995) was applicable to the analysis as to whether Section 101(b)(2)(B) should be applied retroactively. (OSC brief in *Day* at 10-11 and n. 8). The Board's analysis in *Scott* is instructive here as it relates to Section 107(b) and the facts of *Scott* can be distinguished from those of the instant appeal. In *Scott*, the Board analyzed a change to the WPA that established the per se "knowledge-timing" rule that says an employee may demonstrate protected disclosures were contributing factors through circumstantial evidence. In determining whether the provision at issue in *Scott* would have

retroactive effect, the Board determined that "[u]nlike the provision at issue in *Caddell*, the provision at issue in this appeal is 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." *Scott*, 69 M.S.P.R. at 239. In other words, the knowledge-timing test did not affect the disclosures by the employee or the personnel action taken by the agency. Rather, the test in *Scott* impacted what the Board referred to as the "secondary conduct" of the parties by changing the manner in which evidence is presented to the Board.

The changes in Section 107(b) of the WPEA do more than impact the manner in which the parties will present evidence. Rather they fall squarely within regulating the primary conduct of the party by increasing a party's liability.

By adding this additional remedy, Congress has acted to impose new liabilities. Under the pre-WPEA standard, the corrective action available to individuals found to have been retaliated against for making protected disclosures included reasonable and foreseeable consequential damages, not compensatory damages. The Supreme Court has unequivocally stated that compensatory damages are "quintessentially backward looking" and affect the liabilities of the parties. *Landgraf*, 511 U.S. at 282.

The changes in Section 107(b) create wholly different considerations of liability for an agency. The Court has held this is "an important legal consequence that cannot be ignored." *Landgraf*, 511 U.S. at 283-84. The instant appeal was filed in 2009 and the administrative judge issued an initial decision on October 3,

2012, which became final on November 7, 2012. The Appellant filed her request for compensatory damages on December 17, 2012. Thus, all relevant actions in the instant appeal, occurred prior to December 27, 2012, the effective date of the WPEA.

In assessing liability in litigation, an agency will consider the relevant legal standards and all potential costs of litigation to include the cost of discovery, a hearing, and any remedy to which the appellant may be entitled. In the instant appeal, the parties completed virtually all aspects of the litigation under the WPA standards, which meant that in considering its potential liability in the case, the Air Force had absolutely no reason to consider the possibility of an award of compensatory damages, particularly those subject to no cap. Had the Air Force known about this significant additional potential burden on the agency, it may have acted drastically different in its approach to the litigation. To change the rules upon completion of the litigation and place the burden of uncapped compensatory damages on the Air Force now is completely contradictory to the "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf*, 511 U.S. at 270.

B. The remaining WPEA provisions attach new legal consequences to events completed before its enactment.

Although the remaining provisions within the WPEA are not yet at issue in the instant appeal, Amicus DHS addresses them here. The WPEA, as discussed below, creates new rights and liabilities, imposes new duties with respect to transactions already completed, and is a substantive change from previous law.

Section 101(b)(1) allows government employees to bring IRA appeals before the MSPB for violations of 5 U.S.C. § 2302(b)(9) where previously the only recourse had been a request for OSC to conduct a discretionary investigation. Pub. L. No. 112-199, §101, 126 Stat. 1465. As in *Hughes*, permitting these new IRAs for allegations grounded in pre-enactment conduct would have a retroactive effect because claims that were once pursued at OSC's discretion may now be brought as a matter of right by individual employees to the MSPB – a class of "plaintiffs with different incentives." *Hughes*, 520 U.S. at 950 ("The extension of an FCA cause of action to private parties in circumstances where the action was previously foreclosed is not insignificant. As a class of plaintiffs, *qui tam* relators are different in kind than the Government.").

Section 101(b)(2)(B), those at issue in *Day*, broadens the definition of protected disclosure and is analogous to those changes in the laws addressed in both *Hughes* and *Caddell*. Under the WPA and *Huffman* standards, individuals who made disclosures within the normal course of their job duties or to the alleged wrongdoer could not establish non-frivolous allegations of protected disclosures sufficient to confer Board jurisdiction. Given that Section 101(b)(2)(B) of the WPEA acts to effectively overturn *Huffman*, by its very nature, the provision creates new causes of action and expands the universe of individuals who can bring suit, in the same way that the changes to the FCA at issue in *Hughes* and the changes to the WPA at issue in *Caddell* broadened the class of plaintiffs who could bring claims.

Even if considering the standard set forth by the Board in *Scott*, whether the change in the law was directed at regulating the primary conduct of the parties, one

can only conclude that the provisions of Section 101(b)(2)(B) do impact the primary conduct of the parties because they change the definition of protected disclosures, which, since *Willis* in 1998, has not included disclosing information to the alleged wrongdoers and, since *Huffman*, in 2001, has not included disclosing information in the normal course of job duties.

This new definition of protected disclosures imposes new rights. Under the pre-WPEA standard, disclosures to the wrongdoer and those made in the normal course of job duties were not protected as a matter of law, a well-established principle set forth almost 15 years ago. In assessing how to manage the federal workforce, management officials may consider numerous factors. For example, pre-WPEA, a management official may be aware that an employee, in the normal course of his duties, has made management aware of alleged violations of law. Separate and apart from these "disclosures," management may have a legitimate, business need to reassign the employee. In considering reassignment, management may be aware of the "disclosures" and, even if not considering them, believe that the act of making the "disclosures" is not protected activity, thus not have any concern about the "disclosures" as they relate to the separate decision to reassign.

Amici in *Day* argued that Section 101(b)(2)(B) merely clarifies the definition of protected disclosure. In support of this argument, The National Employment Lawyers Association ("NELA") and OSC argued that the legislative history supports this notion and that the language in the statute itself – "Clarification of Disclosures Covered" – establishes this provision was meant to clarify, not to create, rights. (NELA brief in *Day* at 10, OSC brief in *Day* at 10 – 11). This argument is circular and confuses the *Landgraf*

standard. As argued above in Section I, the mere act of entitling a provision in a time-neutral statute does not "demonstrate" clear intent on the part of Congress for retroactive application. Moreover, the very fact that the legal analysis of application requires consideration of the actual retroactive effect of the law means the statute did not expressly authorize retroactive application.

Amici in *Day*, NELA and OSC, also argued that the WPEA provisions are clarifying in nature because Congress simply intended to correct erroneous decisions by the Board and the Federal Circuit. (NELA brief in *Day* at 10 – 12, OSC brief in *Day* at 10-11). However, these arguments also fail. A new law is not automatically deemed to be clarifying in nature simply by virtue of the fact that Congress issued it to correct "erroneous" court decisions which is "quite distinct" from the choice to *retroactively* correct decisions. *Lytes*, 572 F.3d. at 941, *citing Rivers*, 511 U.S. at 311. The very fact that Congress believes legislation is necessary in order to correct "erroneous" court decisions is evidence that Congress is acting to do more than simply clarify the law and "requiring clear intent assures Congress itself has affirmatively 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.

Each of the *Day* Amici's arguments above regarding use of the word, "clarifying" and "clarification" in the statute and the fact that Congress intended to overturn specific court decisions when it passed the WPEA, is dispelled by considering Congress's intentions when passing the ADAAA. In the same way Congress broadened the definition of protected disclosure to overturn *Willis* and *Huffman* within Section 101(b)(2)(B) of the WPEA, Congress, when passing the ADAAA, unequivocally stated

within the law itself its intent to broaden the definition of disability and overturn Supreme Court precedent. In determining whether the ADAAA applies retroactively, given the "disfavored retroactive effect" of "broaden[ing] the class of employees entitled to reasonable accommodation," and the lack of any evidence to establish clear congressional intent of retroactive application, the D.C. Circuit was not persuaded by such language in the body of the statute. *Lytes*, 572 F.3d at 939-42. It is abundantly clear that Section 101(b)(2)(B) does much more than clarify the law. It creates a new class of individuals to file whistleblower appeals and shifts the ground under which all parties have been operating for close to fifteen years.

Similarly, Section 106 broadens the scope of available disciplinary actions that can be imposed on government supervisors who are found to have violated the Act. Pub. L. No. 112-199, § 106, 126 Stat. 1465. Where the old legal framework only permitted the MSPB to discipline supervisors in a single manner, the WPEA now permits any combination of removal, reduction-in-grade, debarment from federal employment, suspension, reprimand, and civil fine. In *Caddell*, the Federal Circuit construed a WPA amendment prospectively, in part, because it "could increase a government official's liability for past conduct." 96 F.3d at 1371. This implicates due process considerations. Due process is based on the concept of fundamental fairness and the anti-retroactivity principle stems from fundamental fairness and notice concerns. See *Landgraf*, 511 U.S. at 265 ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted").

While OSC may not have authority to seek disciplinary action against those management officials involved in the instant IRA appeal, OSC would have such authority in pending prohibited personnel practice investigations with regard to agency officials, thus pinning the officials with "additional burdens based on conduct that occurred in the past." *Landgraf*, 511 U.S. at 283, n. 35. Such a finding is not in keeping with the notion of fairness that individuals should have an opportunity to conform their conduct in accordance with the law.

The WPEA's new disciplinary provision would not only increase liabilities that attach to conduct already considered illegal under the pre-existing WPA, but would also attach significant new liabilities on government supervisors for conduct that was previously considered insufficient to establish a viable whistleblower complaint.

As the United States Department of Veterans Affairs pointed out in its amicus brief filed in *Day*,

> Retroactive application of this expanded coverage may subject the manager to discipline after she, either with or without correct legal guidance from agency counsel or from OSC, failed to act on such a disclosure but later, and possibly unrelated to the earlier disclosure, imposed discipline against the disclosing employee. In short, managers who previously justifiably relied on the then-current state of the law regarding what constituted a protected disclosure could be disciplined up to and including being removed from federal employment.

(*See* VA Brief in *Day* at 12).

Retroactively applying the WPEA to pending cases will subject management officials to disciplinary actions for past conduct and thus deprive them of their due process rights inasmuch as they were not placed on notice regarding the current state of the law at the time they engaged in actions in regard to communications which are now

considered to be protected disclosures under the WPEA. This well fits within the anti-retroactivity principles discussed above.

III. The WPEA's legislative history does not conclusively demonstrate a clear congressional intent for retroactive application.

Although consideration of congressional intent is not necessary because the statute's prospective nature is clear on its face, we address the arguments below.

The only significant piece of legislative history that contemplates retroactive application of the WPEA is a single Senate committee report stating: "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." S. Rep. No. 112-155, at 52 (2012). No similar language can be found in the legislation's parallel House committee report. H.R. Rep. No. 112-508, at 12 (2012). Of course, the Senate committee's language and sentiment never made its way into the statute, was never voted on by the full Senate or the House of Representatives, and was never signed into law. At most, the reference to retroactivity in the Senate report highlights the fact that some Senators thought the amendments should apply retroactively, but that view evidently never garnered enough support to include the kind of express language in the bill itself that would rebut the presumption.

In *Day*, the amici's argument that Congress's intent that the WPEA should apply retroactively rested merely on the above-mentioned single paragraph contained in the Senate committee report. (See OSC brief in *Day* at 5, GAP brief in *Day* at 15, NELA brief in *Day* at 7.) Such legislative history is far too slender a reed to rebut the presumption against retroactivity.

Legislative history may not be employed to generate ambiguity that is otherwise missing from the statute. "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it…When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language." *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1267 (2011). Bypassing express language in a statute to sift through legislative history is particularly disfavored when it only serves to "mudd[y] the waters" of an otherwise clear statutory command. *United States v. Gonzales*, 520 U.S. 1, 6 (1997).

In *Milner*, the Supreme Court rejected the Government's argument that a single House committee report was sufficient to provide the proper construction of a FOIA provision. *Milner*, 131 S. Ct. at 1267. In particular, the Court noted the fact that the corresponding Senate committee report failed to express a similar intent. *Id.* More recently, in *Gonzales*, the Supreme Court rejected legislative history arguments grounded in a single committee report, finding that such a "snippet of legislative history injects into [the statute] an entirely new idea . . . 'in no way anchored in the text of the statute.'" 520 U.S. at 6.

Assuming, for argument's sake, that the delayed effective date language in the WPEA is not clear indication of prospective application, language in a single committee report and corresponding floor statements is not enough to rebut the *Landgraf* presumption against retroactivity. In *Zarcon, Inc. v. National Labor Relations Board*, 578 F.3d 892 (8th Cir. 2009), the Eighth Circuit specifically addressed the question of whether a committee report and corresponding floor statements expressing an intent to apply a statute retroactively were sufficient to rebut the *Landgraf* presumption,

concluding persuasively that they were not. Finding that the OPEN Government Act—which amended the FOIA—could not be applied to cases pending at the time of its enactment, the Eighth Circuit rejected the plaintiff's contention that the legislative history of the act evidenced "clear congressional intent" to apply its provisions retroactively to pending cases. *Id.* at 896. Specifically, the court held that a single Senate committee report and floor statements made by the bill's sponsoring Senator "are insufficient to overcome the default rule announced in *Landgraf* that '[w]hen . . . the statute contains no . . . express command [regarding its effective date],' it is not to be applied retroactively." *Id.*

Even members of Congress themselves recognize the danger in relying upon such slim legislative history. The words of former Senator John Danforth made during discussions regarding congressional intent as it related to the Civil Rights Act of 1991 ring true today, "[A] court would be well advised to take with a large grain of salt floor debate and statements placed in the Congressional Record which purport to create an interpretation for the legislation that is before us." *Landgraf*, 511 U.S. at 262, n. 15, *citing to* 137 Cong. Rec. S15325 (Oct. 29, 1991).

Moreover, a closer look at the legislative development reinforces that the legislative history is neither enlightening nor persuasive here. The WPEA was introduced to the Senate on April 6, 2011 as S.743. A review of each of the bills from introduction through the final version reveals that the effective date of the WPEA was to always be 30 days after its enactment, with the exception of Section 109 which became effective immediately upon enactment for TSA employees and applicants. Nothing in any of the various versions of the bill reveals Congressional intent to retroactively apply

any provision of the WPEA. Congress had multiple opportunities to include the retroactive language – language that, as argued above, it had used before in various other statutes – but plainly did not do so.

IV. The *Landgraf* Doctrine is Applicable to the Board's Question

A. The Board must apply the *Landgraf* doctrine.

In *Day*, OSC sought to limit the Board's authority in the matter by attempting to distinguish the Board, an administrative tribunal, from an Article III court. (OSC brief in *Day* at 12-14). The authority upon which OSC relied is a case that pre-dates *Landgraf* and is wholly unrelated to a federal statute impacting the rights of employees and the obligations of employers. What's more befuddling about the OSC argument is that the Board has already applied *Landgraf* in numerous decisions, to include both *Caddell v. Department of Justice*, 66 M.S.P.R. 347 (1995), and in *Scott*, when determining whether the 1994 amendments to the WPA were retroactive. Moreover, the Board's reviewing court recently remanded a case back to the Board for consideration of the retroactive application of the WPEA. *See Nasuti v. MSPB*, 113 LRP 2327, Nos. 2012-3136, 2012-3162 (January 16, 2013).[2]

In support of its argument, OSC cites to precedent that stands for the premise that the Constitution's grant of executive authority does not include the right to nullify legislative acts. (OSC brief in *Day* at 13). This argument assumes the answer to the very question at issue in the instant appeal. We agree that the Board does not have any such authority and given, as argued above, the WPEA is clear on its face that its provisions were to be applied prospectively, the Board should so find.

[2] The very fact that the Board invited interested organizations to file amicus briefs in the instant appeal is further support that OSC's position from *Day* is incorrect.

B. The presumption against retroactivity is applicable to public sector employers.

In *Day*, OSC suggested that Government's broadly defined interest as a public employer is materially distinguishable from the interest of the private employer in *Landgraf* and, therefore, the Board should apply the law as it exists at the time of its decision. (OSC brief in *Day* at 18). Seemingly, the OSC brief suggests that the Supreme Court's analysis in *Landgraf* was premised on "interest balancing" between an employee and her *private* employer that is sufficiently unique to justify a different balance in this case between an employee and a *public* employer.[3]

However, as established in the preceding section, the *Landgraf* holding was not meant to be narrow in its application, nor was it cabined to the specific facts or equities of that case. Indeed, nothing in *Landgraf* suggests that it applies only to private employers. Instead, *Landgraf* established a robust judicial presumption that Congress legislates prospectively absent a clear statement to the contrary, lest "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration." *Landgraf*, 511 U.S. at 266. The decision, along with its progeny cases, established a strong presumption against retroactive construction of statutes that functionally alter the rights, duties, liabilities, and expectations of parties—a presumption that can only be rebutted if Congress makes its intention to do so unambiguously clear. *Id.* at 268.

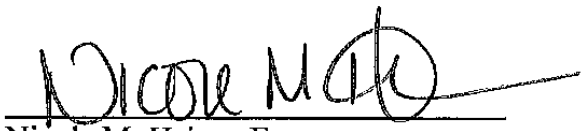
[3] In a footnote of its brief in *Day*, OSC cited to *Lyons v. United States*, 99 Fed. Cl. 552, 556 (Fed. Cl. 2011), as persuasive authority for the proposition that "Supreme Court precedent on retroactivity focuse[s] on private parties and, therefore, [is] inapposite as to Congressional changes to government liability." (OSC brief in *Day* at 18, n.6). OSC's reliance on *Lyons* is misplaced. While the court in *Lyons* noted in passing that "[a]t least one federal court has found retroactivity analysis inapposite where the Government is the defendant, asking only whether sovereign immunity has been properly waived," the *Lyons* court nonetheless analyzed the question of retroactivity within the well-established framework of *Landgraf*, ultimately determining that the statute at-issue in the case would not have retroactive effect and could therefore be applied retroactively. *Id.* at 556-60.

Most important for this case, and as detailed above, the *Landgraf* presumption has already been applied by this Board and the Federal Circuit in the context of amendments to the WPA. OSC's argument in *Day* on this point is therefore inconsistent with existing precedent.

CONCLUSION

Accordingly, the Agency respectfully requests that the Board issue a decision affirming Administrative Judge Malouf's decision finding that Section 107(b) and the remaining provisions of the WPEA are to be prospectively implemented.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that the foregoing document has been sent as designated below this 12th day of April, 2013 to each of the following individuals:

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Clerk of the Board
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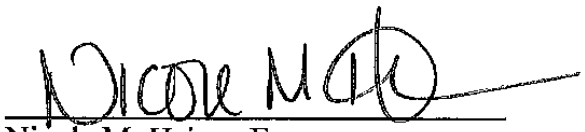

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