

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

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<b>BARBARA S. KING,</b> )	
<b>APPELLANT,</b> )	<b>DOCKET NUMBER</b>
)	<b>DA-0752-09-0604-P-1</b>
<b>v.</b> )	
)	
<b>DEPARTMENT OF</b> )	<b>April 11, 2013</b>
<b>AIR FORCE,</b> )	
<b>AGENCY</b> )	<b><u>ORAL ARGUMENT REQUESTED</u></b>
_____ )	

**BRIEF OF AMICUS CURIAE GOVERNMENT ACCOUNTABILITY PROJECT  
AND WHISTLEWATCH.ORG**

The Government Accountability Project (GAP) is a non-partisan, non-profit public interest law firm specializing in legal advocacy on behalf of “whistleblowers” – government and corporate employees who expose illegality, gross waste and mismanagement; abuse of authority; substantial or specific dangers to public health and safety; or other institutional misconduct undermining the public interest. Since 1978 GAP has helped over 5,000 whistleblowers through representation or informal assistance; and been a leader through sharing expertise, drafting, testifying, advocacy, defense of, and/or oversight of implementation for all of America’s federal whistleblower laws that have been enacted during that period. Those statutes include the civil Service Reform Act of 1978, the Whistleblower Protection Act of 1989, 1994 amendments to the same law, and the Whistleblower Protection Enhancement Act.

The Brown Center for Public Policy, also known as (a/k/a) Whistlewatch.org, is a Not for Profit, Public Benefit 501(c)(3) incorporated in 2011 in the State of California that engages in

advocacy, education, journalism and litigation on behalf of whistleblowers and tax payers. It is an advocate for the need to immediate and retroactive application of the WPEA to pending cases.

WhistleWatch.org qualifies as a representative of the news media under 5 U.S.C. § 552(a)(4)(A)(ii)(II) and is exempt from fees for Freedom of Information Act (FOIA) requests because we disclose information on government performance, oversight responsibilities and costs in the public interest. Further, Whistlewatch.org converts the information received and conducts independent research then publicizes distinct Internet publications and provides information to fellow colleagues in the public policy community including the Make It Safe Campaign & Coalition (MISC). We are a member affiliate of MISC that worked with Government Accountability Project and other good government groups for the passage of the Whistleblower Protection Enhancement Act (WPEA).

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## **OPENING STATEMENT ON HISTORICAL REFORMS TO PROTECT FEDERAL WORKERS**

During the early 1970's, the United States government was controlled by partisan politics under the Nixon administration that manipulated federal workers into committing violations of law including civil and criminal acts. An abuse of authority within the Executive Branch threatened to destroy American Democracy. The Judiciary, the Legislature and Executive Branches were all subject to unchecked political influence resulting in an indifference to the rule of law.

In 1974, the United States Supreme Court addressed the question of Executive Privilege by President Richard Nixon, ruling there would be no sanctuary for illegal acts committed by government officials. Nixon facing oncoming impeachment proceedings resigned. 30 years later we learned the true identity of a vital federal whistleblower.<sup>1</sup>

As it was in the 70's, it is today, whistleblowers within the federal government perform legal duties to protect the public, disclosing fraud, waste, abuse, mismanagement and dangers to public health and safety that government officials often seek to bury, often under the death of the federal employees' career. Federal whistleblowers continue to light a path to expose corruption within government and provide a beacon of oversight authority for industry. The American people owe government workers a debt of gratitude and have chosen to protect them by allowing their elected officials in Congress to pass a series of protectionist laws.

In 1978, Congress made sweeping changes for federal workers through the Civil Service Reform Act. The Office of Personnel Management (OPM), the Merit System Protection Board

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<sup>1</sup> Mark Felt worked for the Federal Bureau of Investigations (FBI) during the Nixon Administration.

(MSPB) and the Federal Labor Relations Authority (FLRA) were created to ensure Constitutional rights for federal employees would be protected. The Office of Special Counsel (OSC), where whistleblowers may seek safe harbor from retaliation was initially created as a subunit of MSPB. Now OSC is an independent investigative federal agency.

These federal agencies have a mission to protect government workers from political influence, discrimination and whistleblower retaliation, enforcing the laws passed by Congress. These laws include the Whistleblower Protection Act (WPA) of 1989, the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No Fear Act), and the Whistleblower Protection Enhancement Act (WPEA) of 2012.

Public laws are the underpinnings of the foundational protections afforded individuals who carry out sacrosanct obligations of public service. “Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.” (*Exhibit A*) We cannot ask federal workers to honor that trust if doing so means they will be subject to unbridled emotional and financial harm. To by a legal duty obligate an employee to expose corruption and wrongdoing within the government or in their work performing industry oversight work but ask them to do so at their own peril is to revert to Nixon era mentality, devoid of ethical conduct.

Employees of the federal government have long been denied a meaningful and just system of adjudication of employment law cases despite clear intent by Congress for over 30 years. Now is the time for the MSPB to send a resounding message to federal management. Unlawful acts of discrimination and whistleblower retaliation will no longer be tolerated. All federal agencies will act as model employers. Individuals who seek to violate any law, including those which protect federal service employees who protect the public and the tax payers’ money shall suffer the consequences. Tax payer waste to discriminate and retaliate against the employees of the people, shall cease.

## **STATEMENT OF POSITION**

The Whistleblower Protection Enhancement Act (WPEA) must be applied retroactively with respect to rights and remedies. Not only is this necessary to provide the full protections that are badly needed by federal service whistleblowers, but based on the CSRA, the WPA and subsequent amendments coupled with the import of the No Fear Act, it is the clear intent of Congress to make the WPEA retroactive as to all pending cases, including those on appeal. Therefore, we stand on our previous sound reasoning and well articulated amicus brief arguments submitted to the Board for *Day v. Department of Homeland Security*, MSPB Docket Number SF-1221-12-0528-W-1 and add additional proof to show full damage recovery was always intended by Congress in order to fully compensate aggrieved parties for their losses.

## **STATEMENT OF THE ISSUE**

The issue before the Board is the retroactive application of the damages provision of the WPEA, signed into law on November 27, 2012. As specified, the issue of retroactive application of the Act is already before the Board in *Day*. More specifically, the issue is whether the Act and its clarified provisions applies to claims filed, cases in process and appeals pending or filed as of the effective date of the Act, December 28, 2012.

In the instant action, the events giving rise to the claim by Appellant occurred before the declared effective date of the WPEA but when passage was imminent. Administrative Law Judge (AJ), Malouf, issued her decision finding that Agency had committed prohibited personnel practices and ordered damages to be paid to Appellant. This decision to order damages paid Appellant is consistent with provisions for damages already encompassed by the WPA and subsequent amendments.

Notably as instructed by the AJ, the Appellant filed her request for full damages on the same day the President signed the WPEA, November 27, 2012. However, in a startling turnabout, in February 2013, the AJ then questioned whether to afford Appellant all compensatory and consequential damages under the WPA or in doing so make it, a retroactive application of the WPEA.

Meanwhile during the same period of time, another AJ overseeing the *Day* case sought whether to apply retroactive application of the WPEA under a previously overruled decision; *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir 2001).<sup>2</sup> Thus, within days of passage by Congress, signature by the President and enactment, pending cases at MSPB were already receiving inconsistent and disparate treatment.

As articulated by the AJ in her March 6, 2013, Order and Certification for Interlocutory Appeal, the clarified damage section of the WPEA would have retroactive effect, not provided for in the language of the statute. In reaching her decision, the AJ relied on a legislative analysis of Congressional intent for the WPEA based on comments [or lack thereof] in the record. However, we contend that the AJ ignored the clear intent in the amendments to the WPA, specifically in 1994 and the declaration in the preamble of the WPEA that Congress once again intended to provide all reasonable and foreseeable damages to aggrieved parties and to reverse all erroneous decisions that misinterpreted legislative intent as in *Huffman* and other ill begotten progeny such as *Bohac v. Department of Agriculture*, 239 F. 3d 1334 (Federal Circuit 2001).

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<sup>2</sup> It is unclear from the record in the instant action if the judge rejected *Huffman* or applied only one component of the WPEA retroactively while denying the same treatment to another section of the WPEA.

## LEGISLATIVE LANGUAGE BACKGROUND & HISTORY

The WPEA is explicitly declared by Congress to be clarifying.<sup>3</sup> Its purpose is thus to reinstate the protections that were designed to be afforded by the original WPA, including comprehensive remedies. The original remedies provided were intended to include all manner of damages that were a consequence of the retaliation visited upon the employee by the Agency. The distinction between compensatory and consequential damages that developed under the WPA was a by-product of several incorrect interpretations of the 1991 amendments to Title VII of the Equal Employment Opportunity (EEO) laws. Only select components of economic damages were allowed to be recovered according to the MSPB.

The WPA was ultimately reduced to a hollow ringing bell that did not apply to disclosures made in the direct course of employment and a way to exclude damages for the emotional harm and other damages directly caused by the retaliation. Since the WPEA is declared to be a long overdue *clarification* of the WPA, it is presumptively retroactive on its face. An enhancement of an existing law cannot logically interpret any other way.

Many unsuccessful attempts were made to enact clarifying amendments to the WPA. Congress after Congress sponsored and promised to pass amendments similar for the new WPEA. From 2004 until 2010, every attempt to achieve final passage was sabotaged at the final step by the exercise of Senate holds and anonymous overrides at the last minute. While the delay in enacting the WPEA is tragic, the tragedy should not be compounded by limiting the application of the

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<sup>3</sup> “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”.

clarifications to those who have endured the tortured application of the Act while trying to do the right thing.

It is clear that the proposed amendments or clarifications are not new or novel, since the exact provisions were anticipated for well over a decade. The Board has the opportunity before it now to recognize what Congress made clear in the **preamble** to the WPEA. Specifically, **the WPEA is an amendment to and a clarification of the WPA...**

*“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”.*

Given the plain language meaning, as applied the WPEA is Congressional intent to correct the law to override decisions that were wrongfully interpreted, decided and applied by the courts. Since the WPEA expressly provides that it is intended **to clarify** and correct the WPA, as a matter of legislative and contract interpretation it can't be construed otherwise. Presumably Congress knew and understood that using the phrase **“clarification”** would produce the desired retroactive application based on well-developed law interpreting legislative enactments.

### **FACTS AND PROCEDURAL HISTORY**

The instant action involves a female veteran of the armed military forces who worked as a civilian federal service employee of the Air Force as the Sexual Assault Prevention & Response Program Manager, at Sheppard Air Force Base in Texas. The Plaintiff made protected whistleblower disclosures of a failed program that was not protecting victims. The protected disclosures included the brutal rapes of our military service members. The subject of which has led to numerous

investigations and class action lawsuits that shame the country. A movie titled The Invisible War<sup>4</sup> speaks to the atrocities of being in a military culture where sexual harassment and sexual assault goes unchecked. Appellant's work was to protect victims and take appropriate actions. Agency thwarted Appellant's efforts to speak up and protect victims.

Rather than act on the protected disclosures to correct problems in the Program, Appellant became a victim of Agency management resistant to change. In the wake of the protected disclosures, Appellant was subject to sex and age discrimination and severe whistleblower retaliation including a stripping of her duties, a several grade level demotion and interference with her attempt to seek other employment in order to cover-up the wrongdoing. Appellant reported wrongdoing up the chain of command but no one was willing to protect her or the other victims. The sex scandal in the military has grown to epic proportion.

The whistleblower disclosures were made during the normal course of work with the case spanning several years with Appellant having first sought protection at the OSC, to no avail. Then, the MSPB dismissed Appellant's first appeal as premature, sending her off to the full Board, adding to the additional delay for relief. The Board eventually reversed and re-opened the appeal.

During the long drawn out proceedings Appellant suffered significant emotional damages and financial harm, including the loss of a low rate Veteran Administration (VA) backed home loan because she was forced to move from one location to the next taking lesser paying jobs in order to feed her family. But for the discrimination and whistleblower retaliation none of this would have

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<sup>4</sup> In 2010, 108,121 veterans screened positive for military sexual trauma, and 68,379 had at least one Veterans Health Administration outpatient visit for related conditions. Also in 2010, The Department of Defense processed reports of 3,198 new assaults but estimated the actual number of assaults to be closer to 19,000. However, these reports only resulted in convictions against 244 perpetrators. "Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2010." Department of Defense. Retrieved 2012-05-30 Source; Wikipedia.

happened to Appellant. The losses Appellant incurred are directly attributed to the prohibited personnel practices. Agency willfully prolonged Appellant's pain and suffering.

On October 3, 2012, Administrative Judge (AJ) Marie A. Malouf ruled in Appellant's favor, thereby making her the prevailing party, finding against Air Force for prohibited personnel practices under 5 U.S.C. 2302. However, the decision was not allowed to be made public by the parties until November 7, 2012, when it became final. Less than one week later on November 13, 2012, Congress passed the WPEA, effectively making it the law of the land. President Obama signed the Bill on November 27, 2012. 30 days later the WPEA became "effective."

### **ARGUMENT**

In the instant appeal, Judge Malouf rejected retroactive application of the WPEA as to Appellant's entitlement to an award of compensatory and consequential damages. See, *Summary of Conference Call on Damages*, (Exhibit B). The reasoning of the AJ is confounding, since the point of the remedial statute is to make a prevailing party whole, and no worse off than if the confirmed violation of rights had not occurred.

Appellant lost her VA low rate mortgage financed home, numerous professional opportunities and hundreds of thousands of dollars for blowing the whistle in order to protect sex assault victims. By virtue of Mr. King's job title, she learned of the disclosures during the normal course of her work duties. The case was correctly decided in her favor contrary to *Huffman*. It appears the AJ recognized the retroactive application of the WPEA as to the *Huffman* issue, however, she did not consider the huge impact of financial damages on King. It is illogical for the AJ to apply one component of the new Act retroactively and deny retroactive effect to another provision concerning damages.

Moreover, the instant AJ decision was made knowing the Board was requesting amicus to be filed on the very issue involved in the instant action: retroactivity. It is extremely worrisome that the AJ, knowing that the WPEA was on its way to passage by Congress, would issue her ruling in the instant case so quickly when years had passed while the case languished at the MSPB. It would appear there could have been a conscious effort to prevent Appellant from being adequately compensated by quickly announcing the decision immediate before passage of the Act. The decision was made by an AJ who clearly knew the arduous journey Appellant traveled.

It would be a travesty of justice to deny Appellant full recovery of all damages directly related to violations of law, rule and regulation and all attorney fees unless the AJ intends to create a lesser class of citizens, who report sexual discrimination and sexual assault by denying them equal rights protection for discrimination and whistleblower retaliation. A decision not in favor of providing all damages related would hold Appellant and other victims must finance their own litigation to assert due process of law and property rights with no substantial recovery for years of losses, while federal agencies violate laws with impunity, all funded by tax payers.

**CONGRESSIONAL INTENT SHOWS REPEATED ATTEMPTS TO ELIMINATE LOOPHOLES AND TO REAFFIRM REMEDIES PREVIOUSLY ESTABLISHED.**

The relevant provision of H.R. 2970, which created consequential remedies in 1994, is consistent with amici's position that specifying compensatory damages merely clarifies the law's intent all along. Section 8 of the legislation provides:

**CORRECTIVE ACTIONS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD.**

(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.'

The WPEA solution on remedies is consistent with the umbrella provision in section 1 of the WPEA for rights. In both cases, the Federal Circuit or Board created specific loopholes that prevented the law from achieving the result Congress intended. In each case, Congress has offered sweeping umbrella language for its “no loopholes” intent, followed by specific illustrative examples. The only difference is that for remedies, Congress provided it in 1994 through subsection (g)(1) of HR 2970. For protected activity, Congress provided both general and specific “no loopholes” guidance in section 1.

The point of compensatory damages is to perfect the make whole remedy – often the only way even to approach making an employee whole for emotional distress, pain or loss of reputation. In the only legislative history for the final text, House floor manager Frank McCloskey (D.-Ind.) explained that the bill had “expanded provisions” for consequential damages. 45 Cong. Rec. H11421 (daily ed., Oct. 7, 1994)

The goal was to provide statutory authority previously lacking for particular types of expenses that require specific language. Consequential damages were included in the 1994 WPA amendments as additive authority to complete a make whole remedy, not substitute language to shrink it. Therefore, Congress closed loopholes and made clear their intent to provide for both compensatory and consequential damages.

## CONSEQUENTIAL DAMAGES INCLUDES PAIN AND SUFFERING

The AJ wrongly denied retroactive application of the damages clarification by finding the section created a new category or species of damages. The AJ erred in her analysis by ignoring the very broad definition of consequential damages and that the WPEA is a statutory cause of action, not one based in contract or tort. She adopted the same erroneous analysis as the court in *Bohac v Department of Agriculture*, 239 F. 3d.1334 (Fed Cir 2001), which incorrectly held that consequential damages did not include compensatory damages because the action was more akin to a contract action and because the amendments to Title VII in 1991 used the term “compensatory damages.”

The definition of consequential damages can be broadly construed to include all damages that are reasonably foreseeable as a consequence of the wrongful act, whether caused by a breach of contract or by negligence. It is well settled that consequential damages includes compensatory damages as a sub species. *Deisler v McKormick Aggregates Co.*, 54 F 3d 1074 (3<sup>rd</sup> Cir. 1995). In *Deisler*, the court noted that compensatory damages are included within the definition of consequential damages:

*While the district court correctly classified Deisler’s lost wages and damages for his pain and suffering as compensatory damages, an award of consequential damages would clearly encompass these compensatory damages. Compensatory damages serve to compensate for harm sustained by a party. Restatement (Second) of Torts § 903 (1977). Consequential damages are merely compensatory damages for harm that “does not flow directly and immediately from the act of a party, but only some of the consequences or results of such act.” Black’s Law Dictionary 390 (6th ed. 1990).*

In almost every area of the law, consequential damages include all damages flowing from or caused by the wrongful conduct if foreseeable. This includes physical and emotional pain and suffering. See, *Restatement of Torts, 2d, Section 903*. Moreover, the Supreme Court in *United States v. Burke*, 504 U.S. 229, 240, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992) expressly recognized that consequential damages in the context of employment discrimination includes physical and emotional

pain and suffering. The concept of consequential damages as a separate and distinct category of purely economic damages is an aberration unique to the WPA. *Bohac v Department of Agriculture*, 239 F. 3d.1334 (Fed Cir 2001).

In *Bohac*, the court incorrectly determined that there was no well recognized definition of consequential damages despite the Restatement and other famous court decisions. It then incorrectly determined that wrongful discharge cases do not allow for an award of non-pecuniary emotional distress damages. Finally, it misconstrued the amendment to Title VII. Since that Act, Title VII, had already provided for back pay and equitable relief, the term “consequential damages” was a redundancy. Thus, the legislature, in amending Title VII, used the term “compensatory” damages, the emotional distress component of the broader category of consequential damages. The WPA, however, began with the term “consequential damages” as its baseline. This necessarily included pecuniary and non-pecuniary damages. The court in *Bohac* did not need to look any further than the decision in *Burke* to recognize that consequential damages include compensatory damages by definition.

While it is clear the concept of “consequential damages” as a unique category of economic damages arose as a result of a misinterpretation of Title VII, consequential damages simply includes pain and suffering and emotional distress from a literalist perspective as well. They are a foreseeable consequence of the prohibited action. In almost all other jurisdictions, however, pain and suffering damages are included within the general category and scope of “consequential” damages when they result from wrongful conduct.

The “unique” decision in *Bohac*, misinterpreting the WPA and improperly creating a sub species of damages that did not previously exist, tortures the definition of “consequential” to avoid making an award for the incredible emotional distress endured by a whistle blower. This aberration is corrected and clarified by the WPEA, Section 1221 (g) (1) (A) (ii). The damages clarification or

amendment simply harmonizes the common definition of consequential damages, as the broadest category of damages, as including compensatory damages as well as economic damages. Therefore, the damage amendment of the WPEA is also clarifying because *Bohac* was not carrying out with the intent of Congress as observed in the legislative history nor the WPA.

**A BRIDGE FOR THE MSPB TO CROSS WAS BUILT ON ANTI-DISCRIMINATION AND ANTI-WHISTLEBLOWER RETALIATION LAW IN THE NO FEAR ACT**

Perhaps it would be helpful for the MSPB to look at every single federal agency website for guidance on how to decide the *King* appeal. That guidance on whether to award full damages is right before its eyes. There is no need to search on high for a way to allow Agency to escape responsibility for the damage it caused Appellant. The Board need only look to a more recent law that protects federal service workers from heinous discrimination and whistleblower retaliation. That law is the No Fear Act.

Passed over a decade ago the No Fear Act specifically articulated clear Congressional intent.

The preamble reads:

To require that Federal agencies be accountable for violations of antidiscrimination and whistleblower protection laws; to require that each Federal agency post quarterly on its public Web site, certain statistical data relating to Federal sector equal employment opportunity complaints filed with such agency; and for other purposes.

In section 101, the text is resoundingly clear that federal agencies must not discriminate nor retaliate and if they do, they must pay for the consequences of their actions:

Congress finds that

- 
- (1) Federal agencies cannot be run effectively if those agencies practice or tolerate discrimination
  - (8) requiring Federal agencies to pay for any discrimination or whistleblower judgment, award, or settlement should improve agency accountability with respect to discrimination and whistleblower laws.

What could be clear regarding discrimination and whistleblower retaliation then the No Fear Act? Yet the MSPB has never applied the No Fear Act to a single case. As here, the MSPB prefers to impose upon Appellants an obligation to become lawyers by churning out references to “statutory retroactivity” and “ex post facto” and “clear statement rules” as defined in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). The AJ must want to dazzle legal minds and befuddle common folk with a diatribe, regurgitating the high court that “absent a clear statement from Congress that an amendment should apply retroactively, we presume that it applies on prospectively...”

There is no need for the MSPB to find another loophole for federal agencies to fall through using *Landgraf*. It took advocates, whistleblowers and Congress more over 13 years to regain ground while whistleblowers lost their jobs while the MSPB obliterated their rights meanwhile, each year, every federal employee choked down meaningless training on the No Fear Act with tax payers spending billions paying the bill out of operating budgets appropriated by Congress for the public good.

A bridge to strengthened whistleblower laws is waiting to be spanned. Its intent is in the clear statement of the No Fear Act. It’s time has come and the MSPB can apply it as a bridge to enforce anti-discrimination and anti-whistleblower retaliation laws.

## CONCLUSION

For all the foresaid reasons, the WPEA is a *clarification* of the WPA. Through its passage and subsequent enactment, it corrects a series of aberrant court decisions. The AJ incorrectly looked to the committee notes and ignored the express language of the WPA, Congressional original intent and the plain language wording of the WPEA while avoiding the No Fear Act. The Board must rule in favor of Appellant to award all costs and damages, compensatory and consequential.

There should be no doubt that Congress intended that the No Fear Act, the WPA and the WPEA would be the best protections for federal employees from discrimination and whistleblower retaliation, with full remedies. The WPEA is not creating anything new as to the damages portion. It is simply an enhancement Act that sought to reverse decades of wrong decisions by the MSPB and Federal Circuit that protected retaliating federal management verses honorable federal workers.

Respectfully Submitted,

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AMICUS CURIAE BRIEF  
GOVERNMENT ACCOUNTABILITY PROJECT & WHISTLEWATCH.ORG  
14 PRINCIPLES OF ETHICAL CONDUCT

EXHIBIT A

## **Fourteen Principles of Ethical Conduct for Federal Employees**

- (1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.
- (2) Employees shall not hold financial interests that conflict with the conscientious performance of duty.
- (3) Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.
- (4) An employee shall not, except as permitted by the Standards of Ethical Conduct, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.
- (5) Employees shall put forth honest effort in the performance of their duties.
- (6) Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.
- (7) Employees shall not use public office for private gain.
- (8) Employees shall act impartially and not give preferential treatment to any private organization or individual.
- (9) Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.
- (10) Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.
- (11) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.
- (12) Employees shall satisfy in good faith their obligations as citizens, including all financial obligations, especially those -- such as Federal, State, or local taxes -- that are imposed by law.
- (13) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.
- (14) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in the Standards of Ethical Conduct. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

AMICUS CURIAE BRIEF  
GOVERNMENT ACCOUNTABILITY PROJECT & WHISTLEWATCH.ORG  
SUMMARY OF CONFERENCE CALL ON DAMAGES

EXHIBIT B

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
DALLAS REGIONAL OFFICE**

BARBARA R. KING,  
Appellant,

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

v.

DEPARTMENT OF THE AIR FORCE,  
Agency.

DATE: February 11, 2013

**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.<sup>1</sup>

REPRESENTATIVES - The appellant confirmed that Joseph Bird is representing her in both of the pending proceedings. The agency's representative confirmed that Heather Masten, who had previously served as the agency's representative, has moved to another agency and she is no longer representing the agency in either of these proceedings.

SETTLEMENT – I encouraged the parties to explore settlement possibilities. I informed them that the Board retains the authority to enforce

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<sup>1</sup> This summary relates only to the appellant's motion for damages.

compliance with a settlement agreement if it is made a part of the record, it appears that the agreement is legal on its face, it was freely reached by the parties, and they understand its terms. The parties will advise me if they want to participate in the Board's Mediation Appeals Program or if they want the assistance of a settlement judge.

ISSUES – The following issues are in dispute:

- A. Whether the appellant is entitled to an award of consequential damages.
- B. Whether the appellant is entitled to an award of compensatory damages.
- C. If the appellant is entitled to such damages, what is the proper amount of damages to be awarded.

BURDEN OF PROOF – The appellant has the burden of proof on her claim for damages. She must prove both that she incurred the damages and that the damages were reasonable and foreseeable, *i.e.*, causally related to the agency's reprisal against her. *Johnston v. Department of the Treasury*, 100 M.S.P.R. 78, ¶ 13 (2005) (citing *Carson v. Department of Energy*, 92 M.S.P.R. 440, 447-48 (2002), *aff'd*, 64 F. App'x 234 (Fed. Cir. 2003)). At the time the agency's action occurred, the law provided that when the Board ordered corrective action pursuant to 5 U.S.C. § 1221(e), it could also order payment of back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages. 5 U.S.C. § 1221(g)(1)(A)(ii).

Consequential damages under 5 U.S.C. § 1221(g) are limited to out-of-pocket costs and do not include non-pecuniary damages. The U.S. Court of Appeals for the Federal Circuit has found that Congress intended a narrow construction of 'consequential damages' and that the phrase 'any other reasonable and foreseeable consequential [damages]' should be read to cover only items similar in nature to the specific items listed in the statute, *i.e.*, back pay and related benefits, medical costs incurred, and travel expenses. These items are all actual monetary losses or out-of-pocket expenses. *See Bohac v. Department of*

*Agriculture*, 239 F.3d 1334, 1343 (Fed. Cir. 2001). The purpose of an award of consequential damages is to make the prevailing employee financially whole and non-pecuniary damages such as pain and suffering or emotional distress are not included. *Kinney v. Department of Agriculture*, 82 M.S.P.R. 338, ¶ 5 (1999). Further, consequential damages do not include compensation for an employee's own time spent pursuing her appeal, or reimbursement for leave (annual, sick or leave without pay) taken from work to pursue an appeal. *Bohac*, 239 F.3d at 1339-43.

In 2012, Congress amended the Whistleblower Protection Act (WPA) through passage of the Whistleblower Protection Enhancement Act of 2012 (WPEA), which was signed into law on November 27, 2012. Section 202 of the WPEA, entitled "Effective Date," provides as follows: "Except as otherwise provided in section 109, this Act shall take effect 30 days after the date of enactment of this Act." Section 109, states that its provisions, governing "Prohibited Personnel Practices Affecting the Transportation Security Administration" (TSA), "shall take effect on the date of enactment of this section." By operation of its express language, therefore, the Act's provisions related to TSA appeals became effective on November 27, 2012, while all other provisions became effective on December 27, 2012. The Act is silent regarding any retroactive operation of its terms.

The WPEA amended the provisions of the WPA relating to damages. Specifically, the amendments provide in relevant part:

(g)(1)(A) If the Board orders corrective action under this section, such corrective action may include –

...

(ii) back pay<sup>2</sup> and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential

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<sup>2</sup> During the conference the appellant and her representative indicated that they do not believe the agency has fully complied with the Board's order to pay the appellant the appropriate amount of back pay, with interest and to adjust benefits with appropriate

damages, and **compensatory damages** (including interest, reasonable expert witness fees, and costs).

5 U.S.C. § 1221(g)(1)(A) (emphasis added). The appellant's request for consequential and compensatory damages was filed after November 27, 2012, but prior to the effective date of the WPEA. Further, the appeal was decided under the provisions of the WPA rather than the WPEA. Thus, there is a question whether the new provisions of the WPEA relating to damages are retroactive so that compensatory damages may be awarded in this proceeding.

The U.S. Supreme Court considered the question of statutory retroactivity in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), a case that involved amendments to the Civil Rights Act of 1964 by the Civil Rights Act of 1991. The language at issue in *Landgraf* was similar to that used here: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." *Id.* at 257. The Court noted that such language does not, by itself, resolve the question. In resolving the question of retroactivity, the Court first addressed the need to reconcile the tension between generally applicable rules of statutory interpretation. Specifically,

[T]he first is the rule that "a court is to apply the law in effect at the time it renders its decision," *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974). The second is the axiom that "retroactivity is not favored in the law," and its interpretative corollary that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988).

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credits and deductions in accordance with the Office of Personnel Management's regulations. I indicated that, as a general rule, compliance matters are handled through a petition for enforcement. *See* 5 C.F.R. § 1201.181 (2012). Because the appellant's back pay and benefits are covered under the damages provision of 5 U.S.C. § 1221, I find that any dispute concerning the appellant's back pay and benefits may be adjudicated in this addendum proceeding.

*Id.* at 264. The Court set out a framework for determining whether a statute should be given retroactive effect. The Court stated that a tribunal must first determine whether Congress has expressly prescribed the statute’s temporal reach. *Id.* at 280. If the new statute does not contain an express prescription, the tribunal must determine whether it would have actual “retroactive effect,” that is, whether its provision “attaches new legal consequences to events completed before its enactment[,]” *id.* at 270, or 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.* at 280. The Court concluded that if retroactive application of the new statute would have the above-cited effects, it would apply the “traditional presumption” against retroactivity, “absent clear congressional intent favoring such a result.” *Id.*; *see also Parker v. Office of Personnel Management*, 90 M.S.P.R. 480, 486 (2002).

The WPEA contains no express prescription of retroactivity and its legislative history concerning this issue is inconclusive. The version passed by the House of Representatives states that “[r]ights in this Act shall govern legal actions filed after its effective date,” expressly declaiming any retroactive application. H.R. REP. NO. 112-508 at 12 (2012). 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) (emphasis added).

The language in the Senate Report is a legislative precursor of the actual Act, but it is contradicted on the point of retroactivity by the express terms of the House of Representative’s legislative version. The Court noted in *Landgraf*, “[s]tatutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal.” *Landgraf*, 511 U.S. at 286.<sup>3</sup> Given the ambiguous legislative history, and the absence of express language in the WPEA itself, I find that the act does not evidence clear Congressional intent in favor of retroactivity. I, further, find that in adding the availability of compensatory damages, the WPEA attached new legal consequences to events completed before its enactment. Further, the expansion of damages to include compensatory damages involves a waiver of sovereign immunity and the United States Supreme Court has held that a waiver of sovereign immunity must be unequivocally expressed in statutory text and a waiver of such immunity will be strictly construed in favor of the sovereign. *Lane v. Pena*, 518, 187, 192 (1996). Upon consideration, Congress has waived sovereign immunity with regard to compensatory damages to be awarded in 5 U.S.C. § 1221(g)(1)(A)(ii), but Congress did not express whether that provision was to apply to cases pending on the date the statute became effective. Accordingly, I conclude that its application to pending cases would have actual retroactive effect, as defined by the Court in *Landgraf*, and that therefore the presumption against statutory retroactivity

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<sup>3</sup> The WPEA expressly provides that its provisions take effect 30 days after the date of enactment, except for TSA cases, which are governed by the WPEA immediately upon enactment. If Congress intended the WPEA to apply retroactively to all pending appeals, there was seemingly no reason to include a separate provision making it effective in TSA cases 30 days sooner than other cases. See *Special Counsel v. Wilkinson*, 104 M.S.P.R. 253, 261 (2006) (“A cardinal principle of statutory construction” [provides] that ‘a statute ought, on the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”) (quoting *TRW, Inc. V. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed2d 339 (2001)).

applies in this case. *See Caddell v. Department of Justice*, 96 F.3d 1367, 1371 (Fed.Cir. 1996)(1994 amendment to the WPA, which included decision to order psychiatric testing as a personnel action, enlarged conduct subject to WPA, and would have retroactive effect if applied to conduct occurring prior to effective date of amendment; in the absence of express legislative intent, presumption against statutory retroactivity therefore barred application of amended version of WPA in pending case).

This ruling regarding the retroactive applicability of the WPEA is subject to certification for interlocutory review by the Board, upon my own motion, or the motion of either party. 5 C.F.R. § 1201.91 (2012). Such an interlocutory appeal is appropriate for review of a ruling involving “an important question of law or policy about which there is substantial ground for difference of opinion[,]” and where “[a]n immediate ruling will materially advance the completion of the proceeding....” 5 C.F.R. § 1201.92 (a), (b). I find the question of whether the provisions of the WPEA with regard to damages may be applied retroactively to pending cases involving conduct occurring prior to its effective date is appropriate for review under the criteria set forth under 5 C.F.R. § 1201.92.<sup>4</sup> Accordingly, it appears to be appropriate to certify this issue for interlocutory appeal. If either party objects to such an interlocutory appeal, I must receive such objection no later than February 20, 2013. If an interlocutory appeal is certified, all further proceedings on the appellant’s motion for damages will be stayed while the interlocutory appeal is pending before the Board. *See* 5 C.F.R. § 1201.93(c).

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<sup>4</sup> The parties are advised that an interlocutory appeal is currently pending before the Board concerning the retroactivity of the WPEA’s provisions concerning covered disclosures. Further, the Board has announced an opportunity to file amicus briefs on that issue. *See* 78 Fed. Reg. 9431 (Feb. 8, 2013).

If either party disagrees with this Summary, I must receive a written objection or motion to supplement this Summary no later than February 15, 2013.

FOR THE BOARD:

\_\_\_\_/S/\_\_\_\_\_  
Marie A. Malouf  
Administrative Judge

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Mail

Barbara R. King

B6

Appellant Representative

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February 11, 2013

(Date)

/s/

Crystal Q. Wilson  
Paralegal Specialist