

# Barbara R. King v. Department of the Air Force

MSPB Docket Number DA-0752-09-0604-P-1

## Amicus Brief

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<sup>1</sup> Jacques A.Durr v. Department of Veterans Affairs. AT-1221-10-0216-W-2, now AT-1221-10-0216-B-21 See: <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=795244&version=798304&application=ACROBAT>

## Subject of the Amicus Brief

The Merit Systems Protection Board (MSPB) published a Notice of Opportunity to File Amicus Briefs in the matter of King v. Department of the Air Force (Docket Number DA-0752-09-0604-P-1), see: [Federal Register/Vol. 78, No. 54/Wednesday, March 20, 2013](#)<sup>2</sup>. The MSPB judge certified for interlocutory review whether the provisions of the WPEA (Whistleblower Protection Enhancement Act) of 2012, 112 Public Law 199, may, with regard to damages, should apply retroactively to cases pending prior to its effective date. The MSPB stressed that “*of particular relevance in King is the question of the retroactive effect of section 107(b) of the WPEA, which addresses damages available to individuals who have suffered reprisal for protected disclosures or activities.*” Prior to the WPEA, corrective actions traditionally available to the few aggrieved whistleblowers who prevailed, covered “consequential,” but not “compensatory” damages. The Notice indicated that “*The Board encourages interested persons and organizations to submit amicus briefs as attachments to electronic mail addressed to [mspb@mspb.gov](mailto:mspb@mspb.gov).*”

## Statement of Interest

I file *pro se* this amicus brief as an interested party. I wish also to speak on behalf of probably hundreds of other aggrieved whistleblowers, who have their respective cases working their way through this slow system, and have usually started at the OSC, and then have gone on to the MSPB, and got caught into the long cycles of reviews, dismissals, appeals, full board reviews, re-appeals, and may even have gone through the federal circuit, only to come back on remand, etc... Indeed, my initial case has gone through several docket numbers, to eventually survive as docket # AT-1221-10-0216-W-1, but then soon became docket # AT-1221-10-0215-W-2, and

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<sup>2</sup> <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=805856&version=808978&application=ACROBAT>

now is back on remand as docket # AT-1221-10-B-1. Soon I will have had the same AJ for the last 10 years (as I had I initially filed with the OSC back in 2003), and I still feel like my case has not yet moved by one inch. The full Board has recently remanded my case back to the AJ, after it had gone dormant on appeal for more than one year. Now my case is on remand and ten (10) years later, “because [I] did not have a full opportunity to present evidence and argument proving by preponderant evidence that [I] reasonably believed that [I] made a protected disclosure in 2003 when [I] placed a non-functioning computer in the trash and left a message on the voicemail of the IRMS, [I] am entitled to a supplemental hearing on that issue on remand if [I] so request.”

### **Argument**

I have recently filed an amicus curiae brief<sup>3</sup> in the case of [Day v. Department of Labor](#)<sup>4</sup> on the retroactivity issue of the WPEA. As a non-jurist, lay person, and former VA employee with an ongoing MSPB case, I have addressed the retroactivity issue from a moral point of view. In last analysis, what drives whistleblowers to take risks and stand up for what they feel is right, are their moral convictions. Pascal wrote “*la vraie morale se moque de la morale*”<sup>5</sup>. Thus, while laws can be codified neatly into discrete statutes, and adhered to literally, it is more difficult to similarly bottle morality into rigid codes of ethics.

Federal employees, however, are expected to adhere to a common standard of *ethical conduct*<sup>6</sup> broadly outlined in the Code of Federal Regulations (CFR). Note here that I have used the term “broadly outlined” standard of *ethical conduct*, because it is difficult to codify or define *ethical*

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<sup>3</sup> <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=801910&version=805007&application=ACROBAT>

<sup>4</sup> <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=795188&version=798248&application=ACROBAT>

<sup>5</sup> True morality cares little for morality (just like sincerity cares little for protocol or etiquette).

<sup>6</sup> <http://www.law.cornell.edu/cfr/text/5/2635.101>

conduct, other than by the colloquial “*I know it when I see it*”<sup>7</sup> formula. Note also that if an employee adheres to [5 CFR § 2635.101\(a\)](#), and more specifically to [5 CFR § 2635.101\(b\)\(5\)](#), or [5 CFR § 2635.101\(b\)\(11\)](#), which respectively read that “*Employees shall put forth honest effort in the performance of their duties*”, and “*Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities*,” then it becomes problematic for that employee, as such conduct renders him/her prone to retaliation for engaging in whistle-blowing activity. Therefore, were it not for protective safeguards put in place in the public’s interest, like the WPA or WPEA, self-preservation, or survival instincts, would dictate the employee’s conduct, not public interest. The civic sense of responsibility<sup>8</sup> towards their group (society), is what drives public servants to *put forth honest effort in the performance of their duties*, and to oppose or *disclose waste, fraud, abuse, and corruption*. However, without in return the support from the public, in the form of the WPE, WPEA, and other safeguards, many public employee would never last if they were acting in pure disregard for self-preservation.

I my amicus in *Day v. Department of Labor*, I had tried to imagine myself in the position of the Chair of the MSPB, who has to render a decision that will affect thousands of federal employees. In my amicus curiae, I noted that the MSPB, in one of its rare *Studies*<sup>9</sup> entitled “[Whistleblower Protections for Federal Employees](#)” wrote:

*Because of the MSPB’s role as the adjudicator of whistleblower retaliation claims, this report differs from most other reports issued under the MSPB’s studies authority. Most MSPB studies include an evaluation of the information being provided and recommendations for the improvement of laws, regulations, managerial practices, or other aspects of the civil service in keeping with the merit principles. However, in order to*

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<sup>7</sup> [http://en.wikipedia.org/wiki/I\\_know\\_it\\_when\\_I\\_see\\_it](http://en.wikipedia.org/wiki/I_know_it_when_I_see_it), expression used by United States Supreme Court Justice [Potter Stewart](#) to describe his threshold test for obscenity in *Jacobellis v. Ohio* (1964).

<sup>8</sup> Some call it morality, others call it ethics, others call it *esprit de corp*, others call it social consciousness..., etc.

<sup>9</sup> <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=557972&version=559604&application=ACROBAT>

*preserve our neutrality as adjudicators, we have limited our evaluations in this particular report to those that are necessary to help the reader understand the information being provided, and we have not included recommendations for changes to Federal laws, regulations, or policies. The absence of recommendations in this report should not be interpreted as support for – or opposition to – any part of the laws as they are currently written, any decision by the Board or the Federal Circuit interpreting those laws, or any bill that seeks to amend the laws pertaining to Federal whistleblowers.”* [Emphasis added]

The above cautionary claim of neutrality in a “Study” that discussed relevant cases, with particular attention to the decision in *Huffman v. Office of Personnel Management*<sup>10</sup>, [263 F.3d 1341 \(Fed. Cir. 2001\)](#) may, or may not be regarded as a subtle expression of self-preservation or political survival.

The MSPB remarked further in that pre-WPEA era “Study” that:

*“It is not surprising that Congress has seen the need to amend whistleblower laws in the past, and has considered doing so again in recent years. It is challenging to create a set of rules that carefully **balances management rights** with the **public’s interest** in **protecting whistleblowers**. A perfect **balance** between **management rights** and **whistleblower protections** may never be fully achieved, but we believe that the best possible balance is worth pursuing. As the Senate noted when the CSRA was enacted, and whistleblower protections were put into the law for Federal employees for the first time: “Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service.”*” [Emphasis added]

Given the MSPB’s statement in that *Study*, I wonder whether the MSPB has adopted an overly neutral attitude, dictated by a misguided concern for balancing *management rights* (sic) with **protecting whistleblowers** or rather, with the **public’s interest** in **protecting whistleblowers**<sup>11</sup>.

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<sup>10</sup> As pointed out in a footnote in [my amicus brief in Day](#), “stop splitting hairs as to whether a disclosure was made to individuals within the chain of command, or as part of an assignment, or made directly to the wrongdoer, or to someone who already knew of it, or was made about a wrongdoer who is not within the chain of command, etc...” Remember, *la vraie morale se moque de la morale*. Stand up for your convictions, since most of the time you will **know it when you see it** whether a given disclosure had amounted to whistle-blowing.

<sup>11</sup> According to the MSPB it is the public’s interest, not the MSPB’s interest to **protect whistleblowers**. The MSPB does appear however concerned for **management rights**.

I had stressed in my amicus in Day that the overriding element in the above cited paragraph is the **public's interest**. I had quoted [Whitmore v. Department of Labor, 680 F. 3d 1353, Fed. Cir. \(2012\)](#), a precedential decision in which the Federal Circuit coined that:

*Congress decided that we as a people are better off knowing than not knowing about such violations and improper conduct, even if it means that an insubordinate employee like Mr. Whitmore becomes, via such disclosures, more difficult to discipline or terminate.*

As far as I know, the public (we as a people) interest is not in **protecting management rights**, but in **protecting whistleblowers**. I remarked that “*obviously, when Congress first enacted the WPA, and then added amendments, including the latest WPEA of 2012, it did it more out of concerns for “we as a people,” and needed whistle-blowers who deserve protection, rather than out of concerns for the Government. This view is clearly expressed by the Fed. Cir., in the Whitmore precedent.*”

The MSPB remarked above that the Senate noted that:

*Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service.*

Obviously, Senate did not note that:

*managers condone  
Protecting ~~employees who disclose~~ government illegality, waste, and corruption is a major step toward a more effective civil service.*

I further noted in my amicus brief in Day that in [Matthew J. Nasuti v. MSPB \(2012-3162\)](#), a non-precedential case decided on January 16, 2013, the Federal Circuit wrote, regarding the WPEA, and the MSPB's conclusion in that case:

***“We think that the Board should decide in the first instance whether the new statute applies retroactively and whether, if so, Nasuti has alleged a protected disclosure under the new statute. We therefore vacate the Board’s conclusion that it lacked jurisdiction over this one aspect of Nasuti’s IRA appeal.”*** [Emphasis added]

I argued that although, for the purpose of the jurisdictional decision made regarding the specific issue in front of the court, this case was “non-precedential,” this remark by the Federal Circuit was nevertheless independent of the case in front of that court, and could therefore be quoted and used for its persuasive weight. Clearly, the Federal Circuit, the MSPB’s reviewing court, defers to the MSPB to make the decision as to whether the WPEA should be applied retroactively. In this specific context of deferral to its upper court, I would like to highlight here again the quote from the MSPB’s Special Study<sup>9</sup> discussed above:

*“The absence<sup>12</sup> of recommendations in this report should not be interpreted as support for – or opposition to – any part of the laws as they are currently written, any decision by the Board or **the Federal Circuit interpreting those laws, or any bill that seeks to amend the laws pertaining to Federal whistleblowers.**”*

Given the Federal Circuit’s declaration above in [Matthew J. Nasuti v. MSPB \(2012-3162\)](#), there are no reasons for the MSPB to seek “neutrality,” or to invoke deference to the Federal Circuit in the upcoming decision regarding retroactivity of the provisions of the WPEA. Again, Congress has entrusted the MSPB with upholding merit systems principles and protecting whistleblowers from retaliation, in the public’s interest (in the interest of we as a people). As far as I know, nothing in the statutes reads about “management.” Although the question as to whether the WPEA should be applied retroactively to issues like those raised in Day v. Department of Homeland Security can easily be resolved on legal grounds, Congressional Intent, and legislative history, I

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<sup>12</sup> Some have criticized the MSPB for failing to take a leading position, see: <http://mspbwatch.net/2013/04/10/in-1978-the-doj-s-office-of-legal-counsel-predicted-the-irrelevance-of-mspbs-special-studies-function-it-was-right/>

suspect that the ultimate decision on whether the provisions of the WPEA should also be applied retroactively to issues raised in *King v. Department of the Air Force*, will largely boil down to a moral decision. Indeed, the MSPB judges will have to do what the Senate and Congress feel is right, when deciding that issue. MSPB employees, including judges, are bound like all other civil service employee to adhere to [5 CFR 2635.101 - Basic obligation of public service](#), the common standard of ethical conduct<sup>6</sup>. All [the amici in \*Day v. Department of Homeland Security\*](#)<sup>13</sup>, at the exception of a single one<sup>14</sup>, express what “we as a people” demand from the MSPB to decide regarding the retroactivity of the provisions of the MSPB. Ultimately, the MSPB’s decision in *King v. Department of the Air Force* will be a judgment on the MSPB itself, as it will show the public whether the MSPB really serves the public’s interests, as was intended by the Congress, or whether its self-proclaimed concerns for *management rights* show that it had come to serve another master.

The DVA in its amicus brief<sup>14</sup> in *Day v. Department of Homeland Security* has shown a total lack of concern for its 60+ whistleblowers currently waiting anxiously, hoping for justice, but showed great concern for *management rights*, i.e., for the “rights” of its responsible managing officials (RMO) who have retaliated against<sup>15</sup> these employees. Where is the DVA’s concern for its employees who had adhered to the standards of ethical conduct, and out of civic concern, stood up, and engaged in what the MSPB calls *protected activity*? All the other agencies at least had the decency not to file amici in *Day v. Department of Homeland Security*. There are victims only because there are perpetrators. It is unpopular to defend perpetrators. In the DVA’s culture, the whistle-blowers appear to be the perpetrators from which managers are to be protected.

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<sup>14</sup> <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=801897&version=804993&application=ACROBAT>, From the Department of Veterans Affairs.

<sup>15</sup> Often by brutally removing them from their jobs.

The DVA wrote in its amicus:

*Under the WPEA and its predecessor, managers are subject to individual liability insofar as it pertains to imposition of direct, administrative discipline if they are found to have retaliated against protected employees*

Besides the fact that discipline of RMOs is exceedingly rare in the DVA, the issue of discipline does not even come into play in Day, or the majority of MSPB cases, where the MSPB at best takes corrective actions (cancellations of disciplinary actions, reinstatements, mitigation of penalties against the aggrieved employee, etc.). According to the DVA's argument in its amicus, the remote possibility of affecting an RMO's "rights" is sufficient reason to deny justice to the victim of retaliation, who had his/her rights denied all this time, and who may even have been fired, while the RMO during all this time went on with his/her life unharmed.

These are the moral issues that need to be addressed in the amici in the matter of King v.

Department of the Air Force. I know what I am talking about. Ten years ago I stood up out of concern for patient safety issues and got retaliated against. Ever since I stood up for what I felt was the right thing to do, I was labeled the disruptive physician. I have suffered a great deal and know what Barbara King must have gone through. I hope that the MSPB hears my voice. I speak in the name of all the aggrieved employees who were compelled to come forward for what they felt was right, and who got retaliated against and have suffered great losses. Justice would not be served by denying them the provisions of the WPEA. Right now they are suffering, while the perpetrators remain unaffected.