BARBARA R. KING v. DEPARTMENT OF THE AIR FORCE
Docket # DA-0752-09-0604-P-1
Response to Amicus Order dated 3/18/2013
Summary Page

Case Title : BARBARA R. KING v. DEPARTMENT OF THE AIR FORCE

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

Pleading Title : Response to Amicus Order dated 3/18/2013

Filer's Name : Lawrence Lynch

Filer's Pleading Role : Agency Representative

Details about the supporting documentation

N/A

Table of Contents

BARBARA R. KING v. DEPARTMENT OF THE AIR FORCE
Docket # DA-0752-09-0604-P-1
Response to Amicus Order dated 3/18/2013
Online Interview

1. Would you like to enter the text online or upload the file containing the pleading?

See attached pleading text document

---

2. Does your pleading assert facts that you know from your personal knowledge?

Yes

---

3. Do you declare, under penalty of perjury, that the facts stated in this pleading are true and correct?

Yes

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Barbara R. King	)	
	)	Docket No. DA-0752-09-0604-P-1
Appellant,	)	
	)	
v.	)	
	)	
Department of the Air Force	)	
	)	May 3, 2013
Agency.	)	
	)	

AGENCY'S RESPONSE TO REQUEST FOR AMICI BRIEFS

Comes now the Agency, through its under-signed counsel, and respectfully submits this response to the Amicus Briefs filed in the above captioned matter.

ISSUE

Whether the damages provisions of the WPEA of 2012, 112 Public Law 199, may be applied retroactively to cases pending prior to its effective date; specifically, the 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 a potential remedy. Prior to passage of the WPEA, individuals were entitled to reasonable and foreseeable consequential damages, but not compensatory or non-pecuniary damages.

SUMMARY

For the reasons set forth below, the 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 states 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.

Second, if the effective date was unclear, the Board should apply the well-established presumption against retroactive construction of new statutes.

Third, though review of the legislative history of the WPEA is unnecessary, it confirms there is no clear congressional intent to depart from the plain language of the statute.

The Board should affirm the decision of the Administrative Judge and rule that Section 107 (b) of the WPEA may not be applied retroactively to conduct occurring prior to its effective date.

ARGUMENT

a. The Plain Language of the Statute is Clear

In *Landgraf v. USI Film Products, et al.*, the Supreme Court framed the primary question 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 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. The WPEA expressly provides that its provisions take effect 30 days after enactment, except for TSA cases, which are governed by the WPEA immediately upon enactment. Judge Malouf noted that 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." (Order and Certification of Interlocutory Appeal, DA--0752-09-0604-P-1, at 4)

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. None of the Amicus Briefs filed in this matter - arguing for retroactive application - assert that the plain language of the statute requires it. They implicitly concede that the statutory language is clear on its face. 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 527

In analyzing another federal statute governing employee rights, the Americans with Disabilities Amendment Act of 2008 ("ADAAA"), the D.C. Circuit found the existence of a delayed effective date in the statute, similar to that in the WPEA, as a clear indication of Congress's express intention 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. 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. 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

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. While other provisions of the WPEA, specifically Section 101(b)(2)(B), act to effectively overturn earlier court decisions, the delayed effective date and absence of clear retroactive

language, mean the general rules of statutory construction govern. Thus, the Board should reach 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.

As noted in the Amicus brief filed by the Department of Veteran Affairs, when Congress intends to create a law with retroactive application, it uses an express statutory grant to demonstrate its clear congressional intent. (DVA brief, at 4-5) Specifically, the DVA brief cites a VA matter where Congress authorized the Secretary of VA to waive payments of premiums for life insurance policies for mentally incompetent persons. In doing so it expressly stated the retroactive authority,"[i]n mentally incompetent cases the waiver is to be made without application and retroactive when necessary." (38 U.S.C §1960) In authorizing the Secretary of the Treasury to prescribe rules and regulations Congress expressly provided, *inter alia,* that "the Secretary may provide that any regulation may take effect or apply retroactively to prevent abuse," and authorized the Secretary "to provide that any regulation may apply retroactively to correct a procedural defect in the issuance of a prior regulation." (26 U.S.C §7805(b)(3) and (4))

As noted in the Amicus brief filed by the Department of Homeland Security, where Congress has intended retroactive applicability in other employment statutes, it unambiguously specified the retroactive effect of legislation within the body of a statute. (DHS brief, at 6-8) DHS points to when Congress amended Title VII in the Equal Employment Opportunity Act of 1972, noting 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.

Similarly, when Congress enacted the Lilly Ledbetter Fair Pay Act of 2009, it provided, "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.

By not including similar express and unambiguous language within the statutory language of the WPEA the Congress clearly intended prospective application only. 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 DVA brief states, the Board will expose itself to reversal by the Court of Appeals if it decides to give retroactive effect to the WPEA without acknowledging and finding a basis for distinguishing the Federal Circuit's holdings in *Caddell* since the *Caddell* decision considered statutory language substantially similar to the WPEA and concluded that retroactive enforcement was not supported by law.

In *Caddell,* the appellant sought to impose retroactivity on a recently enacted whistleblower statute that also expanded the scope of whistleblower disclosures. In that case, the Federal Circuit concluded:

> The Act states that "the amendments made by this Act shall be effective on and after the date of the enactment of this Act," which was October 29, 1994. Pub.L No. 103-424, § 14, 108 Stat. at 4368.

> The amendments clearly apply to conduct that occurs after the date of enactment. The conduct charged in this case occurred several years prior to that date. Thus the question raised is whether the Board should have applied the law in effect at the time the conduct occurred, or at the time of its decision in January1995. The Board, citing *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), concluded that "the 'traditional' presumption against applying a statute retroactively should be applied here." 66 M.S.P.R. at 354. In *Landgraf*, the Supreme Court dealt with a provision of the Civil Rights Act of 1991, which amended Title VII of the Civil Rights Act of 1964, and that, like the amendments here, simply specified that the act shall take effect upon enactment, without addressing the question of retroactivity. *Caddell,* 96 F.3d at 1370.

The Federal Circuit thus concluded that the Board had correctly held that the amendment did not apply to cases pending before the Board on the date of enactment.

At the time the WPEA was passed, Congress was aware of the 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 do so. The language explicitly states otherwise: the WPEA "shall take effect 30 days after the enactment of this Act." Pub. L. No. 112-199 § 202.

b. There Is a Well-Established Presumption against Retroactive Construction of Statutes

Though the effective date of this statue is clear, even without such a clear expression the amendment would be limited to prospective application. The Supreme Court set forth the test to be used when 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.

In *Landgraf*, the 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 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.

The Court in *Landgraf*, examining an amendment to the Civil Rights Act authorizing compensatory damages for certain violations of Title VII, explained "[t]he *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence." 511 U.S. at 283-84 (emphasis in original). Thus, even though Title VII, like the WPA, previously authorized recovery of back pay, the Court found that the new compensatory damages provision did not apply retroactively because, if so applied, the provision would "undoubtedly impose on employers found liable a 'new disability' in respect to past events." *Id.* at 283. "Even when the conduct in question is morally reprehensible or illegal," the Court explained, "a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Id.* at 283, n.35; *see also Hughes Aircraft v.*

United States ex rel Schumer, 520 U.S. 939, 947 (1997)

These principles apply with equal force where a new damages provision alters the liability of the Government, as opposed to private parties. *See, e.g., Tomasello v. Rubin*, 167 F.3d 612, (D.C. Cir. 1999) (preventing retroactive application of same compensatory damages provision at issue in *Landgraf* against Government because it "would 'increase [Treasury's] liability for past conduct'" (alteration in original)); *see also Woolf v. Bowles*, 57 F.3d 407, 410 (4th Cir. 1995) (no retroactive application of statutory amendment extending to Government requirement to pay interest on Title VII awards because it "would impose an important new legal burden on the federal government"); *Chenault v. USPS*, 37 F.3d 535, 536 (9th Cir. 1994) (same).

Contrary to the proposition, that the Board must find retroactivity to give full effect to the purpose of the WPEA, the Board has acknowledged that the presumption against retroactivity applies even when retroactivity would arguably further the overall policy aims of the new law and adopted the *Landgraf* presumption as an important rule of statutory construction with respect to other WPA amendments. (DHS brief, at 11-12) For example, in *Roman v. Department of the Army*, 72 M.S.P.R. 409 (1996), *aff'd*, 1997 WL 636608 (Fed. Cir. 1997), the Board found 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.*

The changes in Section 107(b), those relevant in the instant appeal, create new rights and liabilities for the parties and are a substantive change from previous law. They clearly

increases a party's potential liability for past conduct as they expand the damages to which an individual may be entitled to include uncapped compensatory damages which have never been available to a prevailing party. The changes in Section 107(b) of the WPEA 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 demotion that was the basis for the instant appeal occurred on July 13, 2009, the appeal was filed in July 2009 and the Administrative Judge issued the 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. All these actions 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. To change the rules upon completion of the litigation and place the burden of compensatory damages on the Agency now is completely contradictory to the "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf*, 511 U.S. at 270.

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

Because the statute's plain language is clear, consideration of Congressional intent is not necessary. However, because the Amicus Brief filed by the National Whistleblower Center & Dr. Ram Chaturvedi argues the legislative history indicates Congressional intent of retroactivity, we will address it.

There is no "clear congressional intent" rebutting the presumption against retroactive application of the WPEA's damages provision. As the Administrative Judge correctly noted, the "legislative history concerning this issue is inconclusive." Although a Senate Committee report stated that it "expect[ed] and intend[ed] that the Act's provisions shall be applied in... proceedings... pending on or after [its] effective date," the version of the bill later passed by the House of Representatives stated the opposite: "[r]ights in this Act shall govern legal actions filed after its effective date." App. 3-4 (quoting H.R. Rep. No. 112-508 at 12 (2012) and S. Rep. No. 112-115, at 52 (2012)). (Order and Certification of Interlocutory Appeal, DA--0752-09-0604-P-1, at 3-4)

The version of the bill that became law contains neither of these statements. *See* 126 Stat. 1465. This "inconclusive" Congressional intent does not rebut the presumption against retroactivity. *See Cyr*, 533 U.S. at 316 (standard for finding unambiguous Congressional intent to apply a statute retroactively "is a demanding one" and involves statutory language "so clear that it could sustain only one interpretation").

That Congressional intent is not sufficiently "clear" to require retroactive application

of the damages provision of the WPEA is only further reinforced by the fact the new law involves a waiver of sovereign immunity. As the Administrative Judge correctly observed, such waivers are "strictly construed in favor of the sovereign." (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996)); (Order and Certification of Interlocutory Appeal, DA--0752-09-0604-P-1, at 3-4) *see also Brown v. Sec'y of the Army*, 78 F.3d 645, 654 (D.C. Cir. 1996) (refusing to apply new law awarding interest on attorney's fees retroactively because to do so "would be to impose upon the United States a liability to which it has not explicitly consented");*Nichols v. Pierce*, 740 F.2d 1249, 1255–56 (D.C. Cir. 1984) (same).

The only piece of significant legislative history contemplating retroactivity is a single sentence in a 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). The language in the legislation's parallel House committee report does not contain similar expectations. H.R. Rep. No. 112-508, at 12 (2012).

The Senate committee's expectations and intentions were not voted on by the full Senate or the House of Representatives, not made part of the statute, and never signed into law. The reference to retroactivity in the Senate report merely expresses the desire of a handful of Senators as to what the final legislation would include. Their view did not carry the day and never garnered enough support to include the kind of express language in the bill itself that would rebut the presumption. Their intent was not the intent of the full Congress as indicated by the plain language of the amendment. National Whistleblower Center's argument that Congress's intent that the WPEA should apply retroactively rested on the single paragraph contained in the Senate committee report.

As stated in the Amici filed by DHS; 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).

The Amicus brief filed by Government Accountability Project and Whistlewatch.Org is also errant in claiming that a single sentence in the preamble to the WPEA stating, "the WPEA is an amendment to and a clarification of the WPA," was a clear expression of desired retroactive application.

Similarly, the contention that the WPEA was meant to "clarify" Congress's original intent does not meet the demanding standard necessary to overcome the presumption against retroactivity and, in any event, is incorrect. The preamble to the WPEA does not state that the entire Act is clarifying. Rather, it speaks only in terms of "clarifying" the narrow issue of which disclosures will be protected. 126 Stat. 1465 ("to clarify the disclosures of information protected from prohibited personnel practices...."). Otherwise, the preamble states that the Act is intended to "require" certain statements in non-disclosure policies, "provide" the Special Counsel with certain authorities, "and for other purposes." *Id.*

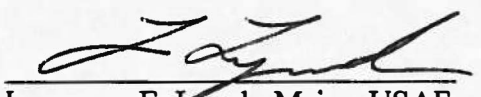
Moreover, the preamble to a statute is not part of the statutory text, and should be used only to clarify an ambiguity in an express statutory provision. *See, e.g., Ass'n of Am. Railroads v. Surface Transp. Bd.*, 237 F.3d 676, 680 (D.C. Cir. 2001). As demonstrated above, the plain language of the WPEA's effective date provision makes the statute applicable only prospectively. Even if it is viewed as ambiguous, however, the preamble

does nothing to resolve that ambiguity, particularly with respect to the question whether the compensatory damages provision applies retroactively.

CONCLUSION

The WPEA is clear on its face that its provisions were to be applied prospectively. 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,



Lawrence E. Lynch, Major, USAF
Agency Representative

CERTIFICATE OF SERVICE

I certify that the attached AGENCY'S RESPONSE TO REQUEST FOR AMICI was placed in official distribution to be sent by regular mail, unless otherwise indicated below, this day to each of the following:

Method	
	U.S. MERIT SYSTEMS PROTECTION BOARD
E-File	1615 M Street, NW 5th Floor Washington, DC 2041
	Appellant
E-File	Barbara R. King
E-File	Appellant Representative
	Joseph Bird, Esq 136 South Pontiac Trail Suite 2 Walled Lake, MI 48390

May 3 13
DATE

LAWRENCE E. LYNCH, Maj, USAF

Certificate Of Service

e-Appeal has handled service of the assembled pleading to MSPB and all of the Parties. Following is the list of the Parties in the case:

Name & Address	Documents	Method of Service
MSPB: Office of the Clerk of the Board	Response to Amicus Order dated 3/18/2013	e-Appeal / e-Mail
Barbara R. King Appellant	Response to Amicus Order dated 3/18/2013	e-Appeal / e-Mail
Joseph Bird, Esq. Appellant Representative	Response to Amicus Order dated 3/18/2013	e-Appeal / e-Mail