UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BARBARA R. KING, **Appellant,**	)	
v.	)	**DOCKET NUMBER** **DA-0752-09-0604-P-1**
DEPARTMENT OF THE AIR FORCE, **Agency.**	)	**ORAL ARGUMENT REQUESTED**

AMICUS BRIEF
FILED BY THE NATIONAL WHISTLEBLOWER CENTER AND DR. RAM CHATURVEDI, M.D.

Pursuant to the "Notice of Opportunity to File Amicus Briefs," published by the Merit Systems Protection Board ("MSPB") on March 20, 2013, the National Whistleblower Center and Dr. Ram Chaturvedi, M.D. hereby file their brief on the issue of whether §107(b) of the Whistleblower Protection Enhancement Act of 2012 ("WPEA") applies to all current cases pending before the MSPB.

FACTS

The legislative history of the Whistleblower Protection Enhancement Act of 2012 ("WPEA") confirms that §107(b) of the Act was intended to be applied retroactively. On April 6, 2011 Senator Daniel K. Akaka of Hawaii and fourteen cosponsors introduced Senate Bill S. 743. The purpose of the bill was to improve protections for federal employees because "few employees will have the courage to disclose Federal Government wrongdoing, which can affect every aspect of government operations, without meaningful whistleblower protections. *Congressional Record* p. S. 2194 (April 6, 2011). Section 107 of S. 743 contained the provision

that would ultimately be enacted into law regarding compensatory damages. That provision was silent as to whether or not it would apply retroactively. *Id.*, p. S2195.

On April 6, 2011 S. 743 was referred to the Senate Committee on Homeland Security and Government Affairs. On April 19, 2012 the Committee on Homeland Security reported favorably on S. 743, with a written report. S. Rep. 112-155.

The version of S. 743 reported in S. Rep. 112-155 contained the precise language regarding compensatory damages that would eventually be enacted into law. *See* S. Rep. 112-155, p. 59. That Committee report also contained an explicit section discussing, in detail, whether or not provisions of S. 743 (including the provision regarding compensatory damages), would apply to "pending cases." The intent of Congress, as set forth in the report was clear: *The Committee expects and intends that the Act's provisions shall be applied in OSC, MSPB, and judicial proceeding initiated by or on behalf of a whistleblower* <u>*and pending on*</u> *or after the effective date.*" S. Rep. 112-155, p. 52 (emphasis added).

On May 8, 2012, less then three weeks after the Homeland Security Committee reported out the bill along with its detailed report, the full Senate, by unanimous consent, passed S. 743. The version of the bill that unanimously passed the Senate contained the precise language regarding compensatory damages that would eventually be signed into law. No member of the Senate Homeland Security Committee, and no Member of the Senate took issue with either the compensatory damages provision, or the Senate Report discussion explicitly stating that various provisions of S. 743, including the compensatory damage provision, would apply to "pending cases."

On May 9, 2012 the Senate sent its message to the House of Representatives regarding its passage of S. 743. On September 28, 2012 Congressman Lewis sought unanimous consent from the House permitting consideration of S. 743. *Congressional Record* H6286 (Sept. 28, 2012). Without objection the request was granted. *Id.* Thereafter, an amendment to S. 743 was proposed on the floor. *Id*., p. H6293. This amendment did not impact the provision of S. 743 related to the date of its application and/or the availability of compensatory damages. Those provisions of the Senate bill were not affected by the amendment. Thereafter, the amended version of S. 743 was passed by the entire House. No member of the House objected to the compensatory damage provision contained in S. 743. No member of the House objected to the Senate Committee Report's discussion on the application of S. 743 to "pending cases".

Indeed, one of the principle sponsors of the House bill, Congressman Todd Platts, issued a floor statement on September 28, 2012 expressing explicit approval of the Senate Report's language concerning the application of WPEA's provisions to pending cases. Significantly, Congressman Platts placed before the full House of Representatives the provision of S. Rep. 112-155 that discussed this application. Congressman Platts stated as follows: "[I]t must be understood that those whistleblowers who have been waiting for this bill to be enacted are protected by its provisions. As stated by the Senate Committee on Homeland Security and Government Affairs in its report accompanying this bill, S. Rpt. 112-155: 'The committee expects and intends that this Act's provisions shall be applied in . . . proceedings . . . pending on or after that effective date.'" *Congressional Record* E1664 (September 28, 2012).

S. 743, as amended by the House, was approved without objection. Thereafter, on November 13, 2012 the Senate approved the House-amended version of S. 743, and President Obama signed the Bill into law on November 27, 2012.

ARGUMENT

In order to determine whether or not a newly enacted law should be applied retroactively (including application to pending cases) a court must first consider whether or not the statute in question explicitly addresses this issue. In the case of the WPEA's provision concerning compensatory damages, the statute itself is silent as to the retroactive application of its provisions. Consequently, a court must review the legislative history behind the provision in question and determine whether or not there is a "*clear congressional intent favoring"* a retroactive application of the statutory provision. *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (emphasis added). If the statute is determined to have retroactive effect, the Court's "traditional presumption teaches that it does not govern *absent such a result*." *Id*. at 280 (emphasis added).

In addressing the retroactive effect of the Civil Rights Act of 1991, the *Landgraf* court noted that "[a]lthough we have long embraced a presumption against statutory retroactivity, for just as long we have recognized that, in many situations, a court should 'apply the law in effect at the time it renders its decision' even though the law was enacted after the events that gave rise to the suit." *Id*. at 273 (quoting *Bradley v*. *Richmond Sch*. *Bd*., 416 U.S. 696, 711 (1974). Such a situation arises when clear congressional intent can be established through legislative history that indicates that "Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."

Id. at 272-73; *cf*. *Caddell v. Dept. of Justice*, 96 F.3d 1367, 1371 (Fed. Cir. 1996) (declining to find retroactivity because the "legislative history of the statute" failed to address the issue). Consequently, the key issue in this case is whether or not the legislative history behind the WPEA clearly establishes Congress' intent to apply the compensatory damage provision (among other provisions) to "pending cases."

It is well established that "*the authoritative source for finding*" Congressional intent is the Committee Report that accompanies a bill. *Garcia v. United States*, 469 U.S. 70, 75 (1985) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). Such a report represents "the considered and collective understanding" of those Members of Congress "involved in drafting and studying proposed legislation." *Id.*; *accord Bruesewitz v . Wyeth, LLC*, 131 S. Ct. 1068, 1083 (2011); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 575 (2005) (stating that "[w]hat is determinative is that the House Report explicitly rejected that broad reading of the statutory text. Such a report has special significance as an indicator of legislative intent. In Congress, committee reports are normally considered the authoritative explication of a statute's text and purposes, and busy legislators and their assistants rely on that explication in casting their votes."); *Eldred v. Ashcroft*, 537 U.S. 186, 209 n. 16 (2003).[1]

In this case, the Committee Report unquestionably, and without any dissent from any member of the House or Senate, explicitly stated that provisions of the WPEA (including those related compensatory damages) would be applied to "pending cases." Moreover, to dispel any

[1] *Also see, e.g., Nevada ex rel. DOT v. United States*, 925 F.Supp. 691, 693 (D. Nev. 1996) (relying upon Congressional intent to find retroactivity); *United States v. Olin Corp.*, 107 F.3d 1506, 1512-13 (11th Cir. 1997) ("although the *Landgraf* Court reaffirmed the presumption against retroactive application of statutes, it emphasized that courts *must* effectuate congressional intent regarding retroactivity.") (emphasis added).

doubt whatsoever as to the clear Congressional intent to apply the WPEA to "pending cases," one of the principle House sponsors of the WPEA read into the Congressional Record the portion of Senate Report 112-155 which stated that the WPEA would apply to "pending cases." *Congressional Record* E1664 (September 28, 2012).[2]

This Senate Report (along with the statement of the House sponsor) constitutes the "authoritative" statement of Congressional intent. They demonstrate, without contradiction, the "*clear congressional intent favoring"* the application of the compensatory damage provisions to pending cases.

REQUEST TO PARTICIPATE IN ORAL ARGUMENT

The Amicus request leave to participate in the oral argument in this matter. Dr. Chaturvedi is a former employee of the Department of Veterans Affairs with a pending WPEA case. Dr. Chaturvedi should he prevail, may be entitled to compensatory damages. *See,* MSPB Docket No. DA-1221-11-0471-W-3. He has a direct and personal stake in the outcome of this Board's ruling in *King*. The National Whistleblower Center has provided charitable assistance to federal employee whistleblowers since 1988, has been admitted to participate as an *amicus curiae* in numerous whistleblower cases, and provided testimony before the Senate Homeland Security Committee on the WPEA. *See* "S. 1358—The Federal Employee Protection of

[2] The Supreme Court has accorded some deference to the interpretations of bill sponsors, stating that the "explanation deserves to be accorded substantial weight in interpreting the statute." *See Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *accord Brock v. Pierce County*, 476 U.S. 253, 263 (1986) (stating that bill sponsor statements "when they are consistent with the statutory language and other legislative history . . . provide evidence of Congress' intent"); *INS v. Phinpathya*, 464 U.S. 183, 204 (1984) ("We have always relied heavily upon authoritative statements by proponents of bills in our search for the meaning of legislation . . . .Of necessity, this is particularly true where, as here, a provision was introduced into a bill by a conference").

Disclosures Act," Hearing on S. 1358 before the Senate Committee on Governmental Affairs, S. Hrg. 108–414 (2003), pp. 18, 132 and 203 (Testimony of the NWC).

CONCLUSION

For the reasons set forth above, § 107(b) of the Act must be applied to cases pending before the MSPB and the OSC as of the effective date of that statute.

Date: April 12, 2013

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Amicus* brief was served by email, on the following person on this 12th day of April 2013:

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