UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BARBARA S. KING, **Appellant,**	**DOCKET NUMBER** **DA-0752-09-0604-P-1**
v.	
DEPARTMENT OF AIR FORCE, **Agency**	**May 3, 2013**

APPELLANT'S RESPONSE TO AMICUS BRIEFS

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INTRODUCTION

This reply brief is in response to the various Amicus Briefs submitted in this interlocutory appeal. The primary issue is whether the Whistleblower Protection Enhancement Act (WPEA) should be applied retroactively and/or retrospectively to provide the protections that were long ago promised to Federal Government Whistleblowers. This appeal presents the specific issue of the application of the provision of the WPEA that clarifies what the meaning of consequential damages was intended to be under the WPA by adding the term "compensatory damages" to the remedy section of the WPA and otherwise making it clear that all reasonably foreseeable damages that are a consequence of the prohibited conduct are recoverable. Since Congress announced its intent that the WPEA is merely clarifying, it is presumptively retroactive.

The focus in the instant this action is the nature of the damages that can be awarded. The focus in the related case of *Day v The Department of Homeland Security* is the scope or nature of the protected disclosure. The two are intertwined as inadequate remedies for making the protected disclosure renders the protection afforded to a disclosure meaningless: a slap on the wrist has not, does not and will not deter retaliation for making the righteous disclosure in the first place. [1]

The Administrative Law Judge (AJ) in the instant action, Judge Malouf, determined that the WPEA, and the recognition of the damages that are a consequence of retaliation, is not

[1] The amicus brief of Dr. Durr makes reference to and discusses the balance between self-interest and public duty that all government employees face when contemplating disclosing an impropriety they observe in the line of duty. Absent a remedy that will make the employee whole and encourage disclosure, self-interest is encouraged to the detriment of the public. It is an act of hypocrisy for the government and its agencies to proclaim the need for one last period of virtual immunity by avoiding the liability that was intended for covering up misconduct when the government demands transparency from its citizens, especially its largest institutions, with significant personal liability for senior management. The government and its agencies should be held to the same standard as its citizens if not a higher one. Moreover, liability under Sabannes Oxley and even amendments to the Federal Rules of Civil Procedure increasing managerial exposure have had no impact on managerial discretion or ability to discipline employees.

applicable because its application would be retroactive and there is no clear congressional intent to make the WPEA retroactive. See, *Barbara R. King v Department of the Air Force,* DA 0752-09-0604-B-1, wherein the question of the retroactive application of the compensatory damages provision of the WPEA, 5 USC Section 1221, (g) (1) (A) (ii), is addressed. Judge Malouf's decision on damages is, however, inconsistent with her decision to afford protection to the disclosures of Ms. King that was a part of her affirmative defense of whistle blower retaliation. Thus, the AJ applied the WPEA retroactively as to the disclosure, but not as to damages. Having first applied the WPEA retroactively to the disclosure provisions of the act, the law of the case compels this Board to recognize that the damages provisions of the act are also retroactive as to the instant action if not all pending actions.[2]

The retroactive application of the WPEA is, moreover, critical to the MSPB achieving its stated goals for insuring justice and providing an efficient and effective deterrent to conduct that is inimical to the system. The MSPB's 2012 Annual Report provides that:

> *"A highly qualified, diverse Federal workforce managed in accordance with the Merit System Principles (MSPs) and in a manner free from Prohibited Personnel Practices (PPPs) is critical to ensuring agency performance and service to the public. The MSPs are, in essence, good management practices that help ensure that the Federal Government is able to recruit, select, develop, and maintain a high-quality workforce and thereby reduce staffing costs and improve organizational results for the American people. The PPPs are specific proscribed behaviors that undermine the MSPs and adversely affect the effectiveness and efficiency of the workforce and the Government. The fundamental function of the U.S. Merit Systems Protection Board (MSPB) is to ensure that the Federal workforce is managed consistent with the MSPs, and protected from occurrence of PPPs."*

[2] Arguably, since this case is still pending below [a stay was entered as to the remaining economic damages and attorney fees], the WPEA is not "retroactive" in the instant action. Factual findings remain to be made by Judge Malouf.

Factual Summary of Barbara King v Air Force

The instant action involves protected[3] whistleblower disclosures. The Agency, the Air Force, chose to decline to take remedial action based on the protected disclosures made by Barbara King. Instead, the Agency chose to retaliate since retaliation had virtually no consequence to the Agency, economic or otherwise. In the wake of those disclosures, Barbara King was stripped of her duties and demoted in order to cover-up the wrongdoing. Ms. King's whistleblower disclosures, however, were made during the normal course of her duties. The claim for emotional suffering and financial losses incurred by Barbara King are directly attributed to the retaliation and the ongoing prohibited personnel practices. It is a cruel irony that Barbara King's disclosures concerned her observations of how sexual assault victims were treated during the investigation process of the sexual assault charges. The victims she counseled were being retaliated against during the process. In turn, Barbara King was retaliated against for giving voice to the abuse of the victims. Retaliation in its many forms is used by federal agencies to protect and cover up their abuse and deter the abuses being brought to light. By refusing to enforce the WPA as intended, a culture of abuse and retaliation has been created and flourished. That culture of abuse and retaliation for speaking up ensnared Barbara King.

A final decision in favor Barbara King was finally issued by Judge Malouf on October 3, 2012. Thus the AJ has determined that Barbara King is the prevailing party under 5 U.S.C. 2302. The decision was not made public until November 7, 2012. 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.

[3] Again, Judge Malouf found the disclosures to be protected. They were not protected under the WPA and the *Huffman* decision.

This brief presents additional argument and authority for the recognition of the clarifying nature of the WPEA and its retroactive application, the subject of several amicus briefs. It also presents an argument specific to Barb King. In the case of King v. Department of the Air Force, the key actors in her retaliation are no longer assigned and working at Sheppard AFB. The Wing Commander, O.G. Mannon, is now a Major General and the Chief of Staff with US Africa Command; the OSI Detachment Chief, Mr. Timothy Habel, working at Randolph AFB in San Antonio TX. Neither of these individuals is capable of being served or sued by King personally. Any concern about personal responsibility or liability of the actors is misplaced in her specific case.

Issues Presented by Amici

In the instant appeal, eight (8) amicus briefs were filed. Of the briefs submitted, six (6) are supportive of the primary argument presented in this appeal and in the companion case of Day v Homeland Security: Is the WPEA intended to be clarifying and retroactive? Two (2) of the briefs, submitted by two separate government agencies, the VA and the Department of Homeland Security, urge the Board to reject retroactive application.

In addition to this primary issue, several sub issues are also discussed, including: 1) Is the WPEA truly clarifying; 2) Is there evidence of Congressional intent to apply the WPEA retroactively; 3) Would retroactive application result in a windfall to Barbara King or other claimants; 4) Are there aspects to Barbara King's case as to damages that distinguish it from other pending claims; 5) What is the plain meaning of the Congressional preamble to the WPEA and other provisions as to its effective scope; 6) Does the WPA create new substantive rights or clarify those already existing which have been subjected to judicial interpretation; 7) Is retroactive application unfair; 8) What is the proper analysis for determining Congressional

intent when there is an announcement by Congress that the WPEA is clarifying and what is the analysis to be applied if there is no statement of intent; 9) What protection is afforded to a whistle blower if the damages do not remedy the consequences of the retaliation? There may well be other issues identified by the Board as it reviews the briefs submitted. These are the important issues gleaned by Barbara King that are addressed in this submission.

ARGUMENT

I.

A clarified, meaningful and complete remedy including all consequential damages is as important as the corrected definition of protected disclosures

By protecting only incidental observations, the WPA as interpreted by the courts, failed to provide any protection to employees. The types of disclosures most likely to be reported are those seen during their normal activities. These disclosures were found to be unprotected by the WPA. Thus, a qualifying protected disclosure was rare. Moreover, the consequence to the agency was virtually non-existent. The judicial interpretation of "consequential" damages simply encouraged government agencies to retaliate against employees. Even if an employee could fit their disclosure into the narrow category of protected disclosures, the minimal consequences for the agency did not deter retaliation or encourage employees to come forward. The combination of an extremely narrow definition of what was protected and limited damages for retaliation created an atmosphere of employee fear and silence when disclosure was needed.

The extremely limited judicial definition of "consequential" damages under the WPA was just as harmful to the purpose of deterring misconduct by the agency in the first place and then protecting those who do the right thing by reporting fraud and improper conduct. What measure of protection is afforded if the retaliation that can be visited upon a just employee entails no remedy but for a slap on wrist to the Agency? If the penalty for rape was the same as the fine for a traffic ticket, does anyone doubt that sexual assaults would increase? Similarly, there should be no doubt that the interpretation of the WPA's damage provisions encouraged agencies to take punitive action against whistle blowers. The interpretation made the protection afforded a qualifying disclosure meaningless, just as a small fine would make the crime of rape meaningless.

The WPEA mandates that all reasonably foreseeable consequential or economic damages are awarded in addition to the category of damages referred to as "compensatory damages", an absolute necessity to protect a qualifying disclosure. One without the other accomplishes nothing. Although the amicus brief of Thomas C. Daniels contains an excellent analysis of the legislative history of the WPEA, it suggests that the WPEA can be parsed and some sections applied retroactively and others not. While Barbara King disputes the ability to carve the WPEA into sections for purposes of retroactive application, she adopts the incisive argument made by Daniels as to the implicit intent of Congress to make even section 107 (b) retroactive. Certainly Congress would not bother to calculate the dollar amount of its additional liability exposure under 107 (b) in the event of retroactive application for calendar years 2012-2014 had it not intended for this provision to be retroactive as well.[4]

[4] See the amicus brief of Mr. Daniels at page 7, note 2. Barbara King expressly adopts this portion of the amicus of Daniels in support of her argument.

II.

The Congressional Declaration that the WPEA is clarifying is the same as an Express Statement that it is Retroactive

The WPEA specifically recognizes the need for immediate retroactive application by providing it is clarifying in the preamble to the act. Congress has weighed the policy arguments in favor of and against providing a full measure of relief to those who have come forward and done the right thing with the misinterpreted WPA offering them no protection. It has chosen to favor the rights and protections of the valiant few who risked their careers than allow the agencies to avoid being held responsible in a meaningful way. The WPEA specifically provides:

> ***"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".***

This is a clear statement of Congressional intent. A legislative act that is announced by Congress as ***clarifying*** is presumed to be applied retroactively. Congress is presumed to know of this well understood legal maxim and used the shorthand version of a direct statement of full retroactive effect as to the entire act by providing it is ***clarifying*** in the preamble.

The express language in the preamble of the WPEA controls and makes clear it is ***clarifying*** in its purpose and intent to be retroactive in its application. See, *supra at page 5.* Clarification is simply a short hand statement for the statement: "THIS ACT IS INTENDED TO

BE APPLIED RETROACTIVELY". It is well settled that clarifying amendments to statutes are afforded retroactive application as a matter of course and that statements of clarifying intent are statements of implied retroactive intent. In *Brown v Thompson*, 374 F. 3d.254, 259 (4th Cir 2004), the court held:

> *[7] In determining whether an amendment clarifies or changes an existing law, a court, of course, looks to statements of intent made by the legislature that enacted the amendment. See, e.g., Piamba Cortes, 177 F.3d at 1284 ("[C]ourts may rely upon a declaration by the enacting body that its intent is to clarify [a] prior enactment."); Liquilux, 979 F.2d at 890 (using the "legislature's expression of what it understood itself to be doing" to determine whether an amendment is a clarification).*
>
> *[8] Most significant to our determination here, Congress formally declared in the titles of the relevant subsections of MMA that the amendments of MSP were "clarifying" and "technical." See MMA § 301(a)-(b). And, the legislature expressly provided in MMA that these technical and clarifying amendments be made effective "as if included in the enactment" of the MSP legislation preceding the 1989 amendments. MMA § 301(d). From this record, it is plain that Congress intended that MMA be a clarifying amendment, not a substantive change.*[2]

Only if a statue fails to contain any statement of its intended temporal scope does the presumption against retroactivity come into consideration. Since the WPEA contains a clear statement that it is clarifying, the presumption against retroactivity is inapplicable. See, *Fernandez-Vargas v Gonzales*, 548 US 30, 126 S.Ct. 2422, 2430 (2006), where the court rejected the application of the presumption against retroactivity station where Congress had provided an indication of temporal reach of the legislation:

> *It is not until a statute is shown to have no firm provision about temporal reach but to produce a retroactive effect when straightforwardly applied that the presumption has its work to do. See 511 U.S., at 280, 114 S.Ct. 1483.*

Given Congress' straight forward statement that the WPEA is clarifying, retroactive intent and application are presumed. The analysis that is entailed when there is no statement of clarifying intent, beginning with the presumption against retroactivity, is irrelevant. The entire discussion

about whether an award of damages for emotional suffering could be deemed a windfall or an unanticipated problem for agency budget planning is unnecessary as Congress commanded retroactive application by its words. See also, *Johnson v HUD*, 911 F. 2d. 1302, 1309 (8th Cir. 1990) [clarifying language is particularly persuasive evidence when retroactive intent is ambiguous or obscure].

Board need look no farther than the plain language used by Congress. The statute provides it is clarifying. It is patent that the legislature intended to insure retroactive application by announcing that the Act was ***clarifying*** in the preamble. In the event the Board does elect to engage in an unnecessary examination of legislative history of section 107 (b), the damages section of the WPEA, Barbara King adopts the excellent analysis and forceful arguments made by the National Whistle blower Center and Dr. Ram Chatervedi.[5]

III.

Retroactive application of the WPEA is the law of the case

In the instant action, the Agency asserted eight claims against Barbara King. Judge Malouf found that the Agency failed to sustain its burden on all eight charges of misconduct. Barbara King claimed in one of her affirmative defenses that she was retaliated against for whistle blowing and that the charges of misconduct and related corrective actions constituted the retaliation. All of the conduct by the Agency and Barbara King occurred during the ordinary course of her duties.

[5] The traditional analysis, applied when there is no clear statement of clarifying intent by Congress, leads inexorably to the same conclusion: Congress intended retroactivity.

Specifically, Barbara King asserted that her disclosures of misconduct observed in the course of her duties [investigating sexual abuse and providing and insuring support for its victims] were protected disclosures under the WPA. Such a claim was barred by the *Huffman* doctrine, which only protected disclosures based on observations that occurred outside of the employee's ordinary duties. Since it is clear from her opinion that Judge Malouf was and is acutely aware of the *Huffman* decision, it is equally clear that Judge Malouf applied the clarifications of the WPEA retroactively as to protected disclosures. While Judge Malouf declined to follow suit as to the WPEA's clarification of damages, retroactive application is now the law of the case since the Agency did not appeal the judge's decision.

Judge Malouf should be applauded for recognizing the legislative mandate of clarification and the corollary requirement of retroactive application of the WPEA. Had she not done so, Barbara King would not have been able to assert her affirmative defenses and upon prevailing on her claims against the agency, seek damages for retaliation for her whistleblowing. The instant appeal and presentation of the issue is only possible because of Judge Malouf's application of the WPEA retroactively to the disclosures. While Judge Malouf did not also embrace an award of compensatory damages based on retroactivity concerns, the decision to apply the WPEA retroactively to the disclosures creates the law of the case and precludes the agency and Judge Malouf from refusing to apply the damages provision of the WPEA retroactively.[6]

The law of the case doctrine exists to provide for consistency of the law within the same action. It ensures that same result will be produced within the action. While ordinarily the

[6] If the Board adopted the analysis based on the law of the case, the application of the WPEA and its express grant of compensatory damages to all other pending cases would be moot.

doctrine does permanently fix the law of the case until an appellate decision is made within the case, where neither party appeals a decision by the lower tribunal on an issue of law, the doctrine applies. In *Kimberlin v Quinlan*, 199 F. 3d. 496 (DC Cir. 1999), the court held that the defendant's failure to appeal the trial court's ruling on an issue of law while the plaintiff embraced the ruling created the law of the case on appeal. In reaching its holding, the court explained:

> *The law-of-the-case doctrine rests on a simple premise: "the same issue presented a second time in the same case in the same court should lead to the same result." LaShawn A. v. Barry, 87 F.3d 1389, 1393 (D.C.Cir.1996) (en banc). Accordingly, a "legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time." Williamsburg Wax Museum, Inc. v. Historic Figures, Inc., 810 F.2d 243, 250 (D.C.Cir.1987). The law-of-the-case may be revisited only if there is an intervening change in the law or if the previous decision was "clearly erroneous and would work a manifest injustice." LaShawn A., 87 F.3d at 1393 (internal quotation marks omitted).*

Accord, *Hartford Ins. Co. v Socialist People's Libyan Arab Jamahirya*, 422 F. Supp. 2d 203, 207 (D. DC 2006).

In the instant appeal, the Air Force did not appeal Judge Malouf's application of the WPEA retroactively as to Barbara King's disclosures and their status as protected disclosures under the WPEA. The same disclosures were not protected under the WPA by virtue of *Huffman*. Thus, retroactive application of the WPEA is the law of this case and this appeal. It follows that the clarified definition of damages, specifically including "compensatory damages" for emotional pain and suffering, is the law of this case regardless of this Board's decision as to all other similarly situated cases.

IV.

Barbara King and those similarly situation will not receive a windfall by virtue of retroactive application

The Air Force and other amicus parties argue that retroactive application of the WPEA should be denied because Barbara King and the other similarly situated parties would receive a windfall or undeserved award of damages. Moreover, they argue that retroactive application creates a new liability cost for purposes of budgeting and payment that was not anticipated because the awardable damages under the WPA had become nominal. In sum, the amicus arguing against retroactive application assert that until Congress said we really mean what we said before they had no idea they might have to pay for the harm they caused.

As a matter of policy, the liability cost for the group of whistleblowers found to have been discriminated or retaliated against, that which should have been anticipated that is claimed to be a surprise, should fall on the government. The government not only should have understood what the WPA actually provided, but for nearly a decade the WPEA and its "compensatory damages" provision was nearly enacted. The board should err on the side of those who suffered the consequences of the government's conduct given the long period of warning given the government that this day would come and its agencies finally held accountable.

As between two parties in a lawsuit, to the extent either could be construed to obtain a windfall as a result of a damage award, the victim as opposed to the wrongdoer is the logical choice to receive any claimed unanticipated or additional benefit. *Hunter v Allis Chalmers Corp.*, 797 F. 2d. 1714, 1729 (2nd Cir 1986). In the instant appeal, the Air Force is the wrongdoer and Barbara Kind is the victim. Thus, if there is an unanticipated windfall, Barbara King should receive it as opposed to the agency benefitting.

It is well settled, however, that compensatory damages do not constitute a windfall to a victim of whistle blower retaliation. Only where punitive damages are allowed and the amount of the punitive damages awarded exceeds the legitimate purpose of deterrence can it be said to be a "windfall" to the victim. *Vasbinder v Scott*, 976 F. 2d. 118 (2nd Cir 1992). In the instant action, the WPA provided for all "consequential" damages. A court decision interpreting this language wrongfully excluded emotional pain and suffering from the category of "consequential" damages awardable. That the WPEA clarifies what is to be included within the general ambit of "consequential" damages does not make a potential award of emotional pain and suffering or an award of other forms of economic damages a "windfall". Other than excess punitive damages, only an award of damages that represents a double recovery for compensation already received for the same harm can there be a windfall damage award. *In re September 11 Litigation v United Airlines,* 889 F. Supp. 2d 616, 621 (SD NY 2012).

In the instant action, the economic damages and emotional distress damages that Barbara King seeks to make her whole have not already been awarded as some component of her back pay award. By definition, an award of damages from either category to Barbara King cannot be a "windfall". Doubtless, the agency and amicus presenting the "windfall" argument misconstrue the term in order to manufacture the appearance of unfairness where there is none. That the WPA is being returned to what it was intended to be originally perhaps is ending an unfair windfall in favor of the government and its agencies. Since the inception of the WPA, the government and its agencies have avoided paying for the consequences of their wrongful conduct. This has been corrected by the WPEA's clarification. The true windfall is the government's avoidance of payments for consequential damages it caused for over a decade. The government and the amicus asserting this argument avoid mention of all those who were destroyed by retaliation for

whistle blowing and the fact they will never be able to recover what was taken from them.

V.

The instant action was "pending" on the announced effective date of the WPEA and there is no issue as to retroactive application

The WPEA expressly provides that it is to apply to:

"....all judicial proceedings initiated by or behalf of a whistleblower and pending on or after that effective date"

As pointed out in the amicus submitted by Thomas Day, the word "pending" means cases that were initiated before the effective date but remain active and in need of a final decision on an issue yet undecided. Otherwise, there is no need for the word. Any case "initiated" after the effective date is subject to the WPEA, but only if it remains pending. Adding the word pending is unnecessary to include a case filed on or after the effective date within the scope of the WPEA. [7]Thus, the Board need only consider it some aspect of the instant action was pending on the effective date or the case was finally and fully decided.

That this case is before the Board upon certification for interlocutory appeals answers the question. The case remained pending when the appeal was certified by Judge Malouf over

[7] The Amicus brief submitted by the VA argues strenuously that there is no clear announcement of statutory intent to make the WPEA retroactive. In support of its argument, it quotes only a particular section of the WPEA's announcement of the effective date, omitting mention of the language concerning pending cases. Barbara King agrees that the WPEA must first be reviewed and applied according to its plain language. Both the specific expression of the application to all cases initiated and pending or the proclamation that the WPEA is clarifying are expressions in plain language that mandate rejecting the VA's arguments. As to the VA's argument that Congress did not anticipate or provide for increased liability exposure, see note 4 infra and the amicus of Daniels.

Barbara King's objection. The issue of compliance with the back pay award is still pending. The issue of consequential damages [out of pocket or pecuniary damages] remains to be decided as well. Thus, it is not simply the issue of compensatory damages that remains to be decided, but other damage issues. By the express language of Congress, the instant action is included within the scope of the WPEA because it was still pending on the effective date of the WPEA. *In Re Total Management LLC*, 706 F. 3d. 245 (4th Cir. 2013) [statute must be construed to avoid surplus or unnecessary language since all language is presumed to have a purpose]. The term "pending" is rendered meaningless unless it refers to cases with issues still to be decided on the effective date of the WPEA. Such a construction violates the principle rules of statutory construction.

VI.

The announced concerns by the VA for fair warning and harming individual property rights of federal employees are without merit

In its amicus brief, the VA not only argues that there exists no express Congressional intent to apply the WPEA retroactively, but that by doing so a host of negative consequences will occur including increased personal liability for government managerial employees who committed the wrongful conduct. Again, the entire analysis is misplaced since an examination of the effects of retroactive application can only take place in the absence of any stated intent by Congress as to retroactive application. See, *Fernandez-Vargas v Gonzales*, supra. As already noted infra, the WPEA applies to Barbara King because: 1) the WPEA proclaims it is clarifying, which requires retroactive application; 2) King had claims that were pending on the effective

date of the WPEA and; 3) Congress specifically contemplated and estimated its retroactive liability costs. To the extent the arguments of the VA are considered by the Board, they are without merit.

The VA argues that since agency employees have individual liability under the act that they are entitled to fair warning as to increased liability for damages and additional training on how to avoid liability by and adhering to conduct within the law. It also proclaims that all federal employees have a property interest in their employment which will be endangered by retroactive application. The arguments are both an admission of agency defiance of the law as set forth in the WPA based on calculated monetary considerations and are otherwise misplaced and lack common sense.

The "fair warning" argument admits that agencies and their managers have carefully calculated both the remote likelihood of a claim under the WPA being successful and the nominal amount of any award. In the instant appeal, the argument is an admission that the Air Force decided to violate the WPA and retaliate because the court decisions interpreting it allowed them to do so with no consequence. If the court decisions had properly interpreted the WPA, as it is now clarified in the WPEA, the VA argues that the Air Force would have respected the law. But since the Air Force was encouraged to violate the WPA by the lack of any meaningful remedy [money damages], they are not really at fault. The VA argues that by virtue of the WPEA telling them, "OK, now we really mean it, don't do it", the agencies should not have to pay the remedies contemplated under the WPA and now assured by the WPEA. The admission that the VA and other agencies disrespected the WPA and had come to rely on lax enforcement and nominal consequences is not a valid to reason to deny retroactive application of what should have been the consequences for their actions in the first place.

As to impacting a property interest, Federal agency employees do not have a property interest in their employment. Rather, only a certain select group of public employees who have employment rights created by state law have a property interest in their employment. Employees who can be terminated in the discretion of their employer or without cause have no property right. In *McCain v Northwest Community Corrections Center*, 440 F.3d. 320, 330 (6th Cir. 2006), the court rejected the claim that the Plaintiff had a property right in his employment:

> *Although McClain has a right to due process under Regulation P, McClain does not have a property interest that is protected by the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. Property interests are not created by the Federal Constitution, but they are instead created by existing rules or understandings from an independent source such as state law. Bd. of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). State law creates property interests by manifesting "rules or mutually explicit understandings that support [the plaintiff's] claim of entitlement to the benefit and that [the plaintiff] might invoke at a hearing." Perry v. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). No constitutional entitlement to procedural due process can logically arise when the decision-maker's power is wholly discretionary. For instance in Bishop v. Wood, 426 U.S. 341, 345-47, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976), the Supreme Court held* that a city police officer, who held his position at the will and *pleasure of the city, had no property interest in his job even though he was entitled to certain procedural rights provided by the city.*
>
> *10 McClain is an unclassified employee, who does not have a protected property interest in her continued employment. Regulation P states that all employees of a community-based correctional facility are "unclassified." "Unclassified" employees, unlike "classified" employees, "serve at the pleasure of their appointing authority, and may be dismissed from their employment with or without cause." Campbell v. Washington County Pub. Library Bd. of Trs., No. 04-CA44, 2005 WL 1405789, at *2 (Ohio App. 4 Dist. June 10, 2005); see also Christophel v. Kukulinsky, 61 F.3d 479, 482 (6th Cir.1995) (stating that "[u]nclassified civil servants [under Ohio law] have no property right to continued employment"). Because McClain may be dismissed without cause, she*

> *cannot "invoke at a hearing," a mutually explicit understanding that she was entitled to* ***retain*** *her* ***employment.***[2] *Perry, 408 U.S. at 601, 92 S.Ct. 2694, 33 L.Ed.2d 570. It follows that McClain lacks a* ***property*** *interest for federal procedural due process purposes, notwithstanding the fact that state law provides her some procedural protection.*

Thus, the premise upon which the VA's argument is made is false. Perhaps some federal employees actually possess a property right in their employment, but it is the rare Federal employee who does. It is rather absurd to believe that those who have used retaliation as a management tool are unaware of potential repercussions of their retaliation. The perpetrators have little or no real personal financial liability. Moreover, there has never been a change in expectations for military and federal employees. Rather, the expectations they should have had have not been enforced.

The argument is also an admission that the WPA as it has been applied has entirely failed of its essential purpose. It is a direct admission that the WPA has failed to deter retaliation for whistle blowing. Thus, the employees and the managers exist in an environment of no protection for disclosure and so no fear of disclosure of their wrongful conduct and no fear of using retaliation if an employee does disclose. The training given by the agencies to its personnel must be such that it emphasizes the lack of any meaningful remedy or consequence to the managers and that in practice managers have been free of any sanction from the agency. That the remedy could now be more than nominal has finally caused the agencies to take notice and consider the training needed to reduce wrongful conduct and eliminate retaliation. The admission that the government agencies did not take their obligations seriously, did not train their managers to avoid improper conduct and retaliation against someone who comes forward and reports

wrongdoing in their department and ignored the WPA is not a valid reason to avoid retroactive application. The Board should send the message that the WPA and its provisions were not to be ignored and the wrongful conduct always had meaningful protections. Adopting the agencies' arguments is tantamount to admitting the WPA never existed.

The argument is based on the notion that Federal managerial employees who engage in wrongful conduct will now finally either cease doing so or will think twice because their personal liability is easier to prove and more substantial. The argument ignores the reality that virtually no employee subjected to wrongdoing is looking to the individual manager for payment. The agency is the source of payment. It is for the same reason that the argument that increased liability warrants "fair warning and additional training". Federal decision makers well understand that they will never pay an award. Fair warning and training to prevent the unfair imposition of increased personal liability is a call for a waste of federal dollars. If the managers who make the decisions have not been adequately trained until now, it seems unlikely that they ever will be as the VA does not even mention the implementation of a training program for the WPEA going forward. It seems clear that the VA is either satisfied with the level of training or no additional training is deemed necessary despite the VA's arguments. The entire argument is meritless.[8]

[8] The amicus brief of the VA fails to address the specific mandate of clarification in the preamble of the WPEA. While the amicus brief of Home Land Security echoes many of the arguments made by the VA, it mentions the concept of clarification and its presumption of retroactivity, but argues Congress can't mean what it said for those reasons that are involved in an analysis of legislative intent when the express language does not so provide. The argument ignores the simple truth that when Congress declares the statute is clarifying, that this is in itself a statement of retroactive intent. Thus, applying the plain meaning rule of interpretation espoused by the amicus briefs of both the VA and the Department of Homeland Security, the WPEA is retroactive because it declares itself to be by using the word "clarifying" in the Act's preamble.

CONCLUSION

For all the foresaid reasons, the WPEA is a ***clarification*** of the WPA. There should be no doubt that Congress intended that the WPEA is *clarifying*, since it expressly so stated in the preamble. The WPEA must be applied retroactively to all cases pending and all outstanding claims yet to be resolved, including the instant action.

Respectfully Submitted,

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