

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

BARBARA R. KING,
Appellant,

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

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DATE: March 6, 2013

ORDER AND CERTIFICATION OF INTERLOCUTORY APPEAL

The appellant challenged the agency's demotion action through an appeal to the Board. In an initial decision issued on October 3, 2012, I found that the agency's action was retaliation for making a protected disclosure under 5 U.S.C. § 2302(b)(8) and reversed the agency's action. The initial decision became final and, based on the finding of retaliation, the appellant filed a timely claim for consequential and compensatory damages on December 18, 2012.

At the time the agency's action occurred, the Whistleblower Protection Act (WPA) provided that when the Board ordered corrective action pursuant to 5 U.S.C. § 1221(e), it could also order payment of back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages. 5 U.S.C. § 1221(g)(1)(A)(ii). Consequential damages under 5 U.S.C. § 1221(g) are limited to out-of-pocket costs and do not include non-pecuniary damages. The purpose of an award of consequential damages is to make the prevailing employee financially whole and non-pecuniary damages such as pain and suffering or emotional distress are not included. *Kinney v. Department of Agriculture*, 82 M.S.P.R. 338, ¶ 5 (1999). Further, consequential damages do not include compensation for an employee's own time spent pursuing

her appeal, or reimbursement for leave (annual, sick or leave without pay) taken from work to pursue an appeal. *Bohac v. Department of Agriculture*, 239 F.3d 1334, 1339-43 (Fed. Cir. 2001).

In 2012, Congress amended the WPA through the Whistleblower Protection Enhancement Act of 2012 (WPEA or the Act), which was signed into law on November 27, 2012. Section 202 of the WPEA, entitled “Effective Date,” provides as follows: With the exception of a provision relating to the Transportation Security Administration (TSA), the WPEA becomes effective on December 27, 2012. The Act is silent, however, regarding any retroactive operation of its terms.

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

Discussion of law

The U.S. Supreme Court considered the question of statutory retroactivity in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), a case that involved amendments to the Civil Rights Act of 1964 by the Civil Rights Act of 1991. The statutory language at issue in *Landgraf* was similar to that used here: “Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.” *Id.* at 257. The Court noted that such language does not, by itself, resolve the question. The Court stated that “[s]tatutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal.” *Id.* at 286.

In resolving the question of retroactivity, the Court addressed the need to reconcile the tension between two applicable rules of statutory interpretation. The first rule provides that a court is to apply the law in effect at the time it renders its decision. *See Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974). The second rule provides that retroactivity is not favored in the law, and that “congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.” *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988). The Court set out a framework for determining whether a statute should be given retroactive effect. *Landgraf*, 511 U.S. at 264. The Court stated that a tribunal must first determine whether Congress has expressly prescribed the statute’s temporal reach. *Id.* at 280. If the new statute does not contain an express prescription, the tribunal must determine whether it would have actual “retroactive effect,” that is, whether its provision “attaches new legal consequences to events completed before its enactment[,]” *id.* at 270, or would “impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” *Id.* at 280. The Court concluded that if retroactive application of the new statute would have the above-cited effects, it would apply the “traditional presumption” against retroactivity, “absent clear congressional intent favoring such a result.” *Id.*; *see also Parker v. Office of Personnel Management*, 90 M.S.P.R. 480, 486 (2002).

The WPEA contains no express prescription of retroactivity and its legislative history concerning this issue is inconclusive. The language in the Senate Report is a legislative precursor of the actual Act, but it is contradicted on the point of retroactivity by the express terms of the House of Representative’s legislative version. The version passed by the House of Representatives states that “[r]ights in this Act shall govern legal actions filed after its effective date,” expressly declaiming any retroactive application. H.R. REP. NO. 112-508 at 12

(2012). By contrast, retroactivity is suggested by comments in the Senate's version, which provides in relevant part:

This section states the Act would take effect 30 days after the date of enactment. The Committee expects and intends that **the Act's provisions shall be applied in OSC, MSPB, and judicial proceedings initiated by or on behalf of a whistleblower and pending on or after that effective date.** Such application is expected and appropriate because the legislation generally corrects erroneous decisions by the MSPB and the courts; removes and compensates for burdens that were wrongfully imposed on individual whistleblowers exercising their rights in the public interest; and improves the rules of administrative and judicial procedure and jurisdiction applicable to the vindication of whistleblowers' rights.

S. REP. NO. 112-155, at 52 (2012) (emphasis added).

Ruling

I find that the application of the WPEA to cases pending prior to its effective date would have actual retroactive effect, as defined by the Court in *Landgraf* and, therefore, the presumption against statutory retroactivity applies in this case.¹ Moreover, given the ambiguous legislative history, and the absence of express language in the WPEA itself, I find that the Act does not evidence clear Congressional intent in favor of retroactivity.² I further find that in adding the availability of compensatory damages, the WPEA attached new legal

¹ See *Caddell v. Department of Justice*, 96 F.3d 1367, 1371 (Fed.Cir. 1996) (1994 amendment to the WPA, which included decision to order psychiatric testing as a personnel action, enlarged conduct subject to WPA, and would have retroactive effect if applied to conduct occurring prior to effective date of amendment; in the absence of express legislative intent, presumption against statutory retroactivity therefore barred application of amended version of WPA in pending case)

² The WPEA expressly provides that its provisions take effect 30 days after the date of enactment, except for TSA cases, which are governed by the WPEA immediately upon enactment. If Congress intended the WPEA to apply retroactively to all pending appeals, there was seemingly no reason to include a separate provision making it effective in TSA cases 30 days sooner than other cases. See *Special Counsel v. Wilkinson*, 104 M.S.P.R. 253, 261 (2006)(a statute should be construed so that no clause, sentence, or word is superfluous, void, or insignificant).

consequences to events completed before its enactment. Further, the expansion of damages to include compensatory damages involves a waiver of sovereign immunity and the United States Supreme Court has held that a waiver of sovereign immunity must be unequivocally expressed in statutory text and a waiver of such immunity will be strictly construed in favor of the sovereign. *See Lane v. Pena*, 518, 187, 192 (1996). Thus, I conclude that the appellant is not entitled to an award of compensatory damages as provided for in the WPEA.

Certification of Interlocutory Appeal

I informed the parties that an administrative judge, upon her own motion, may certify an interlocutory appeal to the Board. 5 C.F.R. § 1201.91 (2012). I explained that such an interlocutory appeal is appropriate for review of a ruling involving “an important question of law or policy about which there is substantial ground for difference of opinion[,]” and where “[a]n immediate ruling will materially advance the completion of the proceeding....” 5 C.F.R. § 1201.92 (a), (b) (2012). I notified the parties that the question, of whether the provisions of the WPEA with regard to damages may be applied retroactively to cases pending prior to its effective date, is appropriate for review under the criteria set forth under 5 C.F.R. § 1201.92. I afforded them an opportunity to object to my ruling.

The agency did not file any objection to the ruling or to certification of an interlocutory appeal. The appellant, however, objected to my ruling and to certification of an interlocutory appeal. The appellant contended that the WPEA was passed by Congress as a clarification of the WPA and to correct a series of “aberrant” court rulings. The appellant argued that it is well settled that clarifying amendments to statutes are to be given retroactive effect and that she is entitled to compensatory as well as consequential damages.

Although I have considered the appellant’s arguments, I find that my ruling concerning the retroactivity of the damages provision of the WPEA is appropriate for review under the Board’s criteria for interlocutory appeals. 5 C.F.R. § 1201.92 (2012). Accordingly, I certify the issue on my own motion. 5 C.F.R.

§ 1201.91 (2012). Pursuant to 5 C.F.R. § 1201.93(c), I hereby stay all further proceedings while the interlocutory appeal is pending before the Board.

FOR THE BOARD:

_____/S/_____

Marie A. Malouf
Administrative Judge

CERTIFICATE OF SERVICE

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

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March 6, 2013

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/s/

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