**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**

**2013 MSPB 49**

Docket No. DC-1221-12-0528-W-1

**Thomas F. Day,**

**Appellant,**

**v.**

**Department of Homeland Security,**

**Agency.**

June 26, 2013

Thomas F. Day, Sterling, Virginia, pro se.

Lorna J. Jerome, Esquire, Washington, D.C., for the agency.

Nicole M. Heiser, Esquire, Washington, D.C., for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Member Robbins issues a separate opinion concurring in part and dissenting in part.

## OPINION AND ORDER

¶1 This appeal is before the Board on interlocutory appeal from the December 14, 2012 order of the administrative judge. The administrative judge stayed the proceedings and certified for Board review his ruling that the provisions of the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465, (WPEA) providing protection to (1) disclosures made in the course of an employee's normal duties, and (2) disclosures made to the alleged

wrongdoer, do not apply to cases that were already pending before the effective date of those provisions. For the reasons discussed below, we REVERSE the administrative judge's ruling, VACATE the stay order, and RETURN the appeal to the administrative judge for further adjudication consistent with this Opinion and Order.

## BACKGROUND

¶2 The appellant filed this individual right of action (IRA) appeal alleging that the agency took several personnel actions against him in reprisal for whistleblowing. Initial Appeal File (IAF), Tab 1. The administrative judge issued an order noting that at least one of the appellant's disclosures appeared to have been made as part of his normal duties, through normal channels, and to an alleged wrongdoer and that the disclosure in question therefore might not be protected under the Whistleblower Protection Act (WPA) according to the criteria set forth by the United States Court of Appeals for the Federal Circuit in *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001). IAF, Tab 13 at 2-4. The administrative judge ordered the parties to provide evidence and argument addressing whether the disclosure at issue was protected under *Huffman*. IAF, Tab 13 at 4. The administrative judge also noted that the WPEA, which had passed both houses of Congress and was awaiting the President's signature at the time the order was issued, appeared to provide protection to disclosures that were not protected under the WPA as interpreted in *Huffman*. *Id.* at 3 n.1. He noted that it was unclear whether the WPEA, once enacted, would apply to pending appeals as of its effective date. *Id.* The administrative judge also raised the possibility that his ruling with respect to the temporal reach of the WPEA could be certified for interlocutory review by the Board. *Id.*

¶3 In their responses to the administrative judge's order, the parties disagreed about whether the appellant's disclosure was protected under *Huffman*. IAF, Tabs 14 (agency's response), 15 (appellant's response). However, both parties

indicated that the issue of the temporal reach of the WPEA should be certified for interlocutory review. IAF, Tab 14 at 6, Tab 15 at 20-22. In an order issued on December 14, 2012, the administrative judge found that it was unclear from the parties' submissions whether the appellant's disclosure was protected under *Huffman*; he found, however, that the appellant had made a nonfrivolous allegation of a protected disclosure. IAF, Tab 16 at 5-6. The administrative judge then considered whether the WPEA standard for determining whether a disclosure is protected should apply to the present case. He noted that the relevant provisions of the WPEA were to become effective on December 27, 2012, and that the statute itself was silent with respect to whether it should be applied retroactively to all pending matters. *Id.* at 6. Applying the standards set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the administrative judge found that Congress had not clearly expressed an intention that the terms of the WPEA should apply retroactively. IAF, Tab 16 at 8-10. He further found that the WPEA standard for determining whether a disclosure is protected would have actual retroactive effect if applied to pending cases, i.e., it would "attach[] new legal consequences to events completed before its enactment." *Id.* at 10 (quoting *Landgraf*, 511 U.S. at 270). He therefore concluded that the presumption against retroactivity applied to the WPEA definition of "protected disclosure." *Id.* at 10-11. The administrative judge certified his ruling regarding the temporal reach of the WPEA for interlocutory review under 5 C.F.R. § 1201.92.

¶4 On January 10, 2013, the Office of Special Counsel (OSC) notified the Board of its intent to file an amicus brief in this matter. IAF, Tab 17. In response to that notice, the Board issued an order inviting OSC to file an amicus brief. IAF, Tab 18. However, the Board subsequently decided to invite any interested individual or organization to file an amicus brief in this appeal.

78 Fed. Reg. 9431 (Feb. 8, 2013). The Board received ten amicus briefs.[1] IAF, Tabs 20-22, 24-30. The Board served the amicus briefs on the parties, and the parties submitted responses to the arguments raised by the amici. IAF, Tabs 23, 31, 33-34.

## ANALYSIS

### The administrative judge properly certified his ruling for interlocutory review.

¶5 An interlocutory appeal is an appeal to the Board of a ruling made by a judge during a proceeding. An appeal may be certified for interlocutory review on the motion of either party or on the administrative judge's own motion. 5 C.F.R. § 1201.91. The Board's regulations provide for certification of a ruling for interlocutory review where (a) the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and (b) an immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public. 5 C.F.R. § 1201.92.

¶6 We find that the criteria for certifying a ruling for interlocutory review are met in this case. The temporal reach of the WPEA is an important question of law about which there is substantial ground for difference of opinion, as evidenced by the number of amicus briefs received in this appeal and the differing views expressed therein. In addition, an immediate ruling regarding the retroactive application of the WPEA will materially advance the completion of

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[1] The amicus briefs were received from (1) Joseph Carson; (2) MSPB Watch; (3) OSC; (4) the Department of Veterans Affairs; (5) the National Employment Lawyers Association; (6) the Brown Center for Public Policy, a.k.a. Whistlewatch.org; (7) Jacques A. Durr, MD; (8) the Government Accountability Project, on behalf of itself, several other organizations, and Representatives Elijah Cummings and Jackie Speier; (9) Elizabeth Jewell Martin; and (10) the National Whistleblower Center (NWC) and Dr. Ram Chaturvedi. In its amicus brief, NWC requests to participate in oral argument. However, the Board has chosen not to hear oral arguments in this interlocutory appeal.

not only this proceeding but many other appeals that were pending when the WPEA became effective.[2] Therefore, the administrative judge properly certified his ruling for interlocutory review.

Congress did not expressly provide that the terms of the WPEA would apply retroactively to conduct occurring before its enactment.

¶7 As the administrative judge correctly found, the proper analytical framework for determining whether a new statute should be given retroactive effect was set forth by the Supreme Court in *Landgraf*.[3] *See* IAF, Tab 16 at 7. *Landgraf* concerned the possible retroactive application of section 102 of the Civil Rights Act of 1991, which provided the right to a jury trial and the right to recover compensatory and punitive damages for violations of Title VII of the Civil Rights Act of 1964. *Landgraf*, 511 U.S. at 247. At the outset of its discussion of that issue, the Court noted the tension between two established canons of statutory interpretation, i.e., the presumption against statutory

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[2] We note that a substantial number of initial appeals involving claims of whistleblower reprisal have been dismissed without prejudice pending the Board's ruling in this matter.

[3] Amicus OSC argues that *Landgraf* is inapplicable because the Board, as an administrative agency, is required to apply the law in effect at the time it issues its decision. IAF, Tab 22 at 12-14. OSC argues that the Board should look to *Ziffrin, Inc. v. United States*, 318 U.S. 73 (1943), for guidance, rather than to *Landgraf*. *Ziffrin* involved a decision by the Interstate Commerce Commission (ICC) to deny a corporation a contract carrier permit based on the law in effect at the time the application was filed. *Id.* at 74. The Court held that the ICC was required to apply a new statutory standard that went into effect between the filing of the application and the entry of the order denying it. *Id.* at 78. The Court explained that "a change of law pending an administrative hearing must be followed in relation to permits for future acts. Otherwise the administrative body would issue orders contrary to the existing legislation." *Id.* Unlike the situation in *Ziffrin*, the Board's adjudication of appeals does not involve "permits for future acts." To the contrary, the Board is deciding the legal status of past conduct. Therefore, we find that *Landgraf* provides the proper analytical framework for determining what law to apply in Board appeals. *See Upshaw v. Consumer Product Safety Commission*, 111 M.S.P.R. 236, ¶¶ 9-10 (2009) (applying *Landgraf*), *modified on other grounds by Scott v. Office of Personnel Management*, 116 M.S.P.R. 356, ¶ 13 n.6 (2011).

retroactivity and the principle that courts should apply the law in effect at the time it renders its decision. *Id.* at 263-64 (internal citations omitted). In resolving that tension in the case before it, the Court identified the following process for determining whether to apply a new statute to pending cases:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the 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.

*Id.* at 280. While recognizing that, in many cases, "retroactive application of a new statute would vindicate its purpose more fully," the Court deemed that consideration insufficient to rebut the presumption against retroactivity. *Id.* at 285-86.

¶8 When Congress intends for statutory language to apply retroactively, it is capable of doing so very clearly. *See, e.g.*, *Presidio Components, Inc. v. American Technical Ceramics Corp.*, 702 F.3d 1351, 1364-65 (Fed. Cir. 2012) (giving retroactive effect to amendments enacted in 2011 in light of express statutory language applying the amendments to "all cases, without exception, that are pending on, or commenced on or after, the date of the enactment of this Act"). Here, Congress did not expressly define the temporal reach of section 101 of the WPEA. Rather, it provided that, with the exception of provisions not at issue in this appeal, the WPEA would become effective 30 days after its enactment. WPEA § 202. "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 257. If anything, the fact that

the effective date was 30 days after enactment suggests that retroactivity was not intended. *See AT&T Corp. v. Hulteen*, 556 U.S. 701, 713 (2009) (citing the fact that the relevant provisions of the Pregnancy Discrimination Act took effect 180 days after enactment as evidence that those provisions were not intended to have retroactive effect).

¶9 Recognizing that Congress did not provide that the WPEA be retroactively applied—despite clear discussion in the legislative history for the Act to be applied to pending cases[4]—we must determine, under *Landgraf*, whether the WPEA impairs the parties' respective rights, increases a party's liability for past conduct, or imposes new duties with respect to past transactions. As discussed below, we find that section 101 does not have an impermissible retroactive effect under *Landgraf* because it does not alter the parties' respective liabilities as Congress initially contemplated in enacting the WPA.

The provisions of the WPEA at issue in this appeal clarify, rather than effect substantive changes to, existing law.

¶10 The appellant and several amici argue that the WPEA merely clarifies the law under the WPA and corrects decisions of the Federal Circuit that misinterpreted the WPA. "Clarification, effective *ab initio*, is a well-recognized

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[4] The committee report accompanying the Senate bill that was eventually approved by both houses of Congress and signed into law by the President states in relevant part as follows:

> 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 51-52 (2012). That statement of intent from the Senate report was also read into the Congressional Record by a Member of the House of Representatives. *See* 158 Cong. Rec. E1664 (2012).

legal principle." *Liquilux Gas Corporation v. Martin Gas Sales*, 979 F.2d 887, 890 (1st Cir. 1992). When legislation clarifies existing law, its application to preenactment conduct does not raise concerns of retroactivity. *See Levy v. Sterling Holding Co.*, 544 F.3d 493, 506 (3d Cir. 2008); *Cookeville Regional Medical Center v. Leavitt*, 531 F.3d 844, 849 (D.C. Cir. 2008); *Brown v. Thompson*, 374 F.3d 253, 258-61 (4th Cir. 2004); *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689-91 (9th Cir. 2000); *Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1283-84 (11th Cir. 1999); *Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993); *Liquilux*, 979 F.2d at 890. *But see Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1363 (Fed. Cir. 2005) (categorizing rules or applications of rules as "clarifications" or "changes" provides little insight into whether a retroactive effect under *Landgraf* would result in a particular case).[5]

¶11 In determining whether a new law clarifies existing law, "[t]here is no bright-line test." *Levy*, 544 F.3d at 506 (quoting *United States v. Marmolejos*, 140 F.3d 488, 491 (3d Cir. 1998)). For example, many courts have deemed significant any declaration by the enacting body of intent to clarify. *See Cortes*, 177 F.3d at 1284 (citing to *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980); *Sykes v. Columbus & Greenville Railway*, 117 F.3d 287, 293-94 (5th Cir. 1997); *Liquilux*, 979 F.2d at 890). *But see Levy*, 544 F.3d at 507 (finding the enacting body's description of an amendment as a "clarification" of the pre-amendment law to not be relevant to the judicial analysis). In this regard, we note that subsequent legislation declaring the intent of an earlier statute is entitled to great weight. *See Red Lion*

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[5] We decline to strictly follow *Princess Cruises* with regard to retroactivity and clarification because it appears to be a minority approach among the courts of appeal. We have discretion to make this determination because the WPEA has changed the rights to judicial review of whistleblowers to include other courts of appeal for a 2-year period. *See* WPEA § 108. Therefore, we must determine the issue of retroactivity with the view that the appellant ultimately may seek review of this decision before any appropriate court of appeal.

*Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 380-81 (1969). In addition, other factors relevant in determining whether legislative enactment clarifies rather than effects a substantive change in existing law are the presence of ambiguity in the preceding statute and the extent to which the new law resolves the ambiguity and comports with both the prior statute and any prior administrative interpretation. *Levy*, 544 F.3d at 507.

¶12 While the statutory language of the WPEA does not contain any express language indicating congressional intent that the Act apply retroactively, it does explicitly provide that the purpose of the WPEA was to clarify the WPA. The preamble states:

> An Act
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> 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 other purposes.

WPEA pmbl. (emphasis added). Furthermore, the pertinent provision in this appeal is section 101 of the statute, which is entitled: "**Sec. 101. CLARIFICATION OF DISCLOSURES COVERED."** WPEA § 101. As such, there can be no doubt that Congress clearly intended to enact the WPEA as a "clarification" of the term "disclosure" in the WPA. Moreover, we find this language to be sufficiently clear as to rebut the agency's argument that, because the WPEA includes a delayed effective date, Congress could not have intended that the Act be applied to pending cases. IAF, Tab 34 at 8.

The WPA's definition of what constitutes a "disclosure" is ambiguous.

¶13 The WPA, as amended in 1989, prohibits reprisal because of "any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences -- (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of

authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8)(A) (2012). Prior to its decision in *Huffman*, the Federal Circuit had issued several decisions finding that employees' disclosures reported through normal channels to their supervisors about matters within their normal duties were protected under the WPA. *See Kewley v. Health & Human Services*, 153 F.3d 1357, 1360 (Fed. Cir. 1998) (holding that a Clinical Psychologist made a protected disclosure when she informed her supervisor, the Clinical Director, and the Service Unit Director that the clinic's practice in counseling minor children violated ethical and legal requirements); *Watson v. Department of Justice*, 64 F.3d 1524, 1528 (Fed. Cir. 1995) (holding that a Border Patrol Agent made a protected disclosure when he reported to his supervisor an illegal shooting by another Border Patrol Agent while they were on duty); *Marano v. Department of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993) (finding that the appellant made a protected disclosure when he reported misconduct and mismanagement by the Albany Resident Office to the incoming Special Agent in Charge of the New York Field Division).

¶14 During the same general time period, the Federal Circuit issued other decisions interpreting the WPA's definition of disclosure narrowly to exclude complaints made to a supervisor about the supervisor's own conduct. *See Meuwissen v. Department of the Interior*, 234 F.3d 9, 13 (Fed. Cir. 2000) (disclosure of information that is publicly known is not a disclosure under the WPA); *Willis v. Department of Agriculture*, 141 F.3d 1139, 1143 (Fed. Cir. 1998) (discussion and even disagreement with supervisors over job-related activities is a normal part of most occupations and does not constitute a protected disclosure); *Horton v. Department of the Navy*, 66 F.3d 279, 281-82 (Fed. Cir. 1995) (verbal and written criticisms directed to the wrongdoers themselves are not normally viewable as whistleblowing and does not further the purpose of the WPA).

¶15 In *Huffman*, a three-judge panel of the Federal Circuit noted that "disclosure" was not defined in the WPA and thereafter interpreted that statute as excluding disclosures made in the course of an employee's normal duties and through normal channels from the scope of its protection. 263 F.3d at 1351-54. The panel found that the court was bound to follow the holdings in *Willis* and *Horton* that disclosures to the wrongdoer are not protected under the WPA. *Huffman*, 263 F.3d at 1349. In so doing, the court acknowledged but dismissed contrary findings in *Watson* and *Marano* on the basis that they were merely "conflicting statements in dictum."[6] *Id.* at 1352 & n.3. However, it failed to explain why the findings in *Marano* and *Watson*, i.e, that the appellant's disclosures were protected under the WPA, were unnecessary to those decisions. Nor did the court address the conflicting holding in *Kewley*.

¶16 While the Federal Circuit wrestled with the meaning of "disclosure" under the WPA, the Board began to question the breadth of the court's decisions with regard to excluding certain disclosures from the WPA's protection. For example, in *Askew v. Department of the Army*, 88 M.S.P.R. 674 (2001), the Board found that the appellant made a protected disclosure when she reported accounting irregularities to the Office of Inspector General (OIG), even though they were longstanding and well-known to management and to the OIG. In so doing, we "declined to give a broad reading to certain passages of *Meuwissen*"—namely those finding that a known matter cannot comprise the basis of a protected disclosure—because they conflicted with the legislative history of the WPA and were based on the court's reading of the legislative history of the Civil Service Reform Act, which was enacted 11 years before the WPA. *Id.*, ¶ 22. The Board pointed out that Congress passed the WPA in an effort to strengthen protections

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[6] Pursuant to the Federal Circuit's judicial practice, the precedential decision of the court is the first decision that was issued unless overruled by an *en banc* decision. *See Bosley v. Merit Systems Protection Board*, 162 F.3d 665, 672 (Fed. Cir. 1998).

for whistleblowers and that the Senate Report on the bill that later became the WPA firmly rejected the notion that an individual who communicates wrongdoing that is "not concealed" or "already known" should not be protected from retaliation. *Askew*, 88 M.S.P.R. 674, ¶ 22 (citing S. Rep. No. 100-413, at 13 (1988) ("OSC, the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected . . . only if the employee is the first to raise the issue.")).

¶17 Even more recently, the Board has distinguished *Meuwissen* and limited its application in our decisions. *See Stiles v. Department of Homeland Security*, 116 M.S.P.R. 263 (2011). In the same vein, we have cautioned against citing *Willis* for broad propositions concerning protected whistleblowing. *Id.*, ¶ 12; *Czarkowski v. Department of the Navy*, 87 M.S.P.R. 107, ¶ 13 (2000).

The WPEA's clarification of what constitutes a "disclosure" resolves the ambiguity in the WPA.

¶18 Section 101 of the WPEA provides, in relevant part, that a disclosure shall not be excluded from 5 U.S.C. § 2302(b)(8) because the disclosure was made to a supervisor or to a person who participated in the activity that is the subject of the disclosure, or because the disclosure revealed information that had been previously disclosed. WPEA § 101. Section 101(b)(2) further provides:

> If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from [5 U.S.C. § 2302(b)(8)] if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure.

WPEA § 101(b)(2). As discussed above, without a statutory definition of disclosure, the WPA was open to ambiguity concerning whether disclosures within its ambit included those made to the wrongdoer or which concerned

information previously disclosed or reported during the normal course of one's duties.[7] The WPEA plainly resolves this ambiguity and explicitly provides that these types of disclosures are covered under the WPA.

The WPEA's resolution of the ambiguity of what constitutes a "disclosure" is consistent with the text of the WPA.

¶19 The WPA makes it a prohibited personnel practice to take, or fail to take, a personnel action because of "*any* disclosure of information" which the employee reasonably believes evidences a violation of law, rule or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8)(A) (emphasis added). The court even acknowledged that this language—"any disclosure"—was deliberately broad. *Huffman*, 263 F.3d at 1347. The WPEA's clarification of "disclosure" does not expand the nature or the scope of disclosures beyond any stated limitation in the text of the prior statute, and there is consistency between the WPEA and the WPA.

The WPEA's resolution of the ambiguity is consistent with the Board's interpretation of the WPA.

¶20 The agency contends that section 101 of the WPEA broadens the definition of protected disclosures, creates new rights and liabilities for the parties, and is a substantive change in the law. IAF, Tab 34 at 16-17. Thus, the agency asserts that it creates a new class of whistleblowers and "shifts the ground under which all parties have been operating." *Id.* at 24. The agency further argues that a new law is not automatically deemed to be clarifying simply because Congress enacted it to correct erroneous court decisions. *Id.* at 23 (citing *Lytes v. DC Water & Sewer Authority*, 572 F.3d 936, 939, 941-42 (D.C. Cir. 2009)

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[7] Indeed, the court specifically acknowledged in *Huffman* that the scope of the term "disclosure" under the WPA is ambiguous and relied upon the statute's legislative history to determine that disclosures of matters made in the course of normal duties were not covered under the Act. 263 F.3d at 1351-54.

(Americans with Disabilities Act Amendments Act of 2008 (ADAAA), which was designed to "reinstate a broad scope of protection" under the Americans with Disabilities Act (ADA) and to "reject" the holdings of two Supreme Court decisions interpreting the ADA, was subject to the presumption against retroactivity because it broadened the class of employees entitled to reasonable accommodation (quoting ADAAA § 2(b)(1), Pub. L. No. 110-325, 122 Stat. 3553, 3554)).[8]

¶21 Although not explicitly argued in its brief, the agency's arguments are predicated upon the principle that the presumption against retroactivity exists to protect settled expectations of law and that, while clarification may be applied to resolve an ambiguity in existing law, it may not alter settled law. *See Cookeville Regional Medical Center*, 531 F.3d at 847-49.[9] The issues are, therefore, whether the restricted definition of "disclosure" adopted in *Huffman* had the force of settled law and whether the WPEA's clarification of what constitutes a "disclosure" is consistent with the Board's interpretation of the WPA.

¶22 While this is a close issue, we find that section 101 of the WPEA is not a substantive change in the law, and it does not otherwise alter settled law. Prior to the enactment of the WPEA, the Federal Circuit was the sole reviewing court for IRA appeals under the WPA. *See* 5 U.S.C. §§ 1221, 7703. As a result, the Board was obligated to consider the *Huffman* decision to be controlling under the

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[8] We find that the holding in *Lytes* is not applicable to this case because, when Congress enacted the ADAAA, it sought to re-define legal issues that had been resolved by several Supreme Court decisions. It is well-recognized that decisions by the Supreme Court on a legal issue must be deemed the final word on the matter. Thus, whenever Congress seeks to overturn the Supreme Court's construction of a statute, the principle of clarification will not be applicable because amending law is attempting to alter settled law.

[9] That said, we also note, as the Third Circuit recognized in *Levy*, 544 F.3d at 507, that "the fact that an amendment conflicts with a judicial interpretation of the pre-amendment law [does not] mean that the amendment is a substantive change and not just a clarification."

doctrine of *stare decisis*. *See LaBerge v. Department of the Navy*, 91 M.S.P.R. 585, 590-91 (2002) (Slavet, concurring). In her concurring opinion in *LaBerge*, Member Slavet stated that, while she recognized that *Huffman* commanded a different result, in her view, both the language and the purpose of the WPA warranted finding that the appellant's disclosures were protected under the statute. *Id.* at 591.

¶23 Moreover, as noted above, the Board has on numerous occasions distinguished its jurisprudence from the Federal Circuit's constricted reading of the WPA. *See, e.g.*, *Stiles*, 116 M.S.P.R. 263, ¶¶ 10-11; *Askew*, 88 M.S.P.R. 674, ¶ 22. Specifically, the Board has distinguished and narrowed the standard adopted in *Huffman* in a number of decisions. *See Farrington v. Department of Transportation*, 118 M.S.P.R. 331, ¶¶ 6-8 (2012) (*Huffman* exclusion of disclosures made through "normal duty channels" was narrowed by finding that the appellant's disclosures to her fourth- or fifth-level supervisor may have been protected if they were reported in a manner that did not follow the typical customs and practices for reporting information in the workplace); *Cassidy v. Department of Justice*, 118 M.S.P.R. 74, ¶¶ 10-11 (2012) (*Huffman* exclusion of disclosures made within "normal course of duties" questioned when the alleged disclosures were complaints made to an official in another federal agency); *Ontivero v. Department of Homeland Security*, 117 M.S.P.R. 600, ¶¶ 16-17 (2012) (the appellant's emails to her supervisors were protected disclosures outside "normal channels" because they were also sent to agency officials in upper management); *Tullis v. Department of the Navy*, 117 M.S.P.R. 236, ¶¶ 10-11 (2012) (Board followed *Marano* to find that the appellant made a protected disclosure related to his day-to-day duties because his position did not require him to report wrongdoing as part of his regular job duties); *Lane v. Department of Homeland Security*, 115 M.S.P.R. 342, ¶¶ 20-23 (2010) (appellant's reports of disputes with his supervisors that he was being asked to breach his ethical obligations, which were made to the procurement office and

human resources, were not part of the appellant's normal job duties nor reported through normal channels).

¶24 Although the agency contends that it reasonably relied upon *Huffman*, we cannot conclude that that decision's narrow definition of "disclosure" had the force of settled law. Rather, the Board's case law shows that rigid application of *Huffman* has been scrutinized and rejected by the Board, often based upon facts and circumstances that would not have been readily apparent to agency management when it allegedly took a retaliatory action against the employee. Therefore, we view it as unlikely that an agency would have acted differently if it had known that it would need to defend its actions based upon the broader definition of "disclosure" followed by the court in *Marano* and *Watson* and adopted in section 101 of the WPEA. In addition, given the Board's decisions distinguishing and narrowing *Huffman*, the agency cannot show that the application of the Board's broader definition of "disclosure" was unforeseeable.

¶25 More importantly, the WPEA's clarification of "disclosure" is consistent with the Board's interpretation of the term. *See Garrett v. Department of Defense*, 62 M.S.P.R. 666, 671 (1994) (finding that the plain language of 5 U.S.C. § 2302(b)(8)(A) does not exclude disclosures made by employees as part of the performance of their duties).

¶26 It should be noted that the Supreme Court has stated that *Chevron* deference requires a federal court to defer to an agency's construction of a statute, even if it differs from what the court believes is the best interpretation of the statute, if the statute is within the agency's jurisdiction to administer, and the agency's construction of the statute is reasonable. *See National Cable & Telecommunications Association v. Brand X Internet Service*, 545 U.S. 967, 980 (2005). The Court further held that "a court's interpretation of a statute trumps an agency's under the doctrine of *stare decisis* . . . only if the relevant court decision held the statute unambiguous." 544 U.S. at 984 (citation omitted); *see City of Arlington v. Federal Communications Commission*, 133 S. Ct. 1863, 185

L. Ed. 2d 941, 957-58 (2013) (an agency's interpretation of its jurisdiction under a statute is entitled to *Chevron* deference). In addition, the Court has held that it is within an agency's discretion to determine whether it will announce its interpretation of a statute that it implements through either rulemaking or adjudication. *See National Labor Relations Board v. Bell Aerospace Co., Division of Textron, Inc.*, 416 U.S. 267, 294 (1974) (affording deference to the agency's interpretation of the National Labor Relations Act through adjudication rather formal rulemaking). Therefore, we hold that section 101 of the WPEA did not alter a matter of settled expectation and that we may apply the principle of clarification to adopt in pending cases the WPEA's refinement of the term "disclosure."

ORDER

¶27 Accordingly, we REVERSE the administrative judge's ruling, VACATE the stay order, and RETURN the appeal to the administrative judge for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

_____

William D. Spencer
Clerk of the Board
Washington, D.C.

SEPARATE OPINION OF MARK A. ROBBINS,
CONCURRING IN PART AND DISSENTING IN PART

in

*Thomas F. Day v. Department of Homeland Security*

MSPB Docket No. DC-1221-12-0528-W-1

¶1 I concur with the majority opinion insofar as it finds that Congress did not expressly provide that the terms of the Whistleblower Protection Enhancement Act of 2012 (WPEA) would apply retroactively to conduct occurring before its enactment. I respectfully dissent from the majority's determination that applying section 101 of the WPEA to pending cases does not have an impermissible retroactive effect under *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), because it does not alter the parties' respective liabilities as Congress initially contemplated in enacting the Whistleblower Protection Act (WPA). I would find that applying section 101 of the WPEA to cases pending when the WPEA went into effect would have an impermissible retroactive effect under *Landgraf*.

The "clarification doctrine" cannot properly be applied in this case because it has been rejected by the Board's reviewing court.

¶2 The majority's determination that the provisions of section 101 of the WPEA, governing which disclosures are protected, may be applied to cases pending when the WPEA became effective is premised on two separate legal conclusions: (1) that the clarification doctrine discussed in paragraphs 11 and 12 of the majority opinion applies to this case, i.e., the WPEA merely clarified what had been ambiguous and unsettled law as to the meaning of the WPA prior to the enactment of the WPEA, and, when legislation clarifies existing law, its application to preenactment conduct does not raise retroactivity concerns; and (2) that the Board is not required to follow as binding precedent the Federal Circuit's decision in *Princess Cruises, Inc. v. United States*, 397 F.3d 1358 (Fed.

Cir. 2005). Even if I were prepared to accept the first proposition, I cannot accept the second.

¶3 In *Princess Cruises*, the Federal Circuit unambiguously and unreservedly rejected the clarification doctrine on which the majority relies:

> We find the binary analysis -- change or clarification -- advanced by the government largely unhelpful. Merely categorizing rules or applications of rules as "clarifications" or "changes" provides little insight into whether a retroactive effect would result in a particular case. As noted by the Court of Appeals for the D.C. Circuit, a clarification, in fact, "changes the legal landscape," because "a precise interpretation is not the same as a range of possible interpretations." *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 423-24 (D.C. Cir. 1994); *McCoy*, 270 F.3d at 509 (noting that the *Landgraf* factors must be applied because "almost every new statute results in some perceptible effect or impact on countless past or pre-existing choices, decisions, and interests of the actors and subjects in the newly-regulated field").
>
> Further, the bright-line, binary test espoused by the government conflicts with the court's obligation to weigh the various factors described in *Landgraf*. Indeed, *Landgraf* explicitly requires the court to consider "the *nature and extent* of the change in the law," not merely whether a change has occurred. 511 U.S. at 270, (emphasis added).

397 F.3d at 1363.

¶4 Although the majority acknowledges that the Federal Circuit has rejected the clarification doctrine, it "decline[s]" to follow *Princess Cruises* on the ground that it "appears to be a minority approach among the courts of appeal" that is not binding legal authority for the Board because the "WPEA has changed the rights to judicial review of whistleblowers to include other courts of appeal for a 2-year period." Majority Opinion ¶ 11 n.5. Even if I were to agree that Federal Circuit precedent is not binding authority for the Board as to the proper interpretation of the WPA as amended, the fact remains that the clarification doctrine is a legal doctrine of general applicability that is not in any respect tied to federal whistleblower law. The *Princess Cruises* decision had nothing to do with such law; it dealt with the retroactivity of a change governing payments to the federal

government related to port use. It has long been established that decisions of the United States Court of Appeals for the Federal Circuit are controlling authority for the Board, whereas other circuit courts' decisions are persuasive but not controlling authority. *E.g.*, *Garcia v. Department of Agriculture*, 110 M.S.P.R. 371, ¶ 12 (2009); *Fairall v. Veterans Administration*, 33 M.S.P.R. 33, 39, *aff'd*, 844 F.2d 775 (Fed. Cir. 1987). Even if the WPEA created an exception to the binding character of Federal Circuit precedent, the exception would apply only to the proper construction of the WPA as amended. The clarification doctrine and the law governing whether statutes will be applied retroactively are general principles of law, not interpretations of federal whistleblower law. Accordingly, I conclude that the Federal Circuit's rejection of the clarification doctrine is fully binding on the Board, regardless of whether that court's position is a majority or a minority position among the federal circuit courts of appeal.

¶5 Even if I were persuaded that the clarification doctrine is a reasonable one and that the Federal Circuit's decision in *Princess Cruises* did not preclude the Board from adopting it, I believe the Supreme Court itself has rejected it. In *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), issued the same day as *Landgraf*, the Supreme Court addressed the possible retroactivity of a provision of the Civil Rights Act of 1991. The Court assumed that the provision at issue in *Rivers* "reflect[ed] Congressional disapproval" of a prior Court decision interpreting 42 U.S.C. § 1981 and that most members of Congress believed that the Court's prior decision represented a misinterpretation of section 1981. *Rivers*, 511 U.S. at 306-07. Nevertheless, the Court determined that the new statutory language "create[d] liabilities that had no legal existence before the Act was passed" and thus did not apply to preenactment conduct. *Id.* at 313.[*]

[*] Legislative titles merely describing statutes or specific provisions therein as "clarifications" are not material to this analysis. The relevant factor is the actual impact of the provision at issue.

Similarly, in the present case, even if we assume that Congress passed the relevant provisions of the WPEA in response to decisions that it believed had misinterpreted the WPA, the WPEA still creates liability where none existed under the WPA as that statute has been interpreted. Accordingly, I would find that section 101 of the WPEA would be retroactive if applied to pending cases and is therefore subject to the judicial presumption against retroactivity. *See Lytes v. DC Water & Sewer Authority*, 572 F.3d 936, 939, 941-42 (D.C. Cir. 2009) (finding that the Americans with Disabilities Act (ADA) Amendments Act of 2008, which was designed to "reinstate a broad scope of protection" under the ADA and to reject the holdings of two Supreme Court decisions interpreting the ADA, was subject to the presumption against retroactivity because it broadened the class of employees entitled to reasonable accommodation).

¶6 For the above reasons, I do not believe that the clarification doctrine can be properly invoked in this instance.

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Mark A. Robbins
Member