Not Yet Scheduled For Oral Argument

United States Court of Appeals for the District of Columbia Circuit

No. 14-7113

ALFRED M. WINDER,

Appellant

v.

LOUIS ERSTE, *et al.*,

Appellees

APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Amicus Curiae Brief of the Metropolitan Washington Employment Lawyers Association in Support of Appellant

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TABLE OF AUTHORITIES

Statutory Authority

Other Authority

Acronyms

MWELA	Metropolitan Washington Employment Lawyers Association
WPA	D.C. Whistleblower Protection Act
WPAA	D.C. Whistleblower Protection Amendment Act of 2009
WPEA	Whistleblower Protection and Enhancement Act of 2012

STATEMENT OF INTEREST

The Metropolitan Washington Employment Lawyers Association ("MWELA"), a professional association of some 400 attorneys, is the local affiliate of the National Employment Lawyers Association, which is the largest professional membership organization in the country comprised of lawyers who represent workers in employment, labor, and civil rights disputes.

MWELA respectfully submits this amicus brief to aid this Court in its resolution of an important statutory issue arising from the March 2010 amendments to the D.C. Whistleblower Protection Act of 1998.

The disposition of this issue in this Court will have an important effect on the ability of District employees to enforce their statutory rights to be free of retaliation, and on the public interest in disclosures of government misconduct, so that the government and the public can take appropriate steps to address that misconduct in order to conserve taxpayer funds.

For these important reasons, MWELA respectfully submits this amicus brief.

STATEMENT OF THE ISSUE

Whether the definition of "protected disclosure" in the D.C. Whistleblower Protection Act, D.C. Code 1-615.52(a)(6), as amended by Section 2(a) of the Whistleblower Protection Amendment Act of 2009 ("WPAA"), may be applied to cases that were pending at the time the amendment was enacted.

SUMMARY

The District of Columbia Council made clear that it intended the WPAA to clarify, not change, the definition of "protected disclosure" in the D.C. Whistleblower Protection Act ("WPA"). The WPAA did not in any way change the existing standard for protected disclosures. Rather it simply reinforced that the law has *always* protected *any* disclosure of information, not specifically prohibited by statute, that an employee reasonably believes evidences certain enumerated types of government misconduct. The specific language added to the definition of protected disclosure did not expand that definition, but rather overturned judicial decisions that did not correctly interpret it. Accordingly, when determining whether a disclosure made prior to the enactment of the WPAA is protected by D.C. Code § 1-615.52(a)(6), the courts must apply the definition as amended by Section 2(a) of the WPAA.

ARGUMENT

As a rule, a court or administrative agency must "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Bd. of Richmond*, 416 U. S. 696, 711 (1974). However, absent statutory language mandating otherwise, the Supreme Court has also held that courts must not apply a "retrospective" change in the law, *i.e.*, a change that "attaches new legal

consequences to events completed before its enactment," as doing so would upset the "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994). If a relevant law is enacted or amended during the pendency of a lawsuit, the Court must apply the new text only if it does not "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.[1]

With respect to the definition of a protected disclosure under the D.C. Whistleblower Protection Act, D.C. Code § 1-615.51 *et seq.*, the law presently in effect is the WPAA. The WPAA's amendment to the definition of protected disclosure does not substantively change the rights, obligations, or liabilities implicated by a public employee's disclosure of information. Rather, the legislative history makes clear that the amendment was merely intended to *clarify* the law and restate it in such a way as to make clear its original intent: that so long as an employee reasonably believes his or her disclosure concerns a violation of law, mismanagement, a gross waste of funds, an abuse of authority, or a substantial

[1] As noted in the *Landgraf* opinion, this is an ancient test that dates back to the judiciary's earliest days. 511 U.S. at 269 (citing *Soc. for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (Story, J.)). The *Landgraf* court instructs that this analysis is done provision by provision when analyzing a given statute, rather than merely assuming that the entire statute is to be construed as a single whole for purposes of retroactivity analysis. *Id.* at 260-61 & n.12, 280. This Brief accordingly limits its analysis to Section 2(a) of the WPAA, rather than the WPAA *in toto.*

and specific danger to public health or safety, then the disclosure is, and has always been, protected.

No injustice will result from applying the WPAA's definition of protected disclosure to the instant case. Indeed, given the D.C. Council's unambiguous declaration that the courts have previously erred by denying protection to certain types of disclosures, it would be an injustice *not* to apply the WPAA to pending cases.

A. The Courts Must Apply the WPAA's Definition of Protected Disclosure Because the WPAA Merely Clarified the Existing Law.

Where a new statute merely clarifies an existing law, rather than changing it in a substantive way, then its application to pending lawsuits is presumed. *See Cookeville Reg'l Med. Ctr. v. Leavitt*, 531 F.3d 844, 849 (D.C. Cir. 2008) (finding "no problem of retroactivity" where new statute "did not retroactively alter settled law," but "simply clarified an ambiguity in the existing legislation"); *Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 506-08 (3d Cir. 2008) (citing decisions "finding retroactivity to be a non-issue with respect to new laws that clarify existing law"); *Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004) ("As we have explained, a 'change[ ] in statutory language need not *ipso facto* constitute a change in meaning or effect. Statutes may be passed purely to make what was intended all along even more unmistakably clear.'") (quoting *United States v. Montgomery County*, 761 F.2d 998, 1003 (4th Cir. 1985)); *ABKCO Music, Inc. v.*

LaVere, 217 F.3d 684, 689 (9th Cir. 2000) (holding that "[n]ormally, when an amendment is deemed clarifying rather than substantive, it is applied retroactively"); *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) (holding that "concerns about retroactive application are not implicated when an amendment . . . is deemed to clarify relevant law rather than effect a substantive change in the law"); *Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993) ("A rule simply clarifying an unsettled or confusing area of the law . . . does not change the law, but restates what the law according to the agency is and has always been: 'It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.'") (quoting *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 135 (1936)), *overruled on other grounds by Johnson v. Apfel*, 189 F.3d 561, 563 (7th Cir. 1999). The Fifth Circuit recognized that a 1992 amendment to the whistleblower protection provision in the Energy Reorganization Act, 42 U.S.C. § 5851, made its prior limitation "incorrect." *Willy v. Administrative Review Bd.*, 423 F.3d 483, 489 & n.11 (5th Cir. 2005).

Accordingly, where an amendment merely clarifies an existing law, "the court applies the law as set forth in the amendment to the present proceeding because the amendment accurately restates the prior law." *Piamba Cortes*, 177 F.3d at 1284.

While these decisions recognize that "there is no bright-line test" for

determining whether an amendment clarifies existing law, *Levy*, 544 F.3d at 506, they consistently point to several factors for a court to consider: (1) whether the enacting body declared that it was clarifying a prior enactment; (2) whether a conflict or ambiguity existed prior to the amendment; and (3) whether the amendment is consistent with a reasonable interpretation of the prior enactment and its legislative history. *Middleton v. City of Chicago*, 578 F.3d 655, 663-65 (7th Cir. 2009).

Thus, the fact that "an amendment alters, even 'significantly alters,' the original statutory language . . . does 'not necessarily' indicate that the amendment institutes a change in the law." *Brown*, 374 F.3d at 259 (quoting *Piamba Cortes*, 177 F.3d at 1283). Rather, the test is whether the legislature declared it to be a clarification, which reasonably resolved prior conflicts or ambiguities, and thus made "what was intended all along even more unmistakably clear." *Id.* (citation omitted).

As set forth below, the WPAA's amendment to the definition of protected disclosure cannot be reasonably construed as anything other than a clarification, and this Court should apply that definition to the instant case.

1. The D.C. Council unambiguously stated that it intended Section 2(a) of the WPAA to be a clarification of the existing Whistleblower Protection Act.

In amending the definition of "protected disclosure," the D.C. Council stated that its intent was to clarify the existing law. The Committee on Government Operations and the Environment's report to the D.C. Council stated: "[t]he proposed legislation seeks to clarify the definition of protected disclosures, expand the scope of prohibited personnel actions, and to address procedural barriers to relief for whistleblowers." *See* App. 27 (Report, D.C. Council Committee on Government Operations and the Environment, at 4 (Nov. 19, 2009)) ("Council Report"). The Council Report then goes on to state that:

> Among the clarifications in the bill is that a whistleblower should be free from retaliation even when the protected disclosure is unintentionally duplicative.
> ***
> In the Committee's view, it is better to provide whistleblower protections to two employees who separately make the same protected disclosure than to risk the possibility that either one would withhold information. Prospective whistleblowers should not have to guess about whether a supervisor already knows about misconduct in government. Indeed, it is better for the public body receiving the protected disclosure as well. Repetition of the same allegation may draw heightened attention to overburdened investigators, and even if two whistleblowers disclose some common facts, each could also disclose other unknown facts. Accordingly, the proposed legislation clarifies that a disclosure is protected without restriction to prior disclosure made to any person by an employee or applicant.

Id. (footnotes omitted).

The instant case is a perfect example of the type of ruling that the WPAA intended to correct. Relying on a Federal Circuit decision, the District Court held that it could not "find that Winder has met his burden to establish that he made 'protected disclosures' during his claimed testimony before the D.C. Council because the information Winder 'disclosed' appears to have already been known." *See* App. 128 (Mem. Op., at 21) (citing *Meuwissen v. Dep't of Interior*, 234 F.3d 9, 13 (Fed. Cir. 2000) (interpreting the federal Whistleblower Protection Act, 5 U.S.C. § 2302)); App. 153-54 (Mem. Op. at 9-10) (same).[2]

2. The D.C. Council amended the definition of protected disclosure to remedy the conflict between its intended definition and the courts' application of that definition.

In its Report, the D.C. Council stated that it believed the amendment to the WPA was necessary because: "Recently . . . courts in the District have approvingly cited precedent from other jurisdictions that eliminated protections for whistleblowers if the underlying information was previously reported. The proposed legislation would amend the definition of protected disclosure to clarify that a disclosure is protected 'without restriction . . . [to] prior disclosure made to

[2] The District Court's reliance on *Meuwissen* is particularly problematic because that case's interpretation of the definition of protected disclosure in the analogous federal Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8), was explicitly overruled by Section 101 of the federal Whistleblower Protection and Enhancement Act of 2012. Pub. L. No. 112-199 (Nov. 27, 2012); S. REP. NO. 112-155 at 5, 41 (2012).

any person by an employee or applicant.'" App. 272 (D.C. Council Report, at 4.[3]

It is clear that Section 2(a) of the WPAA was enacted specifically to resolve the conflict between the D.C. Council's intended definition of protected conduct, and the definition as interpreted by the courts.

3. The amendments to the disclosure requirements are consistent with a reasonable interpretation of the prior enactment and its legislative history.

To determine whether the WPAA's amendments to the definition of protected disclosure are consistent with a reasonable interpretation of the pre-WPAA statute, *i.e.*, that the amendment does not substantively change the law, the courts look to "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). The plain text of the WPAA, as well as its legislative history, make abundantly clear that the amendment to the definition of protected disclosure is completely consistent with the original language of the WPA.

Prior to the 2009 Amendments, the WPA defined "protected disclosure" as "any disclosure of information, not specifically prohibited by statute, by an employee to a supervisor or a public body that the employee reasonably believes

[3] The D.C. Council Report also lists several other judicially-created limitations to the WPA that were contrary to the D.C. Council's intent and thereby "diminished the law's efficacy," including an earlier decision by this Court in the instant case, as an example of a ruling contrary to this intent. App. 271, at n.6 (D.C. Council Report, at 3 n.6) (citing *Winder v. Erste*, 566 F.3d 209, 213-14 (D.C. Cir. 2009)).

evidences [government wrongdoing]." The Amendments changed the definition to "any disclosure of information, not specifically prohibited by statute, *without restriction to time, place, form, motive, context, forum, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties* by an employee to a supervisor or a public body that the employee reasonably believes evidences [government wrongdoing]" (amended text in italics). D.C. Code § 1-615.52(a)(6).

Contrary to the District Court's ruling, App. 125 (Mem. Op., at 18), the plain text of the WPAA did not in any way "broaden[] the scope of a 'protected disclosure.'" Even without the broad construction required by *Tcherepnin*, the original definition of "any disclosure of information, not specifically prohibited by statute" could reasonably be interpreted to include a disclosure that occurred at a particular time or place, or that was made in a particular form, or with a particular motive, or in any particular context or forum, or to a particular person, or in the course of a particular duty. In short, "any disclosure" can reasonably be interpreted to mean *any* disclosure, so long as it concerns a violation of law, mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Having stated that the WPA protects *any* disclosure an employee reasonably believes meets the factors listed in D.C. Code § 1-615.52(a), the D.C. Council

should not have needed to specify that there were no statutory exceptions. When any legislative body crafts statutory language, the inclusion or exclusion of certain language is presumed to be purposeful and intentional. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994). Because the D.C. Council enumerated an explicit list of factors as its definition of protected disclosures (*i.e.*, that the disclosure must not be prohibited by law and must concern violation of law, mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety), the District Court here should not have inferred the existence of exceptions to that definition. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 376 (1958) (holding that Congress' decision to define a general term with a list meant the list was exclusive). The fact that the D.C. Council has now listed several factors that are explicitly *not* excepted in no way changes which disclosures are, and have always been, protected.

This is particularly true since the factors added by the D.C. Council specifically overrule exceptions that were improperly created by the courts. In particular, the WPAA overruled *Wilburn v. District of Columbia*, 957 A.2d 921, 925 (D.C. 2008), one of the cases relied upon by the District Court in dismissing Mr. Winder's WPA claims. *Compare* App. 272 (D.C. Council Report, at 4) *with* App. 128 (Mem. Op., at 21).

B. The WPAA Amendment to the Definition of Protected Disclosure is Nearly Identical to the Amendment in the Federal Whistleblower Protection and Enhancement Act of 2012.

This is not the first time in recent history that a tribunal has considered the applicability of a change in the definition of "protected disclosure" to whistleblower cases pending at the time the change was enacted. In 2013, the Merit Systems Protection Board ("MSPB") considered an almost identical change to the definition of protected disclosure in the federal Whistleblower Protection Act, which was amended by the federal Whistleblower Protection and Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 (Nov. 27, 2012) ("WPEA"). *Day v. Department of Homeland Security*, 119 M.S.P.R. 589, 593-96, 2013 MSPB 49 (MSPB 2013).

As did the WPA, the pre-amendment federal Whistleblower Protection Act protected "any disclosure," excepting those "specifically prohibited by law" and "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." 5 U.S.C. § 2302(b)(8) (2011 ed.). As for the WPAA, the WPEA amended the definition of protected disclosure in order to clarify its intended meaning. S. REP. NO. 112-155, at 2 (2012). As for the WPAA, the WPEA's clarification was necessary because a series of judicial and administrative decisions had narrowed that definition by improperly taking into account factors such as whether the disclosed information was already known

by the government, or the disclosure's timing, manner, or motive. *Id.* at 5, 41; *Day*, 119 M.S.P.R. at 597-98. In fact, the text added by the WPEA to clarify the definition of protected disclosure is functionally identical to the text added by the WPAA. *Compare* 5 U.S.C. § 2302(f)(1) *and* S. REP. NO. 112-155, at 66 *with* D.C. Code § 1-615.52(a)(6).

Accordingly, because the WPAA and WPEA make functionally the same amendment to the definition of protected disclosure, using essentially the same language, and for exactly the same reason, this Court should reach the same conclusion as did the MSPB: that the amendment was a clarification and must be applied to cases pending at the time it was enacted.

CONCLUSION

For the foregoing reasons, this Court should find that the 2009 Amendments to the WPA merely clarified the definition of a protected disclosure, so that the current definition should be applied to the instant case.

Respectfully submitted,

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Certificate of Compliance with Rule 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because the brief contains 3,125 words, less than half the length permissible for the principal brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) and D.C. Cir. Rule 32(a)(1) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

/s/ Alan R. Kabat

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2015, this brief was served by this Court's Electronic Case Filing system, with a copy to follow by first class mail, postage prepaid, to counsel of record:

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