

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

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NINA COLEMAN,  
Appellant,

v.

\_\_\_\_\_  
DEPARTMENT OF HOMELAND SECURITY,  
Agency.

DOCKET NUMBER  
DA-1221-17-0500-W-1

HAND  
DELIVERED

**BRIEF ON BEHALF OF THE U.S. OFFICE OF SPECIAL COUNSEL  
AS AMICUS CURIAE**

**IDENTITY OF THE AMICUS CURIAE**

Amicus curiae, the U.S. Office of Special Counsel (OSC), is an independent federal agency charged with protecting federal employees, former federal employees, and applicants for federal employment from “prohibited personnel practices,” as defined in 5 U.S.C. § 2302(b) of the Whistleblower Protection Act of 1989 (WPA), as amended. In particular, OSC is responsible for investigating and seeking corrective action for whistleblower retaliation claims. See 5 U.S.C. §§ 1214, 2302(b)(8)-(9).

This case concerns the temporal application of the Follow the Rules Act (FRA), enacted on June 14, 2017, which amended 5 U.S.C. § 2302(b)(9)(D). The FRA clarified Congress’s intent that section 2302(b)(9)(D) protect employees for not only refusing to obey orders that are contrary to statute but also refusing to obey orders that are contrary to rules and regulations. It did so by expressly adding the words “rule” and “regulation” to section 2302(b)(9)(D). At issue in this case is the applicability of the FRA to personnel actions taken prior to its enactment. As OSC is the agency responsible for enforcing section 2302(b)(9)(D), the temporal scope of the

amendment directly affects complaints before it. Accordingly, OSC respectfully requests the opportunity to offer its views to the Merit Systems Protection Board (MSPB or Board) on the application of the FRA to personnel actions preceding its enactment.<sup>1</sup>

### **STATEMENT OF THE ISSUE**

Did the MSPB administrative judge err as a matter of law by failing to apply 5 U.S.C. § 2302(b)(9)(D), as amended by the FRA, to appellant's allegation of retaliation?

### **RELEVANT BACKGROUND**

Appellant Nina Coleman was a reservist on a temporary intermittent appointment with the Federal Emergency Management Agency (FEMA). On February 1, 2017, FEMA terminated her employment based on a charge of failure to follow instructions. Coleman filed a claim with OSC and, after exhausting her administrative remedies, she filed an individual right of action (IRA) appeal with the Board alleging that her termination was in retaliation for her refusal to obey an order that would require her to violate FEMA policies, the Arkansas Code, the Highway Safety Act, and Occupational Safety and Health Act regulations.

In an initial decision on September 14, 2018, an MSPB administrative judge denied Coleman's request for corrective action in her IRA appeal. *See Coleman v. Dep't of Homeland Sec.*, DA-1221-17-0500-W-1, 2018 WL 4385890 (Sept. 14, 2018). After holding that Coleman established jurisdiction, the administrative judge analyzed her allegations on the merits. As relevant here, the administrative judge determined that the FRA did not apply to personnel actions that occurred prior to its June 14, 2017 enactment, including Coleman's termination. The administrative judge found that Coleman did not demonstrate by preponderant evidence that

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<sup>1</sup> The Whistleblower Protection Enhancement Act of 2012 (WPEA) authorizes OSC "to appear as amicus curiae in any action brought in a court of the United States related to section 2302(b)(8) or (9), or as otherwise authorized by law." 5 U.S.C. § 1212(h)(1). Congress's clear intent to allow OSC the opportunity to present its views on these issues applies with equal force in MSPB proceedings.

FEMA terminated her employment in retaliation for her refusal to obey an order that would require her to violate a “statute.” Because of the holding on the FRA, the administrative judge did not reach the question of whether Coleman’s termination was in retaliation for her refusal to obey an order that would violate a rule or regulation. Coleman filed a timely petition for review of this decision on October 20, 2018.

The MSPB may grant a petition for review if an administrative judge made an error in interpreting a statute. *See* 5 C.F.R. § 1201.115. OSC respectfully submits that the FRA applies to personnel actions that occurred prior to its enactment, according to Congress’s express legislative intent. Therefore, OSC asks the Board to grant the petition for review and remand to the administrative judge for further factfinding and analysis.

### **ARGUMENT**

Congress enacted the FRA on June 14, 2017, in response to the U.S. Court of Appeals for the Federal Circuit’s decision in *Rainey v. Merit Systems Protection Board*, 824 F.3d 1359 (Fed. Cir.), *cert denied*, 137 S. Ct. 607 (2016). In *Rainey*, the Federal Circuit upheld a Board decision holding that section 2302(b)(9)(D), which provides whistleblower protections to employees who refuse to obey orders that violate a law, only applied to “statutes” but not “rules” or “regulations.” In so holding, the Federal Circuit agreed with the Board that the Supreme Court’s decision in *Department of Homeland Security v. MacLean*, 135 S. Ct. 913 (2015), which construed the word “law” in section 2302(b)(8) to mean “statutes” but not “rules” and “regulations,” applied to section 2302(b)(9)(D). Therefore, the Federal Circuit held that section 2302(b)(9)(D) only protects an employee’s refusal to obey an order that violates a statute.<sup>2</sup>

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<sup>2</sup> The *MacLean* decision analyzed Congress’s intent to provide the broadest possible protections for whistleblowers under the WPA. Section 2302(b)(8)(A) provides protections for making certain categories of disclosures “if such disclosure is not specifically prohibited by law ....” (emphasis added). The Supreme Court interpreted the word

*Rainey*, 824 F.3d at 1364. The Federal Circuit emphasized that it was “constrained” to reach this result by *MacLean* and invited Congress to “alter the scope of the statute.” *Id.* Concluding that *Rainey*’s holding was contrary to legislative intent, Congress enacted the FRA. Pub. L. No. 115-40, 131 Stat. 861 (2017). The FRA amended section 2302(b)(9)(D) to add the language “rule, or regulation,” thus clarifying that protected activity included not only refusing to obey orders that are contrary to statute but also refusing to obey orders that are contrary to rules and regulations.

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court set forth the appropriate two-step analysis of the temporal application of a statutory amendment. The first step is to determine whether congressional intent is clear as to the temporal reach. *Landgraf*, 511 U.S. at 264, 280. In the absence of express statutory language, courts must determine if a “comparably firm conclusion” can be reached using normal rules of statutory construction. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (quoting *Lindh v. Murphy*, 521 U.S. 320, 326 (1997)). “[W]here the congressional intent is clear, it governs[.]” *Landgraf*, 511 U.S. at 264 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990)). The inquiry ends and no further analysis is required. *Landgraf*, 511 U.S. at 280. But if the temporal reach is not clear, courts must proceed to the second step to determine whether the amendment would have “retroactive effect,” meaning that it would impair rights or impose new or increased duties or liabilities than existed at the time of the conduct at issue. *Id.* at 269-70 & n.24 (“[A] statute ‘is not made retroactive merely because it draws upon antecedent facts for its operation.’”) (citation omitted). If any of these is true, a presumption against retroactivity applies. *Id.* at 280.

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“law” to apply restrictively to “statutes” and not an agency’s rules or regulations, discussing Congress’s intent to limit the ability of agencies to “regulate whistleblowers within their ranks.” *MacLean*, 135 S. Ct. at 920. This is in stark contrast to the *Rainey* decision, in which the Federal Circuit applied the high court’s analysis of the word “law” in a different part of the statute to limit whistleblower protections.

Because congressional intent is clear regarding the temporal reach of the FRA, the *Landgraf* inquiry should end at step one, finding that Congress unambiguously intended that the FRA apply to personnel actions that predate its enactment. Nonetheless, even an examination of the FRA under the second step of the *Landgraf* framework leads to the same conclusion that the FRA applies to personnel actions that arose prior to its enactment.

**I. Under Step One of the *Landgraf* Framework, Congress Clearly Intended That the FRA Apply to Personnel Actions That Predate its Enactment**

Congressional intent regarding the temporal reach of the FRA is clear. Section 2 of the FRA amended section 2302(b)(9)(D) as follows:

(a) In General.--Subparagraph (D) of section 2302(b)(9) of title 5, United States Code, is amended by inserting “, rule, or regulation” after “law”.

(b) Technical Correction.--Such subparagraph is further amended by Striking “for”.

The administrative judge presumably relied on the absence of express statutory language regarding the FRA’s temporal reach to conclude that the FRA did not apply to appellant’s pre-FRA termination. *Coleman*, DA-1221-17-0500-W-1, 2018 WL 4385890, at \*5 (citing *Rebstock Consolidation v. Dep’t of Homeland Sec.*, 122 M.S.P.R. 661, 666 (2015) and *Day v. Dep’t of Homeland Sec.*, 119 M.S.P.R. 589, 594-95 (2013)). But the texts of the original and amended versions of the bill make clear that the omission of such language was intentional to provide protection against personnel actions taken both prior to and after the FRA’s enactment.

Congressman Sean Duffy’s original bill, introduced in the House of Representatives (House) and referred to the Committee on Oversight and Government Reform (Committee), included the following language in Section 2:

(c) APPLICATION.—The amendment made by subsection (a) shall apply to any personnel action (as that term is defined in section 2302(a)(2)(A) of such title) occurring after the date of enactment of this Act.

H.R. 657, 115th Cong. (as referred to H.R. Comm. on Oversight and Gov't Reform, Jan. 24, 2017). Section 2(c) thus specified that the FRA should apply prospectively to personnel actions taken after its enactment. But the Committee amended the legislation to expressly omit this language. H.R. Rep. No. 115-67, at 2 (2017). The Committee Report accompanying the FRA explains the Committee's intent for this amendment as follows:

Because of the Committee's view that this legislation clarifies Congress's original intent in passing the Whistleblower Protection Act of 1989, Chairman Jason Chaffetz (R-UT) offered an amendment in the nature of a substitute. The substitute bill does not include Section 2(c), which regarded application of the bill only applying to personnel actions occurring after the date of the Act's enactment.

*Id.* at 3.<sup>3</sup> After the Committee adopted the substitute amendment, the amended bill passed the House with a unanimous vote of 407-0 and passed the Senate by unanimous consent.

That Congress affirmatively considered the retroactivity of the FRA and amended the statute to eliminate the language restricting it to prospective application clearly demonstrates its intent that the FRA apply to personnel actions before *and* after its enactment. *See Brown v. Apfel*, 192 F.3d 492, 497 (5th Cir. 1999) (holding that the legislative record indicated a clear intent that the statute apply to events before its enactment). Further evidence of Congress's intent is its enactment of the FRA in direct response to the *Rainey* decision. The House Committee Report describes the *Rainey* decision at length. H.R. Rep. No. 115-67, at 2-3; *see*

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<sup>3</sup> The Supreme Court has noted: "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984) (*quoting Zuber v. Allen*, 396 U.S. 168, 186 (1969)). The House Committee Report is the only Committee Report issued on H.R. 657.

*Landgraf*, 522 U.S. at 251-52 (provisions of the Civil Rights Act of 1991 that specifically responded to the Court's decisions shed light on Congress's intent); *see also Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 304-05 (1994) ("curative" legislation responding to judicial decisions may apply retroactively when there is clear congressional intent to restore preexisting rights or unambiguous evidence of Congress's intent). After analyzing *Rainey* and noting the Federal Circuit's invitation to "alter the scope" of section 2302(b)(9)(D), the Committee rejected the Federal Circuit's holding, stating, "[t]he Follow the Rules Act was introduced to clarify Congress's original intent with respect to this provision of the [WPA]." H.R. Rep. No. 115-67, at 3; *see Red Lion Broad. Co. v. Fed. Comm'n Comm'n*, 395 U.S. 367, 380-81 (1969) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.").

Additionally, during the House's consideration of the FRA, several Congressmen made statements, without any to the contrary, indicating that the purpose of the FRA was to correct the Federal Circuit's misinterpretation of section 2302(b)(9)(D) and close the "loophole" made by its ruling in *Rainey*. 115 Cong. Rec. H2983 (daily ed. May 1, 2017) (statements of Reps. James Comer, Gerald Connolly, and Glenn Grothman). And Congressman Comer noted the irony in the Federal Circuit's reliance on *MacLean*, a decision which provided stronger protection to whistleblowers under section 2302(b)(8), to restrict whistleblower rights under section 2302(b)(9).

Such clear and forceful language shows that Congress intended the FRA to clarify the original intent of the WPA and to correct the erroneous ruling in *Rainey*. Given that Congress affirmatively considered and amended the FRA to deliberately omit language limiting the FRA's applicability to personnel actions taken after its enactment, and expressly stated that it did so

because the FRA was intended to clarify existing law, Congress's intent is clear and no further inquiry is warranted.

**II. Under Step Two of the *Landgraf* Framework, Clear Congressional Intent on the FRA's Temporal Reach Rebutts Any Presumption Against Retroactivity**

An analysis under step two of the *Landgraf* inquiry further shows that the FRA does not have negative “retroactive effect,” and even if it did, Congress clearly intended such a result. *See Landgraf*, 511 U.S. at 280. Notably, statutes are not considered to have retroactive effect merely because they are applied in a case arising from conduct before the statute's enactment; rather the focus is whether the provision attaches new legal consequences—impairing vested rights or creating new or increased duties or liabilities—with respect to events completed before its enactment. *Id.* at 269-70; *Fernandez-Vargas*, 548 U.S. at 37. This is a “commonsense, functional judgment” that should be guided by considerations of fair notice, reasonable reliance, and settled expectations. *Martin v. Hadix*, 527 U.S. 343, 357-58 (1999); *see also Wilson v. Principi*, 391 F.3d 1203, 1210 (Fed. Cir. 2004) (statutes governing a court's power apply to pre-enactment issues); *Patel v. Thompson*, 319 F.3d 1317, 1319-20 (11th Cir. 2003) (finding that the retroactive concerns in *Landgraf* do not apply to exclusion from a federal program intended to protect patients rather than to punish practitioners), *cert. denied*, 539 U.S. 959 (2003); *Sw. Ctr. for Biological Diversity v. U.S. Dep't of Agric.*, 314 F.3d 1060, 1062 (9th Cir. 2002) (finding no retroactive effect where the Center took no action in reliance on prior law and holding that the law in existence at the time of the decision properly applied). If the statute does operate retroactively, then the presumption is against applying it to pre-enactment conduct unless there is “clear congressional intent favoring such a result.” *Landgraf*, 511 U.S. at 280.<sup>4</sup>

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<sup>4</sup> Although the focus on congressional intent under both steps of the *Landgraf* framework may appear somewhat redundant, the Supreme Court has held that congressional intent to apply a statute to past acts may prove sufficient



The Board's analysis in *Day* is instructive. In *Day*, the Board concluded that certain provisions of the WPEA did not have an impermissibly retroactive effect under *Landgraf*. 119 M.S.P.R. at 595. The Board concluded that the purpose of the provisions in the WPEA concerning the meaning of "disclosure" was to clarify existing law in accordance with Congress's contemplation of the WPA. *Id.* at 596. Central to this analysis was the Board's conclusion that the meaning of "disclosure" was not a matter of settled law. *Id.* at 597-600. The Board surveyed MSPB and Federal Circuit case law interpreting the WPA and detailed the various ways in which the term had been applied over the WPA's history. *Id.* at 597-601. Given the ambiguity of the term's application, and congressional intent to "clarify" its meaning, the Board concluded that the relevant provision in the WPEA resolved the ambiguity in the WPA and did not alter a matter of settled expectation. *Id.* at 602.

Similarly, there was no settled expectation concerning the application of the word "law" in section 2302(b)(9)(D). Prior to *Rainey*, the little case law that existed suggested that rules and regulations are "laws" for the purposes of section 2302(b)(9)(D). See *Veneziano v. Dep't of Energy*, 189 F.3d 1363, 1369 (Fed. Cir. 1999) (treating an Office of Management and Budget Circular as a "law" under section 2302(b)(9)(D) but rejecting appellant's claim because the relevant action would not have violated it); *Olsen v. Albright*, 990 F. Supp. 31, 33 (D.D.C. 1997) (treating agency policies as a "law" under section 2302(b)(9)(D) and granting, in part, plaintiff's motion for summary judgment on his claim that the agency terminated his employment in violation of section 2302(b)(9)(D)).

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under the second step even where it fell short under the first step. See *Republic of Austria v. Altmann*, 541 U.S. 677, 697 (2004) (holding that a statute applied to actions prior to enactment based on indications of Congress's likely understanding of the statute under the second step rather than the first step of the *Landgraf* inquiry).

Indeed, even the first decision in the procedural history of *Rainey* reinforces this point. The administrative judge in that case initially found jurisdiction over the IRA appeal, which solely concerned a violation of section 2302(b)(9)(D), and scheduled appellant's requested hearing. *Rainey v. Dep't of State*, MSPB Docket No. DC-1221-14-0898-W-1, 2015 WL 428936 (Initial Decision Jan. 30, 2015). Shortly after the first day of the hearing but prior to the second day, the Supreme Court issued its decision in *MacLean*. Thereafter, the parties re-briefed the issue of jurisdiction in light of *MacLean*, and the administrative judge then dismissed the IRA appeal for lack of jurisdiction. *Id.* The Board upheld this decision, and the Federal Circuit affirmed. 122 M.S.P.R. 592, *aff'd sub nom Rainey v. Merit Sys. Prot. Bd.*, 824 F.3d 1359.

From the WPA's 1989 enactment until the 2015 *MacLean* decision and the subsequent 2016 *Rainey* decision, federal employees had every reason to believe that section 2302(b)(9)(D) protected refusal to follow an order to violate a rule or regulation, or at a bare minimum did not have a settled expectation to the contrary. Representative Duffy introduced the FRA in direct response to *Rainey* a little more than a month after the Supreme Court denied certiorari. The legislation was enacted just five months later. The FRA was expressly intended to clarify existing law and overturn *Rainey*'s incorrect interpretation of it. In short, *Rainey*—the only decision to define the meaning of “law” in section 2302(b)(9)(D) as being confined to statutes—neither created nor reflected a settled expectation that section 2302(b)(9)(D) excluded refusal to violate rules and regulations. Thus, the FRA did not alter a matter of settled expectation such as to have an impermissibly retroactive effect.

As was the case in *Day*, it could be argued that clarifying the broad protections of the WPA has the potential to increase agency liability or supervisor exposure to potential discipline for past conduct. But, as shown above, there was no settled expectation regarding the scope of

section 2302(b)(9)(D)'s protections. *See Day*, 119 M.S.P.R. at 600-01 (rejecting agency's argument that the WPEA's clarification of protected disclosures created new liabilities because the scope of protection had not previously been settled). It is unlikely that agencies would have changed their behavior in reliance on the permissibility of punishing employees for refusing to violate rules and regulations. *See id.* at 601.

This conclusion is reinforced by a commonsense understanding of the WPA's purpose and effect. Congress intended broad protections that federal employees would feel comfortable relying upon. Federal employees may be more familiar with the rules and regulations implementing statutes than with the underlying statutes. Basic rules of fairness dictate that employees should have assurance that they are protected for refusing an illegal order without requiring them to identify whether there is a statutory basis for the illegality. Indeed, section 2302(b)(9)(D) claims likely subsume a potential traditional whistleblower retaliation claim under section 2302(b)(8)—where employees disclose that they are refusing orders because they believe them to be illegal—reinforcing the logic of interpreting Congress's original intent for section 2302(b)(9)(D)'s protections to be in line with disclosure protections. *See, e.g., Larson v. Dep't of the Army*, 260 F.3d 1350, 1354-56 (Fed. Cir. 2001) (analyzing appellant's refusal to obey an order because of safety concerns as a protected disclosure under section 2302(b)(8)).

By the same token, agencies and individual supervisors should understand that they are prohibited from retaliating against an employee for refusing to obey any illegal order—whether the order is made unlawful by statute, regulation, or rule. *See Landgraf*, 511 U.S. at 296-97 (Blackmun, J., dissenting). This principle is evident in case law carving out exceptions to the general principle that an employee must obey an improper order first, then grieve later, even in the absence of a claim under section 2302(b)(9)(D). *See Cox v. Dep't of the Navy*, 116 F.3d

1497 (Fed. Cir. 1997) (table) (remanding for mitigation of the penalty where appellant was removed for refusing to obey an “illegal order” that violated agency procedures); *Larson v. Dep’t of the Army*, 91 M.S.P.R. 511, ¶ 22 (2002) (finding that “appellant could not be disciplined for refusing to obey [an] order” that he reasonably believed violated safety regulations); *Fleckenstein v. Dep’t of the Army*, 63 M.S.P.R. 470, 475-76 (1994) (holding that agency could not suspend employee for insubordination for refusal to obey an improper order); *Harris v. Dep’t of the Air Force*, 62 M.S.P.R. 524, 529 (1994) (holding that agency could not discipline employee for refusing to obey order to undergo medical examination that was contrary to regulations). Because agencies were unlikely to have previously believed they were permitted to discipline an employee for refusal to abide by an illegal order, the FRA cannot be read to prohibit conduct that was previously permissible.<sup>5</sup> See, e.g., *Gordon v. Pete’s Auto Serv. of Denbigh, Inc.*, 637 F.3d 454, 460-61 (4th Cir. 2011) (holding that statute did not apply in a retroactive manner to pre-enactment conduct because it did not impose a new liability that was not already present in state conversion laws but instead allowed enforcement of the same rights in federal court).

But even if the Board finds that the FRA would have retroactive effect, clear congressional intent favoring such a result still controls. See *Landgraf*, 511 U.S. at 280; *Altmann*, 541 U.S. at 697. As discussed in detail above, the FRA’s purpose and Congress’s intent in enacting it are both clear. Congress expressly stated its intent that the FRA apply to

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<sup>5</sup> We note that the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 included a new statutory provision (later superseded by a nearly identical provision of the OSC Reauthorization Act of 2017) requiring that agencies propose discipline against supervisors found to have engaged in violations of section 2302(b)(8), (b)(9), or (b)(14). See 5 U.S.C. § 7515. However, because this provision substantively changes the conditions under which disciplinary actions may be imposed, OSC interprets this provision to apply prospectively only to personnel actions taken after the Kirkpatrick Act’s October 26, 2017, enactment. Because the FRA predates this disciplinary provision, it does not create additional agency or individual liability for retaliating against an individual for refusing to follow orders that would violate a rule or regulation prior to the FRA.

pre-enactment personnel actions. *See United States v. Olin Corp.*, 107 F.3d 1506, 1514-15 (11th Cir. 1997) (finding clear congressional intent favoring retroactive application of the statute). For these reasons, the presumption against retroactivity does not apply to the FRA.

### **CONCLUSION**

Congress expressly intended that the FRA apply to conduct occurring prior to its enactment. Therefore, OSC urges the Board to clarify the application of the FRA and remand the case for further adjudication on the merits under the FRA.

Respectfully submitted,

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A handwritten signature in dark ink, appearing to read 'Hanan Idilbi', is written over a horizontal line.

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