

Agencies will pay for whistleblowers'™ pain and suffering

Putting a price tag on pain and suffering is an unpleasant task, and it was one I fortunately did not have to do very often while serving as the chairman of the Merit Systems Protection Board (MSPB). On those not-so-common occasions where the MSPB heard a so-called "mixed case," which touched on both discrimination and adverse action issues, statute allows the Board to consider awarding compensatory damages to appellants who proved they were victims of certain types of intentional discrimination for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary [i.e., non-monetary] losses." I always found it odd how the pain and suffering of federal employees who were subjected to intentional discrimination could be valued under statute anywhere from up to \$50,000 or \$300,000, depending on the appellant's agency and the severity and duration of the non-pecuniary losses he or she incurred, yet, at the same time, the pain and suffering of federal employees who were subjected to retaliation for blowing the whistle essentially had no value, because the Whistleblower Protection Act (WPA) did not provide for compensatory damages. Fortunately, the Whistleblower Protection Enhancement Act of 2012 (WPEA) has put an end to this divergent approach toward the valuation of pain and suffering. This law, which took effect Dec. 27, 2012, added compensatory damages to the mix of correction actions the MSPB is authorized to order in whistleblower retaliation cases. This amendment will have a significant impact on agencies' financial situations because it not only creates new liabilities (i.e., compensatory damages), it also does not cap them, unlike the similar liabilities associated with findings of intentional discrimination. Just how significant this impact will be remains to be seen. I am not familiar with any MSPB cases in 2013 in which a whistleblower was awarded compensatory damages under the WPEA. Last August, in *Barbara R. King v. Department of the Air Force*

, the Board did rule against the retroactive application of the WPEA's compensatory damages section to an appeal filed before the law took effect. In 2014, we will likely start seeing more whistleblower retaliation appeals seeking compensatory damages. The changes to the law "may also lead to more addendum appeals such as claims for compensatory and other damages or attorney's fees," the MSPB warned in its latest Annual Performance Report and Plan

. We will also start getting a better sense of the fiscal implications of the WPEA's compensatory damages provision. At the Equal Employment Opportunity Commission (EEOC), agencies found to have violated anti-discrimination laws were ordered to pay \$7.2 million in compensatory damages in cases closed in fiscal year 2011. The U.S. Postal service accounted for 51 percent of that amount, according to the EEOC's latest Annual Report on the Federal Work Force

. Traditionally, the EEOC and MSPB have looked to awards in similar discrimination cases to determine the appropriate amount for compensatory damages. For example, in *Linda D.*

Edwards v. Department of Transportation

(2011), an MSPB administrative judge, citing EEOC decisions, pointed out that \$25,000 was an “appropriate amount as the complainant presented sufficient objective evidence to establish that he had experienced, mental anguish, emotional distress, sleeplessness, irritability, loss of self-esteem, and injury to professional reputation as a result of his termination for a period of 6 months.” So far, EEOC and MSPB awards have mostly moved in tandem because statute had put caps on the award amounts in discrimination cases. Now that the WPEA has removed the cap on compensatory damages in whistleblower retaliation cases, it will be interesting to see if valuations of reprisal-induced pain and suffering at the MSPB will pull ahead of those at the EEOC.