

**UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT**

Joseph P. Carson,)	
)	
Petitioner)	
)	Docket No: 2015-3135, -3211
v.)	
Merit Systems Protection Board,)	
)	
Respondent)	
)	
)	
)	
)	
)	

**PETITIONER’S CORRECTIONS TO ORAL ARGUMENT AND THEIR
BASIS IN THE CASE RECORD**

Misstatements or omissions of material fact during oral argument in the consolidated reprisal appeal Carson v. Merit Systems Protection Board (MSPB), no. 2015-3135; -3211 at US Court of Appeals for the Federal Circuit (CAFC) on February 8, 2017.

1. Did Mr. Carson file IRA appeals after the Office of Special Counsel closed the two reprisal complaints relevant to Carson II (i.e., no. 2015-3211)?

ANSWER: Yes, he did, contrary to Mr. Gauger thrice-repeated claim at oral argument.

From the oral argument:

Judge Moore, starting at 17:00, describes how Mr. Carson could

have gone to MSPB with an IRA appeal after OSC closed his two reprisal complaints relevant to Carson II. She states her understanding that Mr. Carson did not.

Mr. Gauger starting at 17:28 states “That’s absolutely correct (in that Mr. Carson did not file IRA appeals after OSC closed the two reprisal complaints in Carson II).” He elaborates on this by saying that instead of doing this, Mr. Carson filed a complaint against OSC.

Mr. Gauger states this again, starting at 18:30, that Mr. Carson, instead of filing IRA appeals after OSC closed its investigations of the two reprisal complaints relevant to Carson II, instead only filed a (new) complaint against Special Counsel.

Mr. Gauger repeats this claim a third time, starting at 26:25, that Mr. Carson, instead of availing himself of filing IRA appeals at MSPB after OSC closed the two reprisal complaints in Carson II, instead filed a reprisal complaint against Special Counsel.

From the case record:

Mr. Gauger’s thrice repeated claim that Mr. Carson failed to file IRA appeals after OSC closed his two whistleblower reprisal complaints relevant to Carson II (OSC file nos. MA-13-4245 and MA-14-0892) is

demonstrably wrong by the case record. The case record at the Appellant's brief pages 4 and 5 and Appx. 363 as well as MSPB's brief at page 4 and Appx. 161 demonstrate these two reprisal complaints to OSC are the ones relevant to Carson II.

For OSC file no. MA-13-4245:

This complaint concerns a reprimand given to Mr. Carson by the Department of Energy, his employing agency. Mr. Carson's complaint to OSC is at Appx. 219-230. OSC investigation closure letter is at Appx. 274. The initial decision of the MSPB in the IRA appeal Mr. Carson subsequently filed, Carson v. Department of Energy, docket no. AT-1221-14-0520-W-1, is at Appx. 276-290. This IRA appeal is referenced by docket no. or otherwise described at Appx. 013, 132, and 203.

After MSPB issued a final decision in this IRA appeal, finding it did not have jurisdiction to consider Mr. Carson's IRA appeal on the merits, Mr. Carson filed an appeal at the U.S. Court of Appeals for the District of Columbia Circuit. It is docketed as Carson v. Merit Systems Protection Board, no. 15-1206.

Both Mr. Carson's brief and MSPB's brief describe this pending appeal at CADC as a "related case."

For OSC file no. MA-14-0892:

This complaint concerns Mr. Carson claims that MSPB's failure or refusal to resolve his whistleblower disclosures about its failure or refusal to comply with its non-discretionary statutory duty to conduct the necessary studies to determine and report "as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected," is unlawful reprisal that creates "any other significant change in working conditions."

Mr. Carson's complaint to OSC is at Appx. 291-301. OSC investigation closure letter is at Appx. 316. After OSC closed its investigation of this complaint, Mr. Carson filed an IRA appeal at MSPB, Carson v. Merit Systems Protection Board, docket no. AT-1221-14-0637-W-1. The initial MSPB decision in this IRA appeal is at Appx. 319-331. This IRA appeal is referenced by docket no. or otherwise described at Appx. 009, 013, 015, 132, 204 and 205.

MSPB subsequently issued a final decision that determined MSPB did not have jurisdiction to consider Mr. Carson's IRA appeal on the merits.

Mr. Carson then appealed the MSPB final decision to the U.S. Court of Appeals for the District of Columbia Circuit, where it is docketed as

Carson v. Merit Systems Protection Board, docket no. 14-1306.

Both Mr. Carson's brief and MSPB's brief describe this pending appeal at CADC as a "related case."

2. **Did Mr. Carson file a number of petitions for writ of mandamus at District Court to obtain relief from OSC's failures to comply with its non-discretionary statutory duties?**

ANSWER: Mr. Carson did, as the case record shows.

From oral argument:

Mr. Justice did not explicitly state, in response to **Judge O'Malley** fairly direct question, starting at 2:56, what he knew that Mr. Carson has filed petitions for writs of mandamus against OSC in two district courts, filed appeals of the district court decisions to two separate appeals courts, and filed an appeal of a precedential appellate decision to the Supreme Court.

Mr. Gauger repeatedly stated, in dialogue with **Judge O'Malley** between 13:00 and and 14:15, that he did not know whether Mr. Carson - or anyone else - has ever filed a petition for writ of mandamus against OSC.

Mr. Gauger, in response to **Judge Moore** at 27:38 about mandamus, fails to state that Mr. Carson has filed a number of petitions for writ of

mandamus against OSC.

Mr. Justice, in dialogue with **Judge Moore** between 29:20 and 30:40, fails to state what he knew - that Mr. Carson had filed a number of petitions for writ of mandamus against OSC.

From the case record:

Mr. Carson's numerous petitions for writ of mandamus against OSC are listed by docket no. with their Westlaw cites at Appx. 092. They are also mentioned at Appx 098, 138, 197, 204, and 206. The entire decision in one of these cases (which itself cites several of the other ones) is at Appx. 332-346. Mr. Gauger's brief at page 3 also mentions them.