

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Joseph P. Carson v. Merit Systems Protection Board

No. 2015-3135 and 2015-3211

CERTIFICATE OF INTEREST

Amicus Curiae, *pro se*, Brenda McCracken

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Brenda McCracken

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Not Applicable

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

4. There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Not Applicable

April 26, 2016

Date

/s/ Brenda McCracken

Signature of Amicus Curiae *Pro Se*

Brenda McCracken

Printed name of Amicus Curiae *Pro Se*

Certificate of Interest (*preceding page*)

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Statement of the Identity of the *Amicus Curiae*

I am an independent citizen with a personal and professional interest in preventing decisions that enable retaliation against whistleblowers. As a safety professional it is my job to encourage employees to report their concerns, but it is also my job to protect employees from harm, which creates a very real conflict in my responsibilities, because I personally experienced the damage caused by retaliation when I reported concerns at DOE Argonne Laboratory.¹ *See, McCracken v UChicago LLC* (DOE Argonne National

¹ I have decades of experience working in high reliability and multi-site organizations in various industries, including steel manufacturing, nuclear power, demolition and consulting. While working as a Safety Coordinator in the steel mill in the late 70s, I developed a passion for protecting people and the environment. When the steel industry collapsed, I earned an M.S. in Hygiene with an emphasis in Radiation Health from the University of Pittsburgh. My Master's thesis on chemical and radiological toxicity of waste won an award from the Health Physics Society.

While working in the nuclear industry, I developed a drive for continuous improvement and promoting safety culture by incorporating human factors, such as teamwork, self/peer check, lessons learned and best practices. Throughout my safety career I gained practical knowledge and skills by serving in diverse roles such as ALARA Coordinator (ALARA *i.e.* as low as reasonably achievable — an important term that pertains to Radiation Protection), Incident Commander, Confined Space Program Administrator, Fall Protection Competent Person, Radiation Technician Instructor, Asbestos Building Inspector and Behavior Based Program Manager.

I care about SHE (safety health and environmental) issues beyond the workplace. I give back to my community and profession through various volunteer activities. I discussed safety and health with a group of high school students preparing to enter the workforce, and participated in a roundtable for college students preparing to enter the safety profession. I served as

Laboratory), a private portal of related court files is accessible at <https://drive.google.com/file/d/0B0yswEWThr9MG1OVUxieVdnVEE/view?usp=sharing> I was not a federal employee, so the OSC (Office of Special Counsel) did not have jurisdiction over my case, but the OSHA (Occupational Safety and Health Administration) employees who did have jurisdiction over my case are protected by the OSC; therefore, OSHA is not in a position to provide better whistleblower protection than they receive from the OSC, and OSHA does not have more power than the OSC to correct retaliation that occurs under the auspices of the DOE and their contractors.

Statement of Drafting and Financial Support

Pursuant to FRAP 29(5)(A), (B), and (C), *Amicus Curiae* Brenda McCracken states that no party's counsel authored this brief in whole or part. Further, no party's counsel contributed money intended to fund preparing or submitting the brief. National Judicial Conduct and Disability Law Project, Inc.

President and other positions on the board for a local chapter of the American Society of Safety Engineers. I received the Safety Professional of the Year award in 2010 from the Three Rivers Chapter ASSE (American Society of Safety Engineers).

I am an ethical, well rounded and decisive leader with a proven record of reducing incidents and risk by motivating employees to incorporate safety into routine business processes and practices. While providing SHE support during 2015 outages at Calvert Cliffs, Nine Mile Point, Limerick and Ginna nuclear generating stations there were no recordable injuries in my assigned workforce.

(NJCDLP), a nonprofit legal reform organization headquartered in the Chicago metropolitan area, is underwriting the cost of producing and submitting this brief. Your *Amicus Curiae* Brenda McCracken, Petitioner Joseph P. Carson, and other members of the general public have reportedly provided financial contributions to NJCDLP in the past, but not for the specific purpose of preparing, producing, and/or submitting this brief.

Argument

1. The lack of understanding and transparency reflected in the dismissal of this case and others is an abuse of discretion that rewards retaliation, promotes a culture of silence and enables wrongdoing.

An employee determines whether it is safe to report a concern based on prior actions and inactions of authorities. Whistleblowers must overcome concerns that they will face retaliation or that the risks they take will be in vain. See, Pope, Kenneth S. "Steps to Strengthen Ethics in Organizations: Research Findings, Ethics Placebos, and What Works." *Journal of Trauma & Dissociation* 16.2 (2015): 139–152. PMC. Web. 22 Apr. 2016, accessible at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4376242/> Repeatedly failing to investigate concerns and protect whistleblowers destroys employee and public trust, and when those failures are justified by arguments based on

flawed logic and ignorance of basic facts, the agency's in/actions serve to promote retaliation and prevent change to protect the public. These failures could be the result of the agency employing individuals who do not have the ability to apply the knowledge and logic required to perform their duties, and/or capable agency employees justifying the dismissal of concerns based on unknown conditions and expectations, and/or a number of other reasons. The root causes of OSC (Office of Special Counsel) dysfunction need to be identified and corrected so employees, like those working for the OSHA Whistleblower Protection Program, can trust the agency to apply basic knowledge and logic to evaluate the facts in disclosures and reprisals according to known expectations and conditions. Otherwise the public is safer without the OSC.

2. It is an abuse of discretion to decide the appellant, Joseph P. Carson, did not provide enough information for competent agents of the OSC and Merit Systems Protection Board (MSPB) to identify prohibited personnel practices.

The OSC knows that Joseph P. Carson belongs to the same group of employees as his co-workers. When a whistleblower states that ignoring his concerns will prevent co-workers from reporting theirs, the OSC can logically assume the whistleblower is similarly situated with his co-workers, and that

he will be similarly affected. A growing body of knowledge² shows that employees will stop reporting if you ignore their concerns and retaliate, but it does not take a higher education to make the logical leap between a chilling effect on whistleblowing and a prohibited personnel practice, and the whistleblower should not need to explicitly make that connection for the OSC.

3. The court enables retaliation against workers who go beyond what a “reasonable employee” would do to report a safety concern.

Even when authorities openly practice retaliation, there are workers who still report safety concerns risking their career, health and family for the greater good. Their disclosures are rarely investigated or protected, but when they are, the whistleblower pays a heavy price as their complaint is elevated

²See, for example:

Leary, Elizabeth, and Diers, Donna. “The Silence of the Unblown Whistle: The Nevada Hepatitis C Public Health Crisis.” *The Yale Journal of Biology and Medicine* 86.1 (2013): 79–87, accessible at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3592579/>

Martin, Brian. “Illusions of Whistleblower Protection.” *The UTS Law Review*, No. 5, 2003, pp. 119-130, Faculty of Law, University of Technology, Sydney, accessible at <http://www.bmartin.cc/pubs/03utslr.pdf>

Soeken, Karen and Soeken, Donald, “A Survey of Whistleblowers”, accessible at <http://whistleblower-net.de/pdf/Soeken.pdf>

through the system. Employers, regulators and finally the courts betray more of these exceptional workers than they protect.

"I am speechless about the reality of you still going there every day as a walking billboard to everyone to keep their mouth shut...", Senator McCaskill³ said to Walter Tamosaitis⁴ during his congressional testimony about the retaliation he suffered at the DOE Hanford site. "Reasonable employees" at Hanford learned that reporting safety concerns is hazardous and there is no effective protection from retaliation. Donna Busche was one of those reasonable employees, but she chose to report her safety concerns, despite the walking billboard to keep her mouth shut. She risked her personal and professional well being to protect people, and she was fired.⁵

Employees who report concerns despite a chilled work environment suffer far more harm than employees who are intimidated into silence. Discrimination, harassment and abuse in the workplace have been shown to

³ Testimony before the Senate Homeland Security and Governmental Affairs Subcommittee on Contracting Oversight on "Whistleblower Protections for Government Contractors" 12/6/2011, accessible at <http://www.hsgac.senate.gov/subcommittees/contracting-oversight/hearings/whistleblower-protections-for-government-contractors>

⁴ *Walter Tamosaitis v URS and DOE*, accessible at <http://cdn.ca9.uscourts.gov/datastore/opinions/2014/11/07/12-35924.pdf>

⁵ *Donna Busche v URS and Bechtel*, accessible at http://sheridanlawfirm.com/SiteData/Docs/111011_Busche_DOL_complaint_for_publication.pdf

provoke a psychological and/or physiological stress response that disturbs the cortisol profile which leads to a multitude of chronic negative health conditions. *See, Okechukwu, Cassandra A. et al. "Discrimination, Harassment, Abuse and Bullying in the Workplace: Contribution of Workplace Injustice to Occupational Health Disparities." American Journal of Industrial Medicine 57.5 (2014): 573-586. PMC. Web. 21 Apr. 2016, accessible at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3884002/> Hanford employees experienced firsthand the chilled work environment created by the retaliation against Tamosaitis and Busche. *See, the Defense Nuclear Facility Safety Board recommendations to improve Hanford's chilled work environment in Federal Register Doc No 2011-15146 June 20, 2011, accessible at http://www.dnfsb.gov/sites/default/files/fr%20notice_20110620.pdf If courts deny what employees know to be true, that a chilled work environment is a prohibited personnel practice that adversely affects employees who report, then they send the message that no employee will be protected from retaliation unless they do not report, which essentially justifies retaliation when employees put themselves at risk to protect others.**

4. An ineffective whistleblower protection program for federal employees creates an ineffective role model and allows bias and conflict of interest in the OSHA whistleblower protection program.

As a safety professional it is my job to encourage employees to report their concerns, but it is also my job to protect employees from harm, which creates a very real conflict in my responsibilities, because I personally experienced the damage caused by retaliation when I reported concerns at DOE Argonne Laboratory.⁶ While desperately seeking the ever elusive “whistleblower protection”, I learned that I was not Argonne’s first victim of retaliation and I wasn’t the last. *See, Franchini v Argonne National Laboratory,*

ALJ CASE NO. 2009-ERA--014, *accessible at*
[https://www.zuckermanlaw.com/wp-content/uploads/2015/10/Franchini-](https://www.zuckermanlaw.com/wp-content/uploads/2015/10/Franchini-v.-Argonne-National-Laboratory.pdf)

[v.-Argonne-National-Laboratory.pdf](https://www.zuckermanlaw.com/wp-content/uploads/2015/10/Franchini-v.-Argonne-National-Laboratory.pdf) I was not a federal employee, so the OSC did not have jurisdiction over my case, but the OSHA employees who did have jurisdiction over my case are protected by the OSC; therefore, OSHA is not in a position to provide better whistleblower protection than its employees receive from the OSC, and OSHA does not have more power than the OSC to correct retaliation that occurs under the auspices of the DOE and their

⁶ *See, McCracken v UChicago LLC (DOE Argonne National Laboratory), a private portal of related court files is accessible at*
<https://drive.google.com/file/d/0B0yswEWThr9MG10VUxieVdnVEE/view?usp=sharing>

contractors. OSHA will never be motivated to do any better until the OSC improves. Recently, a Federal Investigator for the OSHA Whistleblower Program, Darrell Whitman, came to need whistleblower protection himself. Labor groups, understanding the need to protect the people who protect them, are giving Mr. Whitman their full support⁷, so now is an opportune time to improve the OSC.

5. This case has the potential to identify the risks created when the EEO fails to investigate the safety and health aspects of a reported concern.

My own complaint was dumped into the EEOC mitigation process where the DOE and their contractors avoided an investigation into the safety concerns that I reported. That lack of accountability reinforces unsafe behavior and hides risks from the public. Workers and the public have a right to know those risks. At the very least we deserve transparency in regards to the corrective actions, and that requires a special investigation into the cases funneled into the EEO. A properly functioning OSC is likely to supply such an investigation, and the MSPB should not help undermine that prospect.

⁷ See, San Francisco Labor Council, Resolution on Workers Memorial Day 2016, April 28, 2016, *accessible at* <http://sflaborcouncil.org/wp-content/uploads/2016/04/04-11-16Resolution-On-Workers-Memorial-Day-2016-Ltrhd.pdf>

Conclusion

For the foregoing reasons, *Amicus Curiae*, Brenda McCracken, prays for reversal of the Merit Systems Protection Board in *Carson v. Office of Special Counsel*, Individual Right of Action (IRA) appeal numbers AT-1221-14-0620-W-1 as well as AT-1221-15-0092-W-1.

FRAP 25(d)(2) Certificate of Mailing To Clerk

I hereby certify that on the 26th day of April, 2016, I mailed the foregoing "Brief of *Amicus Curiae* Brenda McCracken Supporting Reversal for the Petitioner" to the Clerk of this Court by priority U.S. mail, postage prepaid and addressed as follows:

Clerk of Court,
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for the Federal Circuit
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Washington, D.C. 20439

Respectfully Submitted,


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