2015-3135, -3211

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOSEPH P. CARSON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

Petitions for Review of the Merit Systems Protection Board
in Nos. AT-1221-14-0620-W-1 and AT-1221-15-0092-W-1

PETITIONER'S REPLY TO BRIEF FOR RESPONDENT

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July 5, 2016

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, -3211

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)
Petitioner 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:
Joseph P. Carson

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:
Joseph P. Carson

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:
Loring E. Justice, Loring Justice, PLLC

April 19, 2016
Date

/s/ B. Chadwick Rickman, Esq.
Signature of counsel

B. Chadwick Rickman, Esq.
Printed name of counsel

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ARGUMENT

I. JOE CARSON ALLEGED PERSONNEL ACTION AGAINST HIM

MSPB states: "But Mr. Carson did not allege that the OSC's actions or inactions caused any significant changes to his own job duties, responsibilities, or working conditions." This is incorrect. Mr. Carson complained the OSC ignored his whistleblower disclosures in *Carson I* and failed to perform aspects of its non-discretionary statutory duties to investigate and report the results of its investigation for two whistleblower reprisal complaints he made to OSC (*Carson II*).[1] Mr. Carson referenced OSC ignores or fails to act in accord with law regarding the complaints of other employees. However, never did Mr. Carson withdraw his assertion the OSC specifically ignored his whistleblower disclosures in *Carson I* or failed to comply with aspects of its non-discretionary duties to investigate and/or report the results of its investigations for two whistleblower complaints made to it (*Carson II*). MSPB unpersuasively pretends it does not understand this. The greater includes the lesser and there is no shortage of precedent recognizing this logic. As Justice Holmes put it, in criticizing a similar distortion to illogic, "[e]ven in the law the whole generally includes its

[1] *See* Brief of Petitioner, pp. 22-25.

parts."[2] Later, the Supreme Court described it as a "common sense maxim" the "greater includes the lesser."[3] The fact that in the course of pointing out OSC effectively ignored his whistleblower disclosure (*Carson I*)[4] and failed to protect him as the law requires (*Carson II*), Joe Carson referenced OSC similarly fails to protect other employees does not make it any less true OSC ignored his whistleblower disclosures (*Carson I*) and failed to protect him as the law requires in two whistleblower reprisal complaints made to it (*Carson II*). Essentially, MSPB urges upon this Court the following illogic: because Joe Carson claims he is not the only victim of OSC law-breaking, he is somehow seeking relief only for others, not himself.[5] Respectfully, the Court should decline MSPB's invitation to nonsense.

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[2] *Western Union Tel. Co. v. Kansas ex rel. Coleman*, 216 U.S. 1, 53 (1910)

[3] *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 368 (1981).

[4] OSC failed to make the determination required by 5 U.S.C. 1213, as to whether the specific violations of law alleged in Mr. Carson's whistleblower disclosures met the "substantial likelihood" threshold. OSC failed to make a finding as to Mr. Carson's "reasonable belief" in his whistleblower disclosures and whether his disclosures were reasonably evidenced. Neither did the Council of the Inspectors General on Integrity and Efficiency, stating in its March 6, 2014 letter regarding the Complaint Referral only that "the allegations do not meet the threshold standard necessary for further review." (Appx097).

[5] MSPB's argument is contrary to the case record too – see the specific relief Mr. Carson requested, only for him, in *Carson II*, Appx154-171.

II. OSC'S ACTIONS AND INACTIONS CREATED SIGNIFICANT CHANGES IN MR. CARSON'S WORKING CONDITIONS

The remaining factual and legal errors all stem from this essential flaw, denying that which cannot be reasonably denied: the greater includes the lesser. MSPB claims: "But Mr. Carson did not allege that the OSC's actions or inactions caused any significant changes to his own job duties, responsibilities, or working conditions."[6] This erroneous statement is again predicated on the error because Mr. Carson referenced OSC engages in similar action or inactions with others who seek its protection from reprisal or make whistleblower disclosures to it about its violations of the law, this somehow means he is not complaining about OSC harming him specifically. But, Mr. Carson specifically claimed OSC failed or refused to protect him as the law requires:

> In reprisal for his whistleblowing activities, the Office of Special Counsel (OSC) refused to review or address Mr. Carson's protected disclosures regarding violations of law by OSC in *Carson I*. This is a personnel action aggrieving Mr. Carson as it represents "any other significant change in working conditions.[7]
>
> In reprisal for his protected activities, the Office of Special Counsel (OSC) failed or refused to comply with a number of its

[6] *See* Brief for Respondent, p. 11.
[7] *See* Brief of Petitioner, p. 10.

> nondiscretionary statutory duties as an investigatory agency in two of his whistleblower reprisal complaints in *Carson II*. This is also personnel action aggrieving Mr. Carson as it represents "any other significant change in working conditions. [8]

Because Mr. Carson has cited *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006) and *Shivaee v. Dept. of Navy*, 74 M.S.P.R. 383 (1997), MSPB claims: "Mr. Carson appears to be filing an IRA appeal on behalf of other employees who he believes are dissuaded from making disclosures or engaging in protected whistleblowing."[9] This is a distortion. The issue is the meaning of the catch-all provision a personnel action includes "any other significant change in duties, responsibilities or working conditions."[10] Because the phraseology, "any other significant change in duties, responsibilities or working conditions" has not been defined in the case law, Mr. Carson previously advocated using *Shivaee* and *Burlington* to perhaps define it. In *Shivaee*, 74 M.S.P.R. 383, 388 (1997), it was held if the agency actions would deter other similarly situated employees from engaging in protected activities or making protected disclosures, it is sufficient to trigger the protections of the statute. The same is true of *Burlington*, 548 U.S. 53 (2006). It is clear Mr. Carson posited the tests of *Shivaee*

[8] *Id.* at pp. 10-11.
[9] *See* Brief for Respondent, p. 11.
[10] 5 U.S.C. § 2302(a)(2)(A)(xii).

and *Burlington* might determine if an agency action is sufficiently "significant." It is equally transparent because Mr. Carson invoked the analyses of these cases which mention other "similarly situated" employees and the hypothetical "reasonable" employee, he is not abandoning his own claim he suffered adverse action nor is he attempting to make claims on behalf of other employees -he is simply referencing case law that analyzes the potential effect on other employees when determining whether an agency action (or inaction) is "significant." MSPB surely realizes this and its distortions are unavailing. When a tort claimant or tort Defendant raises the well-known "reasonable person" standard, do they then abandon their own claims or defenses and are they deemed as claiming or defending for other persons? MSPB urges the Court to decide on illogic and the Court should decline.

III. AVOIDANCE

MSPB's brief is flawed because it refuses to join the debate about the central issue, the meaning of "any other significant change in duties, responsibilities or working conditions," and instead drops red herrings. As MSPB puts it, "[t]he OSC is not Mr. Carson's employer and he does

not allege that the OSC denied an application for employment."[11] The administrative judge found because Mr. Carson was not employed by OSC, such did not preclude Board jurisdiction over his appeal. [12] This is correct because as recognized in *Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶¶ 9-10 (2010), the Whistleblower Protection Act (WPA) does not restrict the definition of an "employee" to employees of the agency alleged to have taken the personnel action. There is no authority for the proposition (and MSPB does not try to reference any) a non-employing agency can only take an adverse action against a non-employee by denying "an application for employment." But, by using this straw man, MSPB avoids engaging the heart of this case, what should be the meaning of "any other significant change in duties, responsibilities or working conditions?" It so avoids because it does not wish to confront the legislative history and purpose of the catch-all category. Persistently, MSPB cites case law from before the catch-all category was added to avoid legitimate discussion of its meaning. Respectfully, the Court cannot adopt MSPB's invitation to avoidance. To do so would be to pretend things are the way they were before Congress enacted the important "catch all" category and to

[11] *See* Brief for Respondent, p. 12.
[12] *See* Appx003 at n. 2.

wholly deprive employees of the protections of the catch-all category and ignore the intent of Congress, frustrate the purpose of the amendment and violate the separation of powers at the core of our tripartite system of government.

MSPB's brief also hints but does not explicitly state OSC properly responded to Mr. Carson's whistleblower disclosures (Carson I) and whistleblower reprisal complaints (*Carson II*), referencing a March 6, 2014 letter and a response from OSC simply claiming Counsel Lerner took "no personnel action" against Mr. Carson.[13] The record is clear, however, regarding his whistleblower complaints (*Carson I*), OSC failed to make the determination regarding the "substantial likelihood" threshold required by 5 U.S.C. 1213, or to make a finding as to Mr. Carson's "reasonable belief" in his whistleblower disclosures and whether his disclosures were reasonably evidenced,[14] and as to his whistleblower reprisal complaints (*Carson II*), OSC failed or refused to comply with several nondiscretionary statutory duties as an investigatory agency including failure to make and report the required determination "whether there are reasonable grounds to believe" Carson experienced reprisal, failure to state whether Carson has

[13] *See* Brief for Respondent, p. 4.
[14] *See supra* n. 4.

"reasonable belief" in his whistleblower disclosures, failure to respond to Carson's comments and requests for information per the "termination statement," and failure to state the facts and law determined in its investigation.[15] There is no genuine dispute OSC did not comply with its statutory duties in making required determinations and findings regarding Mr. Carson's whistleblower complaints in *Carson I* and in investigation and/or reporting the results of its investigation of Mr. Carson's whistleblower reprisal complaints in *Carson II*. The real question MSPB persistently attempts to obscure is does this noncompliance constitute a personnel action particularly given the catch-all category for personnel actions.

IV. ADJUDICATORY EFFICIENCY

MSPB asserts:

> Finally, the Board correctly dismissed Mr. Carson's subsequent appeal on the basis of adjudicatory efficiency. That appeal raised the same jurisdictional issue as to whether Mr. Carson had suffered a personnel action by the OSC. In his opening brief, Mr. Carson did not challenge the dismissal of his second appeal on the grounds of adjudicatory efficiency.[16]

[15] *See* No. 15-3211, MSPB Docket No. AT-1221-15-0092-W-1, Appx199-208.

[16] *See* Brief for Respondent, p. 12.

This is not a complete statement of the matter and the context is important. Mr. Carson described *Carson II*:

> The Board rejected the application of collateral estoppel, as advocated by OSC, but nonetheless found the appeal should be dismissed on the related but more amorphous doctrine of "adjudicatory efficiency." Given OSC did not meaningfully dispute Mr. Carson's allegations were "nonfrivolous," the Board apparently found no factual inquiry was necessary on this prong of the jurisdictional test, making *Carson I* and *II* legally identical in that both would turn on the issue of whether OSC's ignoring or failure to process in any way an admittedly nonfrivolous whistleblower disclosure and whistleblower reprisal complaint is a "personnel action."[17]

MSPB did not take issue with this description. Later, in his opening brief, Mr. Carson stated:

> The agency only contested Mr. Carson claims that it committed a personnel action against him."[18]Mr. Carson continued: "Certainly, the agency should not be allowed to argue on appeal what it has not argued below. However, in the unlikely event the agency is allowed to argue Mr. Carson's disclosures were frivolous, the dismissal of *Carson II* on the basis of adjudicatory efficiency would be in error. If the nonfrivolousness of Mr. Carson's disclosures or protected activity is at issue, the nature of the disclosures and activity in *Carson II* is wholly different than those in *Carson I*, making the use of "adjudicatory efficiency" to dismiss *Carson II*, pending this appeal improper. To determine nonfrivolousness, the facts undergirding the protected disclosure and/or protected activity must be analyzed and that was not done below. But because the subject matter of the claims in *Carson I* and *Carson II* are different unless the nonfrivolous inquiry is undisputed as it

[17] *Id.* at pp. 5-6.
[18] *Id.* at p. 10.

> was below, there is no identity of issues and adjudicatory efficiency cannot be invoked."[19]

Mr. Carson was clear: MSPB has not disputed the nonfrivolous prong and should not now be allowed to dispute it on appeal, having not earlier disputed it. MSPB does not directly engage Mr. Carson's claim it is precluded from arguing the nonfrivolous prong by not raising it earlier but at points in its responding brief mentions in passing the nonfrivolous element. MSPB comes closest to relying on the nonfrivolous element when it writes: "In any event, even if Mr. Carson's allegations were re-written so that the alleged personnel action was taken against him, rather than his co-workers, they would still fall short of the nonfrivolous standard."[20] But, given MSPB does not engage Mr. Carson's waiver argument it is unclear to what extent they are trying to argue on appeal what they have not raised below. MSPB's caginess is not availing. It has waived the nonfrivolous issue by not raising it below and not joining argument on the waiver issue in its responsive brief. However, if the nonfrivolous prong were properly at issue, adjudicatory efficiency could not be proper because the facts on which the protected disclosures are based are different between *Carson*

[19] *Id.* at n. 5.
[20] *See* Brief for Respondent, p. 16.

I and *Carson II*. MSPB's contention Mr. Carson unconditionally accepts adjudicatory efficiency is not correct. But, the extent to which MSPB appears to be craftily attempting to wedge in the nonfrivolous prong substantiates what is evident from MSPB's avoidance of the legislative history of the catch-all category – MSPB does not like the catch-all category and wishes to pretend it does not exist. Because it exists and this Court cannot accept MSPB's invitation to pretend it does not, the Court should either reverse MSPB's jurisdictional determinations in *Carson I* and *Carson II* or vacate them and remand the cases to MSPB for a proper adjudication.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify the foregoing has been filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

Additionally, I hereby certify that on this date, service of the Petitioner's Motion was made upon the following individuals by first class U.S. Mail:

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This 5th day of July, 2016.

LORING JUSTICE, PLLC

By: *s/ B. Chadwick Rickman*

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Civil Procedure 32(a)(7)(B). The brief contains 2731 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in a 14 point Century font.

s/ B. Chadwick Rickman
B. Chadwick Rickman

Attorney for Petitioner

July 5, 2016
Date