

National Judicial Conduct and Disability Law Project, Inc.

3274 Mount Gilead Road SW ▪ Atlanta, Georgia 30311
http://www.njcdlp.org ▪ contactus@njcdlp.org
P (404) 590-5039 ▪ eFax (404) 953-7740

Via U.S. Priority Mail
January 13, 2020

~~Brian Bohlen, MSPB AJ
MSPB Atlanta Regional Office
401 W. Peachtree Street, NW
10th Floor
Atlanta, GA 30308-3519~~

COPY

RE: *Carson v. Department of Energy*
MSPB Appeal No. AT-1221-19-0536-W-2

Dear Judge Bohlen:

Enclosed, please find an original and one copy of the **“Request of National Judicial Conduct and Disability Law Project, Inc. for permission to file an amicus brief in support of the Appellant”** in the above referenced appeal, plus the corresponding **proposed brief and certificate of service**. If these items meet with your approval, please enter the original of record and return a filed-stamp copy of the same to my office in the self-addressed, stamped envelope provided for that purpose. The parties of record are being advised of this action and provided a copy of the stated enclosures by cover of this letter.

Please feel free to contact me with any questions to comments. Thank you for your consideration and assistance in processing the enclosed items.

National Judicial Conduct and Disability Law Project, Inc.

by:



Dr. Zena Crenshaw-Logal, Executive Director

Enclosure
ZDCL/abin

cc (w/ encl): Mr. Kristopher D. Muse
Mr. Joseph Carson, PE ✓

UNITED STATES OF AMERICA
UNITED STATES MERIT SYSTEMS PROTECTION BOARD

JOSEPH P. CARSON,)	
)	
<i>Appellant</i>)	Docket No.
)	
v.)	AT-1221-19-0536-W-2
)	
DEPARTMENT OF ENERGY,)	
)	
<i>Appellee/Agency</i>)	

**Request of
National Judicial Conduct and Disability Law Project, Inc.
for permission to file an amicus brief in support of the Appellant**

Comes now National Judicial Conduct and Disability Law Project, Inc. (hereinafter NJCDLP), by its Executive Director, and requests permission to file an amicus brief in the above captioned appeal. In support of this request, NJCDLP states as follows:

**I.
NJCDLP's Interest in the Appeal**

NJCDLP is a good government and U.S. legal system reform advocate, organized under laws of the State of Indiana for nonprofit corporations, and currently headquartered in Atlanta, Georgia. Since its inception, NJCDLP has, *inter alia*, championed the cause of effective whistleblower protection in America on behalf of, but not limited to whistleblowers deriving that status through legislative provisions. On January 18, 2018, NJCDLP, through its flagship initiative known as Opt IN USA, submitted to the U.N. Human Rights Council (UNHRC) that America lacks effective avenues of relief for its citizens alleging their rights are violated to the point of persecution imposed through organized U.S. legal system abuse. The UNHRC confirmed on October 10, 2018 that related contentions are **not** "manifestly ill-founded".¹ They relate to whistleblowers within the meaning of Title 5 U.S.C. §4302(b)(3)(D), among Opt IN USA's many other constituents.

The Appellant contends a violation of Title 5 U.S.C. §4302(b)(1) and/or (2)² constitutes a "significant change in duties, responsibilities, or working conditions" within the meaning of Title

¹ See, "UN Human Rights Council Poised to Address Prospect of Judicial Impunity in America", Oct. 12, 2018 – *PRLog*, retrievable as of January 10, 2020 @ <https://www.prlog.org/12734665-un-human-rights-council-poised-to-address-prospect-of-judicial-impunity-in-america.html>

(b)

5 U.S.C. §2302(a)(2)(A)(xii). NJCDLP is committed to, and accordingly has an interest in whistleblowers having effective redress for alleged violations of Title 5 U.S.C. §4302(b)(1) and/or (2). That interest extends to whistleblowers alleging one or more "prohibited personnel practice(s)" within the meaning of the aforementioned catch-all phrase codified as Title 5 U.S.C. §2302(a)(2)(A)(xii).

II.

NJCDLP's Proposed Brief Will Be Relevant to the Appeal Issues

A consideration of this appeal is whether the above named agency can ignore whistleblower disclosures of its employees with impunity, and without a corresponding change in their working conditions. NJCDLP's proposed brief submits that Title 5 U.S.C. §4302(b) compels the agency to ensure whistleblowers subject to its supervision receive a constructive response to their "disclosures described in subparagraph (A) or (B) of section 2302(b)(8)", and that "responsible actions to resolve the disclosures" are taken which "foster an environment in which employees of the agency feel comfortable making (those) disclosures . . . to supervisory employees or other appropriate authorities". So, NJCDLP's proposed brief is relevant in determining the agency's range of lawful responses to its employees' whistleblower disclosures. Moreover, the brief asserts ignoring the disclosures is not within that range per the most natural interpretation of Title 5 U.S.C. §2302(a)(2)(A)(xii).

III.

This Request May Be Granted

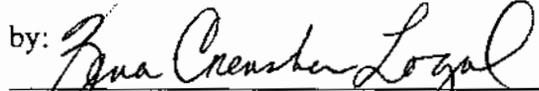
As the foregoing sections I. and II. of this request make clear, NJCDLP has a legitimate interest in this proceeding. It appears that granting the request will not unduly delay the outcome of this appeal. Further, NJCDLP's proposed brief may contribute materially to the proper disposition of

-
- (1) The head of each agency, in consultation with the Director of the Office of Personnel Management and the Special Counsel, shall develop criteria that —
 - (A) the head of the agency shall use as a critical element for establishing the job requirements of a supervisory employee; and
 - (B) promote the protection of whistleblowers.
 - (2) The criteria required under paragraph (1) shall include—
 - (A) principles for the protection of whistleblowers, such as the degree to which supervisory employees—
 - (i) respond constructively when employees of the agency make disclosures described in subparagraph (A) or (B) of section 2302(b)(8);
 - (ii) take responsible actions to resolve the disclosures described in clause (i); and
 - (iii) foster an environment in which employees of the agency feel comfortable making disclosures described in clause (i) to supervisory employees or other appropriate authorities; and
 - (B) for each supervisory employee—
 - (i) whether the agency entered into an agreement with an individual who alleged that the supervisory employee committed a prohibited personnel practice; and
 - (ii) if the agency entered into an agreement described in clause (i), the number of instances in which the agency entered into such an agreement with respect to the supervisory employee.

this appeal. The brief is informed by NJCDLP's insights on the rigors of **effective** human rights protection as countenanced by multiple U.S. treaties, including but not limited to America's International Covenant on Civil and Political Rights.

WHEREFORE, the undersigned requests that its attached amicus brief be filed.

Respectfully Submitted,
National Judicial Conduct and Disability Law Project, Inc.

by: 

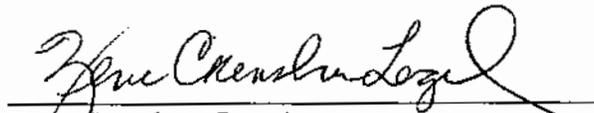
Dr. Zena Crenshaw-Logal, Executive Director
3274 Mount Gilead Road SW
Atlanta, Georgia 30311
[p] (404) 590-5039
[e] crenshaw-logal@njcdlp.org
[f] (404) 953-7740
[i] <https://www.njcdlp.org>

Certificate of Service

I certify that a true and accurate copy of the above and foregoing request for permission to file amicus brief with corresponding proposed brief was served on the following parties on **January 13, 2020** by U.S. first class mail, adequate postage affixed and addressed as follows:

Kristopher D. Muse
Attorney-Advisor
U.S. Department of Energy
Office of Chief Counsel – Oak Ridge / Contracts and General Law
P.O. Box 2001
Oak Ridge, TN 37831 – 2001

Joseph Carson, PE
10953 Twin Harbour Drive
Knoxville, TN 37934


Zena Crenshaw-Logal

UNITED STATES OF AMERICA
UNITED STATES MERIT SYSTEMS PROTECTION BOARD

JOSEPH P. CARSON,)	
)	
<i>Appellant</i>)	Docket No.
)	
v.)	AT-1221-19-0536-W-2
)	
DEPARTMENT OF ENERGY,)	
)	
<i>Appellee/Agency.</i>)	

**Amicus Brief of
National Judicial Conduct and Disability Law Project, Inc.**

Comes now National Judicial Conduct and Disability Law Project, Inc. (hereinafter NJCDLP), by its Executive Director, and for its amicus brief in the above captioned appeal, states as follows:

I.

Title 5 U.S.C. §4302(b)(1)-(2)(A) prescribe circumstances that must be attendant to the Agency’s resolution of whistleblower disclosures and its employees’ work environment.

The Appellant contends a violation of Title 5 U.S.C. §4302(b)(1) and/or (2) constitutes a “significant change in duties, responsibilities, or working conditions” within the meaning of Title 5 U.S.C. §2302(a)(2)(A)(xii). This catch-all phrase is amendable to multiple interpretations. *See, Hesse v. Department of State*, 217 F.3d 1372 at 1378 (2000). A few years before it was added to the list of “prohibited personnel practice(s)” contemplated by Title 5 U.S.C. §2302, the U.S. Supreme Court considered a similar phrase, “conditions of employment”, albeit in a different legal context. Our High Court noted “that the word ‘conditions’ has two common meanings. It can mean matters ‘established or agreed upon as a requisite to the doing . . . of something else’; and it can also mean ‘attendant circumstances,’ or an ‘existing state of affairs’.” *Ft. Stewart Schools v. Federal Labor Relations Authority*, 495 U.S. 641 at 645 (1990).

Title 5 U.S.C. §4302(b)(1)-(2)(A) provides that:

...

- (b)
 - (1) The head of each agency, in consultation with the Director of the Office of Personnel Management and the Special Counsel, shall develop criteria that —

- (A) the head of the agency shall use as a critical element for establishing the job requirements of a supervisory employee; and
- (B) promote the protection of whistleblowers.

(2) The criteria required under paragraph (1) shall include —

- (A) principles for the protection of whistleblowers, such as the degree to which supervisory employees —
 - (i) respond constructively when employees of the agency make disclosures described in subparagraph (A) or (B) of section 2302(b)(8);
 - (ii) take responsible actions to resolve the disclosures described in clause (i); and
 - (iii) foster an environment in which employees of the agency feel comfortable making disclosures described in clause (i) to supervisory employees or other appropriate authorities;

...
Title 5 U.S.C. §4302(b)(1)-(2)(A).

On their face, the foregoing provisions compel the Appellee/Agency of this appeal to ensure whistleblowers subject to its supervision receive a **constructive response** to their “disclosures described in subparagraph (A) or (B) of section 2302(b)(8)”, and that “**responsible actions** to resolve the disclosures” are taken which “**foster an environment** in which employees of the agency feel comfortable making (those) disclosures . . . to supervisory employees or other appropriate authorities”. *Id.* (*emphasis added*). Both the U.S. Federal Circuit Court of Appeals and our U.S. Supreme Court countenance resort to and reliance upon the natural connotations of these highlighted terms. *See, Hesse at 1378, and Ft. Stewart Schools at 644-647.* NJCDLP submits they accordingly prescribe circumstances that must be attendant to the Agency’s resolution of whistleblower disclosures and its employees’ work “environment”; Title 5 U.S.C. §4302(b)(1)-(2)(A) dictate a certain “state of affairs”. *See, Ft. Stewart Schools at 645* [The common meanings of the word conditions], and *Title 5 U.S.C. §4302(b)(1)-(2)(A).*

II.

The result of ignoring Mr. Carson’s many otherwise protected whistleblower disclosures at issue could be nothing less than a “significant change in . . . working conditions”.

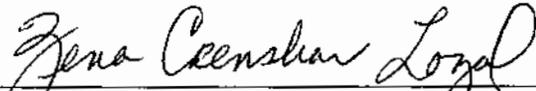
It appears the Appellee/Agency does not dispute the Appellant, Mr. Carson, having “reasonable belief” in his many whistleblower disclosures that are a subject of this appeal. That Mr. Carson’s supervisors refused or failed to respond to, let alone attempt to resolve those disclosures, is also undisputed. Apparently, the Appellee/Agency contends it can ignore the whistleblower disclosures with impunity and without changing Mr. Carson’s working conditions and/or those of his co-workers. Of course, this appeal involves a law created in late 2017 as a result of a 2011 MSPB Special Study that determined the primary reason federal employees acquiesce or bystand

to conditions or situations that would otherwise precipitate “protected” whistleblower disclosures is not fear of reprisal, but fear of being ignored.¹

No response of the Appellee/Agency could be “constructive” and no act of commission or omission on its part could be “responsible” that **fails** to “foster an environment in which employees of the agency feel comfortable making (those) disclosures . . . to supervisory employees or other appropriate authorities”. See, Title 5 U.S.C. §4302(b)(1)-(2)(A). Yet, the agency did just that in ignoring Mr. Carson’s many otherwise protected whistleblower disclosures at issue, seemingly as a matter of policy. The result could be nothing less than a “significant change in . . . working conditions” – ‘attendant circumstances’ or the corresponding ‘state of affairs’ – as such disregard has been shown to chill good-faith whistleblowing among the entire U.S. federal workforce, even more than related reprisals.²

WHEREFORE, the undersigned requests that the Merit System Protection Board be determined to have jurisdiction over this appeal and that it be resolved in accord with all relevant facts and law.

Respectfully Submitted,
National Judicial Conduct and Disability Law Project, Inc.

by: 

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Atlanta, Georgia 30311
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[f] (404) 953-7740
[i] <https://www.njcdlp.org>

¹ “Blowing The Whistle: Barriers to Federal Employees Making Disclosures,” issued November 14, 2011, available at www.mspb.gov.

² *Id.*