

No. 09-1207

In The
SUPREME COURT OF THE UNITED STATES

JOSEPH P. CARSON,
PETITIONER,

v.

MERIT SYSTEMS PROTECTION BOARD,
RESPONDENT

AMICUS CURIAE BRIEF OF

Dorothy Pritchard et al

SUPPORTING PETITION FOR WRIT OF CERTIORARI

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Per Supreme Court rule 37(2)(a), the Solicitor General was timely notified of the intent to file this amicus curiae brief and consented, in writing, to it.

IDENTITY OF PARTIES TO AMICUS CURIAE BRIEF AND THEIR INTEREST IN THE CASE

Parties to this amicus curiae brief are individuals or organizations who are aligned, for a variety of reasons - centering on patriotism - with the objectives of OSC Watch, an unincorporated “ad hoc” group with three objectives: ¹

- 1) expose 31 years of non-compliance by the U.S. Office of Special Counsel (OSC), U.S. Merit Systems Protection Board (MSPB) and agency heads with essential aspects of their respective nondiscretionary statutory duties to ensure federal employees are adequately protected from “prohibited personnel practices (PPP’s),” particularly the whistleblower reprisal type PPP.
- 2) stop it, and
- 3) obtain some measure of justice, no matter how limited or delayed, for the direct victims of this situation - the thousands of loyal, patriotic federal employees who, since 1979, put professional duty before self-interest and were not adequately protected from PPP’s.

The primary purpose of the Civil Service Reform Act of 1978 was to create a statutory framework by which federal employees can perform their duties ethically and competently, per the

¹ Joseph Carson, PE, is the chair of the OSC Watch Steering Committee and David Nolan is its legal advisor. Mr. Carson contributed financially to the printing of this brief. Mr. Nolan is actively seeking the nomination of President Obama to be Special Counsel, head of OSC, a position which has been vacant since October 2008. His campaign blog is www.NolanforOSC.com.

merit system principles - the core values of the federal civil service ² - while being adequately protected from PPP's.³ By harming the merit system principles, PPP's harm federal governance, the public health, safety, and welfare, the common defense, citizen's trust in the federal government and, ultimately, rule of law in America.⁴ OSC has a statutory mandate to "act in the interests" of federal employees who seek its protection from PPP's.⁵ Agency heads, OSC, and MSPB share the statutory mandate that "the protection of individuals who are the subject of PPP's remains the paramount consideration."⁶

Parties to this amicus curiae brief desire that case law be established, over 15 years after the law was passed, at the Federal Circuit regarding when an agency action becomes a "personnel action" for creating "any other significant change in duties, responsibilities or working conditions," per 5 U.S.C. §2302(a)(2)(A)(xi).⁷ They also desire precedent establishing that Burlington North. & Santa Fe Ry. Co. v. White, 126 S.Ct. 2405 (2006) applies to making this determination. They desire that OSC, finally - after over 15 years - start complying with its

² The 9 merit system principles are codified at 5 U.S.C. §2301(b)

³ The 12 types of PPP's are codified at 5 U.S.C. §2302(b)

⁴ For example, App XX is a memo from former Attorney General Mukasey to Department of Justice employees that summarizes the merit system principles and PPP's, it was written in response to several reports which identified numerous PPP's in DOJ during the Bush Administration.

⁵ Section 2, "Whistleblower Protection; Congressional Statement of Findings and Purpose," of Pub. L. 101-12, the Federal Whistleblower Protection Act of 1989, is in the appendix of 5 U.S.C. §1201. Section 2(b)(2)(B) mandates OSC to "act in the interests" of federal employees who seek its protection.

⁶ Pub. L. 101-12, section 2(b)(2)(C), also found in the appendix to §1201.

⁷ Pub. L. 103-424, U.S. Office of Special Counsel Reauthorization Act

nondiscretionary statutory duty to protect federal employees who allege PPP's involving this type of personnel action.

The parties to this amicus curiae brief salute Joseph Carson, PE, for his loyal service to his profession of engineering and the federal civil service, despite the many years of suffering, risk, and loss it has exacted from him and his family as well as for his tremendous exertions, as a licensed professional engineer (PE) employed by the Department of Energy as a nuclear safety engineer, to defend, uphold and advance his profession of engineering, its code of ethics, the merit system principles, and the public health and safety.

This case should be very **good news** for America - Joseph Carson, PE, has uncovered a previously unidentified significant contributing factor for much which has befallen America since 1979 and besets it now - a near complete breakdown in the nondiscretionary statutory framework to protect, adequately, federal employees from PPP's - and it is something that can be readily fixed.

This breakdown centers on OSC's 31 year-long interpretation of (what is now) 5 U.S.C. §1214(e), that its reporting requirements do not apply to OSC's determinations about PPP's and other violations within its enforcement jurisdiction and MSPB's 31 year-long interpretation of (what is now) 5 U.S.C. §1204(a)(3), that its "special studies" do not ever need to consider OSC's interpretation of and compliance with its nondiscretionary statutory duties to protect federal employees from PPP's nor agency heads interpretation of and compliance with their nondiscretionary statutory duty to "prevent PPP's," per 5 U.S.C. §2302(c). As a predictable result, agency heads are unable to comply with this vital duty, because OSC's interpretation of §1214(e) and MSPB's interpretation of §1204(a)(3) keep them "in the dark" as to whether their

employees are adequately protected from PPP's.

All parties to this brief desire "justice for all" where "all" are the 25,000 or more federal employees who have filed about 50,000 PPP complaints with OSC since 1979, alleging about 100,000 specific PPP's.⁸ Almost all of these individuals did not obtain the tangible nondiscretionary statutory protection OSC owed them - a written determination whether "there is reasonable grounds/cause to believe" the alleged PPP occurred and, if positive, an OSC report of that determination to the involved agency head, per §1214(e).

By §1214(e), the involved agency head is required to certify his review of both the OSC report and the agency's response containing the corrective actions and a schedule to implement them. Both the OSC report and the agency-head certified response become permanent, publicly available records per §1219(a)(3). Because OSC, at its creation in 1979, contrary to the plain meaning of the law and its legislative history, renounced its duties to report its determinations of PPP's per §1214(e), it has not issued a single §1214(e) report in 31 years.⁹ Because MSPB, at its creation in 1979, renounced its duty to conduct "special studies" of OSC's compliance with its nondiscretionary statutory duty to protect federal employees from PPP's, this situation has gone uncorrected for 31 years.¹⁰

Additionally, had OSC and MSPB complied with their duties, agency heads would have

⁸ Based on review of OSC's Annual Reports to Congress, per 5 U.S.C. §1218, since 1979.

⁹ As verified by review of OSC's publicly available records, review of all its Annual Reports to Congress, and via OSC's responses to FOIA requests for such records.

¹⁰ See App XX for current MSPB Chairman Susan Grundmann's October 2009 Senate confirmation hearing testimony which, near its end, tacitly admits MSPB has not performed the requisite special studies to make such a report. Dave Nolan, the counsel for this brief, brought this situation to Ms. Grundmann's attention during her confirmation process.

been able to comply with their duty to “prevent PPP’s” for the past 31 years by correcting the deficient workplace cultures in their agencies that permit, if not reward, PPP’s, thereby preventing many, if not most, of the 100,000 PPP’s alleged to OSC since 1979.

A federal workplace that allows any kind of PPP, more likely allows every kind of PPP - together with other violations of law, rule, regulation, gross mismanagement, gross waste of funds, abuse of authority, and/or substantial and specific danger to public health or safety. OSC is supposed to be the “immune system” of the federal civil service, its noncompliance with its nondiscretionary statutory duty to protect federal employees from PPP’s has allowed much corruption and dysfunction to take root and flourish in many federal workplaces, resulting 31 years later, in a much diminished and more threatened America.

More specifically, parties to this amicus curiae brief contend that if OSC, MSPB and agency heads had scrupulously complied with their respective nondiscretionary statutory duties to ensure federal employees were adequately protected from PPP’s, it is reasonable that 9/11 could have been prevented, along with loss of space shuttles, VA health care scandals, SEC’s repeated failure to catch Madoff, and many other instances of federal agency malfeasance or incompetence which has so eroded the public trust in instruments of governance since 1979.

SUMMARY OF ARGUMENT

There is overlap between PPP’s and EEO violations, as explicitly stated in OSC regulations at 5 C.F.R. §1810.1, so Burlington is relevant to determining whether an agency actions causes “any other significant change in duties, responsibilities, or working conditions.” If the Federal Circuit establishes precedent consistent with the relevant legislative history and Burlington, it will force OSC to start complying with its nondiscretionary duties to protect federal

employees from PPP's involving "any other significant change in duties, responsibilities, or working conditions" which will significantly improve the PPP protection available to federal employees, not only prospectively but retroactively to 1994. President Obama has made protection of federal employees from reprisal type PPP's an important public policy goal. Congressional re-authorization of OSC and MSPB are overdue, the results of this case may influence these Congressional deliberations. Legislation to reform the Federal Whistleblower Protection Act is pending in Congress, the results of this case may influence these Congressional deliberations. There is no statute of limitations for PPP allegations and OSC has broad, even if largely untested power, to protect federal employees from PPP's, including re-opening previously closed PPP investigations. OSC can apparently seek corrective action for victims of PPP's, even if they failed to obtain remedy at MSPB, *res judicata* does not apply. This situation illustrates significant deficiencies in the current scope and implementation of legal ethics for government attorneys at OSC and MSPB, something which should be of interest the Court. The politicization of the Department of Justice under President Bush, a result of widespread PPP's, which harmed rule of law, is unimaginable if federal employees are adequately protected from PPP's. There should be no question about whether executive branch employees are adequately protected from PPP's, including in intelligence agencies and White House, right now no one can say. The Office of Special Counsel is a scandal and there is a 20 month-long vacancy for the position of Special Counsel, the Court's actions in this case may influence the nomination and Senate confirmation process for this vital position. There is significant and growing interest in this case, particularly whether the Obama Administration will file a response of acquiescence, if not confession of error, if the Court invites a response. If the Solicitor General files a response of acquiescence, there is a

high probability, based on Court statistics, that the Court will grant Mr. Carson's petition for writ of certiorari.

ARGUMENT

1) There is overlap between PPP's and EEO violations, as explicitly stated in OSC regulations at 5 C.F.R. §1810.1, so Burlington is relevant to determining whether an agency actions causes "any other significant change in duties, responsibilities, or working conditions." 5 U.S.C. §2302(b)(1) is the "EEO-type" PPP, and includes the types of employment discrimination prohibited by EEO law. OSC is authorized to investigate allegations of EEO-type PPP's, but normally defers to EEOC. It makes no sense that Burlington would be relevant to an EEOC investigation but not to an OSC investigation into the identical allegation.

2) If the Federal Circuit establishes precedent consistent with the relevant legislative history and Burlington, it will force OSC to start complying with its nondiscretionary duties to protect federal employees from PPP's involving "any other significant change in duties, responsibilities, or working conditions" which will significantly improve the PPP protection available to federal employees, not only prospectively but retroactively to 1994. OSC uses the lack of case law at the Federal Circuit as justification for its ostensible position that absent contrary Federal Circuit precedent, OSC will presume no agency action creates "any significant change in duties, responsibilities, or working conditions."¹¹ Of course, OSC's posture largely precludes the Federal Circuit establishing relevant precedent and, over 15 years since this new category of personnel

¹¹ While OSC's negative determinations "on the merits" of a PPP complaint are not subject to explicit Court review, its negative jurisdictional determinations are subject to district court review and correction via a writ of mandamus, see Weber v. United States, 209 F.3d 756, 758 (D.C. Cir. 2000).

action was created, there is no precedent at the Federal Circuit because OSC apparently prefers it that way.

3) President Obama has made protection of federal employees from reprisal type PPP's an important public policy goal as evidenced by his campaign pledge to federal whistleblowers and by the public statements of White House Special Counsel for Ethics and Government Reform Norm Eisen about whistleblower protection.^{12 13}

4) Congressional re-authorization of OSC and MSPB are overdue, the results of this case may influence Congressional deliberations in reauthorizing them.¹⁴

5) Legislation to reform the Federal Whistleblower Protection Act is pending in Congress, the results of this case may influence these Congressional deliberations.¹⁵

6) There is no statute of limitations for PPP allegations and OSC has broad, even if largely untested power, to protect federal employees from PPP's, including re-opening previously closed PPP investigations. OSC can apparently seek corrective action for victims of PPP's, even if they failed to obtain remedy at MSPB, *res judicata* does not apply because OSC is a different party and would be seeking corrective action by a different section of law.

7) This situation illustrates significant deficiencies in the current scope and implementation of legal ethics for government attorneys at OSC and MSPB, something which should be of

¹²See App XX for then- candidate Obama's pledges to federal whistleblowers.

¹³ See App XX for a "Corporate Crime Reporter" story about the Obama Administration's unprecedented openness to federal whistleblower advocates.

¹⁴ In the 110th Congress, H.R. 3551 and S.2057, "Federal Merit System Reauthorization Act of 2007"

¹⁵ In the current Congress, H.R. 1507 and S.372, are both approved out of committee.

interest the Court. Specifically, the America Bar Association’s “Model Rules of Professional Conduct,” which has been adopted in whole or significant part by the large majority of attorney licensing authorities, does not address the professional obligations of a “case-worker” attorney at OSC - the OSC attorney responsible to ensure that OSC scrupulously complies with its nondiscretionary statutory duties to protect federal employees from PPP’s in his assigned cases (over half of OSC’s 115 employees are attorneys, most are case-worker attorneys, responsible for the implementation of OSC’s nondiscretionary statutory duties to protect federal employees from PPP’s in their assigned cases).

By current legal ethics, because the client of an OSC case-worker attorney is OSC, his government employer, therefore he must hold the interests of OSC paramount when they conflict with those of a complainant - the case-worker attorney at OSC is prohibited from “blowing whistles” about any OSC non-compliance with its nondiscretionary statutory duties to protect federal employees from PPP’s.

Additionally, by law at 5 U.S.C. §1211, the Special Counsel must be an attorney - so, by current legal ethics, a new Special Counsel, as an attorney, has a positive professional duty to defend how OSC, her client, complies with its nondiscretionary statutory duties to protect federal employees from PPP’s, even if she disagrees with it. This situation seems to be a question of first impression for legal ethics. A similar situation is present at MSPB, where the members of the full board are nearly always attorneys - if they disagree with how MSPB has complied with a nondiscretionary statutory duty relevant to protecting federal employees from PPP’s, can they do anything but defend the past practice of their client?

8) The politicization of the Department of Justice under President Bush, a result of

widespread PPP's, which harmed rule of law, is unimaginable if federal employees are adequately protected from PPP's. The four joint reports of the Department of Justice Office of Inspector General and Office of Professional Responsibility about these PPP's described how concerned employees "looked other way" apparently out of fear of reprisal - another type of PPP - if they responsibly voiced concerns.¹⁶ However, these reports did not address whether DOJ employees were adequately protected by OSC - i.e. whether it was scrupulously complying with its nondiscretionary statutory duties to DOJ employees who alleged PPP's to it or whether MSPB was conducting the requisite "special studies" to determine and report whether DOJ employees are adequately protected from PPP's - because OSC and MSPB are independent agencies over which they have no investigatory jurisdiction.

9) Even though MSPB has a nondiscretionary statutory duty to determine and report whether all federal employees in the Executive Branch - including in intelligence agencies and White House, are adequately protected from PPP's, it has not conducted the requisite special studies - not even of its own employees - to do so, not in 31 years.¹⁷ The Office of Personnel Management (OPM), is explicitly prohibited, by 5 U.S.C. §1103(a)(5), from evaluating whether federal employees are adequately protected from PPP's when implementing its nondiscretionary statutory duty to review agency compliance with the merit system principles, per 5 U.S.C. §1104(b)(2). Bottom line, neither the President nor Congress can tell federal employees whether they are adequately protected from PPP's - and since OSC and MSPB have not complied with essential

¹⁶ These four reports were issued between June 2008 and January 2009 and are available at <www.justice.gov/opr/inv-rpts.htm>

¹⁷ See App XX for MSPB's response to a FOIA request for such records.

aspects of their nondiscretionary statutory duties to protect federal employees from PPP's since their creation in 1979, they are **not** adequately protected.

10) The Office of Special Counsel is a scandal and there is a 20 month-long vacancy for the position of Special Counsel, so the Court's actions in this case may influence the nomination and Senate confirmation process for this vital position.^{18 19} Just as at MSPB, OSC cannot even tell its own employees they are adequately protected from PPP's, despite the nondiscretionary statutory duty of the Special Counsel to "prevent PPP's" in OSC, per 5 U.S.C. §2302(c).

11) There is significant and growing interest in this case in the federal whistleblower community and other stakeholders to a trustworthy federal civil service - one in which federal employees are adequately protected from PPP's - as evidenced by this amicus brief. If the Court invites a response from the Solicitor General, it will probably be a first for a federal whistleblower case and will generate much greater interest, particularly whether the Obama Administration will file a response of acquiescence, if not confession of error. As part of doing so, the Administration may direct, per 28 C.F.R. §0.25, the Office of Legal Counsel of the Department of Justice to issue opinions on the 31 year-long interpretations of the involved sections of law - §§1204(a)(3), 1214(e), and 2302(c) - an exercise that would benefit everyone.

12) If the Solicitor General files a response of acquiescence, there is a high probability, based on Court statistics, that the Court will grant Mr. Carson's petition for writ of certiorari and remand the case to the Federal Circuit with instructions, to develop relevant case law that addresses the

¹⁸ See App XX for Department of Justice press release of April 27, 2010 announcing guilty plea of Scott Bloch, former Special Counsel, to criminal contempt of Congress.

¹⁹ See App XX for April 23, 2010 press release of National Whistleblower Center, calling for President Obama to immediately appoint a new Special Counsel

Burlington precedent. This could result in OSC then complying with its nondiscretionary statutory duty to protect federal employees from PPP's by its reporting, per §1214(e), to the involved agency head, hundreds of instances in which it determined "there is reasonable grounds to believe" a PPP occurred involving "any significant change in duties, responsibilities or working conditions" since 1994 - allowing the agency head to provide the impacted employee the "make whole remedy" of 5 U.S.C. §1214(g), advancing Congressional intent and the merit system principles of the federal civil service.

CONCLUSION

For all the above reasons, the amici respectfully request the Court to invite a response from the Solicitor General to Mr. Carson's petition for writ of certiorari and, following that, to grant it.

Respectfully Submitted,

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