

Reasons Solicitor General should file a response in acquiescence in Carson v. Merit Systems Protection Board, no. 09-1207, at Supreme Court.

1. The case involves no disputed facts, it centers on a jurisdictional determination involving a 1994 addition to the Whistleblower Protection Act of 1989 by which “any other significant changes to duties, responsibilities or working conditions” became a “personnel action.” There is still no precedent at U.S. Court of Appeals for the Federal Circuit, which has a judicial monopoly on federal whistleblower cases, for this addition.
2. There is no precedent at the Merit Systems Protection Board (MSPB) or Federal Circuit about the application of Burlington v. White, 126 S.Ct. 2405 (2006) to federal whistleblower appeals or other appeals involving prohibited personnel practices (PPP’s). However, it is indisputable that one type of PPP includes EEO violations, see 5 C.F.R. §1810.1.
3. The initial MSPB decision was not appealed to the Full MSPB, instead it was allowed to automatically become final. Given the change in make-up at the Full MSPB in past 6 months, it is quite possible the Full MSPB would reverse the initial decision, based on existing MSPB precedent.
4. The Federal Circuit issued a judgment of affirmation without opinion, so it is not ripe for full review by the Supreme Court. If the Court grants the petition, the case will be remanded. Even if it results in a favorable jurisdictional ruling for Mr. Carson, he would still have to prevail on the merits.
5. If the Federal Circuit establishes expansive precedent, it would be retroactive to 1994 and could be used by the U.S. Office of Special Counsel to obtain relief for federal employees impacted by PPP’s since then.