No. _____

In The
Supreme Court of the United States

JOSEPH P. CARSON,

PETITIONER,

v.

UNITED STATES MERIT SYSTEMS PROTECTION BOARD,

RESPONDENT.

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's precedent in *Burlington North. & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006), applies to determining whether a personnel action, defined at 5 U.S.C. § 2302(a)(2)(A)(xii) as, "any other significant change in duties, responsibilities or working conditions," has occurred to a federal agency employee alleging reprisal for making whistleblower disclosures or filing whistleblower reprisal complaints.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Court Rules

Public Laws

Other Authorities

OPINION BELOW

On March 17, 2017, the Court of Appeals for the Federal Circuit issued a nonprecedential disposition affirming two unpublished final decisions of the Merit Systems Protection Board, Appeal numbers AT-1221-14-0620-W-1 and AT-1221-15-0092-W-1, respectively. The Federal Circuit decision is reported at 257 Fed. Appx. 268, 2007 WL 3333475 (C.A.Fed.). (see Appendix)

JURISDICTION

The Federal Circuit filed its nonprecedential decision on March 17, 2017. On August 11, 2017 it denied Petitioner's Motion to Issue a Precedential decision. On November 13, 2017, it issued its denial of Petitioner's Motion to Reconsider the denial of the previous Motion. The Chief Justice granted petitioner's request for an extension of time and directed it be filed on or before April 12, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari. (see Appendix)

STATUTORY PROVISION INVOLVED

5 U.S.C. § 2302(a)(2)(A)(xii)

For the *purpose of this section* - a "personnel action" means – "any other significant change in duties,

responsibilities, or working conditions."

STATEMENT OF THE CASE

Joseph Carson ("Carson," "Joe Carson"), an employee of the Department of Energy (DOE), filed Individual Right of Action appeals alleging that several agencies, including DOE, the U.S. Office of Special Counsel (OSC), and the Merit Systems Protection Board (MSPB or "Board") took personnel actions against him in retaliation for protected disclosures/protected activity. [1] Specific to the two individual right of action (IRA) appeals considered by the CAFC, Mr. Carson claims in one (AT-1221-14-0620) that OSC failed or refused to review his whistleblower disclosures to it about his claims of its violations of law as required its non-discretionary statutory duties to federal agency employees who make whistleblower disclosures to it, thereby creating "any other significant change in…(his) working conditions." In the other (AT-1221-15-0092-W-1), Mr. Carson claims that OSC failed or refused to comply with a number of its nondiscretionary statutory duties to protect him from reprisal in investigating and reporting the results of its investigations in two whistleblower reprisal complaints he filed with it (these became IRA appeals against DOE and MSPB), thereby creating

[1] *Carson v. Office of Special Counsel*, MSPB Docket No. AT-1221-14-0620-W-1; *Carson v. Office of Special Counsel*, MSPB Docket No. AT-1221-15-0092-W-1; *Carson v. Merit Systems Protection Board*, MSPB Docket No. AT-1221-14-0637- W-1.

"any other significant change in …(his) working conditions." In the appeals to the Board below, OSC did not meaningfully dispute Mr. Carson's allegations were "nonfrivolous," rather the sole jurisdictional dispute was whether Mr. Carson's claimed OSC violations, even if true, could possibly create "any other significant change in …(his) working conditions."

The jurisdictional question posed in both underlying IRA appeals was: Could Mr. Carson experience "any other significant change in …working conditions," as the result of OSC's violations of law against him? The question was posed in a consolidated appeal arising from the two individual right of action (IRA) proceedings before the Merit Systems Protection Board below.

a. *Carson v. Office of Special Counsel*, AT-1221-14-0620-W-1

In this whistleblower reprisal appeal (a violation of 5 U.S.C. § (b)(8)), Mr. Carson alleged the OSC engaged in reprisal against him when it ignored his whistleblower disclosures to it about its own violations of law. Mr. Carson filed his IRA appeal on March 19, 2014. MSPB issued a "Show Cause Order" for jurisdiction on July 10, 2014. Mr. Carson timely responded. OSC did not respond to the Show Cause Order. On July 25, 2014, MSPB issued its initial decision. Although there was no dispute that Mr. Carson's allegations were "nonfrivolous" the MSPB AJ nonetheless dismissed

the appeal for lack of jurisdiction based on the determination that it would be impossible for OSC to "create any other significant change in .. (his) working conditions," in any circumstance whatsoever, solely because OSC is not his employing agency. The relevant Board precedent in *Shivaee v. Department Navy*, 74 M.S.P.R. 383, 388 (1997) was not cited or applied to support this summary determination. Mr. Carson timely submitted a PFR of the initial decision. The Board's unpublished final decision of March 25, 2015 upheld the initial decision and provided no additional reasoning for its summary determination. Mr. Carson filed a timely PFR with the US Court of Appeals for the Federal Circuit. Its summary unpublished opinion upheld the Board's summary determination and also cited no supporting precedent.

b. *Carson v. Office of Special Counsel*, AT-1221-15-0092-W-1

This is a federal IRA appeal, alleging reprisal in violation of 5 U.S.C. § 2302(b)(9)(A)(i). Mr. Carson alleged OSC engaged in reprisal against him when it failed or refused to comply with several of its non-discretionary statutory duties to protect him after he filed two whistleblower reprisal complaints with it. Mr. Carson filed the IRA appeal on October 22, 2014. Again, OSC did not meaningfully dispute Mr. Carson's allegations were "nonfrivolous," but focused upon whether, it could not, in any possible circumstance, create "any other significant change in …(his) working conditions." As in the other IRA, the MSPB AJ dismissed the appeal for lack of

jurisdiction based on the determination that it would be impossible for OSC to "create any other significant change in .. (his) working conditions," in any circumstance whatsoever, solely because OSC is not his employing agency. No Board precedent was cited or applied to support this summary determination. Mr. Carson timely submitted a PFR of the initial decision. The Board's unpublished final decision of August 17, 2015 upheld the initial decision and provided no additional reasoning for its summary determination (although it did cite "judicial efficiency" as a possible explanation for not providing any). Mr. Carson filed a timely PFR with the US Court of Appeals for the Federal Circuit. Its summary unpublished opinion upheld the Board's summary determination and also cited no precedent to support it.

These Board decisions were appealed to the Court of Appeal for the Federal Circuit, which has jurisdiction over Board decisions pursuant to 5 U.S.C. §§ 1221(h), (i), and 7703(b)(1). The nonprecedential decision it issued (the subject of this petition for writ) contained no analysis of the lower decisions by the board, other than to cite agreement with the conclusion. It contained no analysis of *Burlington,* or it holdings as they apply to the statutory definition, "other significant change in duties, responsibilities, or working conditions." 5 U.S.C. § 2302(a)(2)(A)(xii)

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD VACATE AND REMAND THE JUDGMENT TO THE FEDERAL CIRCUIT WITH INSTRUCTIONS DEVELOP PRECEDENT FOR WHEN A PERSONNEL ACTION OCCURS AS RESULT OF "ANY OTHER SIGNIFICANT CHANGE IN DUTIES, RESPONSIBILITIES, OR WORKING CONDITIONS," IN LIGHT OF *BURLINGTON*

a. BACKGROUND

The background and current state of federal whistleblower protection is summarized in the first few pages of Senate Report 111-101, "Whistleblower Protection Enhancement Act of 2009," December 3, 2009. From the S. Rep. No. 111-101:

> Whistleblowers have long played a clear goal role in keeping our government honest and efficient, and the events of September 11, 2001 make even clear the fact that our citizens' safety depends on our ensuring that those with knowledge of problems at all nations Ports, borders, law enforcement agencies, and nuclear facilities are able to reveal those problems without fear of retaliation or harassment. (Page 1-2)

With this statement the Senate reaffirmed the

vital policy and legislative goal of protecting whistleblowers first codified in the Civil Service Reform Act of 1978 (CSRA). That Act established statutory protections for federal employees to encourage disclosure of government illegality, waste, fraud, and abuse.[2] As explained in the Senate Report accompanying that legislation:

> Often, the whistleblowers's reward for dedication to the highest more principles is harassment and abuse. Whistleblowers frequent encounter severe damage to their careers and substantial economic loss. Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service..... these conscientious civil service deserve statutory protection rather than bureaucratic harassment and intimidation (page 2-3).[3]

However, in 1984, the MSPB reported that the Act had had no effect on the number of whistleblowers and that federal employees continue to fear reprisal.[4] In response, Congress in 1989 unanimously passed the (Whistleblower Protection Act) WPA, which forbids retaliation against federal

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[2] Civil Service Reform Act of 1978 (CRSA), P.L. 95-454,

[3] S. Rep. No. 95-969, at 8

[4] See Merit Systems Protection Board, "Blowing the Whistle in the Federal Government: A Comparative Analysis of 1980 and 1983 Survey Findings" (October 1984), at page 3.

employees who disclose what they reasonably believe to be evidence of illegal or other seriously improper government activity.[5] It also made OSC an independent executive branch agency with an exclusive statutory mandate to protect the federal agency employees who sought its protection from agency reprisal and to "act in their interests" in doing so. Congress substantially amended the WPA in 1994 as part of legislation to reauthorize the OSC and MSPB. The amendments were designed, in part, to address a series of actions by the OSC and decisions by the MSPB and the Federal Circuit Congress deemed inconsistent with the intent of the 1989 Act.[6]

As part of the 1994 amendments to the WPA, a "catch-all" personnel action - "any other significant change to duties, responsibilities, or working conditions," was added to the list of "personnel actions" in § 2302(a)(2)(A). The purpose was described in the accompanying S. Rep. No. 103-358, "To Authorize Appropriations for the United States Office of Special Counsel, Merit Systems Protection Board, and for Other Purposes," August 23, 1994, starting at page 9 and continuing to page 10:

> Section 5(d) address narrow construction of the Whistleblower Protection Act with regard to the types retaliatory action for which remedies

[5] Federal Whistleblower Protection Act of 1989 (WPA), P.L. 101-12.

[6] U.S. Office of Special Counsel Reauthorization Act of 1994, P.L. 103-424

> are available. Under section 2302(b)(8), retaliation against the whistleblower constitutes a prohibited personal practice only if it takes the form of a "personnel action." Unfortunately, there are many retaliatory actions that do not fall into the definition of personnel actions....
>
> ...The intent of the Whistleblower Protection Act was to create a clear remedy for all cases of retaliation or discrimination against whistleblowers. The Committee believes that such retaliation must be prohibited regardless of form it may take. For this reason, section 5(d) would amend the Act to cover any action taken to discriminate or retaliate against the whistleblower because of his/our protected conduct, regardless of the form that discrimination or retaliation may take.

b. RELEVANT PRECEDENT FROM THIS COURT REGARDING PERSONNEL ACTION

In June 2006 the Supreme Court, in *Burlington Northern and Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (2006) created a specific criteria relevant to existing Board precedent that whether an agency action created "any significant change in working conditions" should be "interpreted broadly." Specifically, the Supreme Court ruled,

> In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

This Supreme Court ruling is consistent with the legislative history for the 1994 amendments to the WPA, cited by the Board in *Shivaee v. Dept. of Navy*, 74 M.S.P.R. 383, 388 (1997). Applying the relevant (even if uncited and unapplied) Board precedent in *Shivaee* to "broadly interpret," informed by the recent Supreme Court precedent *Burlington*, to the OSC's undisputed actions involved in this appeal is straightforward:

1. An agency employee makes whistleblower disclosures to OSC about OSC and MSPB violations of law in not protecting federal agency whistleblowers. (Neither OSC nor MSPB have Inspector Generals). OSC fails or refuses to comply with its statutory duties to review the whistleblower disclosures to make a "substantial likelihood" determination or request the Department of Justice review how it is interpreting and applying the involved civil service laws, relevant to all federal agencies. Would its actions tend to deter other agency employees from making whistleblower disclosures to it, if not at all? Clearly, yes, therefore it creates "any other

significant change in working conditions," and is a personnel action.

2. An agency employee files whistleblower reprisal complaints with OSC, a protected activity. OSC fails or refuses to protect the employee as required by law. Would OSC's violations of law tend to deter other agency employees from seeking its protection from reprisal? Clearly, yes, therefore it creates "any other significant change in working conditions," and is a personnel action.

c. MSPB DECISION CONFLICTS WITH MSPB PRECEDENT AND *BURLINGTON*

Even though there is no Federal Circuit precedent for determining what can create "any other significant change in duties, responsibilities or working conditions," some such precedent exists at MSPB. In reasoning quite similar to that in *Burlington*, the Board held that if the agency/employer's actions would tend to deter other similarly situated employees from engaging in protected activities or making protected disclosures, they qualify as prohibited. *Shivaee v. Dept. of Navy*, 74 M.S.P.R. 383, 388 (1997).

From *Shivaee* at 388:

> ... the provision adding, "any other significant change in duties, responsibilities, or working conditions"

> to listed personnel actions should be interpreted broadly. This personnel action is intended to include any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system, and should be determined on a case-by-case basis.

Compared to that in *Burlington*, at 1215:

> In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' *Rochon*, 438 F.3d, at 1219 (quoting *Washington*, 420 F.3d, at 662).

The MSPB decisions in question did not apply *Shivaee* "case by case analysis" before making their summary determinations that OSC could violate each and every of its nondiscretionary statutory duties to a federal agency employee who made a whistleblower disclosure to it or sought its protection from whistleblower reprisal without, in any possible circumstance, deterring any reasonable federal agency employee from doing likewise. Nor did they consider or apply *Burlington*. The Federal Circuit also failed to consider or apply *Burlington* in its nonpublished, summary decision that cited no

precedent, in affirming the Board's non-published decisions. At this point, 24 years after this "catch-all" personnel action was added to strengthen protection for federal whistleblowers, the Federal Circuit has yet to review it.[7] Additionally, there is no precedent at MSPB about what, if any, impact, *Burlington* has on this section of law. Arguably, this Federal Circuit judgment conflicts with *Burlington*, and, therefore, warrants this Court's action by Rule 10(c) of the Rules of the Supreme Court.

OTHER REASONS TO GRANT THIS PETITION

Rule 10(a) of the Rules of the Supreme Court states this Court may grant a petition for certiorari because a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. The following detail reasons why this Court may find it appropriate to grant this petition on this basis.

Without explicit acknowledgment, federal circuit issued a judgement of affirmance without opinion per Fed. Cir. R. 36. However, its doing so, even if implicit, is contrary to both the criteria of Fed. Cir. R. 36 and its Internal Operating Procedure (IOP) 10 for determining whether to publish a

[7] See *Holderfield v. MSPB*, 326 F.3d 1207, 1209 (Fed.Cir. 2003).

decision. By Fed. Cir. R. 36 at least one of five listed criteria must be met AND an opinion would have no precedential value to be issued as in this case.

An opinion in this case would have clear precedential value, because there is no precedent at the Federal Circuit – or any other appellate court - for when a personnel action occurs as a result of "any other significant change in duties, responsibilities or working conditions."(see *Holderfield v MSPB*, 326 F.3d 1207, 1210 (Fed. Cir. 2003), *Shivaee v. Dept. of Navy*, 74 M.S.P.R. 383, 387 (1997), and *Burlington* p. 1215) ,

Of the five criteria for issuing a Judgment of Affirmance Without Opinion in Fed. Cir. R. 36, only the last two are relevant to an MSPB decision. Criteria (d) states, "the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review." MSPB is the respondent in this petition for review because the case involves MSPB's jurisdiction, see 5 USC 7703(a)(2). Under *Campion v. MSPB*, 326 F.3d 1210, 1213 (Fed. Cir. 2003), the Court reviews issues of law, including the jurisdiction of the Board, without deference to the Board's opinion. In other words, the Court performs *de novo* reviews of issues of law contained in MSPB decisions. Petitioner respectfully posits that a *de novo* review of the issues of law involved here, including a previously untested question, cannot be adequately documented in a judgment of affirmance without opinion.

Criteria (e) from the Rule, "a judgment or decision has been entered without an error of law." The "standard of review" for MSPB cases at the Federal Circuit is found at 5. U.S.C. § 7703(c). As per § 7703(c)(1) the Court must set aside any MSPB decision found "otherwise not in accordance with law." There is currently no precedent at the Federal Circuit for the central issue of law - when do agency actions become a "personnel action" for creating "any other significant change in duties, responsibilities, or working conditions?" Because this case involves a novel question of law at the Federal Circuit, it cannot be affirmed by nonprecedential disposition. This is even more the case where, as here, the MSPB decision mentions (but does not apply) an MSPB precedent, *Shivaee*, which has not been adopted as lawful at the Federal Circuit.

CONCLUSION

For the above reasons, the Court should grant this petition, vacate the decision of the Federal Circuit, and remand the case to the Federal Circuit with instructions for it to address, in light of *Burlington*, when agency actions create "any other significant change in duties, responsibilities or working conditions" and apply its reasoning to the involved agency actions.

Respectfully Submitted,

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