Macktal v. Brown & Root, 86-ERA-23 (Sec'y Oct. 13, 1993)

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: October 13, 1993
CASE NO. 86-ERA-23

IN THE MATTER OF

JOSEPH J. MACKTAL, JR.,
COMPLAINANT,

v.

BROWN & ROOT, INC.,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

ORDER DISAPPROVING SETTLEMENT AND REMANDING CASE

The parties in this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988), entered into a settlement agreement in 1986, which Complainant later attempted to repudiate on various grounds. On November 14, 1989, the Secretary issued an Order Rejecting in Part and Approving in Part Settlement Between the Parties and Dismissing Case. The Secretary found that a settlement had in fact been entered into and that Complainant could not repudiate it. One paragraph of the settlement, restricting Complainant's right to provide information to government agencies about possible violations of the law, the Secretary found void as against public policy. The Secretary ordered the offending paragraph severed and found the remainder of the agreement valid and enforceable. Slip op. at 10-14.

Complainant appealed and the United States Court of Appeals for the Fifth Circuit upheld the Secretary's order in all respects, except that the court held the Secretary could not modify the material terms of the agreement by finding one provision invalid

as against public policy, severing it from the rest of the agreement, and enforcing the remainder.[1] Macktal v. Secretary of Labor, 923 F.2d 1150, 1155 (5th Cir. 1991). The court held that the Secretary, when presented with a settlement by the parties, can only consent or not consent to the settlement as written, id. at 1156, and remanded the case to the Secretary either to enter into the settlement or refuse to enter into it by rejecting it. Id. at 1158. After remand from the court of

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appeals, the parties were given an opportunity and have fully briefed this question to the Secretary.

As stated in the Order to Submit Settlement Agreement issued in this case on May 11, 1987, the Secretary reviews settlements for limited purposes to "determine if the terms of the settlement are fair, adequate and reasonable [and] . . . not against the public interest . . . ." Macktal v. Brown & Root. Inc., Case No. 86-ERA-23, Secretary's Order to Submit Settlement Agreement, May 11, 1987, slip op. at 2. In reviewing settlements, the Secretary is carrying out a responsibility imposed by Congress "to effectuate the purpose of [the ERA], which is to encourage the reporting of safety violations by prohibiting economic retaliation against employees . . . ." Id. (Citations omitted.) The Secretary explained further in Polizzi v. Gibbs & Hill. Inc., Case No. 87-ERA-38, Secretary's Order Rejecting in Part and Approving in Part Settlement Submitted by the Parties and Dismissing Case, July 18, 1989, that "[p]rotected whistleblowing under the ERA may expose not just private harms, but health and safety hazards to the public. The Secretary represents the public interest in keeping channels of information open by assuring that settlements adequately protect whistleblowers." Slip op. at 3.

Complainant argues that, if the Secretary approves this settlement, Complainant may be sued for breach of contract by any of the so-called "Comanche Peak companies" as defined in the settlement. See Settlement at pp.1-2. Approval of the settlement also would be "tantamount to judicial approval" of Respondent's action in entering into an "illegal settlement" and "reaping the benefits thereof." Complainant's Response to Respondent's Brief on Remand at 3-4.

Respondent advanced several grounds upon which the Secretary should approve the settlement. Paragraph 3 of the agreement, Respondent argues, is "entirely moot and unenforceable" because Mr. Macktal already has provided all information he possesses to government agencies, and because the Nuclear Regulatory Commission has directed its licensees and their contractors to notify their employees that provisions of settlement agreements restricting the right of employees to provide

information to the NRC will not be enforced.[2] In addition, Respondent asserted that as a matter of contract law Complainant's claim under the

ERA is barred because 1) he accepted Respondent's payment of $35,000 which "worked an accord and satisfaction" of his ERA claim, 2) Mr. Macktal ratified the settlement "without paragraph 3" by retention of the $35,000 after both the NRC and the Secretary had declared that provision unenforceable and after Respondent had waived any right to enforce it, and 3) Mr. Macktal executed a release separate and distinct from the settlement releasing Respondent of any claims arising out of his employment.

Paragraph 3 has been found in this case to be against public policy for the reasons described above. Although Respondent argues that paragraph 3 is moot and unenforceable, that is no more than a prediction of the action a court might take in an suit to enforce the settlement. The NRC has directed its licensees and their contractors not to enforce provisions of settlements which restrict the employee's right to provide information about safety issues to the NRC, but it is not clear that the NRC directive applies to contact by an employee with any other agency, such as the Department of Labor. Although Respondent has waived the right to enforce the settlement "to the extent that [it] might . . . limit or restrict . . . Mr.

Macktal . . . from communicating with any representative of the NRC about potential safety issues," it also is not clear whether that waiver applies to contact with other agencies. In addition, paragraph 3 limits Mr. Mackal's right to appear as a witness in any proceeding involving the so-called "Comanche Peak companies," but it is not clear whether Respondent acted on behalf of all the corporations and individuals encompassed by that term when Respondent waived its rights under paragraph 3.

More fundamentally, approval of a settlement including a term the Secretary already has found against public policy could give the impression to other whistleblowers that similar language may legitimately be included by employers in future settlements, casting doubt on a whistleblower's right to contact government agencies without any restriction. Whistleblowers may not have knowledge of or understand the subtle nuances of this case which Respondent asserts weigh in favor of approving the settlement.[3]I have concluded that a prophylactic approach to settlements which include questionable language will more faithfully carry out Congressional intent on the role of the Secretary under the ERA. The Fifth Circuit's view of the narrow scope of my authority to review settlements under the ERA leaves me no choice but to disapprove any settlement containing terms I find repugnant to law or public policy.

I also find I cannot approve the settlement on the contract law grounds urged by Respondent. On remand the court of appeals directed the Secretary to take one of two actions, "either consent to the settlement, as written, or not." 923 F.2d at 1156. (Emphasis added.) Assuming I had the authority under other circumstances to apply contract law principles to determine whether a new contract had been formed under either theory proposed by Respondent, I understand my role under the court's order to be strictly circumscribed. For the reasons discussed above, I cannot approve the settlement as written. I reject Respondent's argument that the General Release is a separate agreement which affords an independent basis for dismissal. The General Release, which states "[i]n connection with the Settlement Agreement . . . and in consideration of the promises made therein," clearly relates to and must be considered part of the Settlement Agreement.

After briefing following the remand of this case by the court of appeals had been completed, Complainant filed a Motion for Sanctions and Default Judgment on December 13, 1991. Complainant asserts in that motion that Respondent and its counsel have been engaged in a conspiracy to conceal information from the NRC and have violated Rule 11 of the Federal Rules of Civil Procedure (FRCP). Complainant requests that the Secretary impose the sanction of default judgment against Respondents. This motion has been fully briefed by each party.

Complainant asserts first that Respondent is subject to sanctions under Rule 11 of the Federal Rules of Civil Procedure (FRCP) for falsely asserting that the settlement agreement was not an agreement to suppress or withhold testimony.[4] The Secretary has held that he has no power under Rule 11 to impose sanctions against a party or his counsel because there is a specific provision in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges governing standards of conduct in hearings. 29 C.F.R. § 18.36 (1992). Cable v. Arizona Public Service Co., Case No. 90-ERA-15, Sec'y. Final Dec. and Order Nov. 13, 1992, slip op. at 5-6. The FRCP only applies "in any

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situation not provided for or controlled by" the ALJ Rules of Practice. 29 C.F.R. § 18.1(a).

Complainant also argued Respondent engaged in "abuse of process" by utilizing the settlement to conceal information from the Nuclear Regulatory Commission. Complainant appears to be alleging that Respondent committed the common law tort of abuse of process. See Complainant's Motion for Sanctions and Default Judgment at 6, citing 1 Am. Jur. 2d, Abuse of Process. To the extent Complainant's motion sounds

in tort, it is clear the Secretary has no authority under the ERA to consider it. If Complainant is alleging improper action by Respondent under the ERA in seeking a settlement which restricts the flow of information to government agencies, I note that at the time the settlement was entered into neither the Secretary nor the NRC had declared such provisions of settlements improper. See Polizzi v. Gibbs & Hill. Inc., Case No. 87-ERA-38, Sec'y Order Jul. 18, 1989.

Complainant's motion for default judgment and sanctions is denied. Accordingly, for the reasons discussed above, the settlement agreement in this case is disapproved and this case is REMANDED to the Administrative Law Judge for further proceedings consistent with this order and the ERA.

SO ORDERED.

Robert Reich
Secretary of Labor

Washington D.C.

[ENDNOTES]

[1]Among other things, the court of appeals upheld the Secretary's findings that Complainant did consent to the settlement and that he could not withdraw that consent at any time before the Secretary decides whether to approve the settlement. Id. at 1157. Complainant's Notice of Rejection of Settlement and Request for Hearing filed on July 24, 1991, therefore is denied.

[2]The Nuclear Regulatory Commission (NRC) notified the Secretary on May 3, 1989, that "settlement agreements which impede . . . avenues of communication with the NRC, are clearly contrary to the policy objectives of the . . . [ERA]." Letter of May 3, 1989, to Secretary Dole from Lando W. Zech, Jr., Chairman, Nuclear Regulatory Commission. Accordingly, the NRC had directed all major licensees and principal contractors "to review past settlement agreements to ensure that such agreements provide an opportunity to the settling party to bring safety issues directly to the attention of the Commission." In that directive, issued on April 27, 1989, the NRC ordered its licensees to "promptly inform the [employee] that [such] restrictions

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should be disregarded, [and] that [the employee] may freely come to NRC at any time without fear of any form of retribution, and that such a restriction will not be

enforced." The NRC also informed the Secretary it would initiate rulemaking to ensure that future settlements do not restrict contacts by whistleblowers with the NRC, and those rules have been published in final form. 55 Fed. Reg. 10,397 (1990). See 10 C.F.R. §§ 30.7(g), 40.7(g), 50.7(f), 60.9(f), 61.9(f), 70.7(g), 72.10(f) (1991).

[3]I recognize, as Respondent maintains, that there is a public interest in encouraging settlements and carrying out the original intent of the parties to an agreement whenever possible. I note, however, that the ERA itself provides that a settlement must be "entered into by the Secretary and the person alleged to have committed [the] violation . . . ." 42 U.S.C. § 5851(b). Neither party was entitled to assume there was a final agreement effective for purposes of dismissal of the pending ERA complaint until the Secretary entered into it by granting his approval. Respondent voluntarily fulfilled what it believed was its duty under the settlement to pay Complainant a lump sum of $35,000, but until the Secretary approved the settlement no agreement existed for purposes of the ERA.

[4]This appears to be no more than a dispute over how to characterize the settlement, not a deliberate misstatement of objective facts.

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