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NEWS AND DEVELOPMENTS

Whistleblowers

LABOR SECRETARY REJECTS SETTLEMENT REQUIRING WHISTLEBLOWER TO KEEP MUM

Any settlement of a wrongful termination suit that limits the fired employee's right to blow the whistle on alleged violations of law by the employer will henceforth be disapproved in its entirety, U.S. Labor Secretary Robert B. Reich made clear in an unpublished Oct. 13 opinion. (*Macktal v. Brown & Root Inc.*, DOL, No. 86-ERA-23, 10/13/93)

Reich's decision followed a federal appeals court's ruling that the secretary has no authority to sever such a provision from a settlement and enforce the remainder.

While the plaintiff's suit was filed under the provisions of the Energy Reorganization Act of 1974, the secretary's ruling has considerably broader significance. A number of other major acts—including the Clean Air Act, the Safe Drinking Water Act, the Toxic Substances Control Act, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act (superfund), and the Federal Water Pollution Control Act—also allow whistleblowers to file such suits with the Department of Labor.

Joseph Macktal Jr. filed a complaint with the labor secretary under Section 210 of the ERA alleging that his employer, Brown & Root, fired him for repeatedly reporting potential problems in the nuclear power plant in which he worked. Negotiations between the parties resulted in a settlement that, among other things, required Macktal to refrain from voluntarily appearing in any administrative or judicial proceeding concerning the safety of the power plant. Upon examining the settlement agreement, the labor secretary found the provision barring the plaintiff from speaking out to be contrary to public policy and severed it, but otherwise upheld the settlement.

The Fifth Circuit held that the ERA allows the secretary of labor to approve or disapprove a settlement reached by the parties, but not to force a modified version on them. *Macktal v. Secretary of Labor*, 923 F2d 1150 (CA 5 1991). Accordingly, it vacated the secretary's order and remanded the case for further consideration.

On remand, Secretary Reich voided the entire agreement and said he would do the same with regard to any similar settlements. He explained that "[t]he 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."

He explained that "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 agencies without any restriction. . . . 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 plaintiff's counsel, Steven M. Kohn, of the National Whistleblower Center, Washington, called Reich's decision "a landmark whistleblower case" in the environmental and atomic energy area because the company was actually penalized for entering into a restrictive settlement with a whistleblowing employee. Kohn said this was the first instance in labor law history where the whistleblower was allowed to keep the settlement proceeds and still go to court.

"The implications are immense" in a civil justice system in which safety problems are frequently discovered during litigation but then the public loses access to the information as a result of a settlement forbidding the plaintiff to reveal the information, Kohn said.