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Shackling the Secretary's Hands: Limits to Authorizing Whistle-Blower Settlements under Section 210 of the Energy Reorganization Act - Macktal v. Secretary of Labor

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SHACKLING THE SECRETARY'S HANDS: LIMITS TO AUTHORIZING WHISTLE-BLOWER SETTLEMENTS UNDER SECTION 210 OF THE ENERGY REORGANIZATION ACT

Macktal v. Secretary of Labor[1]

I. INTRODUCTION

In seeking to encourage nuclear industry employees to report safety concerns, Section 210 of the Energy Reorganization Act of 1974 (ERA) acts to protect such "whistle-blowers" in the event they are terminated or discriminated against because of their whistle-blowing activities.[2] When an employee and an employer negotiate a Section 210 "whistle-blower" complaint and subsequently submit the settlement for approval, the Secretary of Labor faces certain encumbrances when reviewing the agreement.[3] This limitation on review arises when certain provisions may be in violation of public policy.[4] In *Macktal v. Secretary of Labor*, the United States Court of Appeals for the Fifth Circuit compared the Secretary's Section 210 powers to those held by any judge considering civil suit settlements and held that the Secretary may either accept the entire negotiated settlement, reject it, or modify the settlement subject to input from the original parties.[5] This Note compares the Section 210 powers of the Secretary to review whistle-blower settlements with similar powers found in the judiciary. This Note also examines the lack of guidance other circuits offer when deciding similar cases in light of a silent United States Supreme Court.

1. 923 F.2d 1150 (5th Cir. 1991).
2. 42 U.S.C. § 5851(b) (1983).
3. 42 U.S.C. §5851(b).
4. *Id.*
5. *Macktal*, 923 F.2d at 1156.

II. FACTS AND HOLDING

Plaintiff, Joseph J. Macktal, Jr., began work as a journeyman electrician for Brown & Root in January 1985.[6] One of plaintiff's assignments placed him at the Comanche Peak nuclear power plant.[7] During a four-month period in 1985-1986, plaintiff raised technical safety concerns regarding the company's operations at Comanche Peak to Brown & Root's in-house investigatory team.[8] On January 2, 1986, Brown & Root issued a written warning to plaintiff about "excessive absenteeism" during the preceding December.[9] The following day, plaintiff notified his supervisor in writing that he believed he was being harassed because of his identification of safety problems at Comanche Peak; in essence, plaintiff believed he was being harassed as a whistle-blower.[10] At the end of his formal complaint, plaintiff asked to be relieved of his duties until the matter could be determined by regulatory authorities.[11] Brown & Root interpreted this request as plaintiff's resignation and escorted plaintiff off-site.[12]

One month later, plaintiff filed a complaint with the Secretary of Labor pursuant to Section 210 of the Energy Reorganization Act of 1974 alleging that Brown & Root discharged him because he was a whistle-blower.[13] After filing his complaint, plaintiff and Brown & Root agreed to settle the underlying dispute, and plaintiff asked the Secretary to dismiss the complaint.[14] Among the settlement terms, paragraph three of the agreement called for plaintiff to agree not to appear voluntarily as a witness in any proceeding, administrative or judicial, regarding the operational safety at Comanche Peak as well as to take reasonable steps to resist a subpoena requiring his testimony at such a proceeding.[15]

While the Secretary considered the request, plaintiff changed his position on the settlement and requested that the Secretary disapprove the agreement.[16]

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6. *Id.* at 1151.

7. *Id.*

8. *Id.*

9. *Id.* at 1151-52.

10. *Id.* at 1152.

11. *Id.* Plaintiff's final paragraph of his complaint to his supervisor stated: "In an effort to preserve my mental health and avoid any further harassment, I wish to be relieved of my duties until the TEC, NLRB, [and] NRC can resolve these matters." *Id.*

12. *Id.*

13. *Id.* (citing 42 U.S.C. § 5851); *see infra* note 23 (containing the text of the statute).

14. *Macktal*, 923 F.2d at 1152.

15. *Id.* Other terms of the agreement, as well as unrelated issues raised by plaintiff at various points in the case at hand have been omitted for purposes of this Note.

16. *Id.* at 1153. Based on the original settlement, plaintiff and Brown & Root moved jointly to dismiss, and the administrative law judge supervising the matter recommended that the Secretary grant the motion. *Id.* at 1152-53. When the Secretary asked to see a copy of the agreement, Brown & Root and plaintiff's original attorneys refused to comply and requested that the Secretary reconsider the order. *Id.* at 1153. Plaintiff's new counsel later learned of the Secretary's request and provided the Secretary with a copy of the settlement. *Id.*

Brown & Root opposed this request.[17] Subsequently, the Secretary struck paragraph three of the settlement as contrary to public policy but otherwise upheld the settlement and dismissed the action.[18]

Plaintiff appealed the Secretary's decision and sought judicial review pursuant to Section 210.[19] In his appeal, plaintiff raised three other issues for consideration: (1) he alleged that he withdrew his consent to the settlement before the Secretary agreed to the settlement; (2) he alleged that he did not consent to the agreement at the time it was negotiated; and (3) he alleged that even if it was found that he did consent, his consent was not voluntary, but coerced by his own attorneys.[20] The United States Court of Appeals for the Fifth Circuit vacated the Secretary's order and remanded the case for further consideration consistent with its opinion.[21] The court held: (1) when an employee files a Section 210 complaint charging that his employer discriminated against his whistle-blowing activity and then subsequently settles with the employer, the Secretary of Labor may either enter into the settlement by approving it or refuse to enter into it by rejecting it; and (2) the Secretary may not modify material terms of the agreement without consent of the parties.[22]

III. LEGAL HISTORY

Section 210 of the Energy Reorganization Act of 1974 forbids a nuclear industry employer from either discriminating or retaliating against any employee lodging a complaint with the Nuclear Regulatory Commission.[23] Under this statute, the Secretary of Labor is obligated to investigate any such complaints filed.[24] Within 30 days of receiving the complaint, the Secretary must complete the investigation and notify the parties of the results.[25] Once the complaint is filed and the investigation is completed, the Secretary must grant the relief sought, deny such relief, or enter into a consensual settlement involving all three

17. *Id.* at 1153.

18. *Id.*

19. *Id.*

20. *Id.* at 1156.

21. *Id.* at 1158.

22. *Id.* The court grounded the first part of its holding on its conclusions as to the three collateral issues raised by plaintiff on his complaint. *Id.*

23. 42 U.S.C. § 5851(b)(1). This section states: "Any employee who believes that he has been discharged or otherwise discriminated against by any person [on account of whistle-blowing] may, within thirty days after such violation occurs, file . . . a complaint with the Secretary of Labor . . . alleging such discharge or discrimination." *Id.*

24. Thompson v. United States Dep't of Labor, 885 F.2d 551, 556 (9th Cir. 1989) (citing 42 U.S.C. § 5851(b)(2)(A)). The court considered the Secretary's authority to modify party settlements under the statute and determined that the Secretary could not dismiss the complaint based on a settlement where the settlement was originally silent regarding dismissal of claims. *Id.* at 556-57.

25. 42 U.S.C. § 5851(b)(2)(A).

parties—the employee-complainant, the employer, and the Secretary.[26] The Secretary must choose one of these actions within 90 days of receipt of the complaint.[27]

In deciding the only other decision concerning Section 210 settlement agreements, the United States Court of Appeals for the Ninth Circuit found that the Secretary had to approve all such settlement agreements and insisted that "[t]he Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant."[28] The court added that the Secretary's power to approve settlement agreements "does not include the power to force employees to accept a settlement."[29] The *Thompson* court also noted that the Secretary's dismissal with prejudice added a material condition to the parties' settlement and provided the employer with a benefit it had been unable to secure in the original negotiations, that the plaintiff would be barred by *res judicata* from raising additional complaints under the ERA based on the same operative facts.[30]

The Secretary of Labor has previously issued administrative regulations specifying procedures to follow in deciding which settlement option to choose.[31] Under these regulations, the Labor Department's Wage and Hour Division conducts the investigation and enters a preliminary determination of the complaint's merits.[32] If either party disputes the preliminary conclusions of the division's investigation, an adversarial hearing may be requested before an administrative law judge (ALJ) where each party may present evidence.[33] At the conclusion of such a hearing, the ALJ will issue a recommended decision for the Secretary.[34]

If the Secretary's application of Section 210 is rational and consistent with the statute, then the judiciary must uphold the interpretation.[35] However, where

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26. *Id.* This provision reads:

> Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint.

Id.

27. *Id.*

28. *Thompson*, 885 F.2d at 556 (citing 42 U.S.C. § 5851(b)(2)(A)).

29. *Id.* at 557.

30. *Id.*

31. *Id.*

32. 29 C.F.R. § 24.4 (1990).

33. *Id.* § 24.5.

34. *Id.* § 24.6.

35. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984), *reh'g denied*, 468 U.S. 1227. The court held that the judiciary is the "final authority" on questions of statutory construction and must reject administrative constructions contrary to "clear congressional intent." *Id.* at 843 n.9. Likewise, the Secretary's authority begins with the language of the statute and any authority claimed must be consistent with such text. NLRB v. United Food & Commercial

the statute is silent or ambiguous regarding a specific issue, such as whether the Secretary may dictate settlement terms or force a modified settlement upon the parties, it is up to the judiciary to determine whether the administrative agency's interpretation is grounded on a permissible construction of the statute.[36]

The United States Supreme Court addressed a similar issue in *Evans v. Jeff, D.*,[37] where a class of handicapped children sought injunctive relief for alleged defects in the education and care provided to them by the State of Idaho.[38] As part of its complaint, the class sought costs and attorney's fees.[39] The defendant's offer to settle required the plaintiffs to waive their right to attorney's fees.[40] The district court, acting pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, approved the settlement with the fee waiver intact.[41] However, the United States Court of Appeals for the Ninth Circuit rejected the fee waiver, in effect modifying a material term of the agreement without consent of the parties.[42]

The Supreme Court held that the court of appeals erred in its view of the district court's power to approve class action settlements.[43] The Court stated that "the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed."[44] The Court also noted that "changed circumstances" may empower a court to order modifications to a consent decree over a party's objections after the decree has been entered and that the district court might have notified the parties that it would not approve the settlement unless certain provisions were deleted or modified.[45] However, the Court found that Rule 23(e) "does not give the court the power, in advance of trial, to modify a proposed consent decree and order its acceptance over either party's objection."[46] The options available to the district court, were essentially to accept the proposed settlement, reject the proposal and postpone the trial allowing the parties to reach a different settlement, or try the case notwithstanding the settlement.[47]

Case law supports the idea of the pre-eminence of original settlement terms over subsequent terms proposed by one party. Considering Title VII claims, the United States Court of Appeals for the Sixth Circuit noted that the agreement must

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Workers Union, 484 U.S. 112, 123 (1987) (citing Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 431-32 (1987)).

36. *Chevron*, 467 U.S. at 843.
37. 475 U.S. 717 (1986), *reh'g denied*, 476 U.S. 1179 (1986).
38. *Id.* at 720.
39. *Id.* at 722.
40. *Id.*
41. *Id.* at 723-24.
42. *Id.* at 724.
43. *Id.* at 726.
44. *Id.*
45. *Id.* at 726-27.
46. *Id.*
47. *Id.* at 727.

be entered into "voluntarily and knowingly" by the plaintiff.[48] Once that threshold has been crossed, if a Title VII party who previously authorized a settlement chooses later to change her mind regarding the terms, the original language controls and that party is bound by the terms of the agreement.[49]

IV. THE INSTANT DECISION

A. *Plaintiff's Claim Under Section 210*

In *Macktal*, the court noted that the Secretary's selection of an adversarial format before an administrative law judge for the required public hearing prompted the parties to use civil litigation as an analogy in determining the appropriate limits to the Secretary's authority.[50] While the court acknowledged that such analogies may be helpful in appraising the situation, an analogy cannot grant the Secretary authority "withheld by the words of the statute," nor can it "deprive the Secretary of authority provided by the words of the statute."[51]

The words of the statute are clear, according to the court.[52] The Secretary is required to take one of three actions once a complaint is filed: accept the settlement as submitted by the parties, reject the settlement, or negotiate a new settlement with the parties.[53] The court concluded that the statute allows no exception for those cases where the complainant and the employer reach an independent settlement.[54]

The court also acknowledged the Secretary's argument likening her role to that of a civil judge determining a private contract settlement.[55] In such a role she could sever terms found in violation of public policy and still enforce the remainder of the settlement.[56] The court agreed that the Secretary may allow a Section 210 complainant and the employer to negotiate a settlement and then approve the agreement if it adequately protects the public's interest and equitably treats the employee.[57] However, the court added, both the use of the term "approval" describing the Secretary's actions and the analogy to civil litigation "should not confuse us as to the nature of her authority."[58]

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48. Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1209 (5th Cir. 1981) (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n.15. (1974)).

49. *Id.*; *see* Odomes v. Nucare, Inc., 653 F.2d 246, 252 (6th Cir. 1981); Harrop v. Western Airlines, Inc., 550 F.2d 1143, 1144 (9th Cir. 1977).

50. *Macktal*, 923 F.2d at 1153.

51. *Id.*

52. *Id.*

53. *Id.* at 1154 (citing 42 U.S.C. § 5851(b)).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

The court recognized that it must uphold the Secretary's interpretation of the authority granted by Section 210 if it is rational and consistent with the statute.[59] However, the *Macktal* Court noted that if the Secretary did not issue one of two authorized orders, the Secretary would be permitted to terminate the action only by entering into a settlement.[60] The *Macktal* court stated that "the only reasonable interpretation we can give the words chosen by Congress is a consensual settlement process involving all three parties."[61] Thus, the court held that it could not reasonably interpret the language "enter into a settlement" to authorize the Secretary to "dictate" the settlement's terms or "force" a modified settlement on the parties because "[s]uch power would be the antithesis of the consensual settlement process contemplated by the statute."[62]

By limiting the Secretary's authority to either consent or not consent to negotiated settlements, the court rejected as inconsistent with the statute the Secretary's second argument: that she can strike certain terms while enforcing the remainder without the consent of both the complainant and the employer.[63] If the Secretary wanted to modify material terms of the settlement, consent to the proposed changes must be obtained from the other two parties.[64]

The court bolstered its conclusions by examining the holdings in *Evans* and *Thompson*.[65] Utilizing the *Evans* analogy to comparable civil litigation procedures involving Article III judges' consideration of negotiated settlements, the court determined that the Secretary could either approve the original settlement "as it was written," obtain consent from the plaintiff and Brown & Root to modify the settlement, or reject the settlement as presented.[66] Similarly, the court determined that the Secretary could not "take the negotiated settlement, strike terms she [did] not like, and then impose it on the parties."[67]

The court also agreed with the *Thompson* analysis that the Secretary's authority to approve settlements does not include the power to force complainants—or even employers—to accept an agreement.[68] Additionally, the *Macktal* Court applied the *Thompson* material condition rationale whereby the

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59. *Id.*; *see* 29 C.F.R. § 24.4.

60. *Macktal*, 923 F.2d at 1154.

61. *Id.* In so holding, the court rejected the Secretary's arguments that Congress "misapprehended the proper role of the Secretary under the statute" and that since the Secretary chose an adversarial format for the requisite public hearing, the Secretary should be considered an "adjudicator" rather than a party: "[w]e do not understand this reasoning." *Id.* at n.14. "The authority of the Secretary begins with the words of the statute, and the question we must ask is whether the authority she claims is consistent with those words." *Id.* at 1154. The court refused to "rewrite the words of the statute so that they are consistent with the authority claimed." *Id.*

62. *Id.* at 1154.

63. *Id.*

64. *Id.*

65. *Id.* at 1155-56.

66. *Id.* at 1155; *see Evans*, 475 U.S. at 724-27.

67. *Macktal*, 923 F.2d at 1155.

68. *Id.*; *see Thompson*, 885 F.2d at 556.

severance of paragraph three "eliminated a material term of the agreement."[69] The court concluded that "the Secretary cannot do [this] without the consent of the other two parties."[70]

The court chose to define "material term" as one that a party "could not customarily change in a private agreement without the consent of the other parties to the agreement."[71] In doing so, the court noted that the Secretary stated she struck paragraph three and allowed the remainder of the agreement to stand because it was not "essential" as defined by Section 184 of the Second Restatement of Contracts.[72] Whether or not the stricken paragraph meets this definition, the court held that "the evidence requires a finding that paragraph three is not so unimportant that a party could add it to, or delete it from, a settlement agreement without the consent of the other parties."[73]

Concluding its analysis of the primary issues, the *Macktal* court instructed the Secretary, on remand, to "either consent to the settlement, as written, or not."[74] If the Secretary elected not to accept the settlement as written, the options remained to negotiate a new settlement with the other two parties, to allow plaintiff and Brown & Root to negotiate a new settlement alone and submit it for the Secretary's consent, or to hold a hearing "to determine which of [the] two authorized orders [to] issue."[75]

B. Plaintiff's Collateral Claims

Plaintiff's first collateral issue concerned his withdrawal of consent before the Secretary consented to the settlement.[76] Section 210 states that the Secretary may not agree to any settlement terminating a proceeding on a complaint "without the participation and consent of the complainant."[77]

Under contracts law, courts hold that a consent judgment "is a contract to end a lawsuit in which the relief to be provided by the judgment and the wording to effectuate that relief are agreed to by the parties."[78] Any agreement to settle a claim may be enforced as a contract and ordinary rules of contract interpretation

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69. *Macktal*, 923 F.2d at 1155-56.

70. *Id.* at 1156.

71. *Id.*; *see Thompson*, 885 F.2d at 557.

72. *Macktal*, 923 F.2d at 1156. The Second Restatement of Contracts reads:

> If less than all of an agreement is unenforceable under the rule stated in § 178, a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.

RESTATEMENT (SECOND) OF CONTRACTS § 184 (1981).

73. *Macktal*, 923 F.2d at 1156 n.25.

74. *Id.* at 1156.

75. *Id.*

76. *Id.*

77. 42 U.S.C. § 5851(b)(2)(A).

78. Interspace Inc. v. Morris, 650 F. Supp. 107, 109 (S.D.N.Y. 1986); *see* Janus Films, Inc. v. Miller, 801 F.2d 578, 582-83 (2d Cir. 1986).

control.[79] Therefore, courts have been reluctant to allow a party to withdraw consent to a settlement that requires court approval in order to escape liability under the terms of the settlement.[80]

The *Macktal* court found that, assuming plaintiff participated in and consented to the settlement at the time of negotiation, Section 210 does not explicitly require "second affirmation" of his consent when the Secretary grants approval.[81] Requiring plaintiff's initial consent adequately protects his interest and ensures that the employer and the Secretary will not agree to a second settlement contrary to plaintiff's interest.[82] The court concluded that binding the parties to their initial agreement allows the process to proceed without fear that one or the other will withdraw from the arrangement before the Secretary completes final review.[83]

Plaintiff's second collateral issue concerned his consent to the actual settlement.[84] If the Secretary determines that the parties consented to the agreement, the decision may be reversed by a federal court only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[85] If the settlement involves a right to sue derived from a federal statute, federal not state law, governs the validity of the settlement and, by extension, any actions of the parties in direct relation to the settlement.[86]

Under federal law, oral agreements to settle are binding upon the parties to the settlement.[87] In *Fulgence v. J. Ray McDermott & Co.*,[88] the court held that if a party to a Title VII suit who has previously authorized a settlement changes his mind when presented with the settlement documents, he remains bound by the terms of the settlement.[89]

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79. *Interspace, Inc.*, 650 F. Supp. at 109; *see* Fustok v. Conticommodity Servs., Inc., 577 F. Supp. 852, 858 (S.D.N.Y. 1984); Mikropul Corp. v. Desimone & Chaplin-Airtech, Inc., 599 F. Supp. 940, 943 (S.D.N.Y. 1984).

80. *Interspace, Inc.*, 650 F. Supp. at 109; *see* Allen v. Alabama State Bd. of Educ., 612 F. Supp. 1046, 1053-54 (M.D. Ala. 1985), *aff'd*, 816 F.2d 575 (11th Cir. 1987); George v. Parry, 77 F.R.D. 421, 423 (S.D.N.Y. 1978), *aff'd without op.*, 578 F.2d 1367 (2d Cir. 1978), *cert. denied*, 439 U.S. 947 (1978).

81. *Macktal*, 923 F.2d at 1156-57.

82. *Id.* at 1157.

83. *Id.*

84. *Id.* at 1156.

85. 5 U.S.C. § 706(2)(A) (1977); *see also Thompson*, 885 F.2d at 555.

86. *See* Town of Newton v. Rumery, 480 U.S. 386, 392 (1987); *Fulgence*, 662 F.2d at 1209 (federal law determines validity of oral settlement agreements in employment discrimination actions brought pursuant to Title VII); Strange v. Gulf & S. Am. S.S. Co., 495 F.2d 1235, 1236 (5th Cir. 1974) (federal law determines validity of oral settlement agreements within federal courts' admiralty and maritime jurisdiction).

87. *Fulgence*, 662 F.2d at 1209 (5th Cir. 1981).

88. 662 F.2d 1207.

89. *Id.* at 1209.

The court also rejected plaintiff's second collateral argument.[90] In so holding, the court refused to conclude that the Secretary's action was an abuse of discretion.[91] The court cited plaintiff's admission in his affidavit that he agreed to the initial settlement as well as two versions of a general release[92] and plaintiff's acceptance of his proceeds stemming from the settlement as indicative of his consent.[93]

In plaintiff's final collateral issue, he argued that pressure exerted by his attorneys to accept the settlement voided his consent.[94] In considering charges of attorney misrepresentation regarding a settlement to a Title VII employee discrimination action, the United States Court of Appeals for the Fourth Circuit held that when a party voluntarily accepts an offer of settlement, "whether directly or indirectly" through the authorized actions of his attorney, the agreement's integrity cannot be attacked on grounds of inadequate representation by the party's attorney.[95] Unless the ensuing settlement is substantially unfair, judicial economy "commands that a party be held to the terms of a voluntary agreement."[96] In any case, the court stated that disputes remain strictly between the party and his attorney.[97]

Finally, the court rejected this last collateral argument.[98] In so holding, the court recognized that the Secretary initially ruled that the alleged serious misconduct by plaintiff's attorneys did not affect the validity of plaintiff's consent.[99] The court acknowledged the two-pronged legal question arising from such an allegation: (1) whether arguments, including any arguments which may be quite heated, between a party to a settlement and his attorney regarding the merits of accepting the settlement void any subsequent consent offered by the party; and (2) which party should bear the risk of any alleged misconduct by the attorney?[100]

To answer these questions, the court relied on the Secretary's initial ruling that plaintiff—not Brown & Root, the other party to the initial settlement—should bear the risk of alleged misconduct by plaintiff's attorney, in light of the professional relationship between an attorney and his client, the plaintiff's right to

90. *Macktal*, 923 F.2d at 1157.

91. *Id.* (quoting 5 U.S.C. § 706(2)(A)).

92. *Id.* at 1157. These releases were signed by the plaintiff. *Id.*

93. *Id.*

94. *Id.* at 1156.

95. Petty v. Timken Corp., 849 F.2d 130, 133 (4th Cir. 1988); *see, e.g.*, Gilbert v. United States, 479 F.2d 1267 (2d Cir. 1973).

96. *Petty*, 849 F.2d at 133.

97. *Id.*

98. *Macktal*, 923 F.2d at 1157.

99. *Id.* The Secretary cited the *Petty* decision among others to support her position. *Id.* at n.34.

100. *Id.* at 1157.

counsel, and the availability of legal action against the attorney.[101] Therefore, the court refused to void the settlement upon these allegations.[102]

V. COMMENT

What role should the Secretary of Labor fulfill when considering a negotiated settlement under the provisions of Section 210 of the ERA? What options may be considered which give deference to an original agreement entered into between the disputing complainant and employer? While considering plaintiff's original complaint, the Secretary of Labor likened her role to that of a judge presiding over a private contract dispute and argued that she should therefore be allowed to sever any terms contrary to public policy.[103] The *Macktal* court freely agreed with the Secretary's association to the civil judiciary but rightly refused to grant the Secretary *carte blanche* to modify material terms to negotiated settlements—even where violations of public policy might occur—without the consent of the original parties.[104] In effect, the court shackled the Secretary's perceived power to the encumbrances facing a judge contemplating negotiated settlements in civil matters.

In doing so, the Fifth Circuit joined the Ninth Circuit by advancing the analysis offered by the *Thompson* decision.[105] When considering Section 210 settlements, both circuits clearly hold that the Secretary may not force the original parties to accept settlements to which they have not previously agreed.[106] The message advanced by these two circuits, grounded in logic forwarded by the Supreme Court in *Evans*, seems clear: the Secretary simply cannot strike settlement terms she does not like and then impose her will on the original parties; the same encumbrances upon a judge considering a comparable settlement transcend the gap between administrative and private law and attach to the Secretary.[107]

It would seem that the Secretary should be able to strike certain provisions as against public policy, thereby providing a second level of protection for the employee-complainant. After all, it was public policy that originally encouraged the employee-complainant to blow the whistle on nuclear power plant contractors

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101. *Id.*

102. *Id.* This action, the court held, did not constitute abuse of discretion. *Id.* at 1157-58.

103. *Id.* at 1154.

104. *Id.* The court instead found it "inconsistent with the statute . . . that [the Secretary] can strike certain terms, and enforce the remainder, of a settlement without the consent of both the complainant and the company." *Id.*

105. *Id.* at 1155.

106. *Id.*; *see, e.g., Thompson*, 885 F.2d at 557. In so holding, both circuits also protect the original parties from being forced by the Secretary into material modifications to their original agreements to which they have not consented. *Macktal*, 923 F.2d at 1154.

107. *Macktal*, 923 F.2d at 1155.

and operators.[108] Such settlements may be products of mismatched "David and Goliath" negotiations in which a lone employee chooses to stand up to a large, economically superior corporation. As a second level of protection, the Secretary should be afforded discretionary power to strike provisions contrary to public policy.[109]

The *Macktal* court skirted this policy protection argument and instead focused on protecting the relative positions of the parties.[110] By applying the *Thompson* analysis to the *Macktal* case, the court, in effect, held that the Secretary's action to strike paragraph three added a material condition to the original agreement and provided plaintiff with a benefit he was not able to achieve in his original negotiation with Brown & Root.[111]

If parties voluntarily enter into a settlement and submit the agreement to the Secretary for approval, the agreement terms should be viewed as *prima facie* evidence of the intent of the parties. In the original settlement, plaintiff yielded his right to continue his whistle-blowing activities in subsequent administrative and judicial proceedings and therefore conferred a substantial benefit to Brown & Root.[112] Regardless of plaintiff's other allegations concerning the settlement, he never expressed dissatisfaction with paragraph three. By his silence, one may conclude he approved the provision.

If the court upheld the Secretary's decision, Brown & Root would forfeit this negotiated benefit without being afforded an opportunity to offer input to the Secretary. The danger of such precedent is that while this matter involved a benefit forfeited by the employer, the next reviewing court could encounter a supposedly protected employee who forfeited a negotiated benefit without a forum for input.

VI. CONCLUSION

In its holding, the *Macktal* court bolsters protection of original settlements entered into and submitted under Section 210 of the Energy Reorganization Act. By requiring the Secretary to either accept, reject, or modify Section 210 settlements with the consent of the original parties, the court has not barred the Secretary from influencing the agreement or advancing public policy. On the

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108. *See generally* Fisher, *The Whistleblower Protection Act of 1989: A False Hope For Whistleblowers*, 43 RUTGERS L. REV. 355 (1991). The Energy Reorganization Act seeks to "protect employees who assist or participate in actions to carry out the purposes of the federal statutes regulating the nuclear energy industry." *Id.* at 408-09 n.351.

109. The very nature of the stricken provision of the settlement in *Macktal* aptly illustrates such an argument. The entire matter began when plaintiff identified potential problems with the construction of the Comanche Peak plant. *Macktal*, 923 F.2d at 1151. Any settlement provision wherein he agrees to resist testifying at any investigatory proceeding concerning the safe operation of Comanche Peak would fly in the face of the policy buttressing Section 210.

110. *Macktal*, 923 F.2d at 1155.

111. *See Thompson*, 885 F.2d at 557.

112. *Macktal*, 923 F.2d at 1152.

contrary, the Secretary's power to reject the entire settlement as against public policy has not been invalidated. Any policy concerns held by the Secretary need not be stifled, but the original parties cannot be left out of the process in the name of expediency.

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