



**Issue Date: 27 January 2016**

CASE NO. 2013-TSC-00001  
2013-CAA-00003

*In the Matter of*

**MICHAEL J. MADRY,**  
Complainant,

v.

**EMLAB P&K, LLC,**  
Respondent.

**ORDER DENYING MOTION TO SEAL**

The parties have settled this matter and submitted their settlement agreement for review and approval. They also moved to seal the settlement agreement. The Solicitor joined the motion on behalf of the Department of Labor. I approved the parties' settlement agreement in a separate order. I will deny the motion to seal.

On the motion to seal, the parties argue that an online article, posted on October 28, 2015, presents a biased and defamatory story concerning the denial of Respondent's motion for summary decision. They are concerned that, if the reporter who wrote that story learns of the settlement, the reporter will publish another biased and defamatory article about the case. In addition, they point to former OSHA investigator Darrell Whitman's use of this case to promote his whistleblower claim against OSHA. They are concerned that the settlement will become the subject of false allegations of criminal corruption and wrongdoing.

Discussion

Adjudicative filings may not be sealed absent a showing that the reasons to seal outweigh the presumption of public access. *See* 29 C.F.R. § 18.85(b). The common-law right of access to judicial records is well-established. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).<sup>1</sup> "This right of access bolsters public confidence in the judicial system by allowing citizens to evaluate the reasonableness and fairness of judicial proceedings and to keep a watchful eye on the workings of public agencies." *IDT Corp. v. eBay*, 709 F.3d 1220, 1222 (8th

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<sup>1</sup> Eleven Circuits, including the Eighth (which is controlling here), apply this right to civil cases as well as criminal. *IDT Corp. v. eBay*, 709 F.3d 1220, 1222 (8th Cir. 2013) (citations omitted).

Cir. 2013) (citations omitted). It also provides a “measure of accountability to the public at large, which pays for the courts.” *Id.*<sup>2</sup>

The right is not absolute. *See Nixon* at 597-98, *IDT* at 1221.

Where the common-law right of access is implicated, the court must consider the degree to which sealing a judicial record would interfere with the interests served by the common-law right of access and balance that interference against the salutary interests served by maintaining confidentiality of the information sought to be sealed.

*IDT* at 1223; 29 C.F.R. § 18.85(b).

As the Supreme Court held, “The decision as to access is one best left to the sound discretion of the trial court . . . in light of the relevant facts and circumstances of the particular case.” *Nixon* at 599. For example, trade-secrets or “compelling reasons of personal privacy” may warrant sealing. *Goesel v. Boley International (H.K.) Ltd.*, 738 F.3d 831, 833 (7th Cir. 2013) (Posner, J.) But to defeat the general right of access to judicial records, the reasons for sealing must rebut the presumption that documents bearing on the “disposition of federal litigation” are “open to public view.” *Goesel*, 738 F.3d at 833.

Settlement agreements that require judicial approval fall squarely within the range of documents that generally must be made available to the public.<sup>3</sup> *Id.* So long as the settlement is filed with the court and the judge participates in its approval, the public has an interest, and the document is presumptively public.<sup>4</sup> *Jessup v. Luther*, 277 F.3d 926, 929-30 (7th Cir. 2002) (Posner, J.).

Here, the parties move to seal a settlement agreement filed with this Office that, with the ALJ’s approval, disposes of the case. The settlement agreement is ineffective without the ALJ’s approval. *See* 29 C.F.R. § 24.111(d)(2). The public has an interest in knowing what the judge would approve and what the judge has approved in this case. It is a presumptively public document in which the people retain their common law right of access.

The parties raise some serious concerns. Any published allegation of criminal misconduct is especially troubling. But the enforcement of federal whistleblower statutes (through agencies of the Department of Labor) is an appropriate subject of public concern. It strengthens the whistleblower statute’s efficacy when people know that enforcement actions occur and lead to settlements, whether they are large or small. There is also a salutary effect when the public can

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<sup>2</sup> As Judge Easterbrook has admonished, “People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials.” *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (Easterbrook, J.).

<sup>3</sup> This is the rule even if the approval does not make the settlement agreement enforceable by contempt. *Jessup v. Luther*, 277 F.3d 926, 927, 929 (7th Cir. 2002).

<sup>4</sup> As Judge Posner wrote, the judge is not a kibitzer, but even were he, “Judicial kibitzing is official behavior. The public has an interest in knowing what terms of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to.” *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002).

monitor government activity to see what effect executive agencies are giving to the statutes of Congress.

The accuracy or propriety of the former OSHA employee's criticisms of the Department of Labor falls outside the jurisdiction of this Office. Orders aimed at cabining that former employee's criticism of OSHA is not an appropriate use of OALJ. The Department conceivably might have a legitimate interest in protecting the parties against potential future defamation or other injury at the hands this former employee, but that too is beyond the purview of OALJ. There are other alternatives for the Department to oppose the activities of its former employee.

As to any future statements that Mr. Madry might make, EmLab has achieved in the settlement agreement the protection it desires. The settlement agreement imposes a very significant cost on Mr. Madry should he disparage EmLab. Given this provision to which Mr. Madry has agreed, there is little need to impede the public's right to access to judicial and administrative records.

As to the former OSHA employee, that employee does not seem focused on this case other than as an example of what he asserts to be OSHA's shortcomings. EmLab has a legitimate concern that the OSHA employee's access to the settlement agreement might lead him to make a comment. But I do not find this sufficient to outweigh the public's right to access.

In particular, the settlement agreement contains a non-admissions clause, and the amount of the settlement is unlikely to convince an objective observer that EmLab had admitted liability in fact even if denying it in words. The agreement, objectively viewed, shows nothing more than a routine compromise of a disputed claim. The risk that someone might misconstrue the agreement as meaning more than that cannot justify obstacles to public access to the records and files of this Office.

Hearings before this Office are public unless the authorizing statute, its implementing regulations, or an executive order provide otherwise. *See* 29 C.F.R. §§ 18.10(a), 18.81(a). Nothing in the Act, regulations, or executive order limits the general rule here. I do not find that the reasons to seal outweigh the presumption of public access here. *See* 29 C.F.R. § 18.85(b).

Nonetheless, I will affix to the settlement agreement a statement concerning the parties' views as they might become relevant on any FOIA request.

#### Order

The parties' motion to seal the settlement agreement is DENIED. The settlement agreement will be noted as follows:

#### NOTICE TO THE DOL FOIA OFFICER:

In the event that this settlement agreement is the subject of a FOIA request, Respondent asserts that the settlement agreement is exempt from production

under FOIA Exemption 4. Respondent requests notice and an opportunity to object to any FOIA production of the settlement agreement. *See* 29 C.F.R. § 70.26.

SO ORDERED.

STEVEN B. BERLIN  
Administrative Law Judge