No. 04-1525

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BARBARA TAYLOR,

Plaintiff-Appellant,

v.

PROGRESS ENERGY, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of North Carolina

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING *EN BANC*

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Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Defendant-Appellee's petition for rehearing *en banc*. Rehearing *en banc* is appropriate in this case because the panel opinion "presents a question of exceptional importance" (Fed. R. App. P. 35(b)(1)(B)).[1] First, it misreads

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[1] The original panel opinion in this case was issued on July 20, 2005. *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005). On June 14, 2006, panel rehearing was granted and the original opinion was vacated. The panel reinstated its prior opinion by published opinion on July 3, 2007. *Taylor v. Progress Energy, Inc.*, 2007 WL 1893362 (4th Cir. 2007). This brief will refer to the panel's opinions as *Taylor I* and *Taylor II*, respectively. Judge Duncan filed a dissenting opinion in *Taylor II*, 2007 WL 1893362, at *7-8.

the Secretary's regulation regarding the waiver of rights under the Family and Medical Leave Act ("FMLA" or "Act"), 29 U.S.C. 2601 *et seq.*, as prohibiting all private settlements of FMLA claims, thereby creating a conflict with the Fifth Circuit as to the scope of the regulation. *Compare Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 321 (5th Cir. 2003) ("A plain reading of the regulation is that it prohibits prospective waiver of rights, not the post-dispute settlement of claims") *with Taylor I*, 415 F.3d at 368 ("The regulation's plain language prohibits both the retrospective and prospective waiver or release of an employee's FMLA rights.").[2] Such a reading also is inconsistent with the judicial construction of virtually every other federal employment statute.

Second, if the panel's decision is allowed to stand, parties will not be able to settle FMLA claims or enter into FMLA-related severance agreements without first seeking the approval of the Department of Labor ("Department") or a federal

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[2] The Secretary's citations to *Faris* in its prior brief to this Court were intended to indicate that the Department of Labor agreed with the Fifth Circuit's holding that 29 C.F.R. 825.220(d) does not prohibit the retrospective settlement of FMLA claims. *See Faris*, 332 F.3d at 319 ("We conclude that the proper reading of the regulation is that it does not apply to post-dispute claims for damages under the FMLA."). The Department has never endorsed the Fifth Circuit's conclusion that the prospective bar on waiver applied only to the waiver of substantive rights and not the waiver of proscriptive rights under the FMLA. *See* Secretary's Brief at 4 n.6 in *Dougherty v. TEVA Pharms. USA, Inc.* (cited by the panel in *Taylor II*).

court. Instituting such a requirement would significantly delay the ability of employees to receive compensation for their claims. It would also require the Department to reallocate significant resources that are currently used to investigate FMLA and other labor standards complaints filed with the Department.[3]

INTEREST OF THE SECRETARY OF LABOR

The Secretary is responsible for promulgating legislative rules under the FMLA. *See* 29 U.S.C. 2654. Pursuant to this statutory authority, the Department has promulgated regulations at 29 C.F.R. Part 825. At issue here is the proper interpretation of the Department's regulation regarding waiver of FMLA rights and its impact on the private settlement of FMLA claims. *See* 29 C.F.R. 825.220(d). The Secretary has a paramount interest in the correct interpretation of her FMLA regulations and the proper administration of the statute.

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[3] The importance of this issue is underscored by the fact that since the panel's decision in *Taylor I*, two district courts in other circuits have addressed the application of section 220(d) to settlement agreements and have reached differing conclusions. *Compare Dougherty v. TEVA Pharms. USA, Inc.*, 2007 WL 1165068, at *6 (E.D. Pa. 2007) (holding on reconsideration that "Section 825.220(d) does not prohibit an employee from waiving past FMLA claims as part of a severance agreement or settlement") *with Brizzee v. Fred Meyer Stores, Inc.*, 2006 WL 2045857, at *11 (D. Or. 2006) (following *Taylor I* and holding that release in severance agreement was unenforceable under section 220(d) in the absence of Department or court approval) (motion for certification of issue for immediate appeal pending; action stayed on September 13, 2006, pending ruling in *Taylor II*).

ARGUMENT

THE SECRETARY'S REGULATION AT 29 C.F.R. 825.220(d) PROHIBITS ONLY THE PROSPECTIVE WAIVER OF FMLA RIGHTS, NOT THE SETTLEMENT OF FMLA CLAIMS BASED ON PAST CONDUCT

The panel's ruling, which would prohibit all settlements of FMLA claims that are not first approved by either a court or the Department, directly conflicts with the terms of section 220(d) and with the Department's reasonable interpretation of that regulation, as well as with the Department's consistent practice since the Act's implementation. It also disregards longstanding case law construing virtually every other federal employment statute to encourage private settlements of claims but to prohibit prospective waivers of statutory rights. The ruling would prevent employers from settling claims with finality, and employees from obtaining compensation without the inevitable delay of filing a lawsuit or seeking Department "supervision."

1. Both *Taylor I* and *Taylor II* focused only on the first sentence of section 220(d), which reads "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." 29 C.F.R. 825.220(d). By its terms, however, that first sentence regulates only the waiver of FMLA rights and makes no mention of the settlement or release of claims. The regulatory reference to waiver of rights is shorthand for a very important and well-understood dichotomy: the ability of an

employee to settle disputes based on past employer misconduct versus the inability of an employee to agree to permit his employer to engage in future misconduct. *See DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 729 (3d Cir. 1995). Indeed, when the regulation is read in its entirety, the only reasonable reading is that the prohibition on waiving rights was intended to apply only to the prospective waiver of rights under the FMLA. *See Monger v. Bowen*, 817 F.2d 15, 17 (4th Cir. 1987) (noting the need to read regulations "as a whole"); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 528 (1994) (Thomas, J., dissenting) (regulatory language must be read in context "because interpreting a statute or regulation is a holistic endeavor") (internal quotation marks and citation omitted).[4]

The second sentence of section 220(d) clearly indicates that the regulation is intended to bar the bargaining away of only employees' future FMLA rights, stating: "For example, employees (or their collective bargaining representatives) cannot 'trade off' the right to take FMLA leave against some other benefit offered by the employer." 29 C.F.R. 825.220(d)

[4] Because section 220(d) is correctly read as not restricting the settlement of private FMLA claims, two circuit courts have addressed the validity of such settlements without referring to the regulation. *See Halvorson v. Boy Scouts of Am.*, 215 F.3d 1326 (6th Cir. 2000) (Table); *Schoenwald v. ARCO Alaska*, 191 F.3d 461 (9th Cir. 1999) (Table).

(emphasis added). The regulation thus precludes, for instance, an employer from offering a new employee six weeks of paid maternity leave in exchange for waiving her right to 12 weeks of unpaid FMLA leave.

The final two sentences of the regulation set forth the only exception to the bar on waiving future FMLA rights. They begin, "This [bar] does not prevent an employee's voluntary and uncoerced acceptance . . . of a 'light duty' assignment while recovering from a serious health condition . . . ." 29 C.F.R. 825.220(d). Without this "carve out," the regulation would have prevented employees who were on FMLA leave from returning to work by voluntarily accepting a light-duty job, because the offer of such a position could be viewed as an inducement to waive their right to return to the same or an equivalent position. *See* 29 U.S.C. 2614(a)(1).[5]

This reading is consistent with the established precedent in employment law disfavoring prospective waivers, but encouraging the settlement of claims. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974) ("Although presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement, . . . an employee's rights under

[5] The regulation goes on to make clear that when employees voluntarily accept offers of "light duty" positions, their right to restoration to the same or an equivalent position continues to run during the time that they fill the modified position. 29 C.F.R. 825.220(d).

Title VII are not susceptible of prospective waiver."); *Richardson v. Sugg*, 448 F.3d 1046, 1054-55 (8th Cir. 2006); *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 116-17 (2d Cir. 2000); *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 584 (6th Cir. 1996); *Kendall v. Watkins*, 998 F.2d 848, 851 (10th Cir. 1993); *Rogers v. Gen. Elec. Co.*, 781 F.2d 452, 454-55 (5th Cir. 1986). Indeed, the panel's opinion in *Taylor I* acknowledged the "general public policy favoring the post-dispute settlement of claims." *Taylor I*, 415 F.3d at 373.

Accordingly, section 220(d) read as a whole is a reasonable interpretation of the FMLA. As such, it is entitled to controlling deference. *See Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2345-46 (2007) ("When an agency fills . . . a [statutory] 'gap' reasonably, and in accordance with other applicable (*e.g.*, procedural) requirements, the courts accept the result as legally binding."); *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984); *Sommer v. The Vanguard Group*, 461 F.3d 397, 399 n.2 (3d Cir. 2006); *Harrell v. United States Postal Serv.*, 445 F.3d 913, 927 (7th Cir.), *cert. denied*, 127 S. Ct. 845 (2006).

2. Even if, contrary to the Department's reading, the regulation is deemed ambiguous, the Secretary's permissible interpretation of the regulation is entitled to controlling

deference. *See Long Island Care*, 127 S. Ct. at 2349; *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *see also Barnhart v. Walton*, 535 U.S. 212, 217 (2002) ("Courts grant an agency's interpretation of its own regulations considerable legal leeway."); *Thomas Jefferson Univ.*, 512 U.S. at 512 ("[T]he agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.") (internal quotation marks an citation omitted); *District Mem'l Hosp. v. Thompson*, 364 F.3d 513, 518 (4th Cir. 2004) ("The agency's interpretation need not be the best or most natural one by grammatical or other standards. Rather it need only be *a* reasonable construction of the regulatory language.") (internal quotation marks and citation omitted). As Judge Duncan noted in her dissent in *Taylor II*, once the Secretary set forth her interpretation of section 220(d) in her amicus brief, the question in the case became not whether the panel's opinion in *Taylor I* represented a reasonable interpretation of the regulation, but whether the panel's interpretation was "compelled by the language of the regulation." *Taylor II*, 2007 WL 1893362, at *7; *see IntraComm, Inc. v. Bajaj*, 2007 WL 1933887, at *8 (4th Cir. 2007) ("[T]he existence of two arguably plausible but conflicting interpretations convinces us that the . . . regulation is at best ambiguous. . . . Because of this ambiguity, and because the Secretary's interpretation is

consistent with the plain meaning of the regulation, we are bound to defer to it."); *Sigma-Tau Pharms., Inc. v. Schwetz*, 288 F.3d 141, 146 (4th Cir. 2002) (noting that review of an agency's interpretation of its own regulation "is more deferential than that afforded under Chevron") (internal quotation marks and citation omitted).

The Department has never interpreted section 220(d) as restricting the settlement of FMLA claims based on past conduct. Rather, based on longstanding judicial precedent encouraging the settlement of employment claims, *see, e.g., Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981), the Department has consistently interpreted section 220(d) to bar only the prospective waiver of FMLA rights and not the retrospective settlement of FMLA claims. Consistent with this interpretation, the only settlements of FMLA claims that the Department has ever reviewed are those involving claims filed directly with, and investigated by, the Wage and Hour Division. Thus, the Department is entitled to controlling deference for its reasonable interpretation of section 220(d) because it represents the Department's considered opinion and is consistent with its longstanding application of the regulation. *See IntraComm*, 2007 WL 1933887, at *8 (noting that deference to the Secretary's interpretation of her regulation "is all the more warranted because the Department of Labor . . . has long

interpreted the . . . regulation in a manner consistent with that presented in the Secretary's brief").[6]

3. Contrary to the panel's opinion in *Taylor II*, the preamble discussion of the waiver bar does not indicate that the bar applies to the retrospective settlement of claims. Instead, the preamble mirrors the regulatory text in using the terms "rights" and "claims" as shorthand for the well accepted dichotomy between the ability of an employee to settle claims based on past conduct versus the inability of an employee to waive rights prospectively. The Department's preamble reference to treating waivers of rights under the FMLA in a manner consistent with their treatment under "other labor standards statutes such as the FLSA" is therefore correctly read as an indication of the Department's intent that the prohibition

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[6] As the Supreme Court noted in *Auer*, where the Secretary's position reflects "the agency's fair and considered judgment on the matter in question," the fact that it is first articulated in a legal brief does not lessen the deference it should be accorded. 519 U.S. at 462; *see also Long Island Care*, 127 S. Ct. at 2349 (deferring to Secretary's interpretation of regulation as set forth in a legal brief and in an internal memorandum written in response to litigation, because the agency's course of action indicated that the interpretation reflected its "considered views"); *IntraComm*, 2007 WL 1933887, at *9 n.6; *Senger v. City of Aberdeen, S.D.*, 466 F.3d 670, 674 (8th Cir. 2006), *cert. denied*, 127 S. Ct. 2251 (2007); *Belt v. EmCare, Inc.*, 444 F.3d 403, 415-17 (5th Cir.), *cert. denied*, 127 S. Ct. 349 (2006); *United States v. Occidental Chem. Corp.*, 200 F.3d 143, 151-52 (3d Cir. 1999).

affect only prospective waiver of FMLA rights. 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995).[7]

The Department's failure to respond specifically to the comments requesting explicit allowance of the settlement of FMLA claims in a severance agreement is consistent with the Department's understanding that the regulation, by its terms, did not bar the retrospective compromise of claims. As with the regulation itself, the examples in the preamble address only the prospective waiver of rights. The first example mirrors the light duty example in the regulatory text discussed above. The second example, which involves early-out retirement programs (that require employees on FMLA leave at the closing date of the program to waive their rights to continue on leave and to return to employment), was added in direct response to a concern about the impact of section 220(d) on such programs. The Department noted that such agreements were not barred by the waiver provision because "[u]nder these circumstances, FMLA rights would cease because the employment relationship ceases, and the employee would not otherwise have continued employment." 60

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[7] Further, because the settlement restrictions of the Fair Labor Standards Act ("FLSA") are unique, *see infra*, the panel erred in reading this reference to the FLSA as a statement of Departmental intent to engraft that statute's unique restrictions on settlement onto the FMLA. If the Department intended the unique restrictions on the settlement of FLSA claims to apply to FMLA claims, it would have indicated its intent to do so unequivocally.

Fed. Reg. at 2219. The preamble text, like the regulatory text, is thus consistent with the Department's understanding that agreements such as the severance agreement at issue in this case are beyond the scope of the section 220(d).[8]

4. The panel also erred in relying on the FLSA for its conclusion that private settlement of FMLA disputes is not permitted. The FLSA is unique among employment statutes in prohibiting the private settlement of claims based on past employer conduct without either Departmental or court authorization. *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981); *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114-15 (1946); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706-07 (1945); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986); *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353-54 (11th Cir. 1982). The judicial prohibition against private settlements, and consequent requirement that all FLSA settlements must be approved by the Department or a court, is based on policy considerations unique to the FLSA. The FLSA is a remedial statute setting the floor for minimum wage and overtime pay. It was intended to protect

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[8] In her dissent, Judge Duncan noted that any change in the Department's interpretation of section 220(d) "over time" would not lessen the deference to which the current interpretation is due. *Taylor II*, 2007 WL 1893362, at *8 (citing *Long Island Care*, 127 S. Ct. at 2349).

the most vulnerable workers, who lacked the bargaining power to negotiate a fair wage or reasonable work hours with their employers, and as such it is alone among federal employment statutes in its restriction on settlements. *See Brooklyn Sav. Bank*, 324 U.S. at 706-07.

Courts consistently have rejected attempts to apply the FLSA's unique settlement restrictions to other employment statutes, including the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 621 *et seq.*, which includes an enforcement provision that expressly references the FLSA's supervised settlement provision. *See* 29 U.S.C. 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of [the FLSA] . . . .").[9] Despite the strong statutory link between the ADEA and the FLSA, courts refused to apply to ADEA claims the requirement that settlements must be approved by a court or supervised by an administrative agency. *See Runyan v. Nat'l Cash Register Corp.*,

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[9] In contrast to the ADEA, the FMLA's enforcement provision does not reference the FLSA's supervised settlement provision (section 216(c)). *See* 29 U.S.C. 2617(b) ("The Secretary shall receive, investigate, and attempt to resolve complaints of violations of [the FMLA] in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 206 and 207 of the [FLSA]."). Consistent with the FMLA's statutory authorization, the Secretary has established an administrative process pursuant to which the Wage and Hour Division investigates and attempts to resolve FMLA complaints in the same way that FLSA complaints are handled.

787 F.2d 1039, 1043 (6th Cir.) (*en banc*), *cert. denied*, 479 U.S. 850 (1986); *see also Gormin v. Brown-Forman Corp.*, 963 F.2d 323, 326 (11th Cir. 1992) (collecting cases holding unsupervised settlement of ADEA claims to be valid). As the Supreme Court noted in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and as is equally true under the FMLA, "[N]othing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes. Such disputes can be settled, for example, without any EEOC involvement." *Id.* at 28. Indeed, when Congress did intend to regulate ADEA settlements, it enacted a specific statutory provision (the Older Workers Benefit Protection Act ("OWBPA")) for that purpose. The FMLA, which was enacted only three years after the OWBPA, is notably devoid of any statutory provision restricting the voluntary settlement of claims. *See Rivera-Flores v. Bristol-Myers Squibb Caribbean*, 112 F.3d 9, 11 (1st Cir. 1997) (noting that the Americans with Disabilities Act does not contain special procedures for settlements such as those in the OWBPA).

Finally, the policy considerations underlying the settlement of FMLA claims are much more akin to those underlying the ADEA, the Americans with Disabilities Act ("ADA"), and Title VII, all of which permit unsupervised settlement of claims. *See United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (Title VII); *Rivera-Flores*, 112 F.3d at 11 (ADA); *O'Shea*

v. Commercial Credit Corp., 930 F.2d 358, 361 (4th Cir. 1991) (ADEA). Like those statutes, the FMLA is not primarily focused on pay, and protects all segments of the workforce, from low wage workers to highly paid professionals. Also, as with those laws and unlike the FLSA, almost all claims under the FMLA are individual claims, generally brought by employees who have been terminated or denied reinstatement and are seeking damages and equitable relief.

CONCLUSION

For the reasons set forth above, the Secretary requests that this Court grant the Defendant's petition for rehearing *en banc*.

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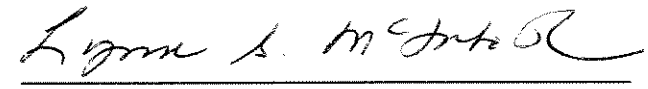

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CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing Brief For The Secretary Of Labor As *Amicus Curiae* In Support Of Defendant-Appellee's Petition For Rehearing *En Banc* have been served using either Federal Express or first-class mail, postage prepaid (as indicated), this 16th day of July 2007, on the following counsel:

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