IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA DOUGHERTY,	:	
Plaintiff,	:	
v.	:	CA No. 05-02336
TEVA PHARMACEUTICALS USA, INC.,	:	
Defendant.	:	

BRIEF OF THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT'S MOTION TO RECONSIDER THE AUGUST 30, 2006 ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR SUMMARY JUDGMENT

The Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Defendant's Motion to Reconsider this Court's August 30, 2006 Order ("Order") denying Defendant's Motion for Judgment on the Pleadings and/or Summary Judgment.[1] The Department respectfully submits that this Court should reconsider its Order denying Defendant TEVA Pharmaceuticals' ("TEVA") Motion and, based upon the reasons set forth below, should hold that the Department's regulation at 29 C.F.R.

[1] On September 27, 2006, the Department of Labor ("Department") submitted a letter to this Court requesting permission to file an *amicus* brief by October 27, 2006, in support of Defendant's motion for reconsideration. The Court granted the Department's request via telephone on October 4, 2006 and, on October 25, 2006, granted the Department's request for additional time in which to file the brief up to, and including, November 3, 2006.

825.220(d) does not bar Plaintiff Barbara Dougherty ("Dougherty") from settling her claims for past violations of the Family and Medical Leave Act ("FMLA" or the "Act"), 29 U.S.C. 2601 *et seq.*, pursuant to a valid release of claims.[2]

The Secretary's interest in participating in this action arises from her responsibility for administering the FMLA, including promulgating legislative rules under the Act. *See* 29 U.S.C. 2654. Pursuant to her statutory authority, the Secretary has promulgated regulations at 29 C.F.R. Part 825. The Secretary has a paramount interest in the correct interpretation of these regulations.[3]

ISSUE PRESENTED

The Secretary's regulation at 29 C.F.R. 825.220(d) states, in part, that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." The

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[2] The Department expresses no opinion on whether the release at issue in this case is valid under applicable state law.

[3] This Court, of course, has the inherent power to reconsider its August 30, 2006 Order in the interest of justice at any time prior to entry of a final judgment. *See United States v. Jerry*, 487 F.2d 600, 604-06 (3d Cir. 1973); *Deily v. Waste Mgmt.*, No. 00-1100, 2000 WL 1858717, at *1 (E.D. Pa. 2000); *Philadelphia Reserve Supply Co. v. Nowalk & Assocs., Inc.*, 864 F. Supp. 1456, 1460-61 (E.D. Pa. 1994). The interests of justice are served by reconsideration in this case because this Court based its order on an erroneous understanding of the Department's waiver regulation at 29 C.F.R. 825.220(d). In reaching its conclusion, this Court did not have the benefit of a full explication of the Department's interpretation of section 220(d) as set forth below.

question presented is whether this legislative rule barring waivers of FMLA rights by employees also prohibits settlements of FMLA claims based on past employer actions.

PROCEDURAL HISTORY

TEVA initially filed a Motion for Judgment on the Pleadings and/or Summary Judgment ("motion"), with an accompanying memorandum, on August 9, 2005. In May 2006, following this Court's appointment of counsel for Dougherty and the filing of an Amended Complaint, TEVA filed a supplement to its memorandum of law in support of the motion. By letter dated August 1, 2006, this Court, *sua sponte*, raised the issue of the application of the Department's regulation at section 825.220(d) to the release at issue in the case and requested that the parties submit supplemental briefing addressing the regulation. Supplemental briefs were filed by Dougherty and TEVA on August 9 and 15, 2006, respectively.

This Court ruled on TEVA's motion on August 30, 2006, noting that "the question of whether an employee can, as part of the severance agreement, waive his or her right to sue for violations of the FMLA appears to be a matter of first impression in this circuit." Slip op. at 10.[4] The Court began

[4] Whether a waiver of FMLA claims is barred by section 220(d) does not turn on whether it takes the form of a general release in a severance agreement or the settlement of a specific FMLA claim.

its analysis of the issue by noting that the FMLA is silent as to the waiver of claims under the Act, and that the Secretary has the authority to promulgate regulations under the FMLA. *Id.*; *see* 29 U.S.C. 2654.

This Court then analyzed the only two federal appellate court decisions that address this issue, *Faris v. Williams WPC-1, Inc.*, 332 F.3d 316 (5th Cir. 2003), and *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005), *vacated* June 14, 2006. Slip op. at 11-14.[5] It rejected the distinction drawn by the Fifth Circuit in *Faris* between the application of section 220(d) to waiver of substantive rights and its application to proscriptive rights under the FMLA. *Id.* at 15-16; *see Faris*, 332 F.3d at 320-21.[6] This Court instead adopted the overly broad

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[5] This Court was aware of the Fourth Circuit's order vacating its opinion in *Taylor*. The Fourth Circuit did not give any reasons for the vacature. However, the sole basis for Progress Energy's petition for rehearing in *Taylor* was the panel's erroneous application of section 220(d) to void the release in that case. The Department filed a brief as *amicus curiae* in support of Progress Energy's petition for rehearing on the ground that the Fourth Circuit misinterpreted the Department's waiver regulation when it held that an employee could not release in a separation agreement claims for violations of the FMLA that took place during the course of the employee's employment. Oral argument pursuant to the Fourth Circuit's grant of panel rehearing in *Taylor* took place on October 25, 2006, with the Department presenting argument as *amicus*.

[6] The Department agrees with the Fifth Circuit's decision in *Faris* to the extent that the court held that section 220(d) prohibits only the prospective waiver of FMLA rights. The court in *Faris* erred, however, in concluding that the prospective bar on waiver applied only to the waiver of substantive rights and

reading of both the first sentence of the regulatory text and the preamble discussion of the regulation set forth in the vacated decision in *Taylor*, holding that section 220(d) "prohibits an employee from waiving the right to sue for FMLA violations through a severance agreement." Slip op. at 17.

ARGUMENT

SECTION 220(d) PROHIBITS ONLY THE PROSPECTIVE WAIVER OF FMLA RIGHTS

This Court's ruling, which would prohibit all settlements of FMLA claims that are not first approved by either a court or the Department, is erroneous as a matter of law.[7] It directly

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not the waiver of proscriptive rights under the FMLA. *See* 332 F.3d at 320-21. Under the Fifth Circuit's reasoning, while an employee could not prospectively waive her right to take FMLA leave (a substantive right under the Act), she could prospectively waive her right to sue for discrimination for having taken such leave (a proscriptive right). The Department construes the regulation as barring the prospective waiver of any right under the FMLA.

[7] Contrary to the only appellate ruling on this issue (*Faris*), three other district courts have concluded that the regulation prohibits both the prospective waiver of FMLA rights and the settlement of FMLA claims. *See Brizzee v. Fred Meyer Stores, Inc.*, No. 04-1566, 2006 WL 2045857 (D. Or. July 17, 2006), *appeal docketed*, No. 06-35757 (9th Cir. Sep. 6, 2006); *Dierlam v. Wesley Jessen Corp.*, 222 F. Supp. 2d 1052 (N.D. Ill. 2002); *Bluitt v. EVAL Co. of Am., Inc.*, 3 F. Supp. 2d 761 (S.D. Tex. 1998). Other courts at both the appellate and district court level, however, have approved the validity of private settlements of FMLA claims without referring to the regulation. *See, e.g., Halvorson v. Boy Scouts of Am.*, 215 F.3d 1326 (6th Cir. 2000) (unpublished table decision); *Schoenwald v. ARCO Alaska, Inc.*, 191 F.3d 461 (9th Cir. 1999) (unpublished table decision); *Kujawski v. U.S. Filter Wastewater Group, Inc.*, No. 00-1151, 2001 WL 893918 (D. Minn. Aug. 7, 2001).

conflicts with the regulation itself, as well as with the Department's reasonable interpretation of its own regulation and its 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. Requiring federal court or Department supervision for the release of claims would prevent employers from settling claims with finality, and employees from obtaining the compensation due to them without the inevitable delay of filing a lawsuit or seeking Department "supervision."

A. Section 220(d) by its Terms Bars only Prospective Waivers

This Court's Order, following the Fourth Circuit's vacated opinion in *Taylor*, focused on the first sentence of section 220(d). By its terms, however, that first sentence regulates only the prospective waiver of FMLA rights and makes no mention of the settlement or release of claims. These terms are 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. As the Third Circuit recognized in *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719 (3d Cir.), *cert. denied*, 516 U.S. 916 (1995), waiver of a claim of employment discrimination is based upon past

conduct and is distinct from waiving the right to be free from discrimination in the future. *See* 48 F.3d at 729 (The district court's error was "in large part due to the conflation of the notion of a 'right' with the notion of an accrued 'claim.' A right to be free prospectively from certain forms of discrimination always is worth something; however, whether a person has accrued a claim based on a right depends entirely on what previously has occurred.").

This Court also followed the vacated *Taylor* opinion in focusing on the word "waiver" instead of on the word "rights" in the first sentence of the regulation. Slip op. at 16 n.10. It agreed with the mistaken conclusion in *Taylor* that the word "waiver" indicates that the regulation applies both prospectively and retrospectively. *Id.* The operative term in the regulation, however, is not "waiver" but "rights," which, as made clear by the remaining sentences in section 220(d), refers to an employee's future FMLA rights and not to claims based on past employer actions.[8]

The second sentence of section 220(d) clearly indicates that the regulation is intended to bar the bargaining away of

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[8] Indeed, even the definitions of waiver cited by the court in *Taylor* implicitly acknowledge a distinction between 'claim' and 'right' by referring to them separately. *See Taylor*, 415 F.3d at 370 (citing definition of "waive" in Webster's Third New International Dictionary as reading, in part, "to relinquish voluntarily (as a legal right) . . . to refrain from pressing or enforcing (as a claim or rule)").

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). The regulation makes clear, therefore, that an employer could not, for example, offer a new employee six weeks of paid maternity leave in exchange for waiving her right to 12 weeks of unpaid FMLA-protected 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). 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. When read in its entirety, therefore, it is clear that section 220(d) addresses only

prospective FMLA rights. *See Sekula v. FDIC*, 39 F.3d 448, 454 (3d Cir. 1994) (in interpreting a regulation, "[o]ne must look at the entire provision, rather than seize on one part in isolation").[9]

Section 220(d)'s prohibition against the prospective waiver of rights, but not the retrospective settlement of claims, is consistent with the established precedent in employment law disfavoring prospective waivers of rights, but encouraging 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 Title VII are not susceptible of prospective waiver."); *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 116-17 (2d Cir. 2000) ("Accordingly, a firm cannot buy from a worker an exemption from the substantive protections of the anti-discrimination laws because workers do not have such an exemption to sell, and any contractual term that purports to confer such an exemption is invalid."); *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 584 (6th Cir. 1995) ("It is the general rule in this circuit that an employee may not prospectively waive his or her rights under either Title VII or the ADEA."); *Kendall v. Watkins*, 998 F.2d

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[9] The Fourth Circuit in its vacated opinion in *Taylor* did not refer to any portion of the regulatory text other than the first sentence. *See* 415 F.3d at 369-71.

848, 851 (10th Cir. 1993) ("In other words, an employee may agree to waive Title VII rights that have accrued, but cannot waive rights that have not yet accrued."), *cert. denied*, 510 U.S. 1120 (1994).

Accordingly, section 220(d) is a reasonable interpretation of the FMLA. As such, it is entitled to controlling deference. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (when considering whether an agency's interpretation of the statute is permissible, "a reviewing court . . . is oblig[ated] to accept the agency's position if . . . the agency's interpretation is reasonable); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (an agency's interpretation must be upheld unless it is "arbitrary, capricious, or manifestly contrary to the statute"); *Sommer v. The Vanguard Group*, 461 F.3d 397, 399 n.2 (3d Cir. 2006) (Department's FMLA regulations entitled to controlling deference); *Harrell v. United States Postal Serv.*, 445 F.3d 913, 927 (7th Cir. 2006) (controlling *Chevron* deference accorded to Department's reasonable interpretation of the FMLA's return-to-work medical certification provision as contained in a legislative rule), *petition for cert. filed*, 75 U.S.L.W. 3066 (U.S. Aug. 2, 2006) (No. 06-192).

B. The Department's Reasonable Interpretation of Section 220(d) Is Entitled to Controlling Deference

Even if, contrary to the plain meaning of section 220(d), the regulation is deemed ambiguous, the Secretary's permissible interpretation of the regulation is entitled to controlling deference. *See Auer v. Robbins*, 519 U.S. 452 (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."); *Facchiano Constr. Co. v. United States Dep't of Labor*, 987 F.2d 206, 213 (3d Cir.) ("[A]n administrative agency's interpretation of its own regulations receives even greater deference than that accorded to its interpretation of a statute."), *cert. denied*, 510 U.S. 820 (1993).[10] The regulation was never intended to restrict, nor has the Department ever interpreted it as restricting, the retrospective settlement of FMLA claims.[11] Rather, the Secretary, based on longstanding

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[10] Indeed, 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 Senger v. City of Aberdeen, S.D.*, ___ F.3d ___, 2006 WL 2787852, at *3 (8th Cir. 2006); *Belt v. EmCare, Inc.*, 444 F.3d 403, 415-17 (5th Cir.), *cert. denied*, No. 05-1658, 2006 WL 2795157 (Oct. 2, 2006); *United States v. Occidental Chem. Corp.*, 200 F.3d 143, 151-52 (3d Cir. 1999). Accordingly, the Department's interpretation as set out in this brief also is entitled to controlling deference.

[11] The Department has not issued any opinion letters directly addressing section 220(d). Two opinion letters issued under the interim regulations did, however, address the regulation. Both

judicial precedent encouraging settlement of employment claims, *see, e.g., Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981), has consistently interpreted section 220(d) to bar only the prospective waiver of FMLA rights and not the settlement of FMLA claims.

In this regard, this Court erred in concluding that the general reference in the preamble discussion of section 220(d) to the Fair Labor Standards Act ("FLSA") indicated the Department's intention to bar the private settlement of claims under the FMLA. *See* Slip op. at 16. Section 107(b)(1) of the FMLA authorizes the Secretary to "receive, investigate, and attempt to resolve complaints of violations of section 105 in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 6 and 7 of the Fair Labor Standards Act." 29 U.S.C. 2617(b)(1). This provision provides the Secretary the authority to establish the same administrative complaint procedure that she utilizes under the minimum wage and overtime provisions of the FLSA. It clearly does not, however, require the Secretary to supervise

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letters involved situations in which employees sought prospectively to waive their right to FMLA-protected leave. The Department's responses in each case made clear that the employees may not prospectively waive their FMLA rights. *See* Wage and Hour Division Opinion Letters FMLA-43 (Aug. 24, 1994) and FMLA-49 (Oct. 27, 1994), *available at* http://www.dol.gov./esa/whd/opinion/fmlana_prior2002.htm.

all FMLA settlements -- a unique, judicially-imposed requirement under the FLSA.

Consistent with the authorization in section 107(b)(1) of the FMLA, 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. When FMLA complaints are settled in the administrative process, the Secretary supervises those settlements in the same manner as she does settlements under section 16(c) of the FLSA. *See* 29 U.S.C. 216(c). Thus, where the FMLA and FLSA differ is not in the manner in which the Secretary supervises settlements, but rather in the scope of settlements that must be supervised.

The judicial doctrine establishing that FLSA rights cannot be waived or settled without federal court or Department approval is based on policy considerations unique to the FLSA, and the Department's general reference in the preamble to "other labor standards statutes such as the FLSA," 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995), was by no means intended to engraft this unique aspect of FLSA law onto the FMLA.[12] Indeed, if the Department had wanted to link the FMLA and the FLSA in this

[12] This Court specifically declined to determine whether court approval was required to settle an FMLA claim in litigation, noting that such a requirement was beyond the plain language of section 220(d). *See* Slip op. at 16 n.11.

regard, it would have referred only to the FLSA (and, more specifically, to its "supervised" settlement provision), as opposed to referring to "other labor standards statutes."

The FLSA is a broad remedial statute setting the floor for minimum wage and overtime pay. *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). It was intended to protect the most vulnerable workers who lacked the bargaining power to negotiate a fair wage or reasonable work hours with their employers. *See Brooklyn Sav. Bank*, 324 U.S. at 706-07. Based on the courts' perception of the characteristics of the workers protected by the FLSA, it is virtually alone among federal employment statutes in its restriction on settlements.

Indeed, courts have rejected attempts to apply a "supervision" requirement to other employment statutes, including the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 621 *et seq.*, which also includes an enforcement provision that is expressly based on the FLSA. *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] . . . ."). Courts consistently have refused to apply to ADEA claims the requirement that settlements must be approved by a court or supervised by an administrative agency. *See Coventry v. United States Steel Corp.*, 856 F.2d 514, 521 n.8 (3d Cir. 1988) ("We are unpersuaded, however, that the policy concerns of the FLSA that the Supreme Court sought to advance by its decisions in *Gangi* and *O'Neil* are present in ADEA cases such that a *per se* rule against releases is necessary."); *Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1043 (6th Cir.) (*en banc*) (noting that purpose of the FLSA was "to secure 'the lowest paid segment . . . a subsistence wage,'" whereas the ADEA was aimed at protecting "an entirely different segment of employees, many of whom were highly paid and capable of securing legal assistance without difficulty") (quoting *Gangi*, 328 U.S. at 116), *cert. denied*, 479 U.S. 850 (1986).[13] As the Supreme Court noted in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), "[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

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[13] It should be noted that the ADEA enforcement provision specifically references section 216 of the FLSA, which provides the Department with authority to supervise settlements. See 29 U.S.C. 626(b). The FMLA enforcement provision lacks any reference to the FLSA "supervised" settlement provision. See 29 U.S.C. 2617(b)(1).

involvement." *Id.* at 28. Indeed, when Congress did intend to regulate ADEA settlements, it enacted a specific statutory provision for that purpose.[14] The FMLA, which was enacted after the OWBPA amended the ADEA, is notably devoid of any statutory provision restricting the voluntary settlement of claims.

The policy considerations underlying the FMLA are more akin to those underlying the ADEA and Title VII than the FLSA. The FMLA protects all segments of the workforce, from low wage workers to highly paid professionals. Also, 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. Thus, in these significant respects, the FMLA is more like Title VII and the ADEA, both of which permit unsupervised settlement of claims, than the FLSA. *See United States v. N.C.*, 180 F.3d 574, 581 (4th Cir. 1999) (in entering a consent decree under Title VII, "a district court should be guided by the general principle that settlements are encouraged"); *Rivera-*

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[14] By enacting the Older Workers Benefit Protection Act ("OWBPA"), Pub. L. No. 101-433, § 201, 104 Stat. 978, 983-84 (1990) (codified at 29 U.S.C. 626(f)), Congress regulated the settlement of ADEA claims by delimiting the elements necessary to establish a knowing and voluntary settlement under the statute. Even after the OWBPA, however, ADEA claims are still subject to unsupervised settlement, so long as the conditions set forth in 29 U.S.C. 626(f) are met.

Flores v. Bristol-Myers Squibb Caribbean, 112 F.3d 9, 11 (1st Cir. 1997) ("Courts have, in the employment law context, commonly upheld releases given in exchange for additional benefits. Such releases provide a means of voluntary resolution of potential and actual legal disputes, and mete out a type of industrial justice. Thus, releases of past claims have been honored under [Title VII and the ADEA]."); (emphasis added); *Gormin v. Brown-Forman Corp.*, 963 F.2d 323 (11th Cir. 1992) (collecting cases holding unsupervised settlement of ADEA claims to be valid).

This Court also erred when it concluded that the Department's preamble discussion of section 220(d) indicated that the Department "appeared to acknowledge that § 825.220(d) would prohibit soon-to-be-former employees from waiving their right to recover for violations of the FMLA that occurred during their employment." Slip op. at 15-16. Indeed, the Department's preamble discussion of section 220(d), like the regulation itself, focuses solely on the impact of the regulation on the prospective waiver of the rights to leave and reinstatement under the FMLA. *See Senger*, 2006 WL 2787852, at *3 (controlling deference to the Department's consistent interpretation of its own regulation as contained in the preamble, a Wage and Hour opinion letter, and the Department's *amicus* brief). The Department's silence as to the specific comments regarding the

impact of the regulation on the settlement of FMLA claims in a severance agreement is properly viewed not as an acknowledgment that such agreements are barred by the regulation, but instead as an indication that the Department viewed such agreements as being beyond the scope of section 220(d).

As the examples in the preamble make clear, the Department viewed section 220(d) as barring only the prospective waiver of rights. The first example (also included in the regulatory provision) is that of an employee who waives her FMLA right to return to her original position by accepting a light duty assignment. 60 Fed. Reg. at 2118-19. As discussed above, this is an explicit "carve out" to the bar on the prospective waiver of FMLA rights.

The second example, which involves early-out retirement programs, was added in direct response to a concern about the impact of section 220(d) on such programs, specifically a concern about the regulation's bar on the prospective waiver of rights. The Department made clear in the preamble that an employee may be required to waive her right to continue on FMLA leave (and to return to her position at the end of the leave) as the condition for participation in an early-out program. *See* 60 Fed. Reg. at 2219 ("[A]n employee on FMLA leave may be required to give up his or her remaining FMLA leave entitlement to take

an early-out offer from the employer.").[15] This, however, presents no obstacle because, as the preamble notes, if an employee participates in such a program, the employee's "FMLA rights would cease because the employment relationship ceases, and the employee would not otherwise have continued employment." *Id.*[16]

Finally, the Department's consistent and long standing interpretation of section 220(d) as barring only the prospective waiver of FMLA rights is borne out by its actions. Since the passage of the FMLA, the Department has supervised only the settlement of FMLA claims arising in connection with complaints filed with the Wage and Hour Division. *Cf. Sekula*, 39 F.3d at

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[15] It should be noted that such early-out retirement programs normally require employees to execute a general release of claims related to their employment as a condition of participation in the program. The fact that the Department did not address the impact of the waiver bar on such releases in its preamble discussion of these programs is further indication that it viewed the settlement of FMLA claims as beyond the scope of the regulation.

[16] The problem with equating the waiver of FMLA rights with the settlement of FMLA claims in applying section 220(d) is made apparent in this statement. If, as is implicit in this Court's reasoning, the term "FMLA rights" encompasses the assertion of an FMLA claim based on past employer actions, then, by stating that FMLA rights cease with the employment relationship, the Department would have been indicating that an employee's ability to assert an FMLA claim also ends with the termination of her employment. Clearly, the Department never intended such a result; rather, it was referring only to an employee's future rights to continue on FMLA leave and return to her position, and not her right to file a claim based on past employer actions.

457 (deferring to an agency's consistent application of an ambiguous regulatory provision). The Department has never established a system for reviewing FMLA settlements in which no administrative complaint has been filed, something it clearly would have done had it intended section 220(d) to require such supervision.

In order to comply with such a requirement, the Department would have to allocate significant resources to establish a process for reviewing settlement of all FMLA disputes (including severance agreements) that are not pending in court. Adding the requirement of Department or court supervision will harm employees by delaying resolution of their cases. Moreover, the shifting of resources from complaint investigation to private party settlement supervision will result in delays for those employees who have filed complaints with, and are relying on, the Department to protect their rights under the FMLA. Such a reallocation would also lessen the resources available to pursue FLSA investigations, which would directly affect the Department's ability to protect the rights of vulnerable low-wage workers.

In sum, section 220(d) bars only the prospective waiver of FMLA rights and not the settlement of FMLA claims based on past employer actions. Even if this legislative rule is deemed to be ambiguous, however, the Department's permissible interpretation

of its own regulation is entitled to controlling deference. *See Auer*, 519 U.S. at 462.

CONCLUSION

For the reasons set forth above, the Secretary requests that this Court grant the Defendant's motion for reconsideration.

Respectfully submitted,

HOWARD M. RADZELY
Solicitor of Labor

STEVEN J. MANDEL
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

Lynn S. McIntosh

LYNN S. MCINTOSH
Attorney

U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5555

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2006, one paper copy of the foregoing Brief for the Secretary of Labor as *amicus curiae* was served using Federal Express, postage prepaid, upon the following counsel of record:

Marc S. Bragg, Esq.
230 West Market Street
West Chester, PA 19382
484-631-0092
Counsel for Plaintiff

Larry J. Rappoport, Esq.
Stevens & Lee
620 Freedom Business Center
Suite 200
King of Prussia, PA 19406
610-205-6039
Counsel for Defendant

Theresa M. Zechman
Stevens & Lee
25 North Queen Street
Suite 602
Lancaster, PA 17603
717-399-6644
Counsel for Defendant

Lynn S. McIntosh

LYNN S. MCINTOSH
Attorney