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 motion 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)): it misreads 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 v. Progress Energy, Inc.*, 2005 WL 1684047 at *3 ("The regulation's plain language prohibits both the retrospective and prospective waiver or release of an employee's FMLA rights."), and threatening to substantially increase the burden on the government to supervise FMLA settlements.

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 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.

At issue here is the proper interpretation of the Secretary's regulation regarding waiver of FMLA rights and its impact on the private settlement of FMLA claims. The regulation states that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." 29 C.F.R. 825.220(d). The panel interpreted this sentence as requiring either court or Department of Labor ("Department") supervision for the settlement of all claims under the FMLA.

The panel erred in its interpretation of the regulation. Section 220(d) bars only the prospective waiver of FMLA rights; it has never been interpreted by the Department as barring the private settlement of past FMLA claims. 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 or a federal 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 allocate considerable resources to the supervision of private settlements; this would of necessity siphon off resources currently used to investigate FMLA and other labor standards complaints that are filed with the Department.

ARGUMENT

THE SECRETARY'S REGULATIONS PROHIBIT ONLY THE PROSPECTIVE WAIVER OF FMLA RIGHTS

The panel's ruling, which would prohibit all settlements of FMLA claims that are not first approved by either a court or the Department, is erroneous. It directly conflicts with the Fifth Circuit's decision in *Faris* and the Department's reasonable interpretation of its own regulation - which is controlling. 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 consequences of the decision would be disastrous both for employers who want to settle claims with finality and for employees who want to obtain the compensation due to them promptly, without filing a lawsuit or seeking Department "supervision."

1. Section 220(d) regulates only the prospective waiver of FMLA rights, not the retrospective settlement of FMLA claims. The regulation was never intended to restrict, nor has the Secretary ever interpreted it as restricting, the retrospective settlement of FMLA claims.[1] Although the panel concluded that "§ 220(d) plainly prohibits the waiver or release of FMLA claims," 2005 WL 1684047, at *7 (emphasis added),[2] the first sentence of the regulation refers only to the waiver of FMLA "rights" and makes no mention of the settlement or release of claims. *See Faris*, 332 F.3d at 321. As the district court below correctly

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[1] The application of section 220(d) is also currently before this court in *Badgett v. Federal Express Corp.*, 2005 WL 1745332 (M.D.N.C. 2005), *appeal docketed*, No. 05-1530 (4th Cir. May 18, 2005), which involves a prospective agreement to foreshorten the statutory period for filing an FMLA claim to six months. The district court concluded "that statutes of limitations are not 'rights' given to claimants and thus protected by the FMLA, but more correctly exist for the protection of defendants." 2005 WL 1745332, at *9.

[2] One district court has also concluded that the regulation prohibits both the prospective waiver of FMLA rights and the retrospective settlement of FMLA claims. *See Dierlam v. Wesley Jessen Corp.*, 222 F. Supp.2d 1052 (N.D. Ill. 2002).

concluded, section 220(d) "does not preclude the post-dispute settlement of a claim alleging that those substantive rights have been previously violated. What it does preclude is the prospective bargaining away of those substantive rights." Slip Op. at 12 (emphases added) ("For example, if an employer and employee signed a 'contract' at the outset of employment in which the employee agreed to waive all of her FMLA rights in exchange for $100, then such a contract would not be enforceable.").[3]

Section 220(d)'s prohibition against the prospective waiver of rights, but not the retrospective settlement of claims, is consistent with the well-accepted policy disfavoring prospective waivers, but encouraging settlement of claims, in employment law. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (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 &*

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[3] Indeed, because section 220(d) does not restrict the settlement of private FMLA claims, several courts have addressed the validity of such settlements without referring to the regulation. *See, e.g., Halvorson v. Boy Scouts of America*, 215 F.3d 1326 (6th Cir. 2000) (Table) (unpublished); *Schoenwald v. ARCO Alaska*, 191 F.3d 461 (9th Cir. 1999) (Table) (unpublished); *Kujawski v. U.S. Filter Wastewater Group*, 2001 WL 893918 (D. Minn. 2001); *Riddell v. Medical Inter-Insurance Exchange*, 18 F. Supp.2d 468 (D.N.J. 1998).

Storage, Inc., 237 F.3d 111, 116-117 (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. 1996) ("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 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).

2. Even if, contrary to the Department's and the Fifth Circuit's plain reading of the first sentence 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."). The Secretary, based on longstanding judicial precedent encouraging settlement of employment claims, *see, e.g., Carson v. American 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 retrospective settlement of FMLA claims. The Department has never sought to supervise the settlement of FMLA claims other than those arising in connection with complaints filed with the Wage and Hour Division. The panel reached its decision without the benefit of a full explication of the Secretary's interpretation of section 220(d). As the Supreme Court noted in *Auer*, however, 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.

3. The structure of section 220(d) further indicates that the regulation is intended to address only the prospective waiver of FMLA rights. Every example the Department provided regarding how the regulation applies in practice is set in a prospective context. Thus, the second sentence of the regulation reads: "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). Therefore, an employer could not, for example, offer an employee six weeks of paid maternity leave

without FMLA protection in exchange for waiving her right to 12 weeks of unpaid FMLA-protected leave.[4]

The final two sentences of the regulation also support the Secretary's interpretation of the regulation. Those sentences set forth a "carve out" to the otherwise complete bar to the prospective waiver of FMLA rights. They begin, "This [bar on the prospective waiver of rights] does not prevent an employee's voluntary and uncoerced acceptance ... of a 'light duty' assignment while recovering from a serious health condition[.]"[5] *See Faris*, 332 F.3d at 321 ("The examples of nonwaivability [in section 220(d)] concern prohibitions on the prospective waiver of rights under the FMLA.").

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[4] Because employees cannot forego FMLA protection for qualifying leave, they are also prohibited from declining their employer's designation of covered leave as FMLA leave even if they would prefer to save such leave for a future qualifying event (e.g., an impending birth). *See* 29 C.F.R. 825.208(a) ("In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying[.]"). In this way, section 825.220(d) works to balance employer and employee interests.

[5] Without this "carve out," the regulation would have prevented employees from voluntarily accepting such modified light-duty jobs because the offer 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 makes 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. The light-duty "carve out" was the only substantive change in the regulatory text of section 220(d) from the interim regulations to the final regulations. *See* 60 Fed. Reg. 2180, 2219 (Jan. 6, 1995).

4. The panel incorrectly interpreted the Department's silence as to the retrospective settlement of FMLA claims in the preamble to the final regulations as an indication that such settlements are prohibited under section 220(d). *See Taylor*, 2005 WL 1684047 at *6. Instead, the Department's silence is correctly understood as an indication that it did not perceive such settlements as falling within the scope of the regulation.

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 (included in the regulatory provision and discussed above) is that of an employee who accepts a light duty assignment in order to return to work from FMLA leave prior to being able to perform all the essential functions of her job. 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. The Department noted that such agreements (which typically include a waiver of past claims) were not barred by the waiver provision. 60 Fed. Reg. 2180, 2218-19 (Jan. 6, 1995). The Department thus clearly indicated that agreements such as the severance agreement at issue in this case are beyond the scope of the section 220(d).[6]

[6] The Department has not issued any opinion letters directly addressing section 220(d) since the promulgation of the final regulations in 1995. Two opinion letters issued under the interim regulations addressed the regulation. Both letters

5. The panel also erred in relying on the Fair Labor Standards Act ("FLSA") for its conclusion that private settlement of FMLA disputes is not permitted. 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 all FMLA settlements - a unique, judicially-imposed requirement under the FLSA. *See infra.* Indeed, courts have rejected attempts to apply such a 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

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involved situations in which employees sought to prospectively 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* Opinion Letters 43 (Aug. 24, 1994) and 49 (Oct. 27, 1994) (copies attached).

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 Runyan v. National 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*, 324 U.S. at 116), *cert. denied*, 479 U.S. 850 (1986).

As the Supreme Court noted in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and 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 for that purpose.[7] The FMLA, which was enacted after

[7] By enacting the Older Workers Benefit Protection Act ("OWBPA"), Pub. L. 101-433 (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 ADEA. Even after the OWBPA, however, ADEA

the OWBPA, is notably devoid of any statutory provision restricting the voluntary settlement of claims.

6. 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. 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).[8] The Secretary, however, has never construed section 107(b)(1) of the FMLA to require her to "supervise" all private settlements.

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claims are still subject to unsupervised settlement so long as the conditions set forth in 29 U.S.C. 626(f) are met.

[8] "The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under section (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional amount as liquidated damages." 29 U.S.C. 216(c).

As the panel correctly noted, judicial decisions establish that "rights guaranteed by the FLSA cannot be waived or settled without prior DOL or court approval." 2005 WL 1684047, at *6. *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 Savings 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. U.S.*, 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, however, is based on policy considerations unique to the FLSA. The FLSA is a broad remedial statute setting the floor for minimum wage and overtime pay. *See Brooklyn Savings Bank*, 324 U.S. at 706. 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. *Id.* 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.

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. In these 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. North Carolina*, 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-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, release 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).

7. 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 the panel's ruling in this case, the Department

would have to allocate significant resources to establish a process for reviewing settlement of all FMLA complaints 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, which would be necessary if the panel decision is allowed to stand, 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.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify the following with respect to the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Defendant-Appellee's Petition for Rehearing *En Banc:*

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,339 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Office Word 2003, with 10.5 characters per inch and Courier New 12 point type style.

8/16/05
DATE

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Defendant-Appellee's Petition for Rehearing *En Banc* has been served to the following by Federal Express this 16th day of August 2005:

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