NO. 04-1525

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BARBARA TAYLOR,

Plaintiff-Appellant,

v.

PROGRESS ENERGY, INCORPORATED,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of North Carolina, at Wilmington
Malcolm J. Howard, District Judge
Case No. CA-03-73-7-H

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING *EN BANC*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

The Equal Employment Advisory Council ("EEAC"), Chamber of Commerce of the United States of America ("the Chamber"), and the Society for Human Resource Management ("SHRM"), respectfully submit this brief as *amici curiae* in support of Defendant-Appellee Progress Energy, Inc.'s Petition for Rehearing *En Banc* contingent on the granting of the accompanying motion for leave. The brief urges this Court to grant the petition, vacate the panel decision, and affirm the district court's decision below.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector,

and from every region of the country. The Chamber advocates the interests of the national business community in courts across the nation by filing amicus curiae briefs in cases involving issues of national concern to American business.

The Society for Human Resource Management ("SHRM") is the world's largest association devoted to human resource management. Representing more than 225,000 individual members, SHRM's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, SHRM's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in over 100 countries.

All of EEAC's members, many of the Chamber's members, and the employers of many of SHRM's members are employers subject to the Family and Medical Leave Act ("FMLA") of 1993, 29 U.S.C. §§ 2601 *et seq.*, as well as other labor and employment statutes and regulations. As employers and representatives of employers who are potential defendants in FMLA and other employment-related lawsuits, the *amici's* members are interested in preserving effective, voluntary means of resolving both actual and potential claims without the costs, risks, and other burdens associated with litigation.

Thus, the *amici's* members have a direct and ongoing interest in the issue presented in this appeal. The panel majority interpreted a regulation of the U.S. Department of Labor as prohibiting all waivers of FMLA claims that are unsupervised by the Department of Labor or a court. The panel's unprecedented holding would make it virtually impossible for employers to obtain an enforceable general release without litigation, since the Department of Labor lacks any vehicle for supervising the hundreds of thousands of releases signed every year. The panel decision is harmful to both employers and employees, and fundamentally misapprehends the meaning and intent of 29 C.F.R. § 825.220(d).

REASONS FOR GRANTING THE PETITION

I. IN HOLDING THAT UNSUPERVISED FMLA WAIVERS ARE UNENFORCEABLE, THE PANEL DECISION DISREGARDS THE IMPORTANCE OF PRIVATE RESOLUTION OF ACTUAL AND POTENTIAL EMPLOYMENT DISPUTES AND IMPOSES A SEVERE HARDSHIP ON BOTH EMPLOYERS AND EMPLOYEES

The panel majority's conclusion that private parties cannot execute a valid release of claims arising under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 *et seq.*, without the supervision of the U.S. Department of Labor or a court will wreak havoc on the ability of employers and employees within the Fourth Circuit and elsewhere to amicably resolve workplace disputes without resort to costly and protracted litigation. By imposing the supervision requirement for FMLA purposes, the panel decision not only will "eviscerate the ability of

parties to settle any FMLA disputes," *Taylor v. Progress Energy, Inc*., No. 7:03-CV-73-H(1), slip op. at 14 (D.N.C. Mar. 22, 2004), but also will undermine the preclusionary effect of *any* general release of employment claims in *any* context, including those wholly unrelated to the FMLA.

An employer seeking to resolve a statutory or tort-based employment claim often will offer the claimant monetary remuneration in exchange for a general release covering not only the specific claims raised in the litigation, but also any others that could have been asserted against the employer to that point. Having agreed to resolve the claims already made, sound business judgment dictates that the employer, for its own protection, seek to obtain full and final disposition of any other ripe claims as yet unasserted by the claimant. If the panel's decision is allowed to stand, employers will be less interested in attempting to settle any dispute for fear of paying good money for something they desire but cannot guarantee: finality and avoidance of continued litigation.

The panel decision also calls into question myriad releases that already have been executed nationwide. Countless employers have given consideration in exchange for general releases, only to find out now that the release is partially unenforceable in the Fourth Circuit. For these employers, the panel decision substantially undermines the certainty for which they paid substantial consideration for a release they reasonably believed to be valid.

Court supervision of FMLA waivers is an untenable solution that ignores the desire of those entering into privately-negotiated settlement agreements to avoid future litigation. For a court to supervise a waiver, there must be some action already filed over which the court has jurisdiction. It is not at all clear how, for example, an employee and employer who are exchanging a general release for an early retirement incentive would go about obtaining court approval where no lawsuit has been filed. Thus, for those settlements reached prior to filing suit, the parties would be required – under the supervision rule – to submit to litigation simply to confirm their desire to avoid it. Furthermore, mandating court supervision of FMLA waivers would raise, as the district court aptly noted, "serious issues of judicial economy." *Taylor v. Progress Energy, Inc*., No. 7:03-CV-73-H(1), slip op. at 14 (D.N.C. Mar. 22, 2004).

Administrative supervision by the Labor Department of FMLA waivers is no less unworkable. The Secretary of Labor confirmed both in her initial brief and her supplemental brief that the Department has no established system for reviewing and supervising private settlements of FMLA claims. *See* Brief for the Secretary of Labor as *Amicus Curiae* at 14*;* Supplemental Brief on Panel Rehearing for the Secretary of Labor as *Amicus Curiae* at 4. Thus, Labor Department supervision would require the filing of an action – in the form of an administrative complaint – simply to trigger the agency's jurisdiction over the matter.

As a result, parties to employment disputes would be forced to incur additional time and expense, as well as potentially lengthy delays and uncertain outcomes, even if a release has been negotiated with the assistance of competent private counsel and regardless of whether the dispute even involves an FMLA claim. Forcing employees to endure lengthy delays before receiving severance pay, early retirement benefits, or settlement payments, especially where in most cases there will not even be an actual FMLA claim in question, is patently unreasonable.

II. THE PANEL MAJORITY OVERSTATED THE RELEVANCE OF THE FLSA'S WAIVER SUPERVISION PROVISION TO CLAIMS BROUGHT UNDER THE FMLA

The panel majority held that since the FMLA's remedial scheme closely resembles that of the Fair Labor Standards Act (FLSA) – whose enforcement provisions authorize (but do not compel) the Labor Department "to supervise the payment of the unpaid minimum wages of the unpaid overtime compensation of any employee," 29 U.S.C. § 216(c) – the same prohibition should apply equally to FMLA claims. Unlike the FLSA, however, neither the FMLA nor its implementing regulations speak to supervision of claim waivers. Furthermore, the FLSA and the FMLA serve vastly different purposes.

The FLSA was enacted "to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and

well-being and the free flow of goods in interstate commerce." *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 705 (1945). As the U.S. Supreme Court observed in *Brooklyn Savings Bank v. O'Neil*, allowing employees to waive their substantive rights to a minimum wage or overtime compensation would run contrary to the purposes of the Act. Accordingly, the Court would not allow employees to waive their rights under the FLSA when the fact of the employer's violation and the extent of its liability were uncontested, because to do so would, in effect, given judicial sanction to employment contracts that violated the statute.

In contrast to the FLSA, the purpose of the FMLA was not to set minimum terms or conditions of employment, but rather "to balance the demands of the workplace with the needs of families . . . in a manner that accommodates the legitimate interests of employers . . . ." 29 U.S.C. § 2601(b). FMLA actions, like those under other federal laws such as Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, typically involve issues of fact and law not resolved by the statute, and resolution of those issues may require extensive discovery and litigation. Perhaps to short-circuit these inherent delays, Congress gave private individuals the right to pursue – and to resolve – their own claims under the FMLA, without court or Department supervision. Given these important distinctions between the two laws, it was error for the panel majority to

rely on the FLSA's permissive, statutory waiver supervision provisions in imposing such a requirement on waivers of FMLA claims.

CONCLUSION

For the foregoing reasons, the *amici curiae* the Equal Employment Advisory Council, Chamber of Commerce of the United States of America, and the Society for Human Resource Management respectfully submit that the Petition for Rehearing *En Banc* should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July 2007, two (2) true and correct copies of the foregoing Brief *Amici Curiae* of the Equal Employment Advisory Council, Chamber of Commerce of the United States of America, and the Society for Human Resource Management For Leave To File Brief *Amici Curiae* in Support of Defendant-Appellee's Petition for Rehearing *En Banc* was served via Federal Express Priority Overnight, addressed as follows:

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I further certify that an original and 19 copies of the foregoing brief were filed on this day via Federal Express Priority Overnight, addressed to Patricia S. Connor; Clerk of the Court; United States Court of Appeals for the Fourth Circuit; Lewis F. Powell, Jr. United States Courthouse Annex; 1100 East Main Street, Suite 501; Richmond, VA 23219-3517; (804) 916-2700.

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