CASE 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, THE 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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The Equal Employment Advisory Council ("EEAC"), the 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 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 320 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 200,000 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 covered by 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 interpreted a regulation of the U.S. Department of Labor as prohibiting employees from ever waiving a potential FMLA claim without supervision 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 misapprehends either the meaning or the validity of 29 C.F.R. § 825.220(d).

REASONS FOR GRANTING THE PETITION

I. THE PANEL DECISION DISREGARDS THE IMPORTANCE OF PRIVATE RESOLUTION OF ACTUAL AND POTENTIAL EMPLOYMENT DISPUTES AND WOULD IMPOSE A SEVERE HARDSHIP ON BOTH EMPLOYERS AND EMPLOYEES

The panel's decision 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 ("DOL") or a court has a devastating impact on hundreds of thousands of employers and employees within the Fourth Circuit and elsewhere. By imposing the supervision requirement for FMLA purposes, the panel decision undermines the preclusionary effect of any general release of employment claims in any context, reducing its

value to employers and in turn what they are willing to pay for it, to the ultimate detriment of the employees who are the recipients of the consideration given for the release.

First, the panel's decision effectively brings to a standstill both voluntary separation incentives and involuntary separation severance pay programs. According to the most recent report of the DOL's Bureau of Labor Statistics ("BLS") Mass Layoff Statistics Program,[1] in May 2005 alone employers took 1,196 "mass layoff actions," defined as layoffs of 50 or more workers, involving a total of 128,771 employees. During the first five months of calendar year 2005, there were 6,249 mass layoff events, involving 665,130 workers. *Id*.

Many employers faced with the necessity of workforce reductions offer severance benefits to ease the impact of lost employment. Some employers, depending on financial circumstances and other considerations, also offer early retirement incentives and other voluntary programs.

Because these employers are offering benefits considerably greater than they are legally required to provide, they understandably ask that the employees accepting such benefits sign a general release of claims in return. By ruling that a general release is unenforceable with respect to FMLA claims absent supervision,

[1] United States Dept. of Labor, Bureau of Labor Statistics, *News: Mass Layoffs in May 2005* (June 23, 2005), *available at* http://www.bls.gov/news.release/archives/mmls_06232005.pdf.

the panel decision creates a substantial disincentive for employers to offer separation benefits. Employers are well aware that the potential risk of an FMLA claim is a significant one. On average, 14.5% of employees took FMLA leave in 2004, and 52% of those took leave more than once. Employment Policy Found., *The Cost and Characteristics of Family and Medical Leave*, Issue Backgrounder (Apr. 19, 2005), at 2.[2] The inability to obtain a full release will substantially reduce the amount employers are willing to pay. As a result, reductions in force will still occur, but with lesser, if any, additional benefits than offered in the past. As a consequence, the many employees who face layoffs will be deprived of a substantial payment that might mean the difference between financial security and financial peril.

Indeed, the panel decision jeopardizes every future voluntary resolution of any employment-related disputes, including those wholly unrelated to the FMLA. 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 - or even how the courts would have jurisdiction over such a situation where there is no dispute. Likewise, no process for obtaining supervision by DOL currently exists, and indeed would overwhelm the resources of the agency if it did. Accordingly, employees will endure lengthy delays even if

[2] *available at* http://www.epf.org/pubs/newsletters/2005/ib20050419.pdf

a release has been negotiated with the assistance of competent private counsel and regardless of whether the dispute even involves an FMLA claim.

Moreover, the panel decision 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 finality and certainty for which they paid substantial consideration a release they reasonably believed to be valid.

II. THE PANEL DECISION MISAPPREHENDS EITHER THE MEANING OR THE VALIDITY OF THE DOL REGULATION

The panel ruled that 29 C.F.R. § 825.220(d) prohibits any release of FMLA claims that is not supervised by the DOL or a court. The panel misapprehended the meaning of the regulation. If it did not, the regulation itself is invalid.

The Fifth Circuit has examined 29 C.F.R. § 825.220(d) and concluded that it operates prospectively only. *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003). The Fifth Circuit reasoned persuasively that the regulation prohibited only waivers of the right to take FMLA leave in the future, not to claims or causes of action for FMLA violations. *Id.*

If the regulation indeed prohibits *all* waivers of *any* FMLA rights, it is invalid under the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The regulation is contrary

to the structure of the FMLA, which provides for two separate and independent enforcement mechanisms – private civil actions as well as suits by the DOL. 29 U.S.C. § 2617. The FMLA unequivocally allows individuals to pursue FMLA claims - and settle them - without any involvement by DOL. Indeed, potential plaintiffs are not even required to exhaust administrative remedies before taking an FMLA complaint to court, 29 U.S.C. § 2617(a)((2), as they would be under federal anti-discrimination statutes, *e.g.*, 42 U.S.C. § 2000e-5(f)(1) (Title VII of the Civil Rights Act of 1964); 29 U.S.C. § 626(d) (Age Discrimination in Employment Act (ADEA)); thus the requirement of DOL supervision is particularly anomalous here.

The panel's decision mirrors the inception of a long-resolved dispute involving the same argument about waivers of ADEA claims. Nearly twenty years ago, a panel of the Sixth Circuit ruled that waivers of ADEA claims were invalid unless supervised, and the Sixth Circuit *en banc* reversed. *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir. 1986). This Court later agreed with the Sixth Circuit *en banc* in *Runyan* that ADEA claims were waivable, *see Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991), as did five of its sister Circuits. *See Gormin v. Brown-Forman Corp.*, 963 F.2d 323 (11th Cir. 1992); *O'Hare v. Global Natural Res., Inc.*, 898 F.2d 1015 (5th Cir. 1990); *Bormann v. AT&T Communications, Inc.*, 875 F.2d 399 (2d Cir. 1989);

Coventry v. U. S. Steel Corp., 856 F.2d 514 (3d Cir. 1988); *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 540 (8th Cir.1987).

If anything, the instant case is even more compelling: while the ADEA incorporates by reference the enforcement provisions of the Fair Labor Standards Act authorizing (not compelling) DOL supervision of waivers, 29 U.S.C. § 626(b) (incorporating, *inter alia*, 29 U.S.C. § 216(c)), the FMLA does not.

CONCLUSION

For the foregoing reasons, the *amici curiae* the Equal Employment Advisory Council, the Chamber of Commerce of the United States, 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 2nd day of August 2005, two (2) true and correct copies of the foregoing Brief *Amici Curiae* of the Equal Employment Advisory Council, the Chamber of Commerce of the United States of America, and the Society for Human Resource Management in Support of the Defendant-Appellee's Petition for Rehearing *En Banc* were 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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