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

SUPPLEMENTAL REPLY BRIEF ON PANEL REHEARING OF *AMICI CURIAE* THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

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By order of June 14, 2006, this Court vacated its opinion in *Taylor v. Progress Energy, Inc.*, No. 04-1525 (July 20, 2005), and granted panel rehearing. On July 17, 2006, this Court directed the parties and *amicus curiae* Secretary of Labor to file supplemental briefs on particular issues, and invited other *amici* to reply to those supplemental briefs. Accordingly, *Amici Curiae* 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 supplemental reply brief at the Court's invitation.

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 ("the Society" or "SHRM") is the world's largest association devoted to human resource management. Representing more than 210,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society'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 within the United States and members in more than 100 countries. Visit SHRM Online at www.shrm.org.

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. The panel's now-vacated decision jeopardized that interest by making it virtually impossible for employers to obtain enforceable general releases without litigation, and thus was potentially harmful to both employers and employees, since the Department of Labor lacks any vehicle for supervising the hundreds of thousands of releases signed every year.

ARGUMENT

MANDATING DEPARTMENT OF LABOR SUPERVISION OF PRIVATE RESOLUTION OF EMPLOYMENT-RELATED CLAIMS WOULD IMPOSE A SEVERE HARDSHIP ON BOTH EMPLOYERS AND EMPLOYEES

As the *amici curiae* EEAC, the Chamber, and SHRM explained in our initial brief supporting the petition for rehearing, a ruling 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 countless employers and employees within the Fourth Circuit and elsewhere. A supervision requirement for releases of FMLA claims would undermine the preclusionary effect of any general release of employment claims in any context, reducing its value to employers and in turn reducing 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.

A. A Supervision Requirement Would Devalue General Releases in Every Employment-Related Context, Including Severance Pay, Termination Incentives, and Non-FMLA Related Claims

A decision requiring supervision of releases that cover FMLA claims would have a far-reaching impact, well beyond the FMLA claims themselves. Importantly, an FMLA supervision requirement would jeopardize involuntary separation severance pay programs such as the one involved in this case.

Currently, many employers faced with the necessity of workforce reductions offer severance benefits to ease the impact of lost employment. Some employers also will offer severance benefits in connection with some individual separations, as the employer did in this case. Because these employers are offering benefits they are not, absent some pre-existing contractual obligation, legally required to provide, they understandably ask that the employees accepting such benefits provide some valuable consideration in return, and the one thing of value an outgoing employee typically can provide to an employer in such situations is a general release of claims in return. *See* Ethan Lipsig & Mary C. Dollarhide, *Downsizing* (1996 & Supp. 1999), at 129 ("It normally is imprudent for an employer to pay significant severance or exit incentive benefits to employees

unless, in exchange for those benefits, the employees execute releases of any claims they may have against the employer and related parties").

Typically, from the employer's perspective, the principal value of a general release is that it eliminates any possibility of post-termination litigation with the outgoing employee, therefore facilitating a full and peaceful closure of the employment relationship. To have such value, however, the release must cover any and all existing or potential claims growing out of the employment relationship. For if the employee remains free to assert even one potential employment-related claim, meritorious or otherwise, the employer will remain subject to the potentially costly and disruptive prospect of having to defend against post-termination litigation by the employee.

For this reason, employers in such situations typically seek broad, general releases of any and all employment-related claims an individual could possibly make. Thus, the release at issue in this case, is typical of the kind of release commonly in use.

According to the most recent report of the DOL's Bureau of Labor Statistics ("BLS") Mass Layoff Statistics Program, in June 2006 alone employers took 1,097 "mass layoff actions, seasonally adjusted," defined as layoffs of 50 or more

workers, involving a total of 119,662 employees.[1] While it is impossible to determine how many of these layoffs involved severance-and-release offers, it is highly likely that many of them did.

Making general releases unenforceable with respect to FMLA claims absent DOL supervision 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, given the breadth of FMLA protection. The FMLA affords protected leave, reinstatement, and retaliation protection to any eligible employee for a qualifying reason. The inability to obtain a full release, including a release of FMLA claims, will substantially reduce the amount employers are willing to pay. As a result, layoffs and terminations 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 substantial payments that might mean the difference between financial security and financial peril.

An FMLA supervision requirement would affect early retirement incentives and other voluntary separation programs in the same way. Again, most employers that offer benefits to which the employee is not otherwise entitled are going to ask in return for a general release of claims. And again, the inability to obtain a full

[1] U.S. Dept. of Labor, Bureau of Labor Statistics, *News: Mass Layoffs in June 2006* (July 20, 2006), *available at* http://www.bls.gov/news.release/pdf/mmls.pdf

release will substantially reduce the value of the release to the employer, and thus decrease the amount the employer is willing to pay for it.

In addition to voluntary and involuntary termination programs, where no claims actually have been made, an FMLA supervision requirement also would jeopardize voluntary settlements of all actual employment-related disputes, most of which are wholly unrelated to the FMLA. Whenever an employer settles an employment-related claim under any of the myriad federal or state statutes governing the employment relationship, as well as common law claims, the employer typically will ask for a general release from the employee, covering any and all claims the employee may have, including claims not yet raised, like the release the employer used in this case. Having agreed to resolve the claims already made, sound business judgment dictates that the employer, for its own protection, seek finality by ensuring that any other claims the employee may have are also being resolved. By necessity, a general release of all claims includes FMLA claims as well. Again, if the employer cannot obtain a full release, it will be disinclined to pay as much for a partial one.

Accordingly, a supervision requirement devalues general releases in every employment-related context. Moreover, the impact of an FMLA supervision requirement is multiplied exponentially by the fact that innumerable releases already have been executed nationwide with no thought of a supervision

requirement. Countless employers have given consideration in exchange for general releases. For these employers, imposition of an FMLA supervision requirement would substantially undermine the finality and certainty for which they paid significant consideration for releases they reasonably believed to be valid.

B. Supervision of Releases of FMLA Claims Is Not Practically Feasible

Obtaining supervision by the DOL or a court in any of these situations is, by all accounts, a practical impossibility. The Secretary of Labor confirmed both in her initial brief and her supplemental brief that DOL 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. Given the scope of the challenge, moreover, trying to supervise all releases likely would overwhelm the resources of the agency in any event.

Court supervision is an untenable solution; 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. Filing an FMLA lawsuit just to obtain a consent decree with respect to every

general release of claims is simply not a viable option, for employees, for employers, and certainly for the federal courts.

Even if supervision were feasible, moreover, such a requirement would force employees to endure lengthy delays before receiving their severance pay, early retirement benefits, or settlement payments. Since in the majority of situations there will not even be an actual FMLA claim in question, such a delay is patently unreasonable.

C. The Impact of Devalued Releases Falls On Employees As Well As Employers

As noted above, by devaluing general releases, an FMLA supervision requirement would make it considerably less attractive for employers to offer severance benefits and separation incentives – and to settle employment-related cases. The true victims, however, would be those employees who would have had the opportunity to gain substantial financial benefits because of their voluntary or involuntary termination. The vast majority of these individuals have no quarrel with their terminations – and perhaps voluntarily chose to participate – and would willingly sign a release as consideration for the extra benefits. Similarly, an FMLA supervision requirement injects an unnecessary disadvantage into the voluntary settlement of unrelated employment claims.

CONCLUSION

For the foregoing reasons, the *amici curiae* the Equal Employment Advisory Council, the Chamber of Commerce of the United States of America, and the Society for Human Resource Management respectfully submit that the decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August 2006, two (2) true and correct copies of the foregoing Supplemental Reply Brief on Panel Rehearing of *Amici Curiae* the Equal Employment Advisory Council, the Chamber of Commerce of the United States of America, and the Society for Human Resource Management were served via first class U.S. mail, postage prepaid, addressed as follows:

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I further certify that an original and 7 copies of the foregoing brief were filed on this day via first class U.S. Mail, postage prepaid, 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.

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