No. 07-539

In The

Supreme Court of the United States

PROGRESS ENERGY, INC.,

Petitioner,

v.

BARBARA TAYLOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE ASSOCIATION OF CORPORATE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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INTEREST OF THE *AMICUS CURIAE*[1]

The Association of Corporate Counsel ("ACC") is the in-house bar association, serving the professional needs of attorneys who practice in the legal departments of corporations and other private sector organizations worldwide. Since its founding in 1982, ACC has grown to include more than 22,000 individual in-house counsel members who work in more than 9,000 business entities worldwide. In the United States, ACC members are at work in every one of the Fortune 100 companies. ACC has an Employment and Labor Law Committee with over 5,000 attorney members.

One of the primary missions of the ACC is to act as the voice of the in-house bar on matters of concern to corporate legal departments, and matters implicating the ability of its members to fulfill their functions as legal counselors to their corporate clients. As ACC's mission statement proclaims, "The Association of Corporate Counsel promotes the common professional and business interests of attorneys who are employed to practice law by corporations, associations, and other private-sector organizations by developing and disseminating information . . . and engaging in advocacy on behalf of the in-house bar."

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[1] This brief is filed with the written consent of all parties. Counsel for the Association of Corporate Counsel states that they authored this brief. No person or entity other than the association, its members, and its counsel, made any monetary contribution to fund the preparation or submission of this brief.

Many ACC members are responsible for providing advice on employment law issues to businesses which must comply with the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* ("FMLA"). In a 2006 survey, members of the ACC identified FMLA compliance as the single employment law issue of greatest concern to them. Because of its members' interest in the FMLA, the ACC has expressed its views to the United States Department of Labor ("DOL") on the difficulty in making determinations as to full compliance with the obligations imposed by the FMLA.

As in-house counsel on workplace law issues for the Nation's corporations, the ACC shares, as *amicus curiae,* its unique perspective regarding interpretation of the FMLA, the impact of the uncertainty brought about by the Fourth Circuit's decision in *Taylor v. Progress Energy, Inc.,* 493 F.3d 454 (4th Cir. 2007), *reinstating* 415 F.3d 364 (4th Cir. 2005), and the circuit conflict thus created with respect to the validity of waivers and releases of claims arising under the FMLA.

SUMMARY OF ARGUMENT

The ACC is concerned about the damage wrought by uncertainty over the ability of employers and employees to resolve actual and potential FMLA disputes. In many ways, the Nation is just beginning to grapple with the enormously important societal,

business and legal implications surrounding an employer's obligation to provide job-protected leaves for an employee's own illness or to fulfill family caregiver responsibilities. The precise contours of this obligation will be the subject of litigation for many years. As the DOL and courts work through those issues, there must be an escape route for employees and employers having no desire to be trapped in the disruption, expense and uncertainty of employment litigation.

The ability to settle FMLA claims provides that escape route, but only so long as the process is clear, and the resulting waiver is enforceable. The current split of authority resulting from the Fourth Circuit's decision below eliminates this certainty, depriving all FMLA stakeholders of the escape route, essentially encouraging litigation despite the willingness and desire of an employer and employee to resolve a disputed claim without resort to the courts. Furthermore, the Fourth Circuit's ruling casts doubt over the ability, and willingness, of employers to enter into individual and group separation agreements, where the ability to secure a general release (and thereby avoid future litigation) is the *sine qua non* for generous separation payments and benefits. Not only will this uncertainty discourage employers from pre-litigation resolution of claims arising under the FMLA, but it will interfere with pre-litigation settlement of claims which are frequently intertwined with FMLA claims, e.g., claims arising under the Americans with Disabilities Act ("ADA"), Title VII of the

Civil Rights Act of 1964 ("Title VII"), the Pregnancy Discrimination Act ("PDA"), the Equal Pay Act ("EPA"), the Employee Retirement Income Security Act of 1973 ("ERISA"), and a host of state laws.

The conflict created by the Fourth Circuit's central holding – that without prior DOL or court approval, waivers or releases of rights under the FMLA are unenforceable – places in doubt additional matters which are critical to an employer's willingness to resolve privately FMLA and related claims:

- Can FMLA claims be waived under any circumstances?
- Can some, but not other, FMLA claims or rights be waived?
- Will a court have Article III jurisdiction over an action brought solely to approve an FMLA waiver?
- Will the DOL have and dedicate the resources to evaluate and approve FMLA waivers and, if not, how can parties secure approval of FMLA waivers?

The confusion and uncertainty stemming from these questions likely will grow, exacerbating the conundrum faced by in-house counsel and other FMLA stakeholders. Furthermore, the decision below causes additional difficulties by undermining employers' ability to rely upon an agency's interpretation of its own regulations. The ACC respectfully asks this Court to grant certiorari to resolve the uncertainty surrounding

the ability of employers and employees to enter into agreements containing enforceable FMLA waivers, thereby allowing all FMLA stakeholders to benefit from knowledge of certain processes to follow in the private, pre-litigation resolution of FMLA and related claims.

ARGUMENT:

REASONS FOR GRANTING THE PETITION

A. The Circuit Conflict Harms Employers and Employees by Limiting Their Ability to Avoid Litigation Over Exceedingly Complex FMLA Compliance Issues.

The conflict created by the Fourth Circuit's decision below upsets an important workplace dynamic. Today, current and former employees willingly and often enthusiastically agree to resolve definitively all potential claims against their employers in exchange for agreed upon consideration. In these arrangements, employers purchase one precious commodity – certainty. The finality provided by such agreements benefits all concerned. The circuit conflict resulting from the decision below eviscerates certainty. Given the high usage of FMLA leave and complexity of FMLA and leave-related claims, this new uncertainty eliminates the opportunity to obtain this bargained-for exchange, and will drive unwanted litigation that serves no one's interests.

1. Employers and Employees Alike Benefit From Certainty Concerning Their Ability to Resolve FMLA Claims Without Litigation.

While ACC believes the Fifth Circuit's holding in *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003) and the DOL's interpretation of its own regulation concerning the validity of FMLA waivers are correct, the current uncertainty as to the ability of employers and employees to resolve substantive disputes about FMLA rights and obligations without resort to litigation is enormously disruptive.

Settlement agreements, and separation agreements containing releases of legal claims, have become a staple in workplace relations. Uncertainty as to their validity disadvantages both employees and employers. Releases of statutory workplace rights are used in many contexts, including individual and group severance agreements, as well as pre-litigation settlement of workplace claims. As a result of the Fourth Circuit's ruling below, employers are increasingly reluctant to enter into agreements containing releases of FMLA claims given the uncertainty concerning their enforceability. In response to a survey by ACC of its members with respect to the impact of the decision below, the following situations were disclosed:

- A financial services company employing approximately 10,000 employees and which normally executes more than 600 agreements a year containing FMLA

waivers has been unable to complete some settlements because of the uncertainty over the validity of FMLA waivers.

- Another financial services company employing approximately 31,000 employees has become hesitant to enter into any agreements resolving FMLA claims even where employees also would like to resolve the disputes.
- A hospitality company employing approximately 90,000 employees has become more conservative on settlements and is allowing cases to go to litigation before obtaining a settlement approved by a court.
- A manufacturing company employing approximately 18,000 employees has removed all references to FMLA waivers in its releases and accepted the reality that they may still be sued for such claims.
- A manufacturing company employing approximately 3,000 employees has become more reluctant to enter into settlement agreements because of the uncertainty in the state of the law governing FMLA waivers.

The difficulties are compounded by the fact that the FMLA overlaps in some respects with other federal and state laws. The ADA, in particular, is implicated when an employee takes FMLA leave due

to the employee's own serious health condition. FMLA "family" leave overlaps with an even broader range of "family responsibilities discrimination" laws. Family responsibilities discrimination ("FRD") is reportedly one of the fastest growing theories of employment claims.[2] Caregivers can bring FRD claims under Title VII as gender or race discrimination, under the Pregnancy Discrimination Act as pregnancy discrimination, or under the Americans with Disabilities Act as disability or "association" discrimination. Claims also could be brought under the Equal Pay Act or ERISA. In addition, various state statutes (leave statutes, discrimination statutes, and workers' compensation laws) provide other causes of action often intertwined with FMLA claims.

The Fourth Circuit's ruling leaves employers around the country with significant uncertainty around the use of termination programs involving releases and severance. The Bureau of Labor Statistics reports that since 2005, U.S. employers have engaged in over

[2] Studies show that there has been an increase of over 400% in claims asserted by family caregivers in the last decade, while the increase in all other discrimination claims during the same period was 23%. *See* Joan C. Williams and Consuela A. Pinto, *Family Responsibilities Discrimination: Don't Get Caught Off Guard*, 22 The Labor Lawyer 293, 295 (2007). Recently the Equal Employment Opportunity Commission issued *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007). *See* http://www.eeoc.gov/policy/docs/caregiving.html. The EEOC observed that the FMLA is only one of several statutes supporting legal claims that may be asserted on behalf of family caregivers.

13,000 mass layoff actions affecting roughly 2.5 million workers. Employers offered many of these workers severance in exchange for a general release, in an effort to bring prompt closure to the relationship and provide transition assistance to affected families. The Fourth Circuit's ruling effectively handcuffs employers in the use of these termination programs by making releases significantly more tenuous.

In-house counsel seeking to protect clients from suit use waivers and releases to "close the book" on all workplace claims, known or unknown, as of a certain date. Partial releases are of less value to employers and, consequently, may be expected to provide the employee with less consideration. As a practical matter, uncertainty concerning whether and how FMLA claims can be resolved will discourage many employers from resolving ***any*** legal claims stemming from family and medical leaves. Some ACC members have confirmed their clients already are refraining from settling claims because of these concerns; others are contemplating reduction of severance benefits offered in exchange for releases.

In sum, uncertainty as to the value of FMLA releases will likely result in increased workplace litigation, in particular with respect to ADA and FRD litigation. By comparison, a return to the clarity and apparent certainty as to the validity of FMLA releases which existed prior to the ruling below would encourage enhanced separation packages designed to

eliminate the risk of litigation, and will not foster ADA and FRD litigation.

2. Since Most Employees Are Eligible and Likely to Use FMLA Leave, Certainty Concerning the Process to Resolve Disputed FMLA Claims Is of Growing Importance to Business.

More than half of all individuals working in the United States are eligible for FMLA leave. A significant number of workers also have chronic health conditions. A National Association of Manufacturers survey reported that "25 percent of those eligible for FMLA leave had medical certifications on file for 'chronic' illness that permitted unannounced, unscheduled intermittent leave." A survey by the U.S. Chamber of Commerce found "[l]arge companies reported having generally 15 percent of the workforce with active medical certifications for FMLA at any time." One company noted that 44 percent of its employees in one of its divisions had medical certifications and another one of its business groups saw a jump in medical certifications from 28 percent in 2005 to 42 percent in 2006. *Family and Medical Leave Act Regulations: A Report,* 72 Fed. Reg. 35549, 35622-26 (June 28, 2007) (citations omitted).

Employee awareness and use of FMLA appears to be increasing significantly. While 1999 survey data estimated that between 2.4 million and 6.1 million employees took FMLA leave each year, in 2005, that

number was "more likely to be between 6.1 million and 13 million." The trend of increased FMLA use is particularly strong in some industries. The Dallas Area Rapid Transit reported that employee FMLA absences increased from 1,965 workdays in FY 2003, to over 6,100 workdays in 2006. The City of New York reported that use of FMLA leave has increased from 10.8% of all medical leaves in 2001 to 27% in 2006. The National Association of Manufacturers (NAM) reported that, for one major auto parts manufacturer, applications for FMLA leave increased 150-fold in ten years. NAM also reported that, for this one major auto parts manufacturer, the use of intermittent leave increased five times more quickly than that for regular FMLA leave. *Id.* at 35623-26 (citations omitted). The trend toward increased FMLA usage, and increased FMLA litigation, makes the need to swiftly resolve the circuit conflict all the more pressing.[3]

[3] The DOL has conceded that "an area that may not have been fully anticipated [was] the prevalence with which unscheduled intermittent FMLA leave would be taken . . . by individuals who have chronic health conditions." About one quarter of all FMLA leave is taken intermittently and many employers report much higher rates. One company reported that 95% of FMLA leave requests were for intermittent leave, another reported 75%. Another reported that the number of intermittent leaves had grown almost 300% in one year. *Id.* at 35552, 35626.

3. Complexity Surrounding an Employer's Obligations Under the FMLA Leads to Many Disputed Claims, but the Circuit Conflict Impairs Employers' Willingness and Ability to Avoid Litigation.

That FMLA and other "leave management" issues raise thorny legal questions, which cry out for private settlement, is apparent. Many complex questions perplex employers attempting to discern their employees' rights and their own obligations. Among those frequently cited are the scope and nature of: 1) penalties under this Court's ruling in *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81 (2002); 2) what constitutes a serious health condition; 3) unscheduled intermittent leave; 4) employee rights to receive notice of their FMLA rights; 5) employee obligations to provide employers notice of their need for FMLA leave; 6) medical certification and verification; 7) the interplay between the FMLA and ADA; 8) transfers to an alternative position; 9) substitution of accrued paid time for unpaid FMLA leave; and 10) joint employment.

The interplay between FMLA and ADA, in particular, raises many additional complex issues, including: a) the interaction of the FMLA employee notice provisions and the ADA medical inquiry prohibitions; b) processes to obtain medical information under the FMLA and ADA; c) processes to follow under the FMLA and ADA to confirm an employee's fitness to return to work after FMLA leave; d) employee rights and obligations when employers offer

light duty, modified duty or transfers and reassignments under the FMLA and ADA; and e) permitting "reasonable leave for medical circumstances" under the FMLA and ADA.

In its conclusions regarding a July 2007 survey on the FMLA and its impact on organizations, the Society for Human Resource Management observed:

> Although certain provisions of the FMLA are favorable for both employees and employers, HR professionals have struggled with certain aspects of the FMLA, specifically those related to serious health conditions, intermittent use of leave and chronic or episodic conditions. Tracking/administering intermittent FMLA leave and determining whether an intermittent serious health condition should be protected by the FMLA were among the most difficult FMLA-related activities for organizations to administer. When HR professionals were asked to elaborate on FMLA requests that they believed were not legitimate, a number of comments were related to problems with administering intermittent leave and questioning the timing of intermittent leave.

Society for Human Resource Management, *FMLA and Its Impact on Organizations* 31 (2007).

The aforementioned statistics and trends, and the breadth of FMLA and related leave issues confronting employers, illustrate an undeniable reality – the FMLA, and "leave management" generally, is

steeped in legal nuances. This clash – between increased use of FMLA leave and the increased uncertainty surrounding employees' rights to take leave and employers' obligations to provide such leave – is at the heart of a rapidly growing number of disputed claims. These claims have been frequently resolved through private settlements and releases, thereby avoiding adding to the employment cases filling court dockets. The uncertainty created by the Fourth Circuit's decision, as to the ability of employers and employees to resolve such claims without litigation, renders them incapable of entering into effective settlements that are desired by both employers and their employees.

4. The Uncertainty Stemming From the Fourth Circuit's Ruling Promotes Disparate Treatment Within Corporate Workforces.

Some in-house counsel employed by the many companies operating in both the Fourth and Fifth Circuits feel compelled to use different separation or settlement agreements in different locations. There are obvious inequities in such an approach. For example, two FMLA-eligible employees performing the same job for the same rate of pay, and whose employment is being terminated for the same reason (as might be the case if a company engaged in a nationwide reduction in force), might be asked to execute different waivers merely because they live in different federal jurisdictions. To an employee untrained in FMLA

waiver jurisprudence, these disparities might be viewed as unlawful discrimination. From an employee's and manager's perspective, there is but one FMLA, and the rules regarding waiver of FMLA rights ought to be uniform regardless of where the employee works.[4]

As the Secretary of Labor proclaimed in her *amicus curiae* brief in support of Progress Energy's motion for reconsideration en banc below, "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.'" Brief for the Secretary of Labor as Amicus Curiae in Support of Appellee's Petition for Rehearing En Banc, at 4, *Taylor v. Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007), *reinstating* 415 F.3d 364 (4th Cir. 2005) (No. 04-1525).

[4] Even those employers which utilize different agreements based on the Circuit in which the workplace is located may be unsuccessful in their efforts to avoid litigation, in that an employee working in one jurisdiction may nevertheless be capable of bringing an action against his or her employer in any of several jurisdictions. *See* 28 U.S.C. § 1391(b) and (c).

B. The Fourth Circuit's Decision Below Calls Into Doubt Employers' Ability to Rely Upon an Agency's Interpretation of Its Own Regulations.

Given short shrift by the panel majority in the Fourth Circuit's ruling below was the Secretary of Labor's interpretation of the regulation at issue. The court of appeals did not have the benefit of that interpretation when the initial ruling was rendered, and attempted to divine the agency's interpretation from the absence of express guidance. In response thereto the Secretary took the extraordinary step of appearing and filing an *amicus curiae* brief in support of Progress Energy's motion for reconsideration. The Secretary's grave concern over the impact of the court's construction of the regulation was reflected in the text cited above. In that *amicus curiae* brief, the Secretary clearly articulated the Department's interpretation, i.e., that the regulation at issue regulates *only* the prospective waiver of FMLA rights, not the retrospective settlement of FMLA claims.

With the benefit of the Department's interpretation before it, the issue before the Fourth Circuit changed, but only the dissenting panel member, Judge Duncan, acknowledged the significance of that development. "The course of this appeal was unexpectedly diverted, however, when the DOL rejected the analysis of *Taylor I* in its belated amicus brief supporting Progress Energy's petition for rehearing en banc . . . After such interposition, the question in the case was necessarily recast", citing *Auer v. Robbins,* 519 U.S.

452, 461 (1977). *Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 463 (4th Cir. 2007) (Duncan, J., dissenting) [also quoted in Petition for a Writ of Certiorari, App. A at 18a, *Progress Energy, Inc. v. Taylor*, No. 07-539 (U.S. Oct. 22, 2007)].

The Nation's businesses struggle mightily in their efforts to comply with the FMLA. As set forth above, disputed claims are often resolved through settlement in order to avoid the expense, disruption and uncertainty of litigation. Similarly, businesses look to an administrative agency's regulations and interpretations thereof in order to evaluate the risk of an investigation or enforcement action initiated by an agency. While businesses may not concur with an agency's interpretation of a statute, they have been able to rely upon an administrative agency's interpretation of its own regulations to evaluate the likelihood of an agency enforcement action and mitigate legal risk in their employment practices. The Fourth Circuit's failure to afford appropriate deference to the Secretary of Labor's interpretation of the DOL regulation suggests that such reliance upon an agency's interpretation of its own regulations may be misplaced, and may not provide the "safe harbor" it was thought to offer in the past. Accordingly, review by this Court is appropriate to avoid such additional uncertainty.

CONCLUSION

Left unresolved, the conflict created by the Fourth Circuit's decision below will discourage employers and employees from resolving FMLA claims and related claims arising under other federal and state laws. Employers and employees attempting to follow the Fourth Circuit's direction to seek approval from the DOL or courts are likely to encounter frustration, as it appears likely that courts must deny jurisdiction due to the absence of a case or controversy, and that the DOL will decline to assist on the grounds that it lacks the process or resources to evaluate waivers. Review of the Fourth Circuit's ruling would help avoid these disruptive workplace challenges, and avoid imposition of an unnecessary burden upon the courts.

The Association of Corporate Counsel, as *amicus curiae,* respectfully urges the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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