**No. 07-539**

IN THE
SUPREME COURT OF THE UNITED STATES

PROGRESS ENERGY, INC.
*Petitioner*,

v.

BARBARA TAYLOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

# REPLY BRIEF FOR THE PETITIONER


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## REPLY BRIEF FOR THE PETITIONER

The Family and Medical Leave Act (FMLA), 29 U.S.C. 2601 *et seq.,* is one of the most broadly applicable and commonly invoked sources of employee rights, covering an estimated 76 million employees. Within the Fifth Circuit, employers and employees may privately resolve the multitude of FMLA claims that arise. *Faris* v. *Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003). Employers and employees within the Fourth Circuit cannot. Pet. App. 1a-20a. Numerous other courts have issued conflicting signals on the validity of FMLA waivers, particularly in the wake of the Fourth Circuit's decision here. As the five amicus briefs filed in this case demonstrate, employers are now "caught in the middle, wondering which way to go," Jeffery J. Kros, *Courts Split on FMLA Waivers*, Workspan (Oct. 1, 2005), because the validity of thousands of settlements and waivers now depends on the geographical accident of where an employee can sue. Given the demonstrated need for this Court's immediate intervention, petitioner has accelerated the submission of this case, so that it can be disposed of this Term. Respondent fails to undercut the compelling showing that certiorari is warranted.

1. a. The Fourth Circuit's decision is in avowed conflict with the Fifth Circuit's decision in *Faris* v. *Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003). See Pet. App. 6a-8a, 17a, 36a.

Respondent admits the conflict, but attempts to characterize it as limited to the waiver of "retaliation claims" and not "*substantive* rights" under the FMLA. Br. 8-9. That argument fails. Neither the Fourth nor

the Fifth Circuit relied on such a distinction. The Fourth Circuit categorically held that, absent approval by a court or the Department of Labor, the regulation "precludes both the prospective and retrospective waiver of *all* FMLA rights, including the right of action (or claim) for a past violation of the Act." Pet. App. 3a (emphasis added). The Fifth Circuit held the opposite, concluding that "the proper reading of the regulation is that it does not apply to post-dispute claims for damages under the FMLA." *Faris*, 332 F.3d at 319. See also *id.* at 321 ("A plain reading of the regulation is that it prohibits prospective waiver of rights, not the post-dispute settlement of claims.").[1]

Nor is there any support for respondent's distinction in the text of the FMLA or the regulation. The statute makes it uniformly "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right." 29 U.S.C. 2615. The regulation is equally unqualified with respect to which rights are covered. 29 C.F.R. 825.220(d) ("Employees cannot waive, nor may employers induce employees to waive, their rights under the FMLA.").

Respondent, in fact, makes no effort to explain how either the Fourth Circuit's analysis or the regu-

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[1] The Fifth Circuit's passing reference to "post dispute causes of action for retaliation" (332 F.3d at 320) was simply descriptive of the facts at hand. That does not, as respondent argues (Br. at 10 n.3), render the rest of the court's decision "dictum." See *Seminole Tribe* v. *Florida*, 517 U.S. 44, 67 (1996) ("[I]t is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

lation's text could support her proposed distinction – unless she now admits that the regulatory text is ambiguous. But that simply highlights yet another reason for this Court's review: the conflict between the decision below and this Court's precedent, which holds that the expert agency's resolution of ambiguity in its own regulations controls. See *Long Island Care at Home, Ltd.* v. *Coke*, 127 S.Ct. 2339, 2347, 2349 (2007); *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

b. Respondent notes that the circuit split involves only two courts of appeals. That is true, just as it was when this Court granted certiorari to review the application of another FMLA regulation in *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). As that case shows, the significance of a conflict is measured not just by its breadth, but also by its practical impact. The FMLA applies to all employers engaged in or affecting commerce who have more than 50 employees. 29 U.S.C. 2611(4). Given the realities of the modern economy, a large number of covered employers have employees in multiple jurisdictions. For them, disuniformity in their obligations under federal law takes its toll as soon as it arises. What matters for purposes of business decisionmaking and the formulation and implementation of employment policies is the presence of uncertainty in the law. The breadth of the instability is less relevant because the need for uniformity in business operations generally forces employers to conform their day-to-day practices to the demands of the most restrictive circuit law. See Ass'n of Corp. Counsel Amicus Br. 6-7 (detailing the problems caused by the Fourth Circuit's decision). That is why so many amicus briefs – rang-

ing from the Chamber of Commerce to human resource managers – have been filed in this case pleading urgently for this Court to bring stability and clarity to the law now.

Moreover, the uncertainty faced by employers and employees reaches more widely than the Fourth and Fifth Circuits. District courts have also issued conflicting decisions on the waiver question. See Pet. 11 & n.5 (citing cases). In addition, while the Sixth Circuit has enforced the settlement of FMLA claims (*Halvorson* v. *Boy Scouts of America*, 215 F.3d 1326, 2000 WL 571933 (6th Cir. 2000)), at least one district court has questioned that practice in light of the Fourth Circuit's decision (see *Bieber* v. *The Mfg. of America, Inc.*, No. 2:06-CV-481, 2007 WL 2688272, at *2 (S.D. Ohio Sept. 11, 2007)). Other courts have questioned the validity of waivers as well. See *Bittner* v. *Blackhawk Brewery & Casino, LLC*, No. 03-CV-02274, 2005 WL 1924499, at *5 n.2 (D. Colo. Aug. 9, 2005) (relying on Fourth Circuit's first panel decision). Plaintiffs' attorneys have even started to argue that an employer's *offer of settlement* is an unlawful interference with FMLA rights. See *Sutherland* v. *Goodyear Tire & Rubber Co.*, 446 F. Supp. 2d 1203, 1214 (D. Kan. 2006) (rejecting the claim, but noting that the original panel decision in this case might support it). The repercussions of the conflicting court of appeals decisions thus are currently being felt nationwide by employers, who face damages claims if they pick the wrong side of the dispute. See 29 U.S.C. 2617(a).

c. Finally, respondent argues (Br. at 10) that review should be postponed to permit "more developed

case law." But there is nothing more to develop. The only question is whether the word "rights" in the regulation is ambiguous. Additional court decisions will simply line up on one side or the other of that debate, without changing the basic analysis.

The only other consequence of postponing review is that federal courts will have to start reviewing and approving thousands of settlements and waivers of FMLA rights, since the Department of Labor's lack of any review mechanism will force parties to turn to the courts. But that diversion of scarce judicial resources will not make the legal question before this Court any clearer or any better positioned for review.

2. The question of whether FMLA claims can be waived or settled is of enormous legal and practical importance. As the Chamber of Commerce explains (Br. 4), the court of appeals' decision directly calls into question "tens (if not hundreds) of thousands of releases entered into between employers and employees as part of reductions in force, private settlements, and voluntary separation programs." Moreover, the decision harms employees as much as employers by "cast[ing] 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." Ass'n of Corp. Counsel Amicus Br. 3; see U.S. Chamber Br. 8-9; EEAC Br. 7-8.

Respondent asserts (Br. 11) that employers can seek Department of Labor approval of severance agreements in "situations where a risk of FMLA liability exists." That is wrong. First, there is no proc-

ess for securing such Department of Labor approval, as the Department itself has explained. DOL Ct. App. Br. at 3, 14. Respondent's reliance on 29 U.S.C. 2617(b), is misplaced. That is an administrative civil enforcement provision that authorizes the Secretary of Labor to "receive, investigate, and attempt to resolve complaints of violations." *Ibid.* A private waiver or settlement of existing claims is not a "complaint" to the Department of Labor seeking "[a]dministrative action" to enforce the FMLA. *Ibid.*

Second, respondent's argument ignores the reality that employers cannot adopt and implement a complex matrix of employment practices and severance policies based on varying, one-at-a-time assessments of the risk of FMLA liability for individual employees.

Respondent further argues (Br. 8) that the issue is unimportant because only two circuits are in conflict. But the case law is not so "[s]parse" as respondent suggests. See Part 1(b), *supra*; Pet. 11 & nn. 4, 5. Beyond that, until the Fourth Circuit's decision here, employees justly would have assumed that the law would make them keep the promises they had made in exchange for generous severance payments and other benefits. That has all changed now. Given both the FMLA's sweeping coverage of roughly 76 million employees, Pet. 20, and the *millions* of severance agreements that have already waived FMLA claims, see Chamber of Commerce Br. 10, 12, the impact of the conflict is enormous and enormously important.

In a footnote (Br. 10 n.4), respondent notes that the Department of Labor previously issued a "Request for Information" that referenced the waiver is-

sue as one of twelve matters for which input was sought. See 71 Fed. Reg. 69504, 69509-10 (Dec. 1, 2006). But that request did not indicate that the Department intended to issue a revised regulation any time in the reasonably near future. In fact, in a subsequent report, the Department underscored that "[t]here are no proposals for regulatory changes being put forward by the Department," and that the Department was just seeking "a fuller discussion" of how its regulations "have played out in the workplace." 72 Fed. Reg. 35550 (June 28, 2007).

Indeed, petitioner is not aware of *any* substantive amendments made to the Department's FMLA regulations in years. For example, the regulation invalidated by this Court in 2002 in *Ragsdale* has never been amended, notwithstanding the Department's announcement in 2003 that a change would be forthcoming. See 68 Fed. Reg. 30559 (May 27, 2003).

Even were the Department to break from past practice and amend the regulation, years would likely pass before the regulatory process and judicial challenges were completed. In the meantime, innumerable severances would occur and the validity of additional tens (if not hundreds) of thousands of waivers, severance agreements, and settlements would remain in doubt and subject to varying rules in different jurisdictions.

3. Respondent focuses the remainder of her argument on the merits of the decision below. But for present purposes all that matters is that, whichever court of appeals is correct, a single answer and stability in the law is urgently needed.

Respondent's arguments are incorrect in any event. The Department of Labor's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation" (*Auer*, 519 U.S. at 461) (internal quotation marks and citations omitted), and the ambiguity of the regulation is confirmed not only by the conflicting court of appeals' decisions, but also by this Court's own distinction between "rights" and "claims" or "causes of action" in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).

Respondent also argues that her cause of action is a "right" protected under the statutory prohibition on employers "interfer[ing] with, restrain[ing], or deny[ing] the exercise of" FMLA rights. 29 U.S.C. 2615(a)(1). (Br. 14-15) Perhaps, but that begs the questions of whether the right to settle a claim is an ordinary incident of that right, and whether an employee's and employer's voluntary, cooperative, and mutually beneficial resolution of a claim constitutes "interfere[ence]" with that right.

Respondent also makes no effort to defend the Fourth Circuit's creation out of whole cloth of the caveat that settlements and waivers are permitted if approved by the Department of Labor or a federal court. The Fourth Circuit identified no basis in the text of the statute, the regulation, or the policies underlying the FMLA for the *post hoc* review provision that it crafted. The impact of that decision, and its profound departure from basic principles of administrative law and agency deference, merit this Court's review. See *Long Island Care*, 127 S.Ct. at 2339; *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (where a decision involves "a determination of policy or

judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment").

Respondent also argues (Br. 15-16) that the Department's interpretation does not merit deference because it was adopted for the first time in this litigation. That is wrong on the law. See *Long Island Care*, 127 S.Ct. at 2349 (deferring to agency interpretation even though "the Department appears to have written [the Advisory Memorandum] in response to this litigation," because the Court had "no reason . . . to suspect that [this] interpretation is merely a *post hoc* rationalization[n] of past agency action, or that it does not reflect the agency's fair and considered judgment on the matter in question"); *Auer*, 519 U.S. at 462-463 (upholding interpretation first presented in brief to the Court). It is also wrong on the facts. See DOL Amicus Br. at 6, 11-12 & n.11, 19; *Dougherty* v. *Teva Pharms. USA, Inc.*, Civ. No. 05-2336, 2007 WL 1165068 (E.D. Pa. Apr. 9, 2007) (explaining the longstanding tenure of the Department's position).

Finally, respondent's argument ignores the strong public policy in favor of the private resolution of employment disputes. See Pet. 15-19. Respondent's analogy to the Fair Labor Standards Act is misplaced. See Pet. 16-18. The mere fact that a statute is modeled in some respects on the FLSA (Br. 16) does not suggest that waiver is proscribed. Indeed, waiver and settlement have long been permitted for Equal Pay Act claims notwithstanding that the Equal Pay Act is part of the FLSA. *Wagner* v. *NutraSweet*

*Co.*, 95 F.3d 527, 532 (7th Cir. 1996); see also *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-29 (1991) (permitting private resolution of ADEA claims, even though the ADEA is modeled on the FLSA, see *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 347 (1998)). The nature of the rights at issue, moreover, is more analogous to Title VII, for which waiver is permitted. See *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2003); 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995) ("FMLA provides the same sorts of protections to workers who oppose, protest, or attempt to correct alleged violations of the FMLA as are provided to workers under Title VII.").

## CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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