

Comprehensive Releases May Not Protect Employers From FMLA Claims

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Following a recent Fourth Circuit decision, a comprehensive release may no longer adequately protect employers from claims under the Family and Medical Leave Act ("FMLA"). In *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005), the Fourth Circuit, covering Maryland, North Carolina, South Carolina, Virginia, and West Virginia, invalidated such a waiver. Interpreting a Department of Labor ("DOL") regulation, the court held that an employee could not waive her FMLA rights without prior approval of the DOL or a court. Therefore, the employee was entitled to maintain a lawsuit under the FMLA, despite having signed a comprehensive release in exchange for severance benefits.

The Fourth Circuit declined to follow the Fifth Circuit's interpretation of the same regulation, setting up a circuit split on this issue.

Background

Plaintiff Barbara Taylor was employed by Carolina Power & Light ("CP&L") in a North Carolina facility. Beginning in April 2000, Taylor missed work on several occasions for medical treatment and testing. After her first health-related absence and again during the summer of 2000, Taylor asked a human resources representative whether she qualified for FMLA leave. Taylor was told that she was ineligible because she had not missed work for more than five consecutive days at any time. In fact, Taylor was eligible for FMLA leave because her continuing treatment and incapacity for more than three consecutive days qualified as a serious health condition under the FMLA.

After accruing additional medical absences, Taylor received a warning in October 2000, advising her that she had exceeded the company's average sick time. Seeking guidance on handling her health-related absences, Taylor was told only to improve her attendance. Taylor was absent for additional medical testing in November 2000 and again asked CP&L whether she qualified for FMLA leave. She was again told that she did not qualify. Following a December 2000 surgery, Taylor missed work for approximately six weeks. CP&L told Taylor that this period qualified as FMLA leave; however, Taylor later discovered she was credited for only four weeks of FMLA leave.

As a result of her health-related absences, Taylor received a poor productivity rating on her 2000 performance evaluation. While CP&L's pay raises that year averaged around six percent, Taylor received only a one percent pay raise. The month after she received her performance evaluation, Taylor learned of a planned reduction in force, in which past performance would be a selection factor. She contacted the DOL about CP&L's failure to

grant her FMLA leave and was told that her leave qualified under the FMLA and could not be counted against her. Taylor asked CP&L to correct her 2000 performance evaluation, but her request was denied.

On May 17, 2001, Taylor learned that her employment was being terminated and that she was eligible for benefits under a transition plan. She was told that she would receive additional benefits for signing a release and severance agreement, which she did. Although the release did not specifically mention FMLA claims; it provided for the release of "other federal law claims." On July 20, 2001, Taylor received approximately \$12,000 pursuant to the terms of the release and related documents.

Following her termination, Taylor again contacted the DOL and was told that she could attempt to resolve her concerns with CP&L directly. In January 2002, the director of human resources corrected Taylor's performance evaluation but did not adjust her salary increase or address any other issue she raised.

The Lawsuit

Taylor filed suit in the Eastern District of North Carolina against Progress Energy, Inc. ("Progress"), CP&L's parent company. She alleged that the company: (1) failed to fully inform her of her FMLA rights; (2) improperly denied requests for medical leave; (3) terminated her employment because of medical absences; and (4) terminated her employment because she complained about the company's FMLA violations. Her lawsuit therefore implicated substantive FMLA rights to receive up to twelve weeks of unpaid leave, including on an intermittent basis, to deal with serious health conditions, as well as proscriptive rights not to be discriminated or retaliated against for exercising FMLA rights.

Taylor sought reinstatement, compensatory damages, liquidated damages, and attorneys' fees and costs. She did not return the \$12,000 she received pursuant to the release and related agreements.

District Court Decision

Progress moved for summary judgment on the basis that Taylor had signed a release, which constituted a valid waiver of her claims. In opposition, Taylor relied on a DOL regulation, 29 C.F.R. § 825.220(d), which provides in part, "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA."

The district court granted summary judgment in favor of Progress, holding that the DOL regulation prohibited only prospective waivers of substantive FMLA rights. The district court held that the regulation did not prohibit any waiver of proscriptive rights (i.e., discrimination or retaliation claims) or any retrospective waiver of FMLA claims.

Reliance on *Faris*

The district court looked to *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003). Like Taylor, Carol Faris had received additional compensation upon termination for signing a release waiving her rights as to "all other claims arising under any other federal, state or local law or regulation."

In her subsequent lawsuit, Faris asserted that she was discharged in retaliation for exercising FMLA rights. The *Faris* defendants moved for summary judgment on the basis of the release, and Faris moved for partial summary judgment arguing that the release was unenforceable under 29 CFR § 825.220(d). The district court granted plaintiff's motion and denied defendants' motion. The Fifth Circuit reversed, holding that the DOL regulation prohibits *only* waiver of substantive rights and not post-dispute settlement of claims. The court further found that Faris ratified the release by retaining the consideration she received for signing the release.

Fourth Circuit Decision

Interpretation of 29 CFR § 825.220(d)

The Fourth Circuit held that the district court had incorrectly interpreted the DOL regulation. The court looked to the plain language of the regulation and concluded "that the regulation prohibits both the prospective and retrospective waiver of any FMLA right (whether substantive or proscriptive) unless the waiver has the prior approval of the DOL or a court." The court held that without prior approval by the DOL or a court, Taylor's purported release of the FMLA claim was unenforceable.

The Fourth Circuit noted that the DOL had considered and rejected proposed language that reflected Progress's interpretation. Further, the court found that the enforcement scheme of the FMLA was meant to parallel that of the Fair Labor Standards Act ("FLSA"), which permits waiver of claims only with the approval of the DOL or a court. Contrary to the Fifth Circuit's analysis in *Faris*, the Fourth Circuit concluded that waiver of any FMLA claim is prohibited without prior approval of the DOL or a court, regardless of when the waiver is executed.

Chevron Analysis

In addition to interpreting the meaning of the DOL regulation, the Fourth Circuit analyzed whether the regulation was valid under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). First, the court considered whether Congress had spoken to the precise issue. Concluding that it had not, the court noted that the Secretary of Labor was charged with administering the FMLA and prescribing necessary regulations. The Secretary of Labor, acting through the DOL, was granted authority to address the issue of waiver.

Second, the Fourth Circuit considered whether the regulation was based on a permissible construction of the FMLA. Under *Chevron*, a regulation cannot be "arbitrary, capricious, or manifestly contrary to the statute." Addressing Progress' argument that the regulation is inconsistent with public policy favoring settlement, the court held that a policy argument has no place in analyzing whether a statutory construction is permissible. Citing the danger of making inferences from Congress's silence, the court likewise rejected Progress' argument

that Congressional silence indicated its intent not to regulate waiver or release.

Finally, the court considered Progress' argument that a regulation entirely prohibiting waiver or release is arbitrary and invalid. The court noted that under 29 CFR § 825.220(d), the prohibition on waiver is not absolute, as FMLA rights *can* be waived with prior approval of the DOL or a court. The Fourth Circuit concluded that the regulation is consistent with the statute and represents a permissible interpretation of the FMLA.

Agreement to Arbitrate Distinguished

The court noted that "agreeing to submit a claim to arbitration is entirely different from agreeing to waive it. An agreement to arbitrate preserves the claim; the agreement simply shifts the forum for resolving the claim from a court to an arbitration setting." Thus, it appears that an FMLA claim remains arbitrable in the Fourth Circuit.

No Waiver by Ratification

The court rejected Progress' argument that Taylor ratified the waiver by retaining the \$12,000 in compensation she received in exchange for executing the release. The court held that FMLA rights cannot be waived by ratification.

Conclusion

Taylor has serious ramifications for employers seeking to obtain a release or settlement of FMLA claims. Employers in Maryland, North Carolina, South Carolina, Virginia and West Virginia must have prior DOL or court approval to obtain an enforceable settlement or release of FMLA claims. At least one district court has reached a similar conclusion. See *Dierlam v. Wesley Jessen Corp.*, 222 F. Supp. 2d 1052 (N.D. Ill. 2002) (interpreting 29 C.F.R. § 825.220(d) to invalidate a waiver of FMLA rights contained in a separation agreement). While under *Faris*, it appears that a waiver or release of FMLA claims remains enforceable in Louisiana, Mississippi and Texas, it is unclear how other courts will approach this issue or whether the Supreme Court will step in to provide a definitive ruling.

As a practical matter, employers may be resistant to seeking DOL or court approval of a release of an FMLA claim, especially when no DOL claim or litigation exists. Employers should consider adding language to their standard release agreements stating that employees agree that they have been granted the FMLA leave to which they were entitled and that they have not been subject to any discrimination or retaliation for using FMLA leave. This may provide employers with added protection to defend against FMLA claims asserted by employees who have executed comprehensive general releases. Appropriate severability language will also help ensure that the remaining provisions of a release remain enforceable, even if a waiver provision relating to FMLA claims is invalidated.

It is also unclear whether an employee who asserts an FMLA claim after executing a release can be required to return the consideration she received under the agreement. Employers should therefore consider including a pay-back provision requiring employees to return payments under a release agreement if they later choose to pursue an FMLA claim against their employer.

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