

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA DOUGHERTY,	:	CIVIL ACTION
	:	
Plaintiff,	:	05-2336
	:	
v.	:	
	:	
TEVA PHARMACEUTICALS USA, INC.,	:	
	:	
Defendant.	:	
	:	

JOYNER, J.

April 9, 2007

MEMORANDUM AND ORDER

Presently before the Court is Defendant's Motion to Reconsider the August 30, 2006 Order¹ Denying Defendant's Motion for Judgment on the Pleadings (Doc. No. 33). For the reasons below, the Court VACATES its August 29, 2006 decision (Doc. No. 32) holding that employees may not waive claims under the Family and Medical Leave Act ("FMLA") as part of a severance agreement, and now HOLDS that the operative regulation, 29 C.F.R. § 825.220(d), does not prevent an employee from waiving and/or settling any claims for past violations of the FMLA.

Background

A. *Procedural History*

On May 23, 2005, Plaintiff filed suit against her former employer, TEVA Pharmaceuticals ("TEVA" or "Defendant"), for

¹ Defendant's motion incorrectly indicates that the Court issued its decision on August 30, 2006. The Court issued its decision on August 29, 2006 and it was docketed on August 30, 2006.

alleged violations of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA"), and the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq. ("FMLA" of "Act").² TEVA moved for Judgment on the Pleadings and/or Summary Judgment (Doc. No. 6) arguing that Plaintiff's claims were barred by a release agreement she entered into as part of her severance package. This agreement provided that Plaintiff, in exchange for various severance benefits, would voluntarily release TEVA from liability for any claims - including FMLA claims - arising out of, or related to, her employment.³ See Dougherty v. Teva Pharm. USA, Inc., 05-2336, 2006 U.S. Dist. LEXIS 62179, at *4 (E.D. Pa. Aug. 29, 2006). Before ruling on TEVA's motion, the Court gave the parties leave to conduct limited discovery concerning the validity of the release agreement. See May 11, 2006 Order (Doc.

² For a more detailed factual background, see Dougherty v. Teva Pharm. USA, Inc., 05-2336, 2006 U.S. Dist. LEXIS 62179, at *1-11 (E.D. Pa. Aug. 29, 2006). The particulars of Dougherty's employment history and claims are unnecessary to resolving the issue of the proper interpretation and application of 29 C.F.R. § 825.220(d) to severance agreements.

³ The Agreement provides, in relevant part:

TEVA agrees to pay DOUGHERTY, by means of a lump sum, the equivalent of two month's wages, in addition to the equivalent cost of two month's COBRA coverage and further agrees not to contest DOUGHERTYS' [sic] application, if any, for unemployment benefits and, in consideration of such and intending to be legally bound, DOUGHERTY does hereby REMISE, RELEASE AND FOREVER DISCHARGE TEVA...of and from any and in all manner of actions, causes of action, suits, debts, claims and demands arising from or relating in any way to her employment with TEVA. DOUGHERTY specifically waives any claims that she might have under...the Americans with Disabilities Act...and any and all other federal, state or local statutory claims....

Def. Mot. for Judgment on the Pleadings and/or Summary Judgment, Ex. A, Separation Agreement and General Release ("Agreement").

No. 19). Following this discovery, Plaintiff filed an Amended Complaint (Doc. No. 22), and TEVA filed a supplement to its Motion (Doc. No. 23). The Court also requested both parties to file additional briefing (Doc. Nos. 29, 30) addressing the applicability of 29 C.F.R. § 825.220(d) to the severance agreement.⁴

B. This Court's August 29, 2006 Decision

On August 29, 2006, this Court, relying principally on the Fourth Circuit's decision in Taylor v. Progress Energy, Inc., 415 F.3d 364, 365 (4th Cir. 2005), vacated by 2006 U.S. App. LEXIS 15744 (4th Cir. June 14, 2006),⁵ held that 29 C.F.R. § 825.220(d) ("Section 825.220(d)") precludes an employee from waiving her FMLA claims as part of a severance agreement. See Dougherty, 2006 U.S. Dist. LEXIS 62179, at *14-15. The Court agreed with Taylor's reasoning that the regulation's plain language and administrative history supported this result. See Dougherty, 2006 U.S. Dist. LEXIS 62179, at *19 ("While Taylor has recently been vacated for unspecified reasons, we find that its core reasoning is, nonetheless, persuasive."). Accordingly, TEVA could not rely upon Plaintiff's release of her FMLA claims as a defense to the present suit. The Court did not, however, reach the merits of Dougherty's claims.

⁴ The Court requested this briefing by letter dated August 1, 2006.

⁵ The panel rehearing was scheduled for October 25, 2006.

Section 825.220(d), in relevant part, provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA." 29 C.F.R. § 825.220(d).⁶

⁶ The complete text of Section 825.220 reads:

§ 825.220 How are employees protected who request leave or otherwise assert FMLA rights?

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has --

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;

(2) changing the essential functions of the job in order to preclude the taking of leave;

(3) reducing hours available to work in order to avoid employee eligibility.

(c) An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the

Although the pertinent language is only fourteen words in length, courts have spent thousands in trying to settle on its meaning. And the result has been a lack of consensus among the federal courts as to the correct interpretation of Section 825.220(d).⁷ Indeed, this Court took as the starting point for its analysis the divergent interpretations offered by the Fourth and Fifth Circuits,⁸ before rejecting the Fifth Circuit's narrower construction of Section 825.220(d).

In Faris v. Williams WPC-I, Inc., the Fifth Circuit concluded that Section 825.220(d)'s prohibition against waivers

taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition (see § 825.702(d)). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of "light duty."

(e) Individuals, and not merely employees, are protected from retaliation for opposing (e.g., file a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

⁷ Compare Faris v. Williams WPC-I, Inc., 332 F.3d 316, 322 (5th Cir. 2003) (holding that Section 825.220(d) applies "only to waivers of substantive rights under the FMLA, rather than to claims for money damages") and Kujawski v. U.S. Filter Wastewater Group, Inc., No. 00-1151, 2001 U.S. Dist. LEXIS 17578 (D. Minn. Aug. 7, 2001) (approving validity of an employee's release of FMLA claims without discussing Section 825.220(d)) with Brizzee v. Fred Meyer Stores, Inc., No. 04-1566, 2006 WL 2045857 (D. Or. July 17, 2006) (adopting Magistrate Judge's decision to follow Taylor and hold that Section 825.220(d) prohibits both prospective waiver of FMLA rights and settlement of FMLA claims).

⁸ The Third Circuit has not ruled on the applicability of Section 825.220(d) in this particular context.

applies only to the "prospective" waiver of "substantive rights under the [FMLA] such as rights to leave, reinstatement, etc., rather than to a cause of action for retaliation for the exercise of those rights." 332 F.3d 316, 320-21 (5th Cir. 2003). The Fifth Court began its analysis by emphasizing that the "proper focus is on the meaning of the phrase 'rights under the FMLA.'" Id. at 320. It concluded that this phrase (when read in the context of the regulation as a whole) referred only to the substantive protections of the FMLA. This was so because nowhere did the regulation describe, for example, a "cause of action for discrimination . . . as an FMLA right." Id. at 321. A cause of action for discrimination, and the like, are only "protection[s] for FMLA rights, the waiver of which is not prohibited by the statute." Id. (emphasis in original). Therefore, critical to the Faris court's analysis was the observation that Section 825.220(d) distinguishes between substantive FMLA rights and proscriptive ones (i.e. one's remedies); this latter set being susceptible to waiver. See id. ("A plain reading of the regulation is that it prohibits the prospective waiver of rights, not the post-dispute settlement of claims.").⁹

⁹ The Fifth Circuit also reached this conclusion by relying, in part, on an earlier decision by that court, which held that a cause of action for retaliation (a proscriptive right) is distinct from the substantive rights under the FMLA. See Faris, 332 F.3d at 321 n.5 (citing Chaffin v. John H. Carter Co., 170 F.3d 316, 319 (5th Cir. 1999)). In its briefing to this Court, the Department of Labor ("DOL") rejects that the plain text of Section 825.220(d) distinguishes between substantive and proscriptive rights. See infra Note 18 and accompanying text.

In contrast, this Court rejected that Section 825.220(d) distinguished between either substantive rights and proscriptive rights, or between prospective rights and retrospective claims. See Dougherty, 2006 U.S. Dist. LEXIS 62179, at *14-15. Instead, the Court wholeheartedly endorsed the Fourth Circuit's approach in Taylor, and read the plain language of Section 825.220(d) as broadly prohibiting an employee from waiving either FMLA rights (substantive or proscriptive ones) or claims. See Dougherty, 2006 U.S. Dist. LEXIS 62179, at *19. The Court also observed (like the Taylor court) that this interpretation of Section 825.220(d) was supported by its (albeit limited) administrative history, which consisted basically of the Preamble to the Final Regulations Implementing the Family and Medical Leave Act of 1993.¹⁰ See Dougherty, 2006 U.S. Dist. LEXIS 62179, at *20-21.

¹⁰ In relevant part, of the Preamble stated:

Nationsbank Corporation (Troutman Sanders), Southern Electric International, Inc (Troutman Sanders), and Chamber of Commerce of USA expressed concerns with the "no waiver of rights" provisions included in paragraph (d) of this section. They recommended explicit allowance of waivers and releases in connection with settlement of FMLA claims and as part of a severance package (as allowed under Title VII and ADEA claims, for example). The ERISA Industry Committee raised a similar concern with respect to the rule's impact on early retirement windows offered by employers. Such windows are typically open for a limited period of time and require all employees accepting the offer to be off the payroll by a certain date. If employees on FMLA leave have the right to participate in an early retirement program, but may continue to have and assert leave rights, the leave rights could adversely affect administration of the early retirement program.

The Department has given careful consideration to the comments received on this section and has concluded that prohibitions against employees waiving their rights and employers inducing employees to waive their rights constitute sound public policy under the FMLA, as is also the case under other labor standards statutes such as the

Because the Court concluded that the Department of Labor ("DOL") did not intend to limit the application of Section 825.220(d) to prohibiting only the prospective waiver of "rights," it held that the regulation also prohibits an employee from waiving claims for past FMLA violations through a severance agreement. See id. at *24.

C. TEVA's Motion to Reconsider this Court's August 29, 2006 Decision

On September 26, 2006, TEVA filed this Motion to Reconsider the Court's August 29, 2006 decision (Doc. No. 33). TEVA contends that this Court's interpretation of Section 825.220(d) is erroneous in light of the position taken by the DOL in its amicus briefing before the Fourth Circuit supporting the appellee-employer's petition to rehear Taylor en banc. See TEVA Memorandum in Support of its Motion to Reconsider ("TEVA Memo.") at 1.¹¹ TEVA argues that while this Court correctly recognized

FLSA. This does not prevent an individual employee on unpaid leave from returning to work quickly by accepting a "light duty" or different assignment. Accordingly, the final rule is revised to allow for an employee's voluntary and uncoerced acceptance of a "light duty" assignment. An employee's right to restoration to the same or an equivalent position would continue until 12 weeks have passed, including all period of FMLA leave and the "light duty" period. In this connection, see also § 825.702(d).

60 Fed. Reg. 2180, 2218-19 (Jan. 6, 1995)(emphasis added).

¹¹ On June 14, 2006, the Fourth Circuit vacated Taylor and granted a panel rehearing. See Taylor v. Progress Energy, Inc., No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. June 14, 2006). In Taylor, the DOL filed an amicus brief explaining that it had consistently interpreted Section 825.220(d) to permit the retrospective settlement of FMLA claims and this interpretation of the FMLA is entitled to deference under Chevron. See TEVA Memo., Ex. A (Brief for the Secretary of Labor as Amicus Curiae in Support of Defendant-Appellee's Petition for Rehearing En Banc ("DOL en banc Brief")) at 4-6; TEVA Memo., Ex.

that the DOL's interpretation of the FMLA through its promulgation of Section 825.220(d) was reasonable and entitled deference under Chevron, this Court nevertheless erred by misreading the plain text of the regulation and ascribing a different (and indeed contrary) interpretation to it than that taken by the DOL. The Court permitted the DOL to file an amicus brief in support of TEVA's position.¹²

Consistent with the position it took before the Fourth Circuit, the DOL contends that Section 825.220(d), by its terms, bars only the prospective waiver of "rights" and not the retrospective waiver of "claims". See Brief of the Secretary of Labor as Amicus Curiae in Support of Defendant's Motion for Reconsideration ("DOL Amicus Brief") (Doc. No. 38) at 5-10.¹³

The DOL argues that both the Taylor court and this Court erred by focusing on the word "waiver" in the first sentence of Section 825.220(d), rather than on the word "rights." See id. at 7 ("The operative term in the regulation . . . is not 'waiver' but 'rights' . . ."). The DOL stresses that because Section

B (Supplemental Brief on Panel Rehearing for the Secretary of Labor as Amicus Curiae ("DOL Supp. Panel Brief")) at 4 ("[T]he [DOL] has never interpreted section [825.]220(d) as barring the private, retrospective settlement of FMLA claims.").

¹² By letter dated September 27, 2006, the DOL had requested permission to file an amicus brief. The DOL filed its brief on November 3, 2006. Because TEVA's brief accompanying its Motion for Reconsideration does little more than parrot the position taken by the DOL before the Fourth Circuit (as well as subsequently this Court), the Court focuses principally on the arguments advanced by the DOL.

¹³ See also Note 11, *supra*.

825.220(d) only refers to "rights," its prohibition does not extend to the settlement of "claims." See id. at 7. And this interpretation, the DOL asserts is "consistent with established precedent in employment law that disfavor[s] the prospective waiver[] of rights, but encourag[es] the settlement of claims." Id. at 9 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1974) ("Although presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement, . . . an employee's rights under Title VII are not susceptible of prospective waiver."); Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 116-17 (2d Cir. 2000) ("Accordingly, a firm cannot buy from a worker an exemption from the substantive protections of the anti-discrimination laws because workers do not have such an exemption to sell, and any contractual term that purports to confer such an exemption is invalid."); Kendall v. Watkins, 998 F.2d 848, 851 (10th Cir. 1993)). Thus, the DOL contends that it is reasonably interpreting the FMLA through Section 825.220(d), and its position is entitled deference. See DOL Amicus Brief at 10.

In the alternative, the DOL argues that even if this Court concludes that the relevant language of Section 825.220(d) is ambiguous, the Secretary's "permissible interpretation" of the regulation, as set forth in its amicus briefs before this Court and the Fourth Circuit, is nevertheless "entitled to controlling

deference." Id. at 11 n.10 (citing Auer v. Robbins, 519 U.S. 452, 462 (1997)); Barnhart v. Wilson, 535 U.S. 212, 217 ("Courts grant an agency's interpretation of its own regulations considerable legal leeway.").¹⁴

The Court now considers TEVA's Motion to Reconsider in light of the DOL's interpretation of the FMLA vis-à-vis Section 825.220(d). This requires the Court to (once again) determine whether the DOL's promulgation of Section 825.220(d) is a reasonable interpretation of the FMLA, and thus entitled to deference under the standard set forth in Chevron, USA, Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ("Chevron").

Standard of Review

The "purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Post Confirmation Trust for Fleming Cos., Inc., v. Friedland, No. 06-CV-1118, 2006 U.S. Dist. LEXIS 86608, at *3-4 (E.D. Pa. Nov. 21, 2006)(quoting Harsco Corp. v. Zlotnicki, 779

¹⁴ The Court agrees with the DOL that the fact that its "interpretation [of Section 825.220(d)] comes . . . in the form of a legal brief . . . does not, in the circumstances of this case, make it unworthy of deference. The [DOL's] position is in no sense a 'post hoc rationalization' advanced by an agency seeking to defend past agency action against attack, Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 212 (1988). There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." Auer, 519 U.S. at 462. But implicit in this statement is the understanding that an agency's interpretation of a statute (or regulation) in a legal brief is not automatically entitled deference under Chevron, USA, Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

F.2d 906, 909 (3d Cir. 1985), cert. denied, 476 U.S. 1171 (1986)). Thus, a motion for reconsideration will be granted if the moving party, here TEVA, can show "one of the following: 1) an intervening change in the controlling law; 2) the availability of new evidence that was not available previously; or 3) the need to correct a clear error of law or fact to prevent manifest injustice." Max's Seafood Café v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999). This motion raises the third situation - the need to correct a clear error of law.

Discussion

In reviewing an agency's construction of the statute which it administers the Court must ask "first, always, . . . whether Congress has directly spoken to the precise question at issue." Chevron, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43 ("Chevron Step One"). In determining whether congressional intent is clear, the Court must examine the statute's language and legislative history. See K Mart Corp. v. Cartier, Inc., 484 U.S. 281, 291 (1988). The initial inquiry under Chevron, therefore, is whether Congress, in enacting the FMLA, explicitly provided for or precluded the waiver of claims.

The statutory text of the FMLA is silent with respect to the waiver or settlement of claims. See 29 U.S.C. § 2601 et. seq.;

Taylor, 415 F.3d at 369. And its legislative history does not clearly evince Congress's intent to permit or preclude the waiver or settlement of FMLA claims. Thus, Congress has not spoken directly to the issue of waiver. It has, however, directed the Secretary of Labor to issue such regulations as are "necessary to carry out" the statute. 29 U.S.C. § 2654. Accordingly, Congress "has by implication delegated authority to the agency" to promulgate regulations to deal specifically with this issue. Taylor, 415 F.3d at 369 (quoting United States v. Deaton, 332 F.3d 698, 708 (4th Cir. 2003)).

In the absence of express congressional intent, a court must determine whether the agency's answer to a specific issue is "based on a permissible construction of the statute." Chevron, 467 U.S. at 843 ("Chevron Step Two"). At this stage, it is not the role of the Court to determine whether the DOL's interpretation is correct or whether another interpretation is preferable. Rather, the Court exercises a limited interpretive role. It must only determine whether the DOL reasonably interpreted the FMLA through Section 825.220(d). And if so, the Court must defer to that interpretation. See, e.g., Sommer v. Vanguard Group, 461 F.3d 397, 399 n.2 (3d Cir. 2006). But whether Section 825.220(d) is a reasonable interpretation of the FMLA, first requires the Court to determine what the regulation means.

In its earlier decision, the Court (following Taylor) held that Section 825.200(d), by its terms, prohibits an employee from waiving either prospective rights or accrued FMLA claims. As detailed above, TEVA (and more importantly the DOL) argues that this interpretation was clearly erroneous. After considering the additional briefing (primarily that from the DOL), the Court agrees.

Section 825.220(d), in relevant part, provides that "employees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA. 29 C.F.R. 825.220(d) (emphasis added). Notably, the regulation's plain language mentions only the waiver of rights. It is, however, silent with regard to the waiver of "claims" (the word claim doesn't even appear in the regulation). And so to properly interpret Section 825.220(d) (according to the DOL), requires the Court to focus on the word "rights," not the word "waiver." The DOL is partially correct.

By not focusing on the word "rights," this Court (like Taylor) did conflate the notion of a 'right' with that of a 'claim.'¹⁵ But properly understood, these are distinct concepts. So to use them interchangeably, as this Court and the Fourth Circuit previously did in analyzing Section 825.220(d), is what (in part) led to the erroneous conclusion that an employee may

¹⁵ Specifically, a claim which has accrued.

not waive claims for past violations of the FMLA.

Contrary to the DOL's suggestion, however, it is not enough to simply focus on the word "rights." And as it will become clear, momentarily, it is also not enough to focus on the word "claim." To properly analyze the meaning of this regulation, requires the Court (as the Fifth Circuit did in Faris) to consider the meaning of the entire phrase "rights under the FMLA." Section 825.220(d) will bar the waiver of an existing claim only if such a waiver amounts to a waiver of an employee's rights under the FMLA.

A claim materializes only after the violation of a right. Therefore, absent the violation of some right, one has no claim.¹⁶ In other words, elementary as this may seem, an employee, who freely exercises her FMLA rights without incident, will never have a claim for violations of the FMLA against her employer. This simplistic example illustrates the distinction between a right and an accrued claim. A claim is essentially backwards looking. One asserts a claim because they have allegedly endured some past legal harm. Rights, on the other hand, are essentially forward looking; they inform us as to the

¹⁶ Though the old adage claims that "where there is a right, there is remedy," this is not entirely true. It is not always the case that there exists a private remedy (i.e. an individual cause of action) for the violation of one's rights. See, e.g., Alden v. Maine, 527 U.S. 706 (1999) (Because Congress lacks the power under its Article I powers to abrogate state sovereign immunity, state employees do not have a private remedy in either state or federal court against their state employers for violations of the Fair Labor Standards Act).

scope of permissible (or impermissible) conduct. And so while anyone covered by the FMLA always has rights under the statute, they don't necessarily have any claims. E.g., DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 729 (3d Cir.), cert. denied, 516 U.S. 916 (1995) ("A right to be free prospectively from certain forms of discrimination always is worth something; however, whether a person has accrued a claim based on a right depends entirely on what previously has occurred.").

So far, so good. It appears that the DOL's focus on the word claim works in their favor; there appears to be a clear dichotomy between rights and claims. But the problem is that an employer could seize upon the DOL's emphasis of the word 'claim' and effectively force an employee to waive a subset of her rights under the FMLA. Specifically, it is not enough to consider the word 'claim' in isolation because doing so fails to distinguish between interfering with an employee's ability to bring a claim in the future versus settling one for past conduct.

When a person sues (i.e. brings a claim) for violations of the FMLA, she is exercising one set of rights - proscriptive rights¹⁷ - to protect another set - substantive rights (in this instance the FMLA's substantive protections). But if an employment contract requires a prospective employee to 'waive any

¹⁷ The FMLA codifies three types of claims (i.e. proscriptive rights). See 29 U.S.C. § 2615(a)(1) (interference claims); 29 U.S.C. § 2615(a)(2) (discrimination claims); 29 U.S.C. § 2615(b) (retaliation claims).

claims she might have for future violations of the FMLA,' this would be asking the employee to do little more than forfeit her proscriptive rights under the FMLA (i.e her FMLA remedies). The net effect being that the employee would still have substantive rights under the FMLA but no way to enforce them. Section 825.220(d) does not permit this type of agreement, however. The regulation prohibits the waiver of any right under the FMLA. Its text does not evince that its applicability is limited to the FMLA's substantive protections. To read the regulation in that manner would be introducing a distinction that the text does not support. The Court can think of no good reason to do so. And it will not.¹⁸

The basic point here is that there is nothing magical about emphasizing the word "claim" over "right." An employer could readily draft a contract which uses the word "claims" that is functionally equivalent to drafting one with the word "rights." With the effect being that under either of these agreements, the employee is waiving her rights under the FMLA. The Court therefore rejects the DOL's argument that the applicability of

¹⁸ As noted earlier, the DOL reads the Fifth Circuit's decision in Faris to suggest that Section 825.220(d) only prohibits the prospective waiver of substantive rights under the FMLA (e.g., the right to take FMLA leave), but not the prospective waiver of proscriptive rights (e.g., the right to sue for violations of the FMLA). See DOL Amicus Brief at 4 n.6. The DOL explicitly rejects this interpretation of Section 825.220(d). See id. ("The [DOL] construes the regulation as barring the prospective waiver of any right under the FMLA.") (emphasis in the original). As noted in the main text, the Court agrees that the regulation does not facially distinguish between proscriptive and substantive rights under the FMLA. And so an employee may not prospectively waive (or be induced to do so) either set of rights.

Section 825.220(d) turns solely on the general distinction between rights and claims.

Now one might argue that the reverse (looking at accrued rather than future claims) is also true. Isn't it the case that the ability to bring a claim (once it accrues) is in fact a right in itself, i.e. the aggrieved employee is now exercising her "right" to bring a claim? Yes. In one sense that is true. It is a kind of right; but importantly, not a right under the FMLA.

By electing to waive (or settle) a claim that has accrued, an employee is not waiving any proscriptive or substantive rights under the FMLA. This is so because the decision to bring a claim (i.e. exercise one's proscriptive rights) is not a separate right under the Act. And Section 825.220(d) only prohibits the waivers of rights under the FMLA. Those rights include its substantive protections (i.e. FMLA leave) and its proscriptive ones (i.e. right to sue for retaliation). In other words, the decision to bring a claim (saying that you are going to exercise your right to sue) is not a separate right under the FMLA. Nowhere does the FMLA (or regulation) mandate that an aggrieved employee must exercise her proscriptive rights and bring an FMLA claim. An employee's decision to exercise her proscriptive rights is an independent one that she alone must make. Thus, the decision to exercise the FMLA's proscriptive protections stands apart from the FMLA. That right (the decision whether to file suit or not)

arises only when an employer has violated the FMLA. So it can't be right "under the FMLA" because it doesn't exist in the absence of an FMLA violation (whereas the proscriptive right to protect against FMLA violations does). So by settling a past FMLA claim, the employee still retains all of her substantive rights and remedies (proscriptive rights) under the FMLA. After a settlement, an employer cannot, for example, deny her of FMLA leave. And if it does, the employee always has a remedy (proscriptive right) under the FMLA to challenge that action. Entering into a settlement or severance agreement therefore doesn't change anything for the employee in terms of rights under the FMLA - she still retains all of them.¹⁹

¹⁹ By concluding that the plain text of Section 825.220(d) permits an employee to waive past FMLA claims, the Court obviously rejects the DOL's alternative contention that Section 825.220(d) is ambiguous. And for several reasons this position is unpersuasive. First, Section 825.220(d) clearly prohibits the waiver of rights under the FMLA. The regulation is not ambiguous as to which rights an employee may not waive. For example, had the regulation simply provided that employees may not "waive their rights," there would be some question as to which rights - rights under the FMLA? Or all federal rights? Or all rights under the sun? That issue does not present itself as the regulation helpfully makes clear that the limitation on waivers pertains only to "rights under the FMLA." Second, the fact that the Fourth and Fifth Circuits disagreed on which type of waivers were permissible under Section 825.220(d) does not render the regulation ambiguous. Their contradictory readings of Section 825.220(d) resulted from each court focusing on a different word (or words) in the regulation (the Fourth Circuit - "waiver" and the Fifth Circuit "rights under the FMLA"). And having done so, it is not possible to conclude that any particular word (or phrase) of Section 825.220(d) is ambiguous that would make the regulation as a whole ambiguous. Moreover, the regulation is not ambiguous because separate courts chose to emphasize different aspects of it. Take for example the situation where Kathy tells her friends Leah and Alex that she just bought a new brown and wooden chair over the weekend. Later that day, Alex tells some friends that Kathy bought a brown chair. Leah, however, tells others that Kathy bought a wooden chair. Even though Alex and Leah chose different details to emphasize, there is no ambiguity as to what type of chair Kathy actually bought. It was brown and wooden. Likewise, by emphasizing different particular phrases (or words) of Section 825.220(d) (as the Fourth and Fifth Circuits did) does not make the regulation ambiguous. It prohibits the waiver of any right under the FMLA.

The Court therefore holds that Section 825.220(d) does not prohibit an employee from waiving past FMLA claims as part of a severance agreement or settlement.

The Court finally reaches Chevron Step Two: Is the DOL's interpretation of the FMLA through Section 825.220(d) reasonable and therefore entitled deference? See Chevron, 467 U.S. at 843. For several reasons, the Court concludes that it is. First, Section 825.220(d) is not inconsistent with the plain language of the FMLA (as neither the FMLA nor any other regulation promulgated thereunder prohibit the settlement of past FMLA claims). Second, insofar as the regulation bars the prospective waiver of rights, but permits (if not encourages) the private settlement of FMLA claims, the DOL has elected to treat the settlement of FMLA claims as being no different from the settlement of other federal employment claims. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1974) ("Although presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement, . . . an employee's rights under Title VII are not susceptible to prospective waiver."); Rivera-Flores v. Bristol-Myers Squibb Caribbean, 112 F.3d 9, 11 (1st Cir. 1999) (Courts have, in the employment law context, commonly upheld releases given in

So its applicability depends solely upon addressing the issue of whether an employee's decision to waive "x" constitutes a waiver of rights under the FMLA. In other words, a court must decide whether "x" is a right under the FMLA.

exchange for additional benefits. . . . Thus, release of past claims have been honored under [Title VII and the ADEA]."); Kendall v. Watkins, 998 F.2d 848, 851 (10th Cir. 1993) ("[A]n employee may agree to waive Title VII rights that have accrued, but cannot waive rights that have not yet accrued."), cert. denied, 510 U.S. 1120 (1994); Rogers v. Gen. Elec. Co., 781 F.2d 452, 454 (5th Cir. 1986) (upholding the validity of a private release of accrued Title VII claims). The Court knows of no good reason why it is unreasonable for the DOL to permit waivers of FMLA claims when such waivers are permitted of Title VII and Age Discrimination in Employment Act ("ADEA") claims.²⁰ Cf. Faris, 332

²⁰ In Taylor, the Fourth Circuit thought there was a good reason. By concluding that the remedial structure of the FMLA most closely resembles that of the Fair Labor Standards Act ("FLSA"), the Fourth Circuit concluded that it was reasonable for the DOL to bar an employee from waiving past FMLA claims as part of a severance agreement. See Taylor, 415 F.3d at 373-74. (It should be noted that the FLSA has a more elaborate enforcement scheme than most other federal employment laws.) This was so for three reasons. First, the Fourth Circuit believed that the DOL had "explicitly analogized" the FMLA to the FLSA in the Preamble to the Final Regulations Implementing the FMLA ("Preamble"). Id. at 373; see also 60 Fed. Reg. at 2218. Second, it observed that the legislative history of the FMLA revealed that Congress intended to model the FMLA's enforcement scheme after that of the FLSA. See id. (citing S. Rep. No. 103-3, at 35 (1993); Arban v. W. Publ'g Corp., 345 F.3d 390, 407-08 (6th Cir. 2003)). And third, it noted that the Supreme Court has consistently held that an employee may not waive claims under FLSA by way of private agreement. See id. at 374 (citations omitted). While the Fourth Circuit found clarity in the administrative and legislative history, this Court sees only a fog at best.

First, the Court disagrees that the DOL "explicitly analogized" the FMLA to the FLSA in the Preamble. In addressing the issue of waiver, the DOL explained that its policy of prohibiting the waiver of rights under the FMLA would be consistent with "other labor standards statutes such as the FLSA." 60 Fed. Reg. at 2218 (emphasis added). This statement indicates little else than that the DOL's policy with respect to the waiver of rights would be no different under the FMLA than other federal labor statutes, including, as an example, the FLSA. Contrary to the Fourth Circuit's reading, nowhere in the Preamble does the DOL indicate that it intends to treat the FMLA as more similar to the FLSA than other federal employment statutes. See Taylor, 415 F.3d at 373. The DOL's response simply does not indicate an unambiguous intent to mirror the FLSA's remedial structure in the FMLA. The DOL was silent on the issue (which had been raised by three commentators during the

F.3d at 321-22. And therefore it concludes that the DOL reasonably interpreted the FMLA in Section 825.220(d) because it is a permissible construction of that statute.

Conclusion

For the foregoing reasons, this Court VACATES its August, 30, 2006 decision holding that employees may not waive claims under the FMLA as part of a severance agreement. An appropriate Order follows.

rulemaking process) of whether Section 825.220(d) bars the waiver of past FMLA claims. Nevertheless, while noting that "inferences from congressional silence, in the context of administrative law, are often treacherous," the Fourth Circuit failed to explain why inferences from agency silence are not similarly treacherous. *Id.* at 373 (citing EEOC v. Seafarers Int'l Union, 394 F.3d 197, 202 (4th Cir. 2005)). The Court therefore believes that the Taylor court committed the very error that it warned against in interpreting the Preamble.

Second, the Court rejects the Fourth Circuit's reliance on the FMLA's legislative history as supporting the contention that waivers of past FMLA claims are impermissible. The mere fact that Congress modeled the FMLA's enforcement scheme on the FLSA's does not mean that it adopted it wholesale. Indeed, the requirement that the DOL supervise settlements in FLSA cases is a judicially created mandate - one that Congress was aware of at the time it enacted the FMLA. Yet, Congress did not explicitly require that the DOL directly supervise the settlement of FMLA claims (and, obviously, the FMLA does not even mention waivers and/or settlements of past claims). The DOL also did not establish an administrative system (like that which exists under the FLSA) for reviewing FMLA settlements in the wake of its enactment. It is also debatable as to whether Congress enacted the FMLA with the same policy considerations as they had in mind when enacting the FLSA to support the assertion that both must have exactly the same remedial scheme. In its briefing to this Court and the Fourth Circuit, the DOL explicitly rejects the Taylor court's contention that these statutes were enacted with the same policy considerations. See DOL *en banc* Brief at 13-15 (describing the FMLA's policy concerns as more akin to those underlying Title VII and the ADEA). And though reference to this legislative history is ultimately unnecessary to resolving the reasonableness of Section 825.220(d), the Court believes that the DOL's views about the purpose of a statute for which it is responsible for enforcing are entitled special solicitude.

In sum, there is simply no clear administrative or legislative history that makes the DOL's interpretation of the FMLA through the promulgation of Section 825.220(d) unreasonable or impermissible.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA DOUGHERTY,	:	CIVIL ACTION
	:	
Plaintiff,	:	05-2336
	:	
v.	:	
	:	
TEVA PHARMACEUTICALS USA, INC.,	:	
	:	
Defendant.	:	
	:	

ORDER

AND NOW, this 9th day of April, 2007, the Court **GRANTS** Defendant TEVA Pharmaceuticals USA, Inc.'s Motion for Reconsideration (Doc. No. 33) AND **VACATES** its August 30, 2006 Decision. The Court now **HOLDS** that 29 C.F.R. § 825.220(d), does not prevent an employee from waiving and/or settling any claims for past violations of the Family and Medical Leave Act.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.