

Topic: Release Agreements and the Family and Medical Leave Act
 Area: Employment and Labor Law

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**Seemed Like a Good Idea at the Time:
 Release Agreements and the FMLA**

“Contrariwise”, continued Tweedle Dee, “if it was so, it might be; and if it were so, it would be; but as it isn’t, it ain’t. That’s logic.”
 Lewis Carroll (1832-1898), Through the Looking Glass, Ch. 4.

“One of the chief purposes” of contract law is ‘to secure the realization of expectations reasonably induced by the expressions of agreement.’” Joyner vs. Adams, 97 N.C.App. 65, 69, 387 S.E.2d 235, 239 (1990). Parties to a contract (or at least one of the parties to a contract), however, can be blindsided when the law declares, in effect, that reasonable “expectations” must, for reasons of public policy, yield to other concerns that are deemed more important than those of the parties themselves. The U.S. Court of Appeals for the Fourth Circuit has recently provided a clear example of just such a deferral to public policy in litigation arising under the Family & Medical Leave Act of 1993 (the “FMLA”).

Picture this: You are sitting in your office on a dreary winter’s afternoon, thumbing through back issues of the *ABA Journal* and waiting for the world to recognize your prodigious legal talents, and for the telephone to ring. It does. You encounter, on the other end, the breathless voice of Polly Anna, the Vice President of Operations of the local branch of a well-known utility company.

She tells you that she needs your help and advice, and needs it fast. She regales you with the following facts: That the company, until recently, employed an employee named **Barbara Taylor** who, for medical reasons, was often absent from work; that Barbara, on one occasion, was absent from work for about six weeks and was duly informed that her absences qualified as permissible leave in accordance with the FMLA; that the company thereafter decided to lay off some employees in a “reduction-in-force”; that Barbara was then informed a few weeks ago that she had been selected for dismissal, but that the company’s selection of Barbara for dismissal (as Polly adamantly insists) had nothing to do with her proper use of FMLA leave; that she was also told that she would receive approximately \$12,000 to which she was not otherwise entitled if she signed and delivered to the company

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a general release and severance agreement; that the proposed agreement tendered to Barbara provided in part that the “employee hereby releases” the company “from all claims ... relating to employee’s employment” with the company including but not limited to claims “arising under ... any ... federal ... law”; that the proposed agreement was drafted by Polly’s brother, a Montana tax lawyer who prepared the agreement as a favor to Polly (and does not claim to be well versed in the FMLA); and that Barbara dutifully signed and returned the release agreement to the company, whereupon Polly provided Barbara with a company check in the promised amount.

Polly, brimming with righteous indignation, then tells you that Barbara, after having signed the release and taken the company’s money, has had the temerity to sue the company in federal court, claiming that the company (a) failed to inform her of her FMLA rights, (b) improperly denied her requests for FMLA leave and (c) fired her because of her FMLA-protected absences and because she complained about the company’s violations of the FMLA. Polly, at your request, promptly e-mails to you a complete copy of the release agreement, which, sure enough, provides that Barbara did release the company from all claims pertaining to her employment, including but not limited to claims arising under federal law. Polly then tells you that she must appear next week at a hastily scheduled meeting of the board of directors’ Executive Committee, and has been told that the Committee looks forward to hearing that the case can be brought to a quick and inexpensive end. “So”, Polly asks, “You CAN get this case thrown out, right?”

You instinctively inform your new client that Barbara’s case cries out for summary dismissal, based on the affirmative defenses of release, waiver and/or estoppel. You, nonetheless, wisely tell Polly that you will look into the matter and call her tomorrow. You hang up the phone, and congratulate yourself for having secured a prosperous new client with a potentially serious problem that seems so easily resolved. Your prodigious talents will triumph.

The next morning you undertake your research and, to your delight, discover that the Fourth Circuit Court of Appeals, about six months ago, addressed the very issue that confronts you in the eerily similar case of Taylor vs. Progress Energy, 415 F.3d 364 (4th Cir. 2005). You settle into your leather wingback with a copy of the opinion and a triple grande caffè mocha. You begin to read. To your dismay, you then discover that, although the Fourth Circuit has answered your question, it has not done so in the way that you presumed.

The FMLA, according to the court, creates both substantive and proscriptive rights. ... The **substantive rights** include the employee’s right to take up to twelve weeks of unpaid leave in any one-year period because of a serious health condition... ; the right to take such leave on an intermittent basis or on a reduced work schedule, when medically necessary ...; and the right to reinstatement following such leave The **proscriptive rights** include an employee’s right not to be discriminated or retaliated against for exercising substantive FMLA rights or for otherwise opposing any practice made unlawful by the Act.

415 F.3d at 368 – 369 (emphasis supplied). That you already knew. What you did **not** know is that regulations published by the Wage & Hour Division of the U.S. Department of Labor (the “DOL”) provide explicitly that “[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA.” 29 C.F.R. § 825.220(d) (2005). “For example, employees ... cannot ‘trade off’ the right to take FMLA leave against some other benefit offered by the employer.” Id. Surely, you think, that cannot mean what it says, and must mean, instead, merely that employers cannot lawfully require or ask employees to waive their FMLA rights **before** the need to invoke those rights arises.

But you read on: The district court in Taylor granted the employer’s motion for summary judgment, “holding that §825.220(d) does not render the release unenforceable.” 415 F.3d at 368. The Fourth Circuit, however, reversed and “remanded for further proceedings”, 415 F.3d at 375, holding that “29 C.F.R. §825.220(d) **bars the prospective and retrospective waiver or release of the FMLA’s substantive and proscriptive rights**”,

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“without prior DOL or court approval”. *Id.* (emphasis supplied). The regulation makes no exception for such “prior approval” by the DOL or a court. The appellate court observed, however, “that employees **may waive or release their FMLA rights with the prior approval of the DOL or a court**” because of the “DOL’s recognition that the FMLA’s enforcement scheme is meant to parallel” that of the Fair Labor Standards Act of 1938 (the “FLSA”), and because the “rights guaranteed by the FLSA cannot be waived or settled without prior DOL or court approval.” 415 F.3d at 371 (emphasis supplied). “Thus, the DOL – ‘the agency charged with administering’ the FMLA ... – has acknowledged that Congress intended for the restrictions imposed on the settlement of FLSA claims to be duplicated in the FMLA’s regulatory scheme.” *Id.*

You know from yesterday’s conversation with Polly that the company did not seek or obtain “prior approval” of the DOL or a court before securing Barbara’s execution of the release agreement. You also know that Barbara, despite suing your client, has not returned the \$12,000. Surely, you think, your client is entitled to summary judgment because Barbara has, in effect, ratified the release of her FMLA claims by retaining the consideration that she received in exchange for having released the company. Wrong again: “Because FMLA claims are not waivable by agreement, neither are they waivable by ratification”, because Section 825.220(d) “makes no exception for waiver by ratification.” 415 F.3d at 372.

So that’s that. The release that Barbara signed is not worth the paper it’s written on insofar as her FMLA claims are concerned. Barbara, moreover, is free to keep the company’s \$12,000 without being deemed to have ratified the otherwise unenforceable release agreement, although, “in future proceedings[,] the district court ‘may need to inquire whether the employer has claims for restitution, recoupment, or set-off against the employee’”. 415 F.3d at 372. Polly will take little comfort in that.

You, sadder (for your client) but wiser (for yourself), prepare to break the bad news to Polly. She, no doubt, will feel that she and her company have been deeply wronged. You make the call. She does.

Polly, not feeling very conversational (and confessing that she needs to make a quick appointment with the company’s outplacement services director), asks you to prepare a detailed opinion letter for the Executive Committee and then hangs up. You turn to your laptop and begin to type.

You are inclined to, but on second thought don’t, open with Mark Twain’s observation that, “If you pick up a starving dog and make him prosperous, he will not bite you. This is the principal difference between a dog and a man.”

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