LABOR & EMPLOYMENT LAW

NEVADA V. HIBBS: AN UNSOUND DEPARTURE FROM THE STATES' RIGHTS TREND

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Editor's Note: Another perspective on the Hibbs case is offered by Michael S. Fried at page 51 of this issue.

In 1997, William Hibbs, an employee of Nevada's Department of Human Resources, sought leave to care for his wife while she recovered from an automobile accident and surgery. When Hibbs felt the leave granted by the State did not comport with the Family and Medical Leave Act of 1993 (FMLA), he filed suit. The District Court dismissed the suit on grounds that Nevada was immune from damage suits under the FMLA pursuant to the Eleventh Amendment to the United States Constitution. The Ninth Circuit reversed and the Supreme Court granted a writ of certiorari to resolve a split amongst the circuits on the Eleventh Amendment/FMLA issue.

Following on the heels of the Court's 2000 decision that the Eleventh Amendment immunizes States from damage claims under the Age Discrimination in Employment Act (ADEA) and 2001's ruling that Americans with Disabilities Act (ADA) claims are also barred, the decision in *Hibbs* seemed a foregone conclusion to many observers. However, in a break from a strong States' rights trend, the *Hibbs* majority concluded earlier this summer that the Eleventh Amendment does not shield the States from suit under the FMLA. To understand (and perhaps take issue with) the Court's rationale, let's review some basic principles.

Consistent with the federalism which permeates the Constitution, the Eleventh Amendment grants the States immunity from damage suits in federal court absent their consent to be sued.[1] In tension with that right, Congress has wide authority to regulate interstate commerce under Article I of the Constitution, and a separate power to enforce the guarantees of the Fourteenth Amendment through Section 5 of that Amendment. In balancing these inevitably conflicting provisions, the Supreme Court has found that if Congress seeks to abrogate Eleventh Amendment immunity pursuant to its power to regulate interstate commerce, that attempt will fail.[2] However, Congress may abrogate Eleventh Amendment immunity when its intention to do so is clear and legislation is enacted pursuant to a *valid* exercise of power under Section 5 of the Fourteenth Amendment.[3] Congress usually makes clear its intention to negate States' immunity so the discrimination/immunity conflict typically boils down to the question of whether the legislation constitutes a valid exercise of Congress' powers under the Fourteenth Amendment. It was against this backdrop that the Court decided that States are immune from suit under the ADEA and ADA.

In *Kimel v. Florida Board of Regents,* 528 U.S. 62 (2000), the Court found Eleventh Amendment immunity was not abrogated by the ADEA. The Court noted that States retain the authority to make age-based classifications without offending the Fourteenth Amendment, if the classification in question has a "rational basis," i.e., is in furtherance of a legitimate State interest. In contrast, race and gender classifications are subject to higher scrutiny under the Fourteenth Amendment. The Court examined whether there was evidence that age classifications by States led to equal protection violations. In analyzing equal protection jurisprudence concerning age claims, the Court concluded that age classifications only very rarely equated to equal protection violations. The Court ruled that with the ADEA, Congress effectively elevated the standard for analyzing age discrimination claims against the States to a heightened scrutiny not supported by the Fourteenth Amendment. The Court thus concluded that the ADEA is broader than the Fourteenth Amendment, not "congruent" and "proportional" to any equal protection violations identified, and therefore not a valid exercise of Fourteenth Amendment power. Basically, in the absence of any legislative record indicating a pattern of age discrimination in employment by the States which equated to an equal protection violation, and would thus require implementation of the ADEA, Congress' attempt to abrogate States immunity was not a valid exercise of its power under the Fourteenth Amendment.

In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Court was presented with the question of whether States are immune from suit under the ADA. Following *Kimel*, the Court concluded that States are not required by the Fourteenth Amendment to make special accommodations for the disabled as long as their actions toward that group are rational and serve a legitimate State interest. Further, the Court examined whether a historic pattern of disability discrimination by the States existed. The Court noted there was little evidence that disability discrimination extended beyond the private sector, and what existed was insufficient to permit Congress to abrogate States immunity for a statute as strict in application as the ADA. As in *Kimel*, the Court found that to uphold application of the ADA to the States would effectively allow Congress to heighten the standard of review for discrimination against the disabled under the Fourteenth Amendment from "rational basis" to a higher level. The Court also found that congruence and proportionality were lacking primarily because the ADA's requirements far exceed what is constitutionally required.

So, just to review the bidding, after *Kimel* and *Garrett* the road map for examining Eleventh Amendment immunity was this:

- ascertain whether Congress intended to abrogate States' Eleventh Amendment immunity;
- identify the Constitutional right at issue;
- examine the equal protection jurisprudence concerning that right;
- note the level of review for that right and what it takes to show a violation;
- determine whether Congress found a history and pattern of that Constitutional violation by the state(s); and
- determine if the legislation in question was "congruent with" and "proportional to" the injury to be prevented or remedied.

Given *Kimel* and *Garrett*, recent pronouncements in a strong States' rights trend, many expected Mr. Hibbs' FMLA claim to be barred by the Eleventh Amendment.

In *Hibbs*, the Court quickly concluded that Congress intended to abrogate State immunity with enactment of the FMLA. The question then became whether or not Congress acted within its Constitutional authority. Based on precedent, the Court noted that Congress would be within its authority if it enacted the FMLA pursuant to a valid exercise of its power under Section 5 of the Fourteenth Amendment. That is, Congress must have identified an equal protection violation by the States, and then determined whether the FMLA's means for preventing injury were "congruent with" and "proportional to" the injury to be prevented.

Relying on the language of the FMLA, the Court found that the Act was intended to protect against and prevent gender discrimination in the workplace. That classification removes us from the "rational basis" environment of *Kimel* and *Garrett*, and transports us to the land of heightened scrutiny inhabited by classifications based upon gender. Heightened scrutiny means important governmental objectives must be established as the aim of any suspect classifications, and those classifications must be substantially related to achievement of those objectives. It also turns out to mean Congress can more readily act to impose its will on the States.

Addressing whether or not Congress had evidence of a pattern of gender discrimination in employment by the States (on which the dissent rightly took the majority to task) the Court examined the legislative record before Congress, as well as its own precedent. The Court first noted that its own decisions, until recently, often sanctioned restrictions and classifications regarding women while utilizing stereotypes regarding their "maternal functions." Further, the Court found that the evidence before Congress supported the conclusion that an extensive history of gender discrimination in employment existed in both the private and public sectors. Consequently, a legitimate objective – remedying gender discrimination by the States in violation of the equal protection clause – existed for enacting the FMLA. The Court then reviewed whether the twelve week leave guarantee was "congruent and proportional to the targeted violation."

The Court noted that Congress had already attempted to address gender discrimination in employment with the enactment of Title VII and the Pregnancy Discrimination Act, but that those attempts were unsuccessful. Further, the Court reasoned that an across-the-board routine benefit for all eligible employees would ensure that family-care leave could not be construed as an inordinate drain on the workplace caused by female employees alone. The Court also found that the FMLA was narrowly targeted at the one aspect of the employment relationship in which gender-based discrimination remained strongest: family-care leave. Finally, the Court was impressed by the exceptions in the FMLA, which would limit the breadth of its applicability to the States (as well as, of course, to private employers). Therefore, finding evidence of a violation and that the remedy was appropriate, the Court concluded that the FMLA was a valid exercise of Fourteenth Amendment powers which abrogated States' immunity. Thus, suits against the States based upon the FMLA are not barred by the Eleventh Amendment.

In dissent, Justice Kennedy, joined by Justices Scalia and Thomas, focused on the aspect of the majority's opinion which appeared most vulnerable: whether evidence was presented to Congress that the States exhibited a pattern or practice of discrimination in employment based upon gender. In particular, Justice Kennedy noted that the FMLA findings of purpose were devoid of any discussion of such evidence, and that all evidence considered by Congress concerned discriminatory practices in the private sector, not the public. Further, to the extent that any such evidence existed, the majority's opinion relied on legislative evidence before Congress regarding a bill other than the FMLA: one of its predecessors which failed to pass seven years earlier.

Finally, Justice Kennedy noted that, in truth, the States appeared to be well ahead of Congress in providing gender-neutral family leave benefits by the time Congress enacted the FMLA. In particular, thirty States, as well as the District of Columbia and Puerto Rico, had adopted some form of such leave, and Justice Kennedy argued that this was evidence that the States were not practicing or exhibiting a pattern of discrimination. In fact, regarding the matter before the Court, Justice Kennedy pointed out that Nevada not only provided its employees (on a gender-neutral basis) up to a year of unpaid leave, but also permitted absences of over a year subject to approval and other conditions. The dissent concluded with the observation that even if the evidence existed to support a pattern of discrimination based on gender among the States, the remedy imposed (an across-the-board twelve week grant of leave) was not "congruent and proportional" as a remedy to that problem. Thus, Justice Kennedy would have concluded that Congress did not abro-

gate the States' immunity with the FMLA.

For Justice Kennedy, proof that the FMLA confers an entitlement, and is not remedial, is found in the fact that as long as States give twelve weeks leave as a floor, they can otherwise discriminate between men and women in leave issues. This truth does, in fact, seem to gut the argument that the Act is meant only to "remedy" gender discrimination. Justice Kennedy would have found the FMLA a valid exercise of commerce clause power, thus binding the States and permitting enforcement by the federal government and injunctive relief, but not subjecting the States to money damage suits by citizens.

In a separate dissent, Justice Scalia said that he would have required some evidence that Nevada had exhibited a pattern or practice of gender discrimination in employment. In particular, he noted that "guilt by association" among the States was unsupported in the Constitution, likening it to an individual's right to a determination that a statute is constitutional as applied to him.

The Supreme Court has indicated over the past several years a willingness to limit Congress' ability to impinge upon States' rights. With *Kimel* and *Garrett*, the trend appeared to be towards barring suits against a State absent a clear violation of a right secured by the Fourteenth Amendment supported by evidence of State conduct. However, in *Hibbs*, the Court stepped back from this rule and concluded that the protections afforded by the FMLA were equivalent to those protections already afforded by the Fourteenth Amendment (in itself a big step) without really examining whether those protections were in jeopardy via State action. The Court tried to make this ruling seem of a piece with precedent, but as the dissent points out, *Hibbs* is a huge departure from *Kimel* and *Garrett*.

Like the evidence before Congress on the ADEA and ADA, the evidence of State gender discrimination in employment seemed sparse. In particular, nobody pointed out much of anything regarding actual discrimination in connection with leave plans, except to say there was discrimination in the "administration of leave benefits." To the contrary, the wealth of statutory protections available under State law for the same relief provided by the FMLA (and, in some cases, greater) indicated that the States had taken affirmative steps to offer gender-neutral leave to workers.

Hibbs represents a departure from the high standard requiring actual evidence of a violation to support abrogation of States' immunity under the Eleventh Amendment. The majority noted that the gender classification equals heightened scrutiny, which in turn renders it "easier for Congress to show a pattern of State Constitutional violations." But still ….. one would have hoped more evidence of discrimination would have been required before stripping States of their immunity. As the dissent puts it, the majority decision suggests that unconstitutional conduct can be inferred from state benefits simply falling short of what Congress deems best.

Even more than the "evidence of a violation" problem, the really troubling aspect of the decision is that it makes short work of the "congruence and proportionality" test and skims like a stone on a pond over the notion that the FMLA confers an affirmative benefit rather than merely proscribing particular conduct that discriminates on the basis of gender. The only real problem identified by the majority in connection with leave in the state employment context was discrimination in the administration of leave benefits. It is not at all clear the FMLA will cure that (it probably cannot) and mandated leave certainly seems a remedy out of proportion to arguably uneven application of gender-neutral leave policies.

Of greater concern than the *Hibbs* holding regarding the FMLA and Eleventh Amendment immunity is the state in which the Court's precedent now lies. The door is now ajar for Congress to revisit perceived discrimination by the States in employment (and other areas) and fashion its own menu of remedies and benefits.

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Footnotes

[1] *Hans v. Louisiana*, 134 U.S. 1 (1890).

[2] *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

[3] *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).