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MUST STATES FOLLOW A FEDERAL STATUTE MANDATING UNPAID LEAVE FOR EMPLOYEES TO CARE FOR SICK FAMILY MEMBERS AND NEWBORNS?
The Supreme Court Will Soon Decide

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When it returns in the new year, the Supreme Court will hear arguments in a case, Hibbs v. Department of Human Resources, that will be of great import to employees who seek unpaid leave to care for sick family members or newborn children.

The case will also be very significant to those who have been following the Court's recent Eleventh Amendment opinions. These decisions have limited federal power, and at the same time, limited the ability of civil rights plaintiffs to sue state entities in federal court.

The Eleventh Amendment provides states (and state agencies) with immunity from suits for money damages brought in federal court, whether they are based on state or federal law. The only exceptions occur if a state voluntarily waives immunity, or Congress abrogates that immunity.

The Family and Medical Leave Act (FMLA)

Enacted in 1993, the FMLA requires employers with more than 50 employees to provide up to twelve weeks of unpaid birth, new parenting (for both mothers and fathers), or medical leave needed to care for a sick family member.

Because the leave is unpaid, what this means for the employee is that he or she can keep participating in a group health plan (if there is one); has the right not to be retaliated against for taking the leave; and has the right to be reinstated after the leave period.

FMLA combats sex discrimination in several ways. First, since most caretakers are women, it improves the chance that women can continue wage-earning despite family responsibilities (as men have always been able to do). Second, it allows men to take leave and share the caregiving responsibilities, rather than leaving them solely to women.

The FMLA/Eleventh Amendment Case that Will Soon Come Before the Court

Mr. Hibbs, the plaintiff in the case the Court will soon hear, was an employee in the Welfare Division of the Nevada Department of Human Resources, a unit of Nevada's state government. He sought unpaid leave from his job to care for his ailing wife.

Nevada granted him the leave under FMLA, as well as under a "catastrophic leave" policy, but later fired him anyway. (The parties disputed, among other points, whether the two kinds of leave should be concurrent or consecutive.)

Hibbs sued under the FMLA, but Nevada argued for dismissal because of the sovereign immunity provided by the Eleventh Amendment. The trial court agreed with Nevada, but the U.S. Court of Appeals for the Ninth Circuit...
agreed with Hibbs.

The Supreme Court must now decide who is right.

The Eleventh Amendment Analysis

As noted above, the Eleventh Amendment renders Nevada immune from federal court suits unless it has waived immunity (probably not the case here), or unless Congress has abrogated its immunity from FMLA suits in particular.

How can Congress validly abrogate Eleventh Amendment immunity? First, Congress must unequivocally express its intent to do so. Here, it clearly did so (as all seven Circuits agreed).

The FMLA expressly authorizes suits against any "public agency" in federal or state court, and defines "public agency" to include state governments and their subdivisions. And in 2000, the Court held in Kimel v. Fla. Bd. of Regents that language similar to this effectively abrogated immunity.

Second, Congress must act pursuant to a valid exercise of power. This question - on which the Circuits divided - is far trickier, and depends on the power under which the legislation is passed. The Court has held, for instance, that Congress does not have the authority to abrogate immunity when it acts pursuant to Article I of the Constitution, but it does have that authority when it acts pursuant to Section 5 of the Fourteenth Amendment.

Section 5 gives Congress the "power to enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment, which guarantees, among other things, the equal protection the laws and thus has been the source of a number of antidiscrimination statutes.

Arguably, Section 5 is also the source of Congress's power to pass the FMLA - which helps fight sex discrimination in the two respects I discussed above.

Congruence and Proportionality: The Tests for Section 5 Legislation

So the Court must ask two additional questions: What is the nature of the constitutional right Congress was trying to protect by enacting the FMLA? And is the FMLA an appropriate mechanism for protecting that right?

Nevada is arguing that Hibbs must find proof that that the states were committing an "actual constitutional violation" that Congress was intending to correct as part of this inquiry.

Two Prior Supreme Court Cases May Spell Defeat For the Plaintiff

Two federal antidiscrimination statutes have already failed this test, according to the Supreme Court. The first is the Age Discrimination in Employment Act (ADEA), as the Court held in 2000 in Kimel. The second is the Americans with Disabilities Act, as the Court held in 2001 in Board of Trustees v. Garrett.

But the FMLA may be different. The ADA and the ADEA protect groups of people--the aged and the disabled--that do not receive special Fourteenth Amendment Equal Protection Clause protection. But the FMLA, although facially gender neutral, protects women, and the Fourteenth Amendment has been construed to provide special protection against sex discrimination.

A number of circuits have held that other statutes targeting sex discrimination - the Equal Pay Act and Title IX - are valid Section 5 legislation. The FMLA seems to be in the same category. There is no doubt that it was designed to combat the facial sex discrimination inherent in women-only leave policies, and the discriminatory impact of no-leave policies that meant, in practice, that women often had to choose between wage-earning work and caregiving work.

Evidence that the States Have Sponsored Workplace Sex Discrimination

But what about the question of actual constitutional violations that, according to some Circuits, must also be answered: Is there proof that the states were committing an "actual constitutional violation" that Congress was intending to correct?

A brief filed by women's history scholars says the answer is yes. It argues that states sponsored much of the historical discrimination in workplace leave policies. States were involved in creating and perpetuating a society in which women are largely responsible for family caretaking. Part of their involvement took the form of the employment policies applied to their own employees--women-only leave policies, or no-leave policies that...
effectively forced women, typically the lower wage-earners, to become stay-at-home moms.

These laws' legacy was a set of stereotypes about sex roles, caretaking, and work for which the states bear a large part of the responsibility. Just as the advent of Rosie the Riveter dispelled sex stereotypes to some extent, state laws telling potential Rosies they couldn't work kept those stereotypes in place.

Significantly, this evidence implies that an "actual constitutional violation" did indeed occur. When there is "state action" - that is, government involvement - in a policy, it can violate the constitution; a private violation will not. And sex discrimination by a state government is an obvious Fourteenth Amendment violation.

All these factors suggest some hope for proponents of the FMLA, and for the women, men, and young children who benefit from its compassionate leave policies.

Nevertheless, if the Court runs true to form, Nevada will probably prevail, and the FMLA will be held not to apply to the States. (It won't help that Hibbs was decided by the oft-reversed and famously liberal Ninth Circuit, and that other Circuits took opposite views.)

That's a shame: The Court should not let its preference for states' rights override its concern for families. But in this case, it well may. The cost, for women, of motherhood or family illness should not be job loss, and Congress enforced the Fourteenth Amendment when it said so in the FMLA.

Joanna Grossman, a FindLaw columnist, is an associate professor of law at Hofstra University, where she teaches Sex Discrimination, among other subjects. Grossman's other articles on sex discrimination, sex harassment, and other issues may be found in the archive of her pieces on this site.