U. S. Department of Justice

Office of the Solicitor General

Solicitor General

Washington, D.C. 20530

February 15, 2000

Patricia Mack Bryan, Esq.
Senate Legal Counsel
United States Senate
Senate Hart Office Building
Room 642
Washington, D.C. 20510-7250

Re: Garrett v. University of Alabama, No. 98-6069 (11th Cir.)

Dear Ms. Bryan:

I am writing to advise you that I have determined not to file a petition for a writ of certiorari in the above case.

This case concerns the constitutionality of the Family Medical Leave Act (FMLA), 29 U.S.C. 2601 et seq., insofar as it subjects state employers to suits by private individuals. The FMLA provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period" for one or more of four reasons. Those reasons are (1) "[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter," (2) "[b]ecause of the placement of a son or daughter with the employee for adoption or foster case," (3) [i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition," and (4) "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. 2612(a)(1). Only the last reason -- "because of a serious health condition" of the employee -- is at issue here.

Patricia Garrett was the Director of OB/GYN/Neonatal Services at the University of Alabama. After being diagnosed with breast cancer and undergoing a lumpectomy and radiation and chemotherapy treatment, she took medical leave. When she returned to her job, the University demoted her to a position with a significantly lower salary. Garrett filed suit against

the University, a state instrumentality, alleging that it had violated the FMLA by failing to offer her the same or an equivalent position upon her return. She sought damages and equitable relief. The district court granted summary judgment in favor of the University, holding that Congress lacked authority under Section 5 of the Fourteenth Amendment to subject a state instrumentality to suit under the FMLA. Garrett appealed and the United States intervened in the appeal to defend the constitutionality of the medical leave provision of the FMLA insofar as it subjects state instrumentalities to suit.

A divided panel of the court of appeals affirmed. The panel majority held that Congress lacked authority under Section 5 of the Fourteenth Amendment to abrogate a state employer's immunity from suit with respect to the medical leave provision of the FMLA. Judge Cook dissented. He concluded that the medical leave provision is valid Section 5 legislation.

The Department of Justice is defending the constitutionality of the FMLA in the Fifth and Sixth Circuits. Kazmier v. Widmann, No. 99-30242 (5th Cir.); Sims v. University of Cincinatti, No. 99-3274 (6th Cir.). Because the private plaintiff in this case has decided not to petition for a writ of certiorari, I have decided against petitioning in this particular case. To do so would involve taking a private plaintiff's case to the Supreme Court when she has decided not to pursue her claim. Other cases pending in the federal courts, including those noted above, remain available for the presentation by the United States of a defense of the FMLA.

A copy of the court of appeals' decision is enclosed. A petition for a writ of certiorari would have to filed by February 23, 2000. Please let me know if I can be of further assistance in this matter.

Sincerely,

Seth P. Waxman
Solicitor General

Enclosure