U. S. Department of Justice

Office of the Solicitor General

Solicitor General

Washington, D.C. 20530

October 6, 2000

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

Re: Sims v. University of Cincinnati, No. 98-1553

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 care," (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.

Naomi L. Sims worked as a medical secretary at the University of Cincinnati. During a period of medical leave, Sims catered a wedding reception without approval. The University discharged Sims for accepting outside work without approval. Sims filed suit against the University, a state instrumentality, alleging that it had discharged her in violation of the FMLA. The district court dismissed Sims' complaint, holding that Congress lacked authority under Section 5 of the Fourteenth Amendment to subject a state instrumentality to suit under the FMLA. Sims 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.

The court of appeals affirmed. The court held that Congress lacked authority under Section 5 of the Fourteenth Amendment to abrogate a state employer's immunity from suit.

The private plaintiff in this case has decided not to file a petition for a writ of certiorari. I therefore have decided against petitioning in this particular case on behalf of the United States. To do so would involve taking a private plaintiff's case to the Supreme Court when she has decided not to pursue her claim.

A copy of the court of appeals' decision is enclosed. The time within which to file a petition for a writ of certiorari expires on October 16, 2000. Please let me know if I can be of further assistance in this matter.

Sincerely,

Seth P. Waxman
Solicitor General

Enclosure