



U. S. Department of Justice

Office of the Solicitor General

Solicitor General

Washington, D.C. 20530

December 20, 2001

The Honorable J. Dennis Hastert  
Speaker of the House of Representatives  
Washington, DC 20515

RE: Bates v. Indiana Dep't of Corrections,  
No. IP01-1159-C-H/G (S. D. Ind.)

Dear Mr. Speaker:

I am writing to advise you that, after extensive consideration, I have determined that the Department of Justice will not continue to intervene in cases to defend the abrogation of Eleventh Amendment immunity effected by the medical leave provision of the Family and Medical Leave Act, 29 U.S.C. 2612(a)(1)(D), as appropriate legislation under Section 5 of the Fourteenth Amendment. The medical leave provision, among other things, requires state employers to provide twelve weeks of leave a year to eligible employees if needed "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." The Act further authorizes aggrieved employees to file suit against state employers for damages and equitable relief. 29 U.S.C. 2617(a).

The present case involves a suit against the Indiana Department of Corrections. The State has defended, in part, on the ground that the Eleventh Amendment bars the suit. The district court notified the Attorney General that the constitutionality of the Family and Medical Leave Act's abrogation has been drawn into question in the litigation, pursuant to 28 U.S.C. 2403, and invited the Department to intervene.

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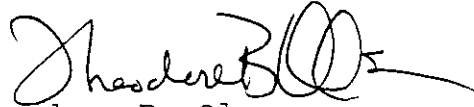
I have determined not to intervene in this case or, absent changed circumstances, in any future medical-leave case where the constitutionality of the Family and Medical Leave Act's abrogation of Eleventh Amendment immunity is drawn into question. The Department already has attempted to defend the abrogation in eight courts of appeals, all of which have flatly rejected our arguments. See Laro v. New Hampshire, 259 F.3d 1 (1st Cir. 2001); Hale v. Mann, 219 F.3d 61 (2d Cir. 2000); Chittister v. Department of Comm. & Econ. Development, 226 F.3d 223 (3d Cir. 2000); Lizzi v. Alexander, 255 F.3d 128 (4th Cir. 2001); Kazmier v. Widmann, 225 F.3d 519 (5th Cir. 2000); Sims v. University of Cincinnati, 219 F.3d 559 (6th Cir. 2000); Townsel v. Missouri, 233 F.3d 1094 (8th Cir. 2000); Garrett v. University of Alabama Bd. of Trustees, 193 F.3d 1214 (11th Cir. 1999), rev'd on other grounds, 531 U.S. 356 (2001). Moreover, the Supreme Court's decision last term in Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001), which held that Title I of the Americans with Disabilities Act, 42 U.S.C. 12111 to 12117, is not appropriate Section 5 legislation, effectively eliminated our ability to defend the medical-leave provision as protecting against discrimination on the basis of temporary disability. The Supreme Court's analysis and holding in Garrett have left the Department with no sound basis to continue defending the abrogation of Eleventh Amendment immunity in this or other medical-leave cases under the Family and Medical Leave Act.

I wish to emphasize that this decision is confined to the medical-leave provision of the Act; no corresponding decision has been made to discontinue defense of the abrogation of Eleventh Amendment immunity for cases arising under the parental and family leave provisions of the Act. Further, this decision is limited to the constitutional question of abrogating Eleventh Amendment immunity. Where necessary, we will defend the substantive medical leave provision, as applied to private employers, as an appropriate exercise of Congress's Commerce Clause power. Likewise, we continue to believe that state employees may enforce the substantive medical-leave provision through actions for equitable relief (but not monetary damages) if suit is brought against a state official under Ex parte Young, 209 U.S. 123 (1908).

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If your office wishes to participate in this litigation, we will be happy to notify the district court and seek an appropriate extension of time to accommodate your filing.

Very truly yours,

  
Theodore B. Olson

Enclosure

cc: The Honorable Geraldine R. Gennet  
General Counsel to the Clerk