



U. S. Department of Justice

Office of the Solicitor General

Solicitor General

Washington, D.C. 20530

January 7, 2000

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

Re: Crosby v. South Carolina Dept of Health & Environmental Control, No. 3:97-3588-19BD (D.S.C.)

Dear Mr. Bryan:

I am writing to advise you that I have determined not to appeal the decision in the above case to the United States Court of Appeals for the Fourth Circuit.

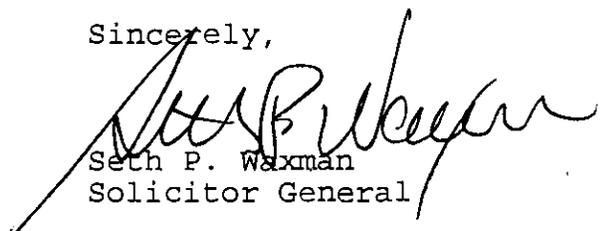
This case concerns the constitutionality of the Family Medical Leave Act (FMLA), 29 U.S.C. 2601 et seq., insofar as it subjects state employers to suits by private individuals. Plaintiff is a former division director of the South Carolina Department of Health & Environmental Control (DHEC). She filed suit against DHEC, alleging that she was constructively discharged from her position, in violation of, inter alia, the FMLA. The DHEC moved for summary judgment on plaintiff's claim under the FMLA, contending that the FMLA violates the Eleventh Amendment insofar as it subjects States to suit by private individuals. The United States intervened to defend the constitutionality of the FMLA. The district court granted summary judgment, holding the FMLA unconstitutional insofar as it subjects States to suit by private individuals. The plaintiff did not object to that disposition, and did not appeal.

The Eleventh Circuit has held that the medical leave provision of the FMLA is not a valid abrogation of the Eleventh Amendment, Garrett v. University of Alabama, 193 F.3d 1214 (11th Cir. 1999), and I have not yet decided whether to file a petition for a writ of certiorari in that case. 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 Cincinnati, No. 99-3274 (6th Cir.). Because the private plaintiff in this case has decided not to

pursue an appeal, I have decided against appealing the decision in this particular case. To do so would involve taking a private plaintiff's case to an appellate court when she has decided not to pursue her claim. Other cases pending in the federal courts remain available for the presentation by the United States of a defense of the FMLA.

A copy of the district court's decision is enclosed. The United States has filed a protective notice of appeal, but we intend to withdraw the notice of appeal by the end of the month. Please let me know if I can be of further assistance in this matter.

Sincerely,



Seth P. Waxman
Solicitor General

Enclosure