2006

# Lynn Nicholas v. Attorney General State of Utah : Reply Brief

Utah Court of Appeals


Reha Deal; Assistant Utah Attorney General; Counsel for Appellee.
Mary J. Woodhead; Counsel for Appellant.

BEFORE THE UTAH SUPREME COURT

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| LYNN NICHOLAS,<br><br>PLAINTIFF/APPELLANT,<br><br>vs.<br><br>ATTORNEY GENERAL,<br>STATE OF UTAH<br><br>DEFENDANT/APPELLEE. | REPLY BRIEF OF<br>APPELLANT LYNN NICHOLAS<br><br>CASE NO. 20060297 |

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, HONORABLE SHEILA K. MCCLEVE, DISTRICT JUDGE

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## ARGUMENT

### I. THERE IS LEGISLATIVE HISTORY TO SUPPORT THE APPLICATION OF THE SELF-CARE PROVISION OF THE FAMILY MEDICAL LEAVE ACT TO THE STATES.

The State of Utah argues that there is no legislative history sufficient in the debates regarding the self-care provision Family Medical Leave Act, 29 U.S.C.S. § 2611 et seq. to presume that it confronts issues of gender discrimination or to support the decision by Congress to extend the Act to the States.[1] Under the State's theory of the Act, the State has no immunity when Ms. Nicholas acts as a care-giver because that role is historically female. When she suffers illness as a result as a consequence of her care-giving, she is not protected. The Congressional history of the FMLA does not support this conclusion.

In support of its assertions regarding the lack of record tying the Act to issues of gender discrimination, the state cites a summary[2] of the testimony relating to the act as evidence that the self-care provision was directed at protecting the sick, not preventing discrimination among them. In noting that the legislative history makes no reference to

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[1]In Appellant's Opening Brief, Nicholas cited *Toeller v. Wisconsin Dept. Of Corr.*, 296 F. Supp. 2d 946 (E.D. Wis. 2003) for the proposition that the self-care provision of the FMLA was a proper exercise of Congressional authority. That decision has now been reversed by the 7th Circuit Court of Appeals in *Toeller v. Wisconsin Dept. Of Corr.*, 2006 U.S. App. Lexis 21690 (7th Cir. 2006).

[2]The summary attached to the Appellee's brief as Exhibit D does not constitute the legislative history of the Family Medical Leave Act as represented by the State ("The history includes on anecdote...." Appellee's Brief, page 18). The legislative history includes hundreds of pages of written testimony, hearings and debate by both houses of Congress.

either the States or issues of gender, the State points to a passage in the history referencing testimony by a woman with colon cancer. At the same time, however, the State ignores other sections of the text. Under "Leave for the Employee's Own Serious Illness," the report states:

> Indeed, it is hard to understand how single parents, who have no choice but to work to support their families, have survived under the present system. For this highly vulnerable group, whose numbers have exploded, a job guarantee for periods when they or their children have serious health conditions is urgently necessary. **The high rates of single parenthood among minority families and of labor force participation by minority single mothers make job-guaranteed leaves especially critical for minorities**.

S. Rep. No. 103-3 (1993), emphasis added, attached to Appellee's Brief as Exhibit D. Not only does this language indicate a specific intention to protect women and minorities, both protected classes, it demonstrates the relationship between the family leave provision and the personal leave provision and supports the notion that the statute must be read as a whole, not broken into individual pieces.

By focusing on that one report, the State neglects other record evidence, including the language of the act itself, that Congress saw evidence of discrimination against women in the dissemination of medical leave. "The bill will provide no incentive to discriminate against women, because it addresses the leave needs of workers who are young and old, male and female, married and single." H.R. Rep. No. 28, 101st Cong., 1st Sess. (1993). "This legislation is as much about giving women an equal economic

opportunity as it is about providing a national policy to protect jobs during times of family crisis." 139 Cong. Rec. 2262 (1993).

Moreover, the Congressional Record contains a long history of evidence of gender discrimination by the States toward women in conditions of employment. That the history exists in the record outside the debates regarding the Family Medical Leave is not dispositive. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91 (2000) (noting that an examination of the legislative record is not necessary in all circumstances.) "After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Fullilove v. Klutznick,* 448 U.S. 448, 503 (1980) (Powell, J., concurring). *See also; Hibbs v. Dept. of Human Res.,* 273 F.3d 844, 861 (9th Cir. 2001) ("when our nation's judicial history already documents unconstitutional discrimination against the class at issue, there is no need for Congress, separately and redundantly, to provide detailed findings of such discrimination in order to exercise its Fourteenth Amendment powers.").

There is no question that the States have been complicit in the nation's long history of gender discrimination. As recently as 1973, the United States Supreme Court noted the impact of the culture's paternalistic attitude toward women. "As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes . . . . Neither slaves nor women could hold office, serve on juries, or

bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children." *Frontiero v. Richardson,* 411 U.S. 677, 685 (1973). The Court went on to note that while the position of women had improved, there continued to be substantial, although at times more subtle, discrimination in arenas controlled by the states. *Id.*

Moreover, Congress had a long record of legislative history relating to discrimination, including discrimination by the states, with regard to women's rights as employees including hearings arising out of the passage of the Equal Pay Act, 29 U.S.C. 206(d)(1), Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e. *et. seq* and the Pregnancy Discrimination Act, 42 U.S.C. 2000e(k). In each of these cases, Congress found sufficient evidence to extend the reach of the law to the States. By the time Congress passed the pregnancy discrimination act in 1978, the Supreme Court had twice considered whether a failure to provide medical coverage for pregnancy constituted discrimination and in both case found that it did not. *See; Geduldig v. Aiello*, 417 U.S. 484 (1974) *and General Electric v. Gilbert*, 429 U.S. 125 (1976). Each of these decisions resulting in continued debate before Congress regarding discrimination against women in the workplace.

Even after passage of the Pregnancy Discrimination Act, there was debate over whether the act protected the pregnant spouses of male employees. *Newport News Shipbuilding and Dry Dock v. EEOC,* 462 U.S. 669 (1983) ("It seems to me that analysis of this case should end here. Under our [previous decisions], petitioner's exclusion of

pregnancy benefits for male employees' spouses would not offend Title VII. Nothing in the Pregnancy Discrimination Act was intended to reach beyond female employees.") *Id.* at 693, (Rehnquist, C.J., dissenting). Because the problem was not fully solved by the Act, Congress addressed the issue again in the Family Medical Leave Act, which in addition to the self-care provision which provides leave for women who become ill as a result of and after childbirth, also includes a provision for leave necessitated by the birth or adoption of a child.

The case law dismissing claims by State employees based on 11th Amendment Immunity almost uniformly arises out of a decision to look at the Act in individual pieces. The result is the old adage of missing the forest for the trees. The language of the statute and the legislative history demonstrate an intention by Congress to move toward the goal of protecting both job and family stability, without sacrificing one for the other. The facts of this case support the notion that the Act only functions as intended when read together, as a whole.

Lynn Nicholas took leave to help care for her son and grandchild after her daughter-in-law died during childbirth. This leave was not covered by the Act because the son was not a dependent. As time progressed, Ms. Nicholas took sporadic leave, both to help her son and to deal with her own depression. Finally, when her difficulty in dealing with sadness became overwhelming, she took personal medical leave. When the act is not read as a whole, the job security of an employee with a serious illness is nonexistent,

leaving the family without access to short term relief to protect itself from one of the most significant negative impacts resulting from the illness of one of its members. By providing leave, to be administered in a nondiscriminatory manner, the Act completes its intention of protecting the family and the workplace.

Thus, the Family Medical Leave act in all of its provisions serves to fill the holes left by other measures intended to insure that sick leave is administered equitably. That purpose is consistent with Congressional power authorized by the 14th amendment and is not prohibited by 11th Amendment immunity.[3]

## CONCLUSION

Based on the foregoing the Court should find that Congress was acting within its authority and that State of Utah cannot avoid complying with its promises pursuant to the FMLA by relying on its sovereign immunity.

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[3]. The Utah Public Employees Association submitted an Amicus Curiae Brief to educate the Court that in some circuits employees retain the right to sue their individual supervisors or to request injunctive relief. The Brief does not address any of the issues raised in this case. Moreover, the brief does not acknowledge that the issue regarding the right to sue individual supervisors is the subject of a split among the circuits. *Compare; Darby v. Bratch*, 87 F. 3d 673 (8th Cir. 2002) *with Mitchell v. Chapman*, 343 F.3d 811, 832 (6th Cir. 2003). Thus, there is not necessarily an alternate litigation strategy available to Nicholas.

Nicholas asks the Court to reverse the decision of the Court below and remand this matter for further proceedings.

RESPECTFULLY SUBMITTED this 1st day of November 2006.

MARY J. WOODHEAD
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November 2006, I caused two true and exact copies of the foregoing REPLY BRIEF OF APPELLANT LYNN NICHOLAS to be placed in the United States Mail, addressed to:

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