2006

Lynn Nicholas v. Attorney General, State of Utah : Amicus Brief

Utah Court of Appeals

Reha Deal; Assistant Utah Attorney General; Mark L. Shurtleff; Utah Attorney General; Counsel for Appellee.

Mary J. Woodhead; Counsel for Appellant Benson L. Hathaway Jr., Stephen W. Geary; Kirton & McConkie; Attorneys for Amicus Curiae.

IN THE U[redacted]UPREME COURT

LYNN NICHOLAS,

Plaintiff/Appellant,

Supreme Court No.: 20060297-SC

vs.

ATTORNEY GENERAL, STATE [redacted]
UTAH,

District Court Civil No.: 050909664

Defendant/Appellee.

BRIEF OF *AMICUS CURI*[redacted]UPEA IN SUPPORT OF APPELLANT

**ON APPEAL FROM TH[redacted]HIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT [redacted]KE COUNTY, STATE OF UTAH,
HONORA[redacted] SHIELA K. McCLEVE**

Mary J. Woodhead
261 East 300 South, Suite 300
Salt Lake City, Utah 84111

Attorney for Appellant

Reha Deal
Assistant Utah Attorney General
Mark L. Shurtleff
Utah Attorney General
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. Box 140856
Salt Lake City, Utah 84111-0856

Attorneys for Appellee

Benson L. Hathaway, Jr. (#4219)
Stephen W. Geary (# 9635)
KIRTON & McCONKIE
60 East South Temple, Suite 1800
P.O. Box 45120
Salt Lake City, Utah 84145-0120

Attorneys for *Amicus Curiae*
Utah Public Employees Association

IN THE UTAH SUPREME COURT

LYNN NICHOLAS, Plaintiff/Appellant, vs. ATTORNEY GENERAL, STATE OF UTAH, Defendant/Appellee.	:	Supreme Court No.: 20060297-SC District Court Civil No.: 050909664

BRIEF OF *AMICUS CURIAE* UPEA IN SUPPORT OF APPELLANT

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, HONORABLE SHIELA K. McCLEVE

Mary J. Woodhead
261 East 300 South, Suite 300
Salt Lake City, Utah 84111

Attorney for Appellant

Reha Deal
Assistant Utah Attorney General
Mark L. Shurtleff
Utah Attorney General
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. Box 140856
Salt Lake City, Utah 84111-0856

Attorneys for Appellee

Benson L. Hathaway, Jr. (#4219)
Stephen W. Geary (# 9635)
KIRTON & McCONKIE
60 East South Temple, Suite 1800
P.O. Box 45120
Salt Lake City, Utah 84145-0120

Attorneys for *Amicus Curiae*
Utah Public Employees Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ADOPTION BY REFERENCE

Amicus Utah Public Employees Association ("UPEA") adopts by reference the following sections of the Appellant's brief: (1) Jurisdiction, (2) Statement of the Issues, (3) Determinative Constitutional and Statutory Provisions, and (4) Statement of the Case.

SUMMARY OF THE ARGUMENT

Whether or not the self care provision of the Family Medical Leave Act is beyond congressional authority, as applied to the States, certain well-established exceptions to State sovereign immunity persist, under which State employees may yet enforce their federal rights to self care leave. These exceptions include injunctive claims against State officials to prevent the violation of an employee's right to self care leave, and suits for money damages against State officials in their individual capacity for violation of those rights.

ARGUMENT

The present appeal concerns the intersection of the Family Medical Leave Act ("FMLA"), 29 U.S.C. §2601 *et seq.*, and the Eleventh Amendment. The FMLA entitles employees to twelve workweeks of unpaid leave in any twelve month period for maternity/paternity care of a newborn child, adoption or fostering of a new child, care of an immediate family member with a serious health condition, and – in the clause at issue in this appeal – for an employee's own serious health condition. *See* 29 U.S.C.

§ 2612(a)(1). For ease of reference, the first three categories are collectively referred to as "family-care," while the last is referred to as "self-care."

The family care provisions of the FMLA have already been upheld against constitutional challenge by the United States Supreme Court. As to these provisions, the United States Supreme Court has already considered the constitutionality of the FMLA as applied to the States and upheld it, holding both that Congress expressly intended to abrogate any State immunity under the Eleventh Amendment and that it was within Congress' power, under section 5 of the Fourteenth Amendment, to do so. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726-35, 123 S.Ct. 1972 (2003).

Four months after *Hibbs*, the Tenth Circuit issued its decision in *Brockman v. Wyoming Dep't of Family Servs.*, 342 F.3d 1159 (10th Cir. 2003), addressing the constitutionality of the FMLA's self care provision. Expressly acknowledging *Hibbs*, the Tenth Circuit nevertheless held that *Hibbs'* reasoning was limited to the family care provisions of the FMLA. *Id.* at 1164. The self care provision, as applied to a State, was barred by Eleventh Amendment sovereign immunity. *Id.* at 1165.

UPEA leaves the correctness of *Brockman*'s reasoning to the parties to the appeal and submits this *amicus* brief to highlight the avenues that remain open for the enforcement of the FMLA self care provision by State employees whether or not *Brockman* is correct.

I. THE ELEVENTH AMENDMENT DOES NOT BAR SUITS AGAINST STATE OFFICIALS FOR INJUNCTIVE ENFORCEMENT OF THE FMLA'S SELF CARE PROVISION.

First, the Eleventh Amendment does not bar suit against a State for injunctive relief. The United States Supreme Court first announced this doctrine in *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908). Notwithstanding Eleventh Amendment immunity, the Court held that injunctive relief was still available to protect against constitutional violations. *See id.* at 154 ("'It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that Amendment.'") (quoting *Smyth v. Ames*, 169 U.S. 466, 518, 18 S.Ct. 418 (1898)).

Ex parte Young has subsequently been expanded to protect against the violation of any federal law. *See, e.g., Meiners v. Univ. of Kansas*, 359 F.3d 1222, 1232-33 (10th Cir. 2004) ("[A]s the district court noted, the Eleventh Amendment does not prohibit a suit in federal court to enjoin prospectively a state official from violating federal law."); *Brockman*, 342 F.3d at 1165 ("Sovereign immunity does not, however, . . . bar claims for injunctive relief."). Thus, even if a plaintiff cannot recover monetary damages for the violation of the FMLA's self care provision, she may nevertheless pursue injunctive relief to prevent State officials from interfering with her exercise of her right to self care.

II. THE ELEVENTH AMENDMENT DOES NOT BAR SUITS AGAINST STATE OFFICIALS, IN THEIR INDIVIDUAL CAPACITY, FOR MONEY DAMAGES FOR VIOLATION OF THE FMLA'S SELF CARE PROVISION.

Second, the Eleventh Amendment does not bar suit against State officials, in their individual capacity, for money damages for violation of the FMLA's self care provision. *Ex parte Young* has also been applied as justification for monetary relief from individual State actors. *See Scheuer v. Rhodes*, 416 U.S. 232, 238, 94 S.Ct. 1683 (1974) ("While it is clear that the doctrine of *Ex parte Young* is of no aid to a plaintiff seeking damages from the public treasury, [citations omitted], damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office."), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012 (1984); *Brockman*, 342 F.3d at 1165 ("Sovereign immunity does not, however, bar suits for money damages against employees of a state . . . .") (*citing Alden v. Maine*, 527 U.S. 706, 757, 119 S.Ct. 2240 (1999)).

Supervisory employees are expressly subject to suit under the FMLA, which defines "employer" to include "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." 29 U.S.C. § 2611(4)(A)(ii)(I); *Darby v. Bratch,* 287 F.3d 673, 681 (8th Cir. 2002). Thus, when a supervisory employee denies self care leave, he subjects himself to potential liability for damages under the FMLA.

CONCLUSION

This appeal appears to be the first instance in which this Court has addressed the FMLA, whether with regard to public or private employees. Hence, lower courts will inevitably rely upon the decision in any future FMLA suits. Therefore, UPEA respectfully requests that, whatever the Court's decision, the Court write with circumspection regarding these well-established exceptions to Eleventh Amendment immunity.

DATED this 17 day of July, 2006.

KIRTON & McCONKIE

By: _____

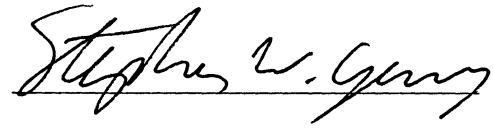
Benson L. Hathaway, Jr.
Stephen W. Geary
Attorneys for *Amicus Curiae* Utah Public Employees Association

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2006, I caused to be delivered by the method indicated below a true and correct copy of the **BRIEF OF *AMICUS CURIAE* UPEA IN SUPPORT OF APPELLANT** to the following:

____	FEDERAL EXPRESS	Mary J. Woodhead
____	U.S. MAIL	261 East 300 South, Suite 300
X	HAND DELIVERY	Salt Lake City, Utah 84111
____	FAX TRANSMISSION	

____	FEDERAL EXPRESS	Reha Deal
____	U.S. MAIL	Assistant Utah Attorney General
X	HAND DELIVERY	Mark L. Shurtleff
____	FAX TRANSMISSION	Utah Attorney General
		UTAH ATTORNEY GENERAL
		160 East 300 South, 6th Floor
		P.O. Box 140856
		Salt Lake City, Utah 84111-0856524



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