

2006

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

Utah Court of Appeals

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BEFORE THE UTAH SUPREME COURT

LYNN NICHOLAS,

PLAINTIFF/APPELLANT,

vs.

ATTORNEY GENERAL,
STATE OF UTAH

DEFENDANT/APPELLEE.

BRIEF OF APPELLANT
LYNN NICHOLAS

CASE NO. 20060297

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

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FILED
UTAH APPELLATE COURTS
JUL 17 2006

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JURISDICTIONAL STATEMENT

Jurisdiction is vested in this Court by Utah Code Ann. § 78-2-2(j) (1953 as amended) which provides that the Utah Supreme Court has jurisdiction over “orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original jurisdiction.”

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment 11:

Suits against States: The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or subjects or any Foreign State.

United States Constitution, Amendment 14, Section 1:

Section 1: All persons born or naturalized in the United States; and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor; shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment 14, Section 5

Section 5: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

The Family Medical Leave Act. 29 U.S.C.S. § 2612(a)(1)(d)

- 1) ENTITLEMENT TO LEAVE.--Subject to section 103, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:
 - (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
 - (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
 - ©) In 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.
 - (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Is the State of Utah immune, by virtue of the 11th Amendment to the United States Constitution, from an action in the Utah State Courts filed pursuant to the “self-care” provision of the Family Medical Leave Act. 29 U.S.C.S. § 2612(a)(1)(d)? The self care provision is the section of the FMLA which provides leave “because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.” *Id.* The actual issue before the Court in this case is whether Congress acted pursuant to its authority to enforce the goals of the fourteenth amendment, in particular, the goal of eliminating gender discrimination.

The issue presented by this appeal is a legal in nature and arises out of the United States Constitution. Therefore, the district court decision is reviewed for correctness,

without deference. *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 196 (Utah 1991).

This issue was directly addressed by the Attorney General's Motion to Dismiss and the Memorandum in Opposition filed by Nicholas. R. 38-46 and the oral argument on the Motion to Dismiss. R. 118.

STATEMENT OF THE CASE

On May 27, 2005, Lynn Nicholas ("Nicholas"), by her attorney, filed a complaint against her former employer, the Attorney General of the State of Utah. ("Attorney General") R. 1-10. The Complaint alleged that the Attorney General interfered with Nicholas' rights granted by the Family Medical Leave Act when it placed obstacles in the way of her return to work following leave designated as Family Medical Leave. *Id.* The Attorney General filed an Answer followed by a Motion to Dismiss on basis of qualified immunity. The issue was briefed and argued to the Court on February 13, 2006. R. 118. On February 23, 2006, the Court granted the Motion to Dismiss and issued a Memorandum Decision. R. 99-101. On March 30, 2006, the Court entered an order of dismissal. R. 107. This appeal ensued.

STATEMENT OF FACTS

1. Ms. Nicholas was an Assistant Attorney General in the Office of the Utah Attorney General. On February 7, 2004, Ms. Nicholas's daughter-in law, Karen Sclafani, died unexpectedly following childbirth.¹ R.2.

2. The child survived and Ms. Nicholas's son, Brian Maffley, was left to raise the baby girl on his own. *Id.*

3. Following Ms. Sclafani's death, Ms. Nicholas was diagnosed with post-traumatic stress disorder. R.3-4.

4. Over the next several months, Ms. Nicholas worked a reduced schedule and took several leaves of absence to deal with her own illness and to support her son in his efforts to overcome his grief and establish a life with his new child.² R. 3-8.

5. The leaves were always classified by the Attorney General's Office as Family Medical Leave. R. 4, 6-7.

¹ The facts stated herein are from the Complaint. "When reviewing the propriety of a motion to dismiss, we accept the factual allegations in the complaint as true and interpret those facts and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff as the nonmoving party." *Krouse v. Bower*, 20 P.3d 895 (Utah 2001).

²Because Ms. Sclafani was not her daughter, and because her son was an adult, Ms. Nicholas could only take leave under the self-care provision of the FMLA.

6. At the end of her leave, the Office of the Attorney General actively discouraged Ms. Nicholas from coming back to work by placing numerous impediments in the way of her return. R.7-9.

7. As a result of the stress associated with overcoming these impediments, and frightened of returning to hostility in the workplace, Ms. Nicholas experienced a deterioration of her condition and took disability retirement. R. 9.

SUMMARY OF ARGUMENT

The trial court erred when it found that Congress had acted outside its authority pursuant to the 11th Amendment of the United States constitution when it applied the self-care provision of the Family Medical Leave Act to the States. The Act, by its language, was intended to prevent discrimination in the granting of medical leave. At the time the act was passed, Congress had evidence of a long history of gender discrimination sufficient to conclude that federal legislation requiring a uniform, gender neutral policy for personal medical leave was a necessary and legitimate use of its authority to enforce the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I. CONGRESS ACTED WITHIN ITS AUTHORITY WHEN IT PASSED THE FMLA.

Beginning in 1890, the United States Supreme Court has ruled that the 11th amendment to the United States Constitution contains an implicit recognition of the States sovereign immunity. *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504 (1890).”For over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting states.” *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 726, 123 S. Ct. 1972, 1977, 155 L.Ed 953, 958 (2003).

Congress does, however, have the authority to abrogate state sovereign immunity under some circumstances. “Congress may, however, abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment.” *Id.* This authority arises out of the increased scope of Congressional power granted by the constitutional amendments passed following the civil war.

But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section, Congress is expressly granted authority to enforce “by appropriate legislation” the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. . . . We think that Congress may, in determining what is “appropriate legislation” for the

purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

Fitzpatrick v. Bitzer, 427 U.S. 445, 456, 96 S.Ct. 2666, 49 L.E.d 2nd 614 (1976).

In determining whether Congress has properly abrogated sovereign immunity, the Supreme Court has developed a two part test. First; as indicated above, Congress must make its intention to abrogate state immunity “unmistakably clear.” *Hibbs* at 726. Second, Congress must act pursuant to its expanded authority pursuant to Section 5 of the Fourteenth Amendment and the Congressional remedy must “exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. *Id.* at 728.

The self-care provision of the Family Medical Leave Act meets these tests.

II. CONGRESS EVIDENCED AN INTENTION TO BIND THE STATES TO SELF-CARE THE PROVISIONS OF THE FMLA.

The self-care provision of the Family Medical Leave Act provides enforceable rights against the State of Utah because it falls within the jurisdiction granted Congress by the fourteenth amendment to the Constitution. The FMLA constitutes an effort by Congress to prevent personal or family illness from interfering with women’s ability to survive and flourish in the workplace.

In *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003), the United States Supreme Court considered whether the Congress acted within its authority in applying the

Family Medical Leave Act to the States. The facts of the case involved an employee who took leave pursuant to Section D of the Act which creates an entitlement to leave:

In order to care for the spouse, or a son or daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

29 U.S.C.S. § 2612(a)(1)c). In determining whether or not Congress had properly abrogated Nevada’s immunity, the Court determined that the statutory language evidenced a clear intent to bind the States. This finding applies to all sections of the Act including the provision before the Court today:³

Congress may, however, abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and act pursuant to a valid exercise of power under §5 of the Fourteenth Amendment The clarity of Congress’s intent here is not fairly debatable.”

Hibbs at 726. The Act allows employees to seek damages against any employer in any State or Federal Court and defines employer to include a “public agency.” 29 U.S.C. S. § 2617(a)(2). Public Agency is then defined to include the government of a state and any agency of a state. 29 U.S.C. S. § 2611(4)(A)(iii). That Nicholas’s claim meets this standard is undisputed.

³ Ms. Nicholas’ claim is that her employer, the Attorney General’s office interfered with her right to return to work following approved leave. This claim was brought pursuant to 29 U.S.C. 2615(a)(1) which states that “[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.”

III. CONGRESS ACTED WITHIN THE SCOPE OF ITS AUTHORITY WHEN IT APPLIED THE SELF-CARE PROVISION OF THE FMLA TO THE STATES.

It is the second step of the sovereign immunity analysis which serves as the basis for the dispute now before this Court.. In order for the self-care provision of the FMLA to constitute a valid exercise of Congressional authority to bind the states, it must arise out of congressional power to enforce the guarantees of the of 14th amendment. Congress cited this authority in passing the FMLA but it is for the Court to determine whether that exercise is constitutional. *Hibbs* at 727.

In determining that the family care provision of *Hibbs* was sufficiently tied to the goals of the fourteenth amendment, the Supreme Court noted that the provision was intended to combat gender based discrimination, a valid exercise of Congressional power. *Id.* at 729-730 (“The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny; . . . the persistence of such unconstitutional discrimination by the States justifies Congress’ passage of prophylactic § 5 legislation.”). This Court should find the self-care provision similarly consistent with the legitimate exercise of power by Congress.

As part of the FMLA, Congress stated its purpose as follows:

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity; (2) **to entitle employees to take reasonable leave for medical reasons**, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition; (3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the

legitimate interests of employers; (4) to accomplish the purposes described in paragraphs (1) and (2) **in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability)** and for compelling family reasons, on a gender-neutral basis; and (5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

29 U.S.C.S. § 2601(b). *Emphasis added.* Thus., Congress was clearly concerned with gender discrimination in passage of both the self-care and family care provisions.

Following *Hibbs*, the Federal and State Courts that have considered whether States are immune from the self-care provision have reached conflicting results. In its memorandum decision, R. 99-100, the Court relied largely on the reasoning in *Brockman v. Dept. of Family Services*, 342 F.3d 1159 (10th Cir. 2003), *cert. denied*, 540 U.S. 1219 (2004), where the Court held that the ruling in *Hibbs* was limited to the family care provision of the FMLA and that Congress overstepped its bounds in subjecting states to jurisdiction as to the self-care provision of the Act. In *Brockman*, the Court found that the self care provision of the FMLA was intended to prevent discrimination against sick employees, not to prevent discrimination among them. *Brockman* at 1154-55. Thus, the court found there was no overreaching fourteenth amendment justification sufficient to support federal jurisdiction.

The *Brockman* decision has been cited and followed by the Sixth Circuit Court of Appeals in *Touvell v. Ohio Department of Retardation and Developmental Disabilities*

422 F.3d 392 (6th Circuit 2005) and a federal District Court in Mississippi. *Bryant v. Mississippi State University*, 329 F. Supp. 2nd 818 (N.D. Miss. 2004). Both cases rejected any possibility that the self-care provision could serve to remedy gender discrimination and found instead, to the extent that the Act protected women, the FMLA might actually discourage employers from hiring women, by forcing the employers to provide leave to a group they might suspect of abusing the policy.⁴

Brockman is underpinned by a decision not to consider the FMLA as a whole. The reasoning by which *Brockman* gets to this conclusion is circular and should be rejected:

There is a colorable argument to the effect that the self-care provision of the FMLA must be viewed as part of the Act as a whole, and that it would therefore be a valid abrogation of states' sovereign immunity. We decline to adopt that view here, because 'even with the heightened standard of review for gender-based discrimination....we do not find that the legislative history sufficiently ties the FMLA's personal medical leave provision to the prevention of gender-based discrimination.' Moreover, 'there is no showing . . . that establishes any nexus between gender-neutral medical leave for one's own health conditions and the prevention of discrimination on the basis of gender *on the part of states as employers*.'

Brockman at 1164-1165, *emphasis in original, citations omitted*. Thus, the Court found that because the self-care provision does not act independently to remedy gender

⁴Both *Bryant* and *Touvell* argue that there is no evidence in the record indicating a need for the self-care provision as a remedy to gender discrimination. However, the Supreme Court has not always required such a showing where there is a long demonstrated history of discrimination. *See, for example; Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) where the Court upheld Title VII against a sovereign immunity challenge with no discussion of any Congressional findings on the subject of gender discrimination.

discrimination it cannot have the analytical benefit of being part of a statute which otherwise has a demonstrable benefit with regard to gender discrimination in the workplace.

The fallacy of that part of the *Brockman* analysis is demonstrated by the facts of this case. Ms. Nicholas took several periods of leave during the early winter and spring of 2004 after her daughter-in-law's sudden death. Early on, her time off was for the mixed purpose of helping her son grieve and care for his child, and to allow her time to grieve and look after her health. By late spring and summer, Ms. Nicholas was given time off for personal health reasons, in part as a result of the stress she shouldered both from her own grief and from helping her son move on from his grief. Her physical and emotional illness were directly related to her role as a care-giver. Thus, while the Tenth Circuit recognizes that women have suffered on the job discrimination disproportionately as a result of their roles as care-givers, the Court truncates any connection between that role and its effects on the health of the care-giver. The facts of this case make plain that the separate elements of the FMLA are inextricably intertwined.⁵

In *Hibbs*, the Court found:

It can hardly be doubted that . . . women still face pervasive, although at times more subtle, discrimination. . . . in the job market. According to evidence that was before Congress when it enacted the FMLA, States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits. . . . The long and

⁵This argument was made before the Trial Court at R. 118, p.11, 12.

extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny; here, as in *Fitzpatrick*, the persistence of such unconstitutional discrimination by the States justifies Congress's passage of prophylactic § 5 legislation.

Hibbs, at 1978-1979

In *Toeller v. Wisconsin*, 296 F. Supp. 946 (E.D. Wisc. 2003), the District Court considered whether there is a gender element sufficient in the “self-care” provision of the FMLA to support federal jurisdiction.⁶ Specifically, rejecting the view espoused by *Brockman*, the court found that the right of an employee to take time off for a serious illness, although gender neutral, had the intended effect of preventing employers from favoring men over women in employment. “[B]y creating the self-care provision, Congress has attempted to preclude any incentive for an employer to hire a man over a woman because, regardless of sex or family status, all eligible employees are entitled to leave under the FMLA.” *Toeller* at 949.

Moreover, the family care and childbirth provisions do not, in themselves, protect women who may need leave associated with pregnancy rather than childbirth. The childbirth provision of the Act does not provide leave, for example, for a pregnant woman

⁶The Fourth Circuit Court of Appeals has ruled that the finding in *Hibbs* applies with equal force to the self care provision and that sovereign immunity does not protect state entities from lawsuits filed pursuant to the FMLA. *Montgomery v. Maryland*, 72 Fed. Appx. 17, 19 (4th Cir. 2003) (“Sovereign immunity does not protect the states in FMLA actions.”)(unpublished decision, included in the Addendum as Addendum C). The *Montgomery* case, however, contains very little analysis of the issue and simply finds the sovereign immunity issue moot as a result of *Hibbs*.

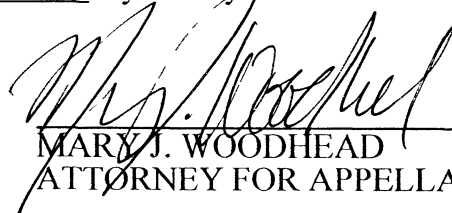
placed on bed-rest prior to the birth of a child. Equally important, the law requires employers to provide equivalent leave to a woman whose health is sidelined for serious illness related to her reproductive system as it gives to a man who has had a heart attack. Thus, the self-care provision has the direct effect of preventing gender discrimination by prohibiting an employer from acting with bias when deciding when and if to grant leave.

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.

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

RESPECTFULLY SUBMITTED this 17th day of July 2006.

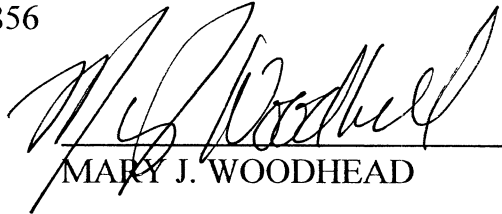


MARY J. WOODHEAD
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July 2006, I caused a true and exact copy of the foregoing BRIEF OF APPELLANT LYNN NICHOLAS to be placed in the United States Mail, addressed to:

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MARY J. WOODHEAD

ADDENDUM

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE DEPARTMENT

Third Judicial District
SALT LAKE COUNTY

FEB 23 2006
SALT LAKE COUNTY

Deputy Clerk

LYNN NICHOLAS,	:	MEMORANDUM DECISION
	:	
Plaintiff,	:	Case No. 050909664
	:	
v.	:	Judge Sheila K. McCleve
	:	
ATTORNEY GENERAL - STATE OF UT,	:	Date: February 22, 2006
	:	
Defendant.	:	

This matter is before the Court on Defendant's Motion to Dismiss, pursuant to Utah Rule of Civil Procedure 7. After considering the memoranda submitted by the parties, as well as holding oral argument, the Court enters the following decision:

Defendant's Motion to Dismiss is **GRANTED**.

Because this is a Motion to Dismiss, the facts are not in dispute. The only operable fact for purposes of this motion is that Plaintiff has brought an action under 29 USC § 2615, which makes it unlawful for any employer to interfere with, etc. an employee's exercise of his/her rights under the Family Medical Leave Act ("FMLA"). Specifically, Plaintiff argues that she attempted to exercise her rights to take leave pursuant to 29 USC § 2612(a)(1)(D), which allows a individual to take leave because of a serious health condition that makes the employee unable to perform the functions of the position of such employee, and that Defendant interfered with her efforts. Defendant argues that, as a State agency, it is entitled to immunity from such suits. The Court is persuaded by Defendant's argument.

This case turns on the application of *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003). In *Hibbs*, the court held, that the FMLA "creates a private right of action to seek both equitable and money damages 'against any employer (including a public agency) in any Federal or State court of competent jurisdiction,'" should that employer 'interfere with, restrain, or deny the exercise of FMLA rights. [The Court held] that employees of the State . . . may recover money damages in the event of the State's failure to comply with the family-care provisions of the Act." *Id.* at 724 (internal citations omitted). Defendant argues that the holding of *Hibbs* was specifically limited to the family-care provisions of the Act and did not include the self-care provisions. Plaintiff disagrees and urges the Court to find that *Hibbs* encompasses the whole Act and so the State's immunity from suit has been abrogated even for the self-care provisions.

The Court finds that the holding in *Hibbs* was specifically limited to the family-care provisions of the FMLA and did not indicate that Congress has abrogated state immunity for suits brought under the self-care provisions. This is supported by the plain language of *Hibbs* which provides that employees of the State may recover money damages "in the event of the State's failure to comply with the *family-care provisions* of the Act." If the court had wanted to include all the provisions of Act within its analysis, it could have easily done so by referring broadly to the FMLA as a whole. It did not do so. This holding is also supported by *Brockman v. Wyoming Dept. of Family Services*, 342 F.3d 1159 (10th Cir. 2003) and its


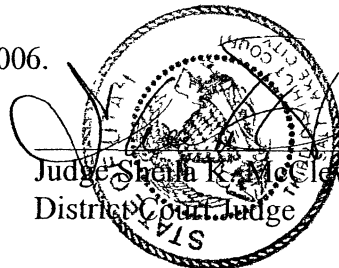
progeny.

Although Plaintiff points to two cases, *Toeller v. State of Wisconsin Department of Corrections*, 296 F. Supp. 2d 946 (E.D.Wis. 2003) and *Montgomery v. State of Maryland; Department of Public Safety and Correctional Services*, 72 Fed. Appx. 17, 2003 U.S. App. LEXIS 15068 (4th Cir. 2003), which hold that *Hibbs* applies to the whole FMLA, the Court finds that they are not persuasive. *Montgomery* offers no analysis for its holding and the analysis of *Toeller* is simply not convincing. Instead, the Court finds that *Brockman, et. al* offers better analysis on this issue. In fact, *Bryant v. Mississippi State University*, 329 F. Supp. 2d 818 (N.D.Miss. 2004) and *Touvell v. Ohio Department of Retardation and Developmental Disabilities*, 422 F.3d 392 (6th Cir. 2005) specifically discuss *Toeller* and determine that *Brockman* is the better-reasoned case. Without reiterating that analysis, the Court finds that *Bryant* and *Touvell* appropriately discredited the analysis in *Toeller*. The Court, therefore, adopts the well-reasoned opinions of *Brockman*, *Bryant*, and *Touvell*, and holds that *Hibbs* did not extend its holding to subsection (D) of 29 USC § 2612(a)(1).

Although, *Hibbs* did not extend to the self-care provisions of the FMLA, this Court can still find that Congress validly abrogated State immunity from suit if Congress abrogated such immunity by making its intention to abrogate “unmistakably clear in the language of the statutes and acts” and if Congress acted pursuant to valid exercise of its power under § 5 of the 14th Amendment. See *Hibbs*, 532 U.S. at 726. The Court finds that Congress did not meet the requirements for abrogation. Although Congress clearly intended to abrogate immunity (*id.* at 724), the Court finds that the *self-care* provisions were not enacted pursuant to a valid exercise of authority under Section 5 of the 14th Amendment. Again, the Court adopts the excellent analysis from *Brockman*, *Bryant*, and *Touvell* on this issue.

Because the State (and, by extension, the Attorney General) is immune from suits alleging money damages brought under the self-care provisions of the FMLA, this action must be DISMISSED.

DATED this 22 day of February, 2006.


Judge Sheila K. McClellan
District Court Judge


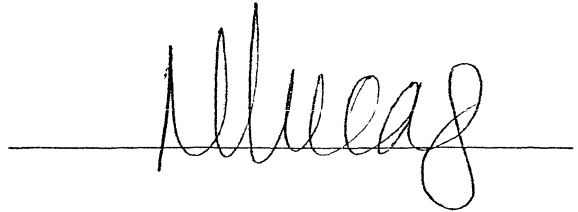
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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, on this ____ day of February, 2006.


Mary J. Woodhead
Attorney for Plaintiff
261 East 200 South, Suite 300
Salt Lake City, Utah 84111

David V. Pena
Assistant Utah Attorney General
Attorney for Defendant
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856

A handwritten signature in black ink, appearing to read "D. Pena", is written over a horizontal line.

FILED
MAR 15 2006
THIRD JUDICIAL DISTRICT COURT

MAR 30 2006

By _____ 

DAVID V. PEÑA (6962)
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MARK L. SHURTLEFF (4666)
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Attorney for Defendant Attorney General
160 East 300 South, Sixth Floor
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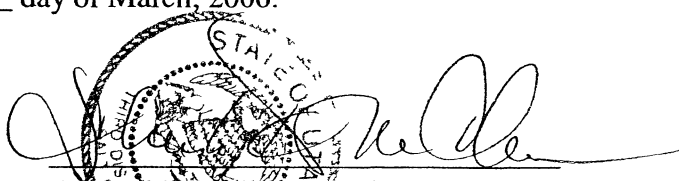
IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

LYNN NICHOLAS, Plaintiff, vs. ATTORNEY GENERAL, STATE OF UTAH, Defendants.	ORDER OF DISMISSAL Case No. 050909664 Judge Sheila K. McCleve
---	--

The Court, having considered the memoranda submitted by the parties, as well as holding oral argument, entered a Memorandum Decision on February 22, 2006 granting the Defendant's Motion to Dismiss.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that Plaintiffs' Complaint be, and hereby is, dismissed.

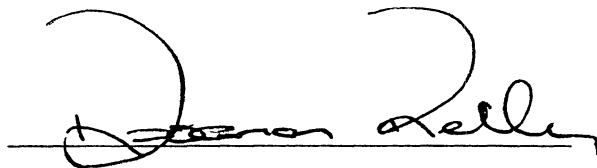
DATED this 30 day of March, 2006.


Honorable Sheila K. McCleve
Third Judicial District Court Judge

CERTIFICATE OF SERVICE

I certify that on this 17th day of March, 2006, I caused to be served by U.S. mail, postage pre-paid, a true and correct copy of the foregoing proposed **ORDER OF DISMISSAL**, to the following:

Mary J. Woodhead
362 West Pierpont Avenue
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Dawn Kelly", is written over a horizontal line.

72 Fed. Appx. 17, *; 2003 U.S. App. LEXIS 15068, **

SHEILA K. MONTGOMERY, Plaintiff-Appellant, v. THE STATE OF MARYLAND; DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, Division of Corrections; ROBERT KUPEC, Warden; GEORGE KALOROUMAKIS, Deputy Warden, Defendants-Appellees.

No. 02-1998

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

72 Fed. Appx. 17; 2003 U.S. App. LEXIS 15068

June 30, 2003, Submitted
July 30, 2003, Decided

NOTICE: [1]** RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the District of Maryland, at Baltimore. (CA-00-1019-S). Frederic N. Smalkin, Senior District Judge.

Montgomery v. Maryland, 266 F.3d 334, 2001 U.S. App. LEXIS 20974 (4th Cir. Md., 2001)

DISPOSITION: Affirmed as modified

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff employee sued defendants, State, employer, and two supervisors, alleging claims under 42 U.S.C.S. § 1983 and the Family Medical Leave Act (FMLA), 29 U.S.C.S. §§ 2601-2619. The United States District Court for the District of Maryland dismissed the claims, and the court affirmed. The case was remanded to the district court for reconsideration, which reaffirmed its decision. The employee challenged the dismissal of the FMLA claim.


OVERVIEW: The district court originally dismissed the employee's claims on sovereign immunity grounds. On remand, the district court dismissed the 42 U.S.C.S. § 1983 claim for failure to state a claim and the FMLA claim for lack of subject matter jurisdiction. The employee only appealed the ruling on the FMLA claim. The court held that sovereign immunity did not protect the states in FMLA actions. In affirming on different grounds, the court held that dismissal was appropriate under Fed. R. 12(b)(6) because the employee failed to show she was entitled to relief and did not seek relief that was recoverable under FMLA. Specifically, the complaint focused on damages for emotional distress, which were not covered under FMLA. Also, the employee's request for injunctive relief was based on de minimis and unmeasurable parts of her new assignment to which the equivalency requirement of 29 U.S.C.S. § 2614(a)(1)(A), (B) did not apply. The district court did not err in failing to act on the employee's motion to amend because she failed to make a written motion to amend, and her sentence at the end of a memorandum opposing a motion to dismiss did not satisfy the requirements of Fed. R. Civ. P. 7(b).


OUTCOME: The court modified the district court's judgment to reflect that the complaint


was subject to dismissal for failure to state a claim and affirmed the judgment as modified.

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[Labor & Employment Law](#) > [Leaves of Absence](#) > [Family & Medical Leave](#) 


[Constitutional Law](#) > [State Autonomy](#) 


HN1  Congress effectively abrogated the states' Eleventh Amendment immunity against causes of action based on the Family Medical Leave Act, 29 U.S.C.S. §§ 2601-2619. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


[Civil Procedure](#) > [Pleading & Practice](#) > [Defenses, Objections & Demurrers](#) > [Failure to State a Cause of Action](#)


HN2  A complaint should not be dismissed for failure to state a claim unless after accepting all well-pleaded allegations in a plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief. [More Like This Headnote](#)


[Labor & Employment Law](#) > [Leaves of Absence](#) > [Family & Medical Leave](#) 

HN3  Damages under the Family Medical Leave Act, 29 U.S.C.S. §§ 2601-2619, are limited to lost or denied wages, salary, benefits, or other compensation. 29 U.S.C.S. § 2617(a)(1)(A)(i)(I). If there have been no such losses, damages are limited to actual monetary losses such as the cost of care. 29 U.S.C.S. § 2617(a)(1)(A)(i)(II). [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


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HN4  Emotional distress, along with nominal and consequential damages, is not covered under the Family Medical Leave Act, 29 U.S.C.S. §§ 2601-2619. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


[Labor & Employment Law](#) > [Leaves of Absence](#) > [Family & Medical Leave](#) 


HN5  Under the Family Medical Leave Act, 29 U.S.C.S. §§ 2601-2619, an employer must restore an employee to the same or an equivalent position with equivalent benefits, pay and other conditions of employment. 29 U.S.C.S. § 2614(a)(1)(A), (B). Under 29 C.F.R. § 825.215(a) (2003), an equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. The equivalency requirement does not extend to de minimis or intangible, unmeasurable aspects of the job. 29 C.F.R. § 825.215(f). [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Civil Procedure](#) > [Pleading & Practice](#) > [Pleadings](#) > [Interpretation](#) 


HN6  Under Fed. R. Civ. P. 8(a), a pleading must contain: (1) a short, plain statement of the grounds for jurisdiction; (2) a short, plain statement of the claim, showing plaintiff is entitled to relief; and (3) a demand for judgment for the relief the pleader seeks. [More Like This Headnote](#)

[Civil Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Abuse of Discretion](#) 

[Civil Procedure](#) > [Pleading & Practice](#) > [Pleadings](#) > [Amended Pleadings](#) 

HN7  A federal appeals court reviews a district court's denial of a motion to amend for abuse of discretion. [More Like This Headnote](#)

[Civil Procedure](#) > [Pleading & Practice](#) > [Pleadings](#) > [Interpretation](#) 

HN8  Where a plaintiff failed to make a written motion to amend in the district court, a sentence at the end of a memorandum opposing a motion to dismiss does not satisfy the requirements of Fed. R. Civ. P. 7(b), governing the form of motions. [More Like This Headnote](#)

COUNSEL: Jonathan R. Siegel, Washington, D.C.; Robin R. Cockey, COCKEY, BRENNAN & MALONEY, P.C., Salisbury, Maryland, for Appellant.

J. Joseph Curran, Jr., Attorney General of Maryland, Andrew H. Baida, Solicitor General, Scott S. Oakley, Assistant Attorney General, Baltimore, Maryland, for Appellees.

JUDGES: Before WILKINS, Chief Judge, and WILKINSON and LUTTIG, Circuit Judges.


OPINION: [*18] PER CURIAM:

In 2000, Sheila K. Montgomery filed this action against the State of Maryland, the Department of Public Safety and Correctional Services, and the Warden and Deputy Warden at Eastern Correctional Institution, in their official and individual capacities, alleging claims under 42 U.S.C. § 1983 (2000), and the Family Medical Leave Act ("FMLA" or "the Act"), 29 U.S.C.A. §§ 2601-2619 (West 1999 & Supp. 2003). Although **[**2]** Defendants withdrew their assertion of Eleventh Amendment immunity, the district court dismissed both counts on sovereign immunity grounds.

On appeal, the State reasserted its Eleventh Amendment immunity. This court held that the Eleventh Amendment barred all claims against the State and the Department of Public Safety, the Warden, and the Deputy Warden except the claim for reinstatement under the FMLA against the individual administrators in their official capacities. That claim, we held, was properly dismissed for failure to state a claim on which relief could be granted. *Montgomery v. Maryland*, 266 F.3d 334 (4th Cir. 2001).

The Supreme Court granted Montgomery's petition for certiorari. The Court vacated our decision and remanded the case for reconsideration in light of *Lapides v. Board of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 152 L. Ed. 2d 806, 122 S. Ct. 1640 (2002). We remanded the case to the district court for reconsideration in light of *Lapides*.

On remand, the district court concluded that *Lapides* did not affect its holding, and reinstated its order dismissing the § 1983 claim for failure to state a claim and the **[*19]** FMLA **[**3]** claim for lack of subject matter jurisdiction. The latter ruling was based on the court's conclusion that the FMLA did not validly abrogate the State's sovereign immunity. Montgomery appeals, raising issues only as to the FMLA claim. She therefore has abandoned the § 1983 claim. See *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999).

In a recent decision, the Supreme Court held that **HN1**  Congress effectively abrogated the states' Eleventh Amendment immunity against causes of action based on the FMLA. *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 155 L. Ed. 2d 953, 123 S. Ct. 1972 (2003). Thus, the issue of whether the State can waive the immunity and then withdraw the waiver is moot in this case, as sovereign immunity does not protect the states in FMLA actions. Unless the complaint is subject to dismissal on other grounds, we must remand the case to the district court for consideration on the merits.

In our prior decision, we stated, "even if Montgomery's claim for damages could somehow survive the sovereign immunity defense, dismissal would still be proper because she has failed to state a claim upon which relief can be granted." *Montgomery*, 266 F.3d at

341. **[**4]** ^{HN2} A complaint should not be dismissed for failure to state a claim unless "after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999).

Montgomery argues that, as the Supreme Court vacated that decision, our holding is not binding. While that may be so, see *Johnson v. Bd. of Educ. of City of Chicago*, 457 U.S. 52, 53-54, 72 L. Ed. 2d 668, 102 S. Ct. 2223 (1982), we are persuaded that our reasoning remains valid.

^{HN3} Damages under the FMLA are limited to lost or denied wages, salary, benefits, or other compensation. 29 U.S.C. § 2617(a)(1)(A)(i)(I). If there have been no such losses, damages are limited to actual monetary losses such as the cost of care. § 2617(a)(1)(A)(i)(II). Montgomery alleged no lost wages or cost of care, focusing instead on ^{HN4} emotional distress, which, along with nominal and consequential damages, is not covered under the **[**5]** Act. See *Walker v. United Parcel Serv., Inc.*, 240 F.3d 1268, 1277 (10th Cir. 2001) (no actual damages suffered, no grounds for equitable relief; plaintiff sought only nominal damages); *Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1284 (11th Cir. 1999) (plaintiff failed to show adverse employment action or damages; damages not recoverable for mental distress); *Nero v. Industrial Molding Corp.*, 167 F.3d 921, 930 (5th Cir. 1999) (FMLA damages limited to lost salary or wages, employment benefits, or any other compensation that shows quid pro quo between employer, employee--not out-of-pocket expenses and damages for mental anguish); *Cianci v. Pettibone Corp.*, 152 F.3d 723, 728 (7th Cir. 1998) (inmate fired before FMLA leave scheduled suffered no damages recoverable under the Act).

As to Montgomery's request for injunctive relief, we addressed this issue as well in our prior decision and remain persuaded by that reasoning. ^{HN5} Under the FMLA, an employer must restore an employee to the same or an equivalent position with equivalent benefits, pay and other conditions of employment. 29 U.S.C. § 2614 **[**6]** (a)(1)(A), (B). Under 29 C.F.R. § 825.215(a) (2003), an equivalent position is "one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including **[*20]** privileges, perquisites and status." The equivalency requirement does not extend to "de minimis or intangible, unmeasurable aspects of the job." 29 C.F.R. § 825.215(f). As we stated previously, Montgomery's complaints are based on these de minimis and unmeasurable parts of her new assignment as compared with her old. The jobs are at the same pay grade and increment level, her classification is the same, and she received a significant raise within two months of the transfer.

Montgomery alleges that, under the notice pleading requirements of the federal system, her complaint was adequate and she should not be held to any factual allegations in her complaint. However, ^{HN6} under Fed. R. Civ. P. 8(a), a pleading must contain: (1) a short, plain statement of the grounds for jurisdiction; (2) a short, plain statement of the claim, showing plaintiff is entitled to relief; and (3) "a demand for judgment for the relief the pleader seeks." Fed. **[**7]** R. Civ. P. 8(a). Montgomery fails to show that she is entitled to relief, and her demand for judgment does not seek relief that is recoverable under the Act. Therefore, we conclude that dismissal under Fed. R. Civ. P. 12(b)(6), for failure to state a claim on which relief can be granted, is appropriate.

Her allegation that the district court erred in denying her motion to amend also lacks merit. ^{HN7} We review the district court's denial of a motion to amend for abuse of discretion. *Deasy v. Hill*, 833 F.2d 38, 40 (4th Cir. 1987). ^{HN8} Montgomery failed to make a written motion to amend in the district court; her sentence at the end of a memorandum opposing a motion to dismiss does not satisfy the requirements of Fed. R. Civ. P. 7(b), governing the form of







motions. See *Ramsgate Court Townhome Assoc. v. West Chester Borough*, 313 F.3d 157, 161 (3d Cir. 2002); *Calderon v. Kansas Dep't of Soc. and Rehab. Serv.*, 181 F.3d 1180, 1185-87 (10th Cir. 1999). Therefore, the district court did not err in failing to act on such a motion.

Accepting all Montgomery's allegations as true and making all inferences in her favor, it is clear that she cannot prove **[**8]** any set of facts in support of her claim that would entitle her to relief. *Edwards*, 178 F.3d at 244. Therefore, although the district court erred in dismissing for lack of jurisdiction, the complaint is subject to dismissal for failure to state a claim on which relief can be granted. We affirm the decision of the district court dismissing her claim under the FMLA, for the reasons stated above. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED AS MODIFIED

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