

IN THE
SUPREME COURT
OF TEXAS

NO. 08-1049

THE UNIVERSITY OF TEXAS AT EL PASO,

Petitioner,

v.

ALFREDO HERRERA,

Respondent.

On Petition for Review from the
Eighth Court of Appeals at El Paso, Texas

RESPONSE TO PETITION FOR REVIEW

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STATEMENT OF FACTS

This is a suit for retaliation in violation of the Family and Medical Leave Act (FMLA) and retaliation for the exercise of first amendment rights. Alfredo Herrera, Respondent, went to work for Petitioner the University of Texas at El Paso (UTEP) in November 2002. (CR 24). In March 2005, he began medical leave for an injury. (CR 24). He returned to work on January 4, 2006, but he faced negative comments about his condition and other discriminatory treatment. (CR 24). He was terminated less than a month after his return from medical leave. (CR 25).

UTEP's handbook of operating procedures guarantees employees' rights under the FMLA. (CR 31). It recognizes that the FMLA makes it unlawful to discharge or discriminate against any person for involvement in any proceeding under the FMLA. (CR 32). UTEP's handbook specifically provides that "An eligible employee may also bring a civil action against an employer for violations" of the Act. (CR 32).

Because he believes he was terminated in retaliation for his exercise of FMLA rights and for exercising his first amendment rights by complaining about being required to work unsafely, Herrera brought this suit against UTEP. (CR 23-26). UTEP filed a plea to the jurisdiction as to Herrera's FMLA claim only. (CR 16). It alleges that this claim is barred by sovereign immunity. (CR 17). It did not claim that the trial court lacked jurisdiction over Herrera's first amendment retaliation claim. (CR 16-21). The trial court denied the plea to the jurisdiction. (CR 33). UTEP appealed. (CR 37). The Eighth Court of Appeals affirmed, leading to the filing of this petition for review.

SUMMARY OF ARGUMENT

The issue presented by Petitioner is not worthy of this Court's review. The issue is not "important" to Texas jurisprudence because it is one of federal law, not state law; this is the only Texas case to have faced the question in the sixteen years since the FMLA was adopted; and reversal of the court of appeals on the particular issue argued by Petitioner is not necessarily dispositive of the case. The Court should deny review.

A State's immunity from suit under federal law can be waived either by a State itself, or by Congress in the exercise of its authority under the Fourteenth Amendment to prevent and deter violations of the constitutional right to equal protection. Both occurred here.

UTEP waived sovereign immunity by its handbook of operating procedures, which expressly promised employees that they could "bring a civil action" for violation of the FMLA. The Legislature has delegated to the UT system the power to enact regulations which have the force of law. In addition, a governmental body may waive its own immunity by its conduct. UTEP's publication of the policy stating that employees have the right to bring suit helps it to recruit and retain those employees, by leading them to believe that they will possess the same rights that they would have if employed by the private sector. Its conduct in doing so is a clearer waiver of immunity than the conduct found to have waived immunity in other recent cases, since it reflects an express decision by Petitioner to permit employees to bring a civil action. The trial court correctly found that UTEP has waived any immunity from suit for violation of the FMLA by this conduct.

Congress also validly waived States' immunity from suit under the FMLA. Congress' findings and purpose clearly express its intent to prevent gender discrimination in violation of the Equal Protection clause of the Fourteenth Amendment. The Congressional record reveals that Congress heard evidence that the inability to take leave for medical care has a discriminatory impact on women, because of its particularly devastating effect on households headed by single parents – who are usually women. Congress also heard testimony that the lack of uniform medical leave policies has created an environment where sex discrimination is rampant. The stereotypical ideology that women are mothers first, and workers second, creates an environment in which men are held to higher standards at work, and thus are denied accommodations or discouraged from taking leave when necessary for medical care. Congress' findings, stated purposes, and the Congressional record establish that Congress did identify a pattern of gender discrimination in the application and effect of medical leave policies. Its chosen remedy, the self-care provisions of the FMLA, was a valid exercise of its authority under the Fourteenth Amendment. The trial court properly denied the plea to the jurisdiction, and review should be denied.

ARGUMENT AND AUTHORITIES

I. The petition does not presents grounds justifying review by this Court.

The Family and Medical Leave Act was enacted in 1993. During the ensuing sixteen years, this is the first Texas state case to have presented the issue raised by Petitioner, i.e., whether Congress validly abrogated States' immunity under the self-care provision of the FMLA, as opposed to merely the family-care provision of that Act. The issue presented is

a narrow issue of federal law, on which federal courts are divided. There is little reason for this Court to add its voice to the federal-law controversy.

The issue briefed by Petitioner is also not in itself dispositive of this case. If the Court finds that Congress did not validly abrogate sovereign immunity under the self-care provision of the FMLA, it must consider whether immunity was waived under Texas law. The Legislature delegated to the UT system the power to enact regulations which have the force of law, and UTEP also had the ability to waive its immunity by its conduct. The University's adoption of a handbook providing that "An eligible employee may also bring a civil action against an employer for violations" of the Act (CR 32) validly waived its immunity and allows this suit to proceed regardless of the outcome of the federal-law question.

For these reasons, the issue presented by Petitioner is not worthy of this Court's review. The Court should deny review.

II. The trial court did not err in denying the plea to the jurisdiction because UTEP explicitly waived any immunity from suit.

The Texas Legislature has instructed that state employees are entitled to the leave provided by the FMLA. Tex.Gov't Code § 661.912. Consistent with this directive, UTEP's handbook of operating procedures guarantees employees their FMLA rights. (CR 31). It recognizes that the FMLA makes it unlawful to discharge or discriminate against any person for involvement in any proceeding under the FMLA. (CR 32). UTEP's handbook goes further, by specifically providing that "An eligible employee may also bring a civil action against an employer for violations" of the Act. (CR 32). This language unambiguously waived any immunity UTEP may possess from a civil suit for FMLA violations.

UTEP has not argued that the language of its policy is insufficient to waive its immunity; instead, it claims that the policy is ineffective because it lacks legal authority to waive its own immunity. This argument should be rejected for two reasons: First, the Texas Legislature has authorized the University of Texas system to enact regulations with the force of law; and second, a unit of government possesses the inherent ability to waive immunity.

A. The Legislature granted the UT system the authority to waive its own immunity.

UTEP is part of the University of Texas System, under the management and control of its board of regents. Tex.Educ.Code § 69.02. The board of regents governs the University of Texas System. Tex.Educ.Code § 65.11. The Legislature has granted to the board of regents broad authority. Tex.Educ.Code § 65.31. Specifically, the board is authorized to govern, operate, and maintain each of the institutions within the system; and has the authority to promulgate any rules and regulations for the operation, management, and control of the system and its institutions “as it may deem either necessary or advisable.” Tex.Educ.Code § 65.31(a), (c). When the board of regents exercises these delegated powers, its rules have the same force and effect as legislative enactments. *Foley v. Benedict*, 122 Tex. 193, 55 S.W.2d 805, 808 (1932) (interpreting the predecessor statute to Education Code section 65.31).

Furthermore, the board is statutorily empowered to delegate its powers to committees or agents. Tex.Educ.Code § 65.31(g). The UTEP handbook of operating procedures, which includes its waiver of immunity from FMLA claims, reflects that its provisions were adopted pursuant to rules and regulations of the board of regents. (CR 30). UTEP’s waiver of

sovereign immunity thus represents a valid exercise of delegated legislative authority. Because UTEP was delegated the legislative authority to waive its immunity, and it did so, the trial court properly denied the plea to the jurisdiction, and review should be denied.

B. A governmental body possesses the ability to waive its own immunity.

Petitioner also had the inherent ability to waive immunity by its conduct, and did so in enacting the policy advising employees of their right to bring a civil action. In *Reata Construction Corp. v. City of Dallas*, the Court pointed out that although it has “generally deferred to the Legislature to waive immunity,” it “remains the judiciary’s responsibility to define the boundaries of the common-law doctrine and to determine under what circumstances sovereign immunity exists in the first instance.” *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006). The Court recognized a “tension” between the concept of a governmental entity waiving its immunity from suit independent from legislative action, and previous statements that only the Legislature can waive immunity. *Id.* Nonetheless, the Court rejected a conclusion that immunity could never be waived without action by the Legislature, and instead determined that a governmental entity could waive its own immunity by voluntarily becoming a party to a suit. *Id.*

Thus, governmental bodies have waived their own immunity without an express waiver by the Legislature in numerous recent cases. In *Reata Construction*, the City of Dallas waived immunity from a contractor’s claims by suing the contractor for damages (at least to the extent the contractor’s claims were connected to and properly defensive to the City’s claims). *Reata Const. Corp.*, 197 S.W.3d at 377. Likewise, the Texas Commission

on Human Rights waived immunity from suit by filing an action for violation of the Fair Housing Act in *Kinnear v. Texas Commission on Human Rights*, 14 S.W.3d 299, 300 (Tex. 2000).

In a case more closely on point, Texas Southern University was found to have waived its sovereign immunity for a breach of contract claim by accepting the benefits of a contract, particularly because it had assured the contracting party that the contract would be valid, binding, and enforceable. *Texas Southern University v. State Street Bank and Trust Co.*, 212 S.W.3d 893, 898, 908 (Tex.App.–Houston [1st Dist.] 2007, pet. denied). UTEP’s conduct in adopting and publishing a policy assuring employees that they may pursue a civil action in the event of an FMLA violation is comparable; it helps UTEP to recruit and retain those employees, by leading them to believe that they will have the same legal remedies that they would possess if employed in the private sector.

UTEP’s conduct in adopting a policy granting employees the right to file suit for an FMLA violation waived its immunity from suit. Waiver is “an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right.” *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003). A party’s express renunciation of a known right can establish waiver. *Motor Vehicle Bd. v. El Paso Indep. Auto Dealers Ass’n*, 1 S.W.3d 108, 111 (Tex. 1999). The waiver of immunity is even clearer in this case than the waivers found in other recent cases, because UTEP’s policy reflects an intentional decision to subject itself to suit for FMLA violations. It would be a strange rule of law which would permit a governmental body to accidentally waive its immunity by its conduct in filing a lawsuit, but

prohibit it from doing so intentionally by its conduct in adopting a policy granting employees the right to bring a civil action.

It would be “fundamentally unfair” to allow UTEP to disavow its policy assuring employees that they could sue for FMLA violations and assert immunity from such a suit, after enjoying the benefits of those employees’ services. *See Reata Const. Corp.*, 197 S.W.3d at 375 (waiver of immunity mandated by fundamental fairness). UTEP’s conduct is inconsistent with a claim of immunity, and sufficed to waive immunity for FMLA claims. The trial court properly denied the plea to the jurisdiction, and review should be denied.

III. The trial court did not err in denying the plea to the jurisdiction because the United States Congress validly abrogated States’ immunity from suit under the FMLA.

Additionally, Petitioner does not possess sovereign immunity because it has been explicitly waived by Congress in its enactment of the FMLA. The FMLA creates a private right of action “against any employer (including a public agency)” which violates an employee’s FMLA rights. 29 U.S.C. § 2617(a)(2). A “public agency” is defined to include “the government of a State or political subdivision thereof” and “any agency of . . . a State, or a political subdivision of a State . . .” 29 U.S.C. §§ 203(x), 2611(4)(A)(iii). Congress intended to waive States’ sovereign immunity for claims under the FMLA. *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 123 S.Ct. 1972, 1976, 155 L.Ed.2d 953 (2003).

Prior to 2003, eight federal appellate circuits held that although Congress had intended by the FMLA to abrogate the states’ immunity from suit for money damages, it did not validly do so. *See generally Sharp v. Illinois Dept. of Corrections*, 2002 WL 441320 *1

(N.D. Ill. 2002) (collecting cases). However, the Supreme Court reversed these decisions in 2003, holding that the FMLA validly abrogated immunity, in *Hibbs*, 123 S.Ct. at 1981.

Hibbs was decided in the context of the family-care provision of the FMLA, but it does not follow that the decision is inapplicable to claims for retaliation based on exercise of self-care leave. Federal courts have divided on the question. For the following reasons, the holding and rationale of *Hibbs* apply equally to claims of retaliation after self-care leave.

As *Hibbs* pointed out, in enacting the FMLA, Congress relied partially on its power under section 5 of the Fourteenth Amendment to enforce that Amendment's guarantees. *Hibbs*, 123 S.Ct. at 1977. Section 1 of the Fourteenth Amendment guarantees equal protection of the laws. U.S. CONST. AMD. XIV, § 1. Section 5 of the Fourteenth Amendment grants Congress the power to enforce section 1 by appropriate legislation. *Id.* § 5. Congress stated its purposes in enacting the FMLA as including "to accomplish the purposes [of the Act] 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 . . . to promote the goal of equal employment opportunity for women and men, pursuant to such clause." 29 U.S.C. § 2601(b) (4), (5).

Congress may abrogate the States' sovereign immunity through a valid exercise of its authority under the Fourteenth Amendment, because "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.” *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), *quoted in Hibbs*, 123 S.Ct. at 1977. Furthermore, Congressional authority under section 5 is not limited to proscribing unconstitutional conduct. *Hibbs*, 123 S.Ct. at 1977. Instead, it may also act to remedy and deter violations of the right to equal protection by prohibiting a broader swath of conduct, including that which is not itself forbidden by the text of the Fourteenth Amendment. *Id.* In other words, Congress may enact prophylactic legislation that proscribes constitutional conduct, in order to prevent and deter unconstitutional conduct. *Id.* “It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference.” *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 2172, 138 L.Ed.2d 624 (1997) (citation and internal quote marks and alterations omitted).

In order to validly legislate away States’ sovereign immunity under section 5, Congress must be acting to remedy identified constitutional violations – not attempting to substantively redefine the States’ legal obligations. *Hibbs*, 123 S.Ct. at 1977; *City of Boerne*, 117 S.Ct. at 2164-68. Legislation is valid under section 5 if it exhibits congruence and proportionality between the injury to be prevented or remedied, and the means adopted to that end. *Hibbs*, 123 S.Ct. at 1978, *citing City of Boerne*, 117 S.Ct. at 2157.

Petitioner argues that Congress did not identify discrimination by the States in connection with the FMLA’s self-care clause. To the contrary, the text of the Act makes clear that the FMLA aims to protect the right to be free from gender-based discrimination in

the workplace. *Hibbs*, 123 S.Ct. at 1978 & n. 2. Congress found that “employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.” 29 U.S.C. § 2601(a)(6). Its stated purposes included to entitle employees to take reasonable leave for medical reasons; to accomplish this purpose 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 on a gender-neutral basis; and to promote the goal of equal employment opportunity for women and men, pursuant to the Equal Protection Clause. 29 U.S.C. § 2601(b)(2), (4), (5). These findings and purposes are not limited to leave for care of family members, but also apply to leave for an employee’s own medical needs.

Petitioner complains that the language of the self-care subsection alone does not suggest that its purpose was to combat gender-based discrimination, and that the types of medical conditions for which FMLA leave is allowed are not limited to those predominantly affecting workers of either gender. (P.f.r. p. 8). However, the same is true of the family-care subsection. 29 U.S.C. § 2612(a)(1)(C). The text of that section allows an employee to take necessary leave in order to care for that person’s “spouse;” it is not limited to caring for a wife or husband. *Id.* This did not prevent the Supreme Court from holding that Congress validly waived immunity in the family-care context. *Hibbs*, 123 S.Ct. at 1981. The subsection referring to self-care leave can not be divorced from the legislation as a whole in determining whether Congress validly waived immunity from suit.

In addition to these findings, the *Hibbs* Court examined the Congressional record to determine whether it reflected a pattern of constitutional violations on the part of the States. *Id.* at 1978-82. Gender-based classifications are subjected to heightened scrutiny: they will be permitted only if they serve important governmental objectives, and the discriminatory means employed are substantially related to the achievement of those objectives. *Hibbs*, 123 S.Ct. at 1978, citing *United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). Because of this heightened level of scrutiny, it is easier for Congress to show a pattern of constitutional violations to justify abrogation of immunity. *Hibbs*, 123 S.Ct. at 1982. Based on the congressional findings and record, the Supreme Court determined that the enactment of the FMLA as prophylactic legislation was valid. *Id.* at 1981.

Petitioner argues that the legislative history does not tie the self-care leave provision to the prevention of discrimination. However, the evidence before Congress *did* establish the discriminatory impact on women of the inability to take leave for personal medical care. Specifically, the Senate Report on the FMLA indicates in its examination of leave for an employee's own serious illness, that "Job loss because of illness has a particularly devastating effect . . . where a single parent heads the household." S.Rep. no. 103-3, pp. 11 (1993), U.S.Code Cong. & Admin. News 1993, p.13-14. The Senate quoted testimony that "For the single parent, *usually a woman*, losing her job when she is unable to work during a time of serious health condition can often mean borrowing beyond prudence, going on welfare, or destitution for herself and her family." *Id.*, U.S.C.C.A.N. p. 14 (emphasis added).

Hibbs also pointed out that

Congress had evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways. It was aware of the ‘serious problems with the discretionary nature of family leave,’ because when ‘the authority to grant leave and to arrange the length of that leave rests with individual supervisors,’ it leaves ‘employees open to discretionary and possibly unequal treatment.’ H.R.Rep. No. 103-8, pt. 2, pp. 10-11 (1993). Testimony supported that conclusion, explaining that ‘[t]he lack of uniform parental *and medical* leave policies in the work place has created an environment where [sex] discrimination is rampant.’ 1987 Senate Labor Hearings, pt. 2, at 170 (testimony of Peggy Montes, Mayor's Commission on Women's Affairs, City of Chicago).

Hibbs, 123 S.Ct. at 1980 (emphasis added).

Congress also recognized the prevailing ideology that women are “mothers first, and workers second.” *Hibbs*, 123 S.Ct. at 1982. The corollary to this stereotype is that male employees belong in the workplace, even if suffering from a medical condition for which female employees would be permitted to take self-care leave. As the Supreme Court pointed out, employers holding this stereotype “often denied men similar accommodations or discouraged them from taking leave.” *Hibbs*, 123 S.Ct. at 1982. This perception can also “lead to subtle discrimination that may be difficult to detect on a case-by-case basis.” *Id.* Congress accordingly found that “employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.” 29 U.S.C. § 2601(a)(6).

Thus, the evidence before Congress was not limited to the discriminatory application and effect of family-care leave policies, but also reflected discrimination in the application and effect of self-care leave. Petitioner’s brief emphasizes that some of the testimony was

not directed particularly to public-sector employment; however, *Hibbs* approved application of private-sector evidence to government employment in analyzing the FMLA based on the evidence before Congress that the “proportion and construction of leave policies available to public sector employees differs little from those offered private sector employees.” *Hibbs*, 123 S.Ct. at 1979 & n. 3. In fact, much of the evidence *Hibbs* pointed to as supporting the FMLA’s abrogation of immunity was not restricted to discrimination in employment by the States, but reflected unequal treatment and stereotypical beliefs in the workforce generally. *Id.* at 1979-80, 1982.

The Congressional record of gender discrimination and purpose to eliminate that discrimination distinguishes this case (like *Hibbs*) from those in which Congressional waivers of sovereign immunity were invalidated due to the absence of an identified pattern of constitutional violations. *Hibbs* establishes that the heightened scrutiny to which gender-based decisions are subject is important to this analysis; this makes it easier for Congress to show a pattern of state constitutional violations which would justify its abrogation of States’ immunity. *Hibbs*, 123 S.Ct. at 1982. In *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, the legislation in question subjected states to suits for patent infringement; there was no suspect classification at issue. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 119 S.Ct. 2199, 2205-06, 144 L.Ed.2d 575. In *Kimel* and *Garrett*, the legislation under review responded to a purported tendency of state officials to make age- and disability-based distinctions; discrimination on the basis of such characteristics is reviewed by the rational basis standard rather than the

heightened scrutiny governing review of gender discrimination. *See Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 963-64, 148 L.Ed.2d 866 (2001); *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S.Ct. 631, 646-47, 145 L.Ed.2d 522 (2000). In fact, *Hibbs* expressly distinguished *Kimel* and *Garrett* on this basis. *Hibbs*, 123 S.Ct. at 1981-82.

Thus, the Congressional record and its findings and purpose establish that Congress identified a pattern of gender discrimination in the application and effect of leave policies which related to leave for medical care as well as family care. As with the family-care leave provision, Congress' chosen remedy for this violation was congruent and proportional to the violation. It created "an across-the-board, routine employment benefit for all eligible employees" to ensure that employers "could not evade leave obligations simply by hiring men." *See Hibbs*, 123 S.Ct. at 1982. By entitling all employees to the same benefit regardless of gender, Congress reduced employers' incentive to engage in hiring and promotion decisions on the basis of stereotypes. *Id.* at 1982-83. The self-care leave provision of the FMLA therefore represents a valid exercise of Congress' authority under section 5 of the Fourteenth Amendment to enact prophylactic legislation proscribing State conduct which would discriminate between men and women in the workplace.

For these reasons, Congress validly abrogated the states' immunity from suit under the FMLA. The trial court properly denied Petitioner's plea to the jurisdiction, and review should be denied.

FOR THESE REASONS, Respondent prays that review be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served by first-class U.S. mail to **Sean Jordan**, Attorney for Petitioner, Assistant Solicitor General, Texas Attorney General's Office, PO Box 12548, Capitol Station, Austin, TX 78711-2548, on June 11, 2009.

John P. Mobbs