Nos. 97-3541, 97-3544

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

_____

DENISE DEBOSE, et al.

Plaintiffs-Appellees

v.

STATE OF NEBRASKA

Defendant-Appellant

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

_____

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS INTERVENOR

_____

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3541

DENISE DEBOSE,

Plaintiff-Appellee

UNITED STATES OF AMERICA,

Intervenor on Appeal

v.

STATE OF NEBRASKA

Defendant-Appellant

No. 97-3544

JAMES MCCULLOUGH,

Plaintiff-Appellee

UNITED STATES OF AMERICA,

Intervenor on Appeal

v.

STATE OF NEBRASKA

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS INTERVENOR

This brief is filed in response to the Court's order of July 23, 1999, permitting supplemental briefs on recent developments to be filed by August 16, 1999.

ARGUMENT

TITLE I OF THE AMERICANS WITH DISABILITIES ACT IS A VALID EXERCISE OF CONGRESS' POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

In Alsbrook v. City of Maumelle, No. 97-1825, 1999 WL 521709 (July 23, 1999) (en banc), this Court held that Title II of the Americans with Disabilities Act (ADA) was not valid Section 5 legislation. This Court expressly declined to address the constitutional validity of other titles of the ADA. Id. at *4 n.11. While we disagree with the holding in Alsbrook, we recognize that it is binding law in this Circuit. Even accepting Alsbrook, however, Title I can be upheld as "appropriate" Section 5 legislation because it is more narrowly focused on employment.

1. In Alsbrook, this Court recognized that Congress could use its power to "enforce" the Equal Protection Clause to protect people with disabilities from invidious discrimination. 1999 WL 521709, at *6 ("congressional enforcement of equal protection rights under Section 5 is not limited to suspect classifications"). But this Court found Title II overbroad because it addressed "every state law, policy, or program," when the legislative record did not support the "the proposition that most state programs and services discriminate arbitrarily against the disabled." Id. at *6-*7.

Title I has more limited scope. Instead of applying to all of a State's activities, Title I applies only to employment decisions. As we noted in our initial Brief as Intervenor (at 15-17), Congress heard extensive testimony that employers

irrationally and arbitrarily denied employment to individuals with disabilities. See H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 71 (1990) (House Report) ("As was made strikingly clear at the hearings on the ADA, stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities are still pervasive today. Every government and private study on the issue has shown that employers disfavor hiring persons with disabilities because of stereotypes, discomfort, misconceptions, and unfounded fears about increased costs and decreased productivity."); see also Americans with Disabilities Act: Hearing Before the House Comm. on Small Business, 101st Cong., 2d Sess. 128-134 (1990) (testimony of Arlene Mayerson) (collecting studies showing that employers reacted in a stereotyped and prejudiced manner to applicants with disabilities); Advisory Commission on Intergovernmental Relations, Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal 21 (Apr. 1989) ("Researchers have shown that potential employers and coworkers have negative views and expectations about the productivity and reliance of workers with some form of mental or physical disability.").

There is no doubt that similar discrimination of a constitutional magnitude existed in government employment. A survey of state officials by the Advisory Commission on Intergovernmental Relations (ACIR) prior to the enactment of the ADA reported that 35% identified "negative attitudes about

persons with disabilities" as a "serious impediment" to employing persons with disabilities in state government, and another 48% described them as a "moderate" impediment. ACIR, supra, at 73.[1/] But as the Court explained in City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448 (1985), "mere negative attitudes * * * are not permissible bases" for making legitimate government decisions. Thus, with the extensive evidence of negative employer attitudes in general, and government employer attitudes specifically, Congress had a strong basis in fact for determining that States were acting in an unconstitutional manner when it came to employing persons with disabilities. Congress' conclusion that public employers engage in the same discrimination as private employers is consistent with its coverage of public employers under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. "The ADA targets particular practices--in this case, discrimination in employment--and provides a remedy following the time-tested model provided by the anti-employment discrimination provisions of Title VII of the Civil Rights Act of 1964." Muller v. Costello, 1999 WL 599285 (2d Cir. Aug. 11, 1999).

In Alsbrook, the Court noted that the States in this circuit have enacted laws to prohibit discrimination against the disabled. 1999 WL 521709, at *7. Congress found, however, that

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[1/] ACIR was created by Congress as a bipartisan commission composed of federal, state, and local officials to study the relations between various governmental entities. See 42 U.S.C. 4271-4273.

nationwide "individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination." 42 U.S.C. 12101(a)(4). The fact that some States have provided remedies in some instances does not negate Congress' power to enact Section 5 legislation that governs all States. For example, in Oregon v. Mitchell, 400 U.S. 112 (1970), while the Court agreed that there was little evidence that literacy tests were unconstitutional in every state, it concluded that Congress had the authority to enact a nationwide ban to address what it perceived to be a more than scattered problem. See especially id. at 283-284 (opinion of Stewart, J.); see also Fullilove v. Klutznick, 448 U.S. 448, 483 (1980) (plurality); id. at 501 n.3 (Powell, J., concurring). Moreover, Congress determined that a "clear and comprehensive national mandate for the elimination of discrimination" was necessary, 42 U.S.C. 12101(b)(1), because there was evidence that even when States had good policies on paper, "implementation has sometimes been impeded by negative attitudes and misconceptions about persons with disabilities and their performance capabilities" by those mid-level managers "who actually make hiring and promotion decisions." ACIR, supra, at 75.

In Alsbrook, this Court found that the "reasonable modification" requirement of Title II was not enacted to remedy constitutional violations.[2/] While we disagree with the Court's

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[2/] This Court noted that Congress had not provided a definition of "reasonable modification" in the text of the statute, leading

(continued...)

conclusion, we think it clear that the "reasonable accommodation" provision of Title I is a remedial measure to counteract the effects of the intentional discrimination by the persons in government who make personnel decisions, discrimination rooted in their pervasive negative attitudes towards and misconceptions about persons with disabilities. Congress found that the accommodations needed for people with disabilities to enter the workforce were relatively inexpensive. See S. Rep. No. 116, 101st Cong., 1st Sess. 32 (1989) (Senate Report); House Report, supra, at 33-34, 63 (same); see also 56 Fed. Reg. 8,582-8,584 (1991) (collecting studies). Congress also found that workers with disabilities, when assigned appropriate positions, performed as well as or better than their fellow workers. See Senate Report, supra, at 28-29; House Report, supra, at 58-59; U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 30-32 (1983).

Yet Congress found employers refused to take even minimal steps to include people with disabilities in the workplace, even though there is evidence that in many cases the costs of accommodation would be a good investment because of the lower costs and higher productivity of the disabled worker. See National Council on Disability, The Americans with Disabilities

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[2/] (...continued)
this Court to describe the requirement as "open-ended" and "amorphous." 1999 WL 547910, at *6. Title I, by contrast, defines the term "reasonable accommodation," see 42 U.S.C. 12111(9), and the courts have had no trouble interpreting the same term for the past 20 years under regulations implementing Section 504 of the Rehabilitation Act.

Act: Ensuring Equal Access to the American Dream 12 (1995) (average figures from national data bank reported that for every dollar spent to make an accommodation for an existing worker who incurred a disability, the company saved $15.34 in recruiting and training costs); see also Frederick C. Collignon, The Role of Reasonable Accommodation in Employing Disabled Persons in Private Industry, in Disability and the Labor Market 196, 209 (Monroe Berkowitz & M. Anne Hill eds., 1986). Given these facts, it was within Congress' discretion as a co-equal branch of government with superior fact-finding abilities to conclude that prejudice against people with disabilities unconstitutionally infected the public employment process, just as the Court in Cleburne found that prejudice unconstitutionally infected the decision to deny a zoning waiver.

In addressing that pervasive, nationwide problem, Congress was entitled to conclude that a simple ban on discrimination in hiring of persons with disabilities would not be sufficient to purge the employment process of the effects of past discrimination and prevent discrimination in the future. Congress could conclude that it would be difficult, on a case-by-case basis, to prove that prejudicial attitudes or misinformation about disabilities affected any particular employment decision. In many instances, individual decision makers may not be aware of their own stereotypical thinking. Moreover, employment rules that exclude those with disabilities may have originated at a time when segregation and isolation of those with disabilities

was the norm. At best, those rules were devised without any consideration of how a disabled employee would do the job. At worst, the prejudices and misconceptions of the time are reflected in the rule. Even the neutral application of those rules would carry forward the effects of past discrimination. Congress required government employers to make reasonable accommodations for qualified individuals with disabilities for two reasons: that absent discriminatory attitudes employers would have made those accommodations on their own and that public employers needed to take affirmative steps to overcome the effects of past discrimination, segregation and isolation. Cf. Fullilove, supra.

2. Whether Title I is valid Section 5 legislation depends on how pervasively States were unconstitutionally discriminating against persons with disabilities in employment. For the greater the constitutional evil, the broader Congress' remedial power. City of Boerne v. Flores, 521 U.S. 507, 530 (1997) ("The appropriateness of remedial measures must be considered in light of the evil presented."). On this empirical question, Congress determined that individuals with disabilities have been "subjected to a history of purposeful unequal treatment" and that "discrimination against individuals with disabilities persists in such critical areas as employment," and that such discrimination was "serious and pervasive." 42 U.S.C. 12101(a)(7), (3) & (2).

"Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a

conclusion respecting them contrary to that reached by the Legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker." Radice v. New York, 264 U.S. 292, 294 (1924); see also Board of Educ. v. Mergens, 496 U.S. 226, 251 (1990) ("we do not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical determinations").

This great deference is due not only because Congress is specifically charged by Section 5 with the power to enforce the Fourteenth Amendment. Congress also has a unique institutional capacity to gather information on a comprehensive basis, unconstrained by the limitations of particular litigation, and a distinct capacity to draw relevant information from the people and communities represented by its Members. Accordingly, Congress, unlike the courts, is in a position to "amass and evaluate the vast amounts of data," Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985), that are essential given the heavily fact-bound nature of Equal Protection Clause scrutiny. Congress can study a problem for decades (as it did here), hold fact-finding hearings, and receive reports from the executive branch on the state of a problem across the nation. Because of Congress' unique role as a national fact finder, "significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from

it." United States v. Gainey, 380 U.S. 63, 67 (1965); see also Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195-196 (1997) (emphasizing superiority of Congress in drawing inferences and making predictive judgments).

As the Supreme Court reaffirmed in City of Boerne, "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." 521 U.S. at 536. Given that employment is a field in which Congress had before it evidence of widespread unconstitutional conduct by States as employers, Congress did not exceed its "wide latitude," id. at 520, in determining that Title I was appropriate legislation to enforce the Equal Protection Clause.

CONCLUSION

Even applying the standard articulated in Alsbrook, the ADA's abrogation of Eleventh Amendment immunity for Title I claims is valid.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 1999, two copies of the foregoing Supplemental Brief for the United States as Intervenor and 3 1/2" diskette were served by first-class mail, postage prepaid, on the following counsel:

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