No. 98-6532

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ETHEL LOIS LARRY; DENESE POUNDS,

Plaintiffs-Appellants

UNITED STATES OF AMERICA,

Intervenor

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA
AND THE UNIVERSITY OF ALABAMA AT BIRMINGHAM,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS INTERVENOR

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CERTIFICATE OF INTERESTED PARTIES
AND CORPORATE DISCLOSURE STATEMENT
CASE NO.98-6532

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe oral argument is necessary to resolve the legal argument presented. If this Court elects to hear oral argument, the United States should be permitted to participate. See 28 U.S.C. 2403(a).

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LEGISLATIVE HISTORY:

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 98-6532

ETHEL LOIS LARRY; DENESE POUNDS,

Plaintiffs-Appellants

UNITED STATES OF AMERICA,

Intervenor

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA
AND THE UNIVERSITY OF ALABAMA AT BIRMINGHAM,

Defendants-Appellees

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

_____

BRIEF FOR THE UNITED STATES AS INTERVENOR

_____

STATEMENT OF JURISDICTION

Plaintiffs-appellants filed a complaint in the United States District Court for the Northern District of Alabama, alleging that the defendants violated, inter alia, the Equal Pay Act, 29 U.S.C. 206(d). For the reasons discussed in this brief, the district court had jurisdiction over the case pursuant to 28 U.S.C. 1331 and 29 U.S.C. 216(b).

This appeal is from an order entered on March 20, 1998, as amended by an order of April 27, 1998. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1292(b).

STATEMENT OF THE ISSUE

Whether the Equal Pay Act contains a valid abrogation of Eleventh Amendment immunity.

STATEMENT OF THE CASE

1. This suit is a private action brought by employees of the University of Alabama against the defendants for monetary and equitable relief under, inter alia, the Equal Pay Act, 29 U.S.C. 206(d).

2. The defendants moved to dismiss the action for lack of subject-matter jurisdiction based on the Supreme Court's decision in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996). The district court granted the motion on September 15, 1997, finding that Congress did not have the power under Section 5 of the Fourteenth Amendment to enact the Equal Pay Act, and thus did not validly abrogate Eleventh Amendment immunity. See Larry v. Board of Trustees, 975 F. Supp. 1447, 1449-1450 (N.D. Ala. 1997).

3. On December 19, 1997, the district court granted the United States leave to intervene to defend the constitutionality of the Equal Pay Act's abrogation. See 28 U.S.C. 2403(a). In a March 20, 1998, opinion, the district court adhered to its previous decision. See Larry v. Board of Trustees, 996 F. Supp. 1366, 1367-1368 (N.D. Ala. 1998).

4. On April 27, 1998, the court certified the March 20 order for immediate interlocutory appeal pursuant to 28 U.S.C. 1292(b). This Court granted leave to appeal on July 22, 1998.

5. Because the constitutionality of the Equal Pay Act is a question of law, this Court reviews the issue de novo. See Sea Servs. of the Keys, Inc. v. Florida, No. 97-4309, 1998 WL 681473, at *1 (11th Cir. Oct. 2, 1998).

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to federal court jurisdiction over plaintiffs' Equal Pay Act claim. Although Seminole Tribe made new law regarding Congress' authority to rely on the Commerce Clause to abrogate Eleventh Amendment immunity, the opinion expressly reaffirmed prior decisions that Congress may use the power granted it by Section 5 of the Fourteenth Amendment to abrogate a State's Eleventh Amendment immunity.

Like other civil rights legislation, the purpose of the Equal Pay Act was to combat discriminatory practices that treated people as part of a class instead of treating each person as an individual. Congress determined that it was appropriate to prohibit unequal pay for equal work between persons of the opposite sex unless an employer could show that the differential was not because of sex. The district court held that such legislation was in excess of Congress' power under Section 5 of the Fourteenth Amendment because it did not require plaintiffs to prove discriminatory intent. But the Supreme Court and this Court have both confirmed that Congress may prohibit practices that are discriminatory in effect under its Section 5 authority. Consistent with the five other courts of appeals to address the question, this Court should hold that the extension of the Equal

Pay Act to the States may be upheld as a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause.

ARGUMENT

CONGRESS CONSTITUTIONALLY ABROGATED STATES' ELEVENTH AMENDMENT IMMUNITY IN THE EQUAL PAY ACT

The Equal Pay Act prohibits employers from discriminating on the basis of sex regarding wages. 29 U.S.C. 206(d). Enacted in 1963, and extended to the States in 1974, the Equal Pay Act is generally seen as "part of a wider statutory scheme to protect employees in the workplace" from "invidious bias in employment decisions." McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995).

In determining whether this established anti-discrimination statute has abrogated States' Eleventh Amendment immunity to private suits in federal court, Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), articulated a two-part test:

> we ask two questions: first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power.

Id. at 55 (citations, quotations and brackets omitted).

A. Congress Has Unequivocally Expressed Its Intent To Abrogate The States' Eleventh Amendment Immunity In The Equal Pay Act

The district court did not expressly address the first requirement. In order to abrogate Eleventh Amendment immunity, Congress need not mention the Eleventh Amendment. The statute need only clearly create a private cause of action against States and grant jurisdiction to federal courts to hear those claims. See Seminole Tribe, 517 U.S. at 47; Dellmuth v. Muth, 491 U.S. 223, 233 (1989) (Scalia, J., concurring); Pennsylvania v. Union Gas Co., 491 U.S. 1, 13-14 (1989) (plurality); id. at 29-30 (Scalia, J., concurring in part and dissenting in part); Seminole Tribe of Fla. v. Florida, 11 F.3d 1016, 1024 (11th Cir. 1994) (Congress may "manifest[] its intent to abrogate states' immunity" without "a specific abrogation clause"), aff'd, 517 U.S. 44 (1996).

As this Court recognized in Thomas v. Louisiana, 534 F.2d 613, 614 (5th Cir. 1976), and Wade v. Mississippi Co-op. Extension Service, 528 F.2d 508, 521 n.13 (5th Cir. 1976), 29 U.S.C. 216(b), which is the sole mechanism for enforcing the Equal Pay Act, evinces Congress' intent that employees be permitted to sue state employers in federal court and thus contains the necessary clear statement.[1/] This is consistent

[1/] The private enforcement provision of the Fair Labor Standards Act (upon which the Equal Pay Act is engrafted for enforcement (continued...)

with every other court of appeals to address the question.[2/]

[1/](...continued)
purposes) provides that "[a]n action to recover the liability prescribed in either of the preceding sentences [including Section 206] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. 216(b). The term "employer" is defined in the Fair Labor Standards Act to "include[] a public agency," which in turn is defined as "the government of a State or political subdivision thereof" and any agency of a State. 29 U.S.C. 203(d), 203(x). The term "employee" is defined to include "any individual employed by a State." 29 U.S.C. 203(e)(2)(C).

[2/] See Varner v. Illinois State Univ., 150 F.3d 706, 710-711 (7th Cir. 1998); Scott v. University of Miss., 148 F.3d 493, 500 (5th Cir. 1998); Humenansky v. Regents of the University of Minnesota, 152 F.3d 822, 825 (8th Cir. 1998); Abril v. Virginia, 145 F.3d 182, 186 (4th Cir. 1998); Close v. New York, 125 F.3d 31, 36 (2d Cir. 1997); Mills v. Maine, 118 F.3d 37, 42 (1st Cir. 1997); Aaron v. Kansas, 115 F.3d 813, 814-815 (10th Cir. 1997); Wilson-Jones v. Caviness, 99 F.3d 203, 208 & n.2 (6th Cir. 1996); Hale v. Arizona, 993 F.2d 1387, 1391-1392 (9th Cir.) (en banc), cert. denied, 510 U.S. 946 (1993).

B. The Equal Pay Act As Applied To The States Is An Exercise Of Congress' Power Under Section 5 Of The Fourteenth Amendment

The second inquiry under Seminole Tribe addresses whether "Congress has the power to abrogate unilaterally the States' immunity from suit." 517 U.S. at 59. Here, the Fourteenth Amendment is the source of that power. Even after Seminole Tribe, Section 5 of the Fourteenth Amendment empowers Congress to abrogate States' Eleventh Amendment immunity. See Seminole Tribe, 517 U.S. at 59, 65, 71 n.15; Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). Thus if the Equal Pay Act's extension to the States was appropriate Section 5 legislation, then the Equal Pay Act's abrogation is valid.

1. Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws," and Section 5 gives Congress "power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]." Like the Necessary and Proper Clause (Art. I, § 8, Cl. 18), Section 5 is a broad affirmative grant of legislative power:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. 339, 345-346 (1879).

The Equal Pay Act prohibits employers from paying workers of one sex more than workers of the opposite sex for performing equal work. See Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974). Once an employee has proven equal work and unequal pay, an employer bears the burden of persuasion (if it chooses to mount an affirmative defense) to show the difference is not based on sex. See id. at 196-197; Meeks v. Computer Associates Int'l, 15 F.3d 1013, 1019 (11th Cir. 1994). In essence, Congress has established a rebuttable presumption that unequal pay of opposite sex employees for equal work is intentional sex discrimination, but permits employers to rebut that presumption by showing that the actual cause of the disparity is a factor other than sex.

The district court found (975 F. Supp. at 1449-1450) that because plaintiffs can prevail without proving intentional discrimination that would constitute a violation of the Equal Protection Clause, the statute is beyond Congress' power under Section 5. In so finding, it seeks to deny Congress of the authority the Supreme Court recently confirmed in City of Boerne v. Flores, 117 S. Ct. 2157 (1997).[3/]

[3/] The statute at issue in City of Boerne, the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb et seq., was enacted by Congress in response to the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990). Smith held that the Free Exercise Clause did not require States to provide exceptions to neutral and generally applicable laws even when

(continued...)

[3/](...continued)
those laws significantly burdened religious practices. See id. at 887. In RFRA, Congress attempted to overcome the effects of Smith by imposing through legislation a requirement that laws substantially burdening a person's exercise of religion be justified as in furtherance of a compelling state interest and as the least restrictive means of furthering that interest. See 42 U.S.C. 2000bb-1. The Court found that in enacting this standard, Congress was not acting in response to a history of unconstitutional activity. Indeed, "RFRA's legislative record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry." City of Boerne, 117 S. Ct. at 2169. The Court found that Congress was "attempt[ing] a substantive change in constitutional protections," id. at 2170, rather than attempting to "enforce" a recognized Fourteenth Amendment right.

In City of Boerne the Court found that RFRA was "out of proportion" to the problems identified so that it could not be viewed as preventive or remedial. Id. at 2170. First, it found that there was no "pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith." Id. at 2171; see also id. at 2169 (surveying legislative record). It also found that RFRA's requirement that the State prove a compelling state interest and narrow tailoring imposed "the most demanding test known to constitutional law" and thus possessed a
(continued...)

City of Boerne specifically reaffirmed that when enacting remedial or preventive legislation under Section 5, Congress is not limited to prohibiting unconstitutional activity. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." 117 S. Ct. at 2163. Moreover, the Supreme Court cited with approval and reaffirmed (ibid.) the holdings of South Carolina v. Katzenbach, 383 U.S. 301, 325-337 (1966), and City of Rome v. United States, 446 U.S. 156, 177 (1980), in which the Court upheld the constitutionality of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, which prohibits covered jurisdictions from implementing any electoral change that is discriminatory in effect. Indeed, it expressly stated that "Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal

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[3/](...continued)
high "likelihood of invalidat[ing]" many state laws. Id. at 2171. While stressing that Congress was entitled to "much deference" in determining the need for and scope of laws to enforce Fourteenth Amendment rights, id. at 2172, the Court found that Congress had simply gone so far in attempting to regulate local behavior that, in light of the lack of evidence of a risk of unconstitutional conduct, RFRA could no longer be viewed as remedial or preventive. As such, the Court found RFRA unconstitutional under its Section 5 power. Id. at 2169-2170.

Protection Clause." 117 S. Ct. at 2169 (citing City of Rome and Fullilove v. Klutznick, 448 U.S. 448 (1980)).

This Court reached the same conclusion in Scott v. City of Anniston, 597 F.2d 897 (5th Cir. 1979), cert. denied, 446 U.S. 917 (1980). In Scott, this Court held that Title VII's prohibition against policies with disparate impact was a valid exercise of Congress' power under Section 5. It rejected the argument that Congress could not prohibit unintentional discrimination under its Section 5 power because the Equal Protection Clause only prohibited intentional discrimination, explaining that "Congress is authorized to enact more stringent standards than those provided by the fourteenth and fifteenth amendments in order to carry out the purpose of those amendments." Id. at 900. It concluded that "whether the employer be private or public, the same prerequisites to Title VII liability apply, and discriminatory purpose need not be shown." Ibid.[4/]

[4/] Every other court of appeals to address the validity of the Title VII disparate impact standard under Section 5 has reached the same conclusion. See Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79, 88 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981); United States v. Virginia, 620 F.2d 1018, 1023 (4th Cir.), cert. denied, 449 U.S. 1021 (1980); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 689 n.7 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981); Blake v. City of Los Angeles,

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Similarly, this Court has upheld as a valid exercise of Congress' Section 5 power that provision of the Voting Rights Act, 42 U.S.C. 1973(a), which prohibits policies that have discriminatory "results." See United States v. Marengo County Comm'n, 731 F.2d 1546, 1559 & n.20 (11th Cir.), cert. denied, 469 U.S. 976 (1984). Most recently, this Court in Kimel v. Board of Regents, 139 F.3d 1426 (11th Cir. 1998), held that the Americans with Disabilities Act "was properly enacted under Congress's Fourteenth Amendment enforcement powers," and thus validly abrogated Eleventh Amendment immunity. Id. at 1433 (Edmundson, J.); id. at 1441-1444 (Hatchett, C.J., concurring in part); Seaborn v. Florida, 143 F.3d 1405, 1407 (11th Cir. 1998). This was so even though the ADA prohibits more than disparate treatment. See 139 F.3d at 1449 (Cox, J., dissenting in part). Congress' power to prohibit sex discrimination is equally broad.

The district court attempted to distinguish Scott and the voting rights cases by noting that the defendants in those cases were municipalities, not States, and thus involved the Tenth

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[4/](...continued)
595 F.2d 1367, 1373 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980); United States v. City of Chicago, 573 F.2d 416, 423-424 (7th Cir. 1978); see also Reynolds v. Alabama Dep't of Transp., 4 F. Supp.2d 1092, 1098-1112 (M.D. Ala. 1998) (holding that Title VII disparate impact standard is valid Section 5 legislation after City of Boerne), appeals pending, Nos. 98-6474 & 98-6600 (11th Cir.).

Amendment, not the Eleventh. But "[t]he Civil War Amendments overrode State autonomy apparently embodied in the Tenth and Eleventh Amendments." Marengo County, 731 F.2d at 1560-1561 (emphasis added). The legal inquiry in Scott was whether Title VII's disparate impact standard was "appropriate" legislation under Section 5 to "enforce" the Equal Protection Clause. By answering that question in the affirmative, the Court also resolved the question whether Congress could validly abrogate Eleventh Amendment immunity for such conduct. For in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Court held that Congress could abrogate Eleventh Amendment immunity for any legislation "appropriate" under Section 5. It explained that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." Id. at 456.

2. To the extent that the district court was suggesting that the Equal Pay Act suffered from the infirmities that led the Court to invalidate the statute at issue in City of Boerne, it was mistaken. Unlike City of Boerne, in which the Court found the "legislative record lack[ed] examples of modern instances" of intentional discrimination, 117 S. Ct. at 2169, Congress enacted the Equal Pay Act based on a record that employers were intentionally and systematically paying women less than men for

equal work.[5/] There was thus a basis in fact for Congress to conclude that much of the unequal pay received by women was based on intentional sex discrimination. Accordingly, Congress was permitted to establish a rebuttable statutory presumption that reflected that finding, and place the burden on the employer to show that some factor other than sex was the reason for the disparity. See City of Rome, 446 U.S. at 214 (Rehnquist, J., dissenting) (Congress has the power under Section 5 to "place the burden of proving lack of discriminatory purpose on" government); cf. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 28 (1976); Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910).

Moreover, unlike the statute at issue in City of Boerne, which was attempting to expand the substantive meaning of the Fourteenth Amendment by imposing a strict scrutiny standard on the States in the absence of evidence of widespread use of constitutionally improper criteria, the Equal Pay Act is simply seeking to make effective the right to be free from sex discrimination in wages by establishing a remedial scheme

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[5/] See S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963); H.R. Rep. No. 1714, 87th Cong., 2d Sess. 2 (1962); S. Rep. No. 2263, 81st Cong., 2d Sess. 2, 4 (1950); S. Rep. No. 1610, 79th Cong., 2d Sess. 2-3 (1946); Corning Glass Works, 417 U.S. at 195; see also Kahn v. Shevin, 416 U.S. 351, 353 (1974) (finding that "firmly entrenched practices" made "the job market * * * inhospitable to the woman seeking any but the lowest paid jobs").

tailored to detecting and preventing those acts (unequal pay for equal work) most likely to be the result of such discrimination.

3. Reviewing these arguments, the Seventh Circuit recently upheld the Equal Pay Act as valid Section 5 legislation. See Varner v. Illinois State Univ., 150 F.3d 706 (7th Cir. 1998). It held that City of Boerne compelled it to "reject the University's contention that the Equal Pay Act automatically constitutes inappropriate legislation merely because it proscribes some constitutional conduct." Id. at 716. Instead, it found that Congress "had substantial justification to conclude that pervasive discrimination existed whereby women were paid less than men for equal work." Ibid. In addition, it found that the Equal Pay Act was "reasonably tailored" to the harms Congress sought to redress because after a plaintiff has made out a prima facie case, "the broad scope of [the Equal Pay Act's] defenses protects employers from liability when the employer has sound reasons for the wage disparities ('any other factor other than sex')," and thus permits plaintiffs to win only "when no such reasons exist." Id. at 717. The legislative findings and tailored scheme led the Seventh Circuit to conclude that the Equal Pay Act's "scope is [not] out of proportion to the harms that Congress sought to redress." Ibid.

Given Congress' superior fact-finding ability and the attendant "wide latitude" to which it is entitled in exercising its Section 5 authority, City of Boerne, 117 S. Ct. at 2164, the Equal Pay Act's scheme to detect and deter sex discrimination in

wages is an appropriate exercise of Congress' Section 5 authority. In City of Boerne, the Supreme Court reaffirmed that "[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." Id. at 2172 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)). Following this principle, this Court should join the five other courts of appeals to address the question and uphold the Equal Pay Act as valid Section 5 legislation. See Ussery v. Louisiana, 150 F.3d 431, 435 (5th Cir. 1998); Varner, 150 F.3d at 709-717; Timmer v. Michigan Dep't of Commerce, 104 F.3d 833, 838-839 (6th Cir. 1997); Usery v. Charleston County Sch. Dist., 558 F.2d 1169, 1171 (4th Cir. 1977); Usery v. Allegheny County Inst. Dist., 544 F.2d 148, 155 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977).

CONCLUSION

The district court's judgment granting the defendants' motion to dismiss due to Eleventh Amendment immunity should be reversed.

Respectfully submitted,

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