

Amicus Curiae Briefs Employment Issues

Employment Pregnancy Discrimination

Case: *In re Valerie D.*

Court: Connecticut Supreme Court, 1992

Amicus Brief: Connecticut Women's Education and Legal Fund

Case: In August 1989, the Department of Children and Youth Services (DCYS) petitioned the court for termination of parental rights of Jean D. and John M. The court terminated the mother's rights after finding that her injection of cocaine eight hours prior to delivery constituted a non-accidental serious physical injury to the child amounting to abuse. The ingestion of cocaine most likely caused the infant to pass stool prior to the birth, and this passage of stool caused complications during the birth. In determining that the mother's cocaine ingestion constituted abuse, the court stated that injecting cocaine into the bloodstream of a newborn would amount to abuse and this finding should be no different when the cocaine is injected through the mother's bloodstream prior to birth. The mother appealed the court's decision, claiming that her acts while pregnant could not be the sole basis for terminating her parental rights. The Connecticut Appellate Court affirmed the termination of parental rights, drawing analogies between infants who have birth defects because of acts committed against them while they are in utero having an action in tort with infants who have been harmed by the acts of their mothers while in utero. In so doing, the court determined that a petition for neglect or termination of parental rights can be based solely on a mother's prenatal conduct. The mother appealed to the Connecticut Supreme Court.

Amicus Brief: The brief argues that by permitting termination of parental rights based solely on the mother's prenatal drug use, the courts have sanctioned a state policy of policing women and their actions in a way they do not police men and their actions. Such dissimilar treatment of the sexes is unconstitutional under Connecticut's Equal Protection Clause unless the state can show it has a compelling interest in treating women differently from men. The brief argues that while protecting children from neglect and abuse is a compelling state interest, the state cannot show that this post-birth objective is met by treating female parents differently from male parents at the time of birth. Therefore, the fit between means and end is not tight enough to satisfy strict scrutiny. The brief also argues that the interpretation of the statute utilized by the trial court is unconstitutionally vague so as to deny women of their due process rights for they cannot be sure of what conduct is prohibited under the statute as interpreted. This vagueness, and the immense discretion it grants to those enforcing it, will cause the statute to be enforced selectively against poor women and women of color because of this population's close contact with government health care and other government service providers.

CWEALF: CWEALF wrote the brief because it believes that policing women's behavior while they are pregnant will have only adverse effects. It will cause women to refuse prenatal care because of the valid fear that their children will be taken away from them and they will be jailed for their behavior. Such policing also promotes the view of women as carrying vessels for children as opposed to human beings with a right to reproductive privacy. CWEALF believes

that once women are stripped of their reproductive privacy, their array of reproductive choices becomes endangered as well.

Holding: The court reversed the appellate court's decision and held that only conduct occurring after the child's birth could be considered in a petition for termination of parental rights. As such, the court did not reach any constitutional claims.

Case: *Ferguson v. City of Charleston*

Court: Supreme Court of the United States, 2000

Amicus Brief: Now Legal Defense and Education Fund

Case: A Charleston public hospital operated by the Medical University of South Carolina worked with police and local officials to put in place a policy under which pregnant women who came to the hospital for prenatal care would be tested for drug use. Those women who were tested were done so without having been presented with a warrant and without giving their consent. Regardless of the results of the drug test, the infants, when born, were not treated differently and the prenatal care of all women remained the same. Several women who were arrested under the policy filed suit. A District Court jury found for the City and the Fourth Circuit affirmed the decision, holding that the searches were reasonable as a matter of law for the search policy was designed to meet non-law enforcement ends and the searches fit into the "special needs" exception to traditional Fourth Amendment requirements.

Amicus Brief: The brief sets forth that in order to meet the "special needs" exception to traditional Fourth Amendment requirements, the state must show (1) that its policy is unrelated to normal law enforcement ends and (2) the individuals targeted by the search have an expectation of diminished privacy rights. The brief focuses on the second prong of the test and argues that such a diminished expectation of privacy has only been found where the State takes on a supervisory position of the individuals within the group; women do not become wards of the state simply because they are pregnant. Application of the special needs exception would reduce the status of pregnant women to something less than full adults. Furthermore, allowing the state to exercise such control over pregnant women in this instance would open the door to allowing more infringements on the privacy of pregnant women simply because they are pregnant.

CWEALF: CWEALF joined the brief because a ruling that upholds the diminished capacity of pregnant women would set a precedent for prohibiting a wide range of activities for pregnant women. It would relegate women to a position of lesser status in society and, as such, perpetuate gender inequality.

HOLDING: The lower court decision was reversed. The Court held the policy unconstitutional for all patients in a hospital, regardless of whether or not they are pregnant, have a reasonable expectation that any results of his/her tests will not be shared with non-medical personnel without his/her consent.

Case: *Testimony and Comments to the Advisory Commission on Intergovernmental Relations Regarding the Family and Medical Leave Act, 1996.*

Author: Women's Legal Defense Fund

Issue: The ACIR planned to hold hearings on its preliminary report to Congress suggesting that state and local employees not be covered under FMLA because of the hardship it placed on state and local employers to comply with FMLA provisions.

Testimony: State and local employees are not exempt from the public policy reasons from whence FMLA stemmed—the need for families to have job and financial security. These public policy reasons constitute a compelling national purpose, which far outweighs any minimal increase employers experience in FMLA-related costs. State and local employers also have great flexibility in implementing FMLA, for FMLA sets the minimal policies an employer must offer and employers often provide much more or different options to their employees. However, even though these employers do provide more than what is required by FMLA, these employers should not be exempt or excluded from FMLA, in part because of the certainty FMLA provides employees in regards to both benefits and process.

CWEALF: CWEALF joined the comments because it believes all employees should be granted the same ability to spend necessary time with their families, regardless of with whom they are employed. Likewise, all employees should be guaranteed job stability when devoting like time to their families.

Holding: State and local employers are still covered as employers under the FMLA's provision concerning public agencies. *See* 29 CFR 825.108.

Case: *Hibbs v. Nevada Department of Human Resources*

Court: Supreme Court of the United States, 2003

Amicus Brief: National Women's Law Center

Case: State employee William Hibbs sued the State of Nevada for money damages deriving from an alleged violation of the Family Medical Leave Act. The State moved for summary judgment in the District Court, claiming that, even if it had violated the FMLA, it was immune from having to pay money damages by virtue of the Eleventh Amendment of the United States Constitution. The District Court granted the motion for summary judgment, and Hibbs appealed to the Ninth Circuit. The Ninth Circuit found that the FMLA was a valid exercise of Congress' power under the Fourteenth Amendment and reversed. The Supreme Court granted certiorari to resolve the issue of whether, under FMLA, a state employee can recover money damages for the state's violation of the FMLA.

Amicus Brief: The brief argues that the FMLA is a constitutional exercise of Congress's power under the Fourteenth Amendment because it acts as a "congruent and proportional" remedy to sex discrimination in the workplace. The brief notes that the Court has reviewed sex-based classifications under heightened scrutiny and has continually recognized that many states still pass laws rife with gender-bias and gender-based stereotypes. The Court has also recognized that

ending gender discrimination is a compelling purpose, and Congress's enactment of the FMLA was based on just that purpose. The provisions of the FMLA providing for a gender-neutral leave are means substantially related to the end of eradicating gender discrimination, for it permits employees job security while tending to family needs in a manner which does not question gender roles within family life. Monetary relief to those injured by the failure of the state to abide by FMLA is the only way to ensure enforcement and to make harmed individuals whole. States have ceded some of their sovereign immunity to Congress through § 5 of the Fourteenth Amendment. By requiring monetary damages, Congress is not exceeding its power or taking more than that which the states have already given under § 5, for the harm targeted by the statute – gender based stereotypes and gender bias in the workplace – is the same harm that has caused the Court to view sex-based classifications under heightened scrutiny for over fifteen years.

CWEALF: CWEALF joined brief because CWEALF believes that the FMLA provides much needed job protection for workers and acts as a step in removing some of the gender-bias that is attached to notions of family leave. CWEALF believes that requiring states to pay monetary damages for their failure to abide by FMLA provisions is the only way to ensure that states comply with FMLA and the only way to remedy the monetary injury suffered by employees wrongly terminated by states' failure to comply.

Holding: The Supreme Court affirmed the Ninth Circuit's decision, holding that state employees could recover monetary damages under the FMLA. The Court found that the FMLA was Congress's direct response, based on weighty evidence, to gender discrimination and notions of proper gender roles within private family life perpetuated by state laws and practices. The Court held that the FMLA was a "congruent and proportional" remedy to such discrimination.