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Nevada v. Hibbs: An Unsound Departure From The States' Rights Trend

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In 1997, William Hibbs, an employee of Nevada's Department of Human Resources, sought leave to care for his wife while she recovered from an automobile accident and surgery. When Hibbs felt the leave granted by the State did not comport with the Family and Medical Leave Act of 1993 (FMLA), he filed suit. The District Court dismissed the suit on grounds that Nevada was immune from damage suits under the FMLA pursuant to the Eleventh Amendment to the United States Constitution. The Ninth Circuit reversed and the Supreme Court granted a writ of certiorari to resolve a split amongst the circuits on the Eleventh Amendment/FMLA issue.

Following on the heels of the Court's 2000 decision that the Eleventh Amendment immunizes States from damage claims under the Age Discrimination in Employment Act (ADEA) and 2001's ruling that Americans with Disabilities Act (ADA) claims are also barred, the decision in *Hibbs* seemed a foregone conclusion to many observers. However, in a break from a strong States' rights trend, the *Hibbs* majority concluded earlier this summer that the Eleventh Amendment does not shield the States from suit under the FMLA. To understand (and perhaps take issue with) the Court's rationale, let's review some basic principles.

Consistent with the federalism which permeates the Constitution, the Eleventh Amendment grants the States immunity from damage suits in federal court absent their consent to be sued.¹ In tension with that right, Congress has wide authority to regulate interstate commerce under Article I of the Constitution, and a separate power to enforce the guarantees of the Fourteenth Amendment through Section 5 of that Amendment. In balancing these inevitably conflicting provisions, the Supreme Court has found that if Congress seeks to abrogate Eleventh Amendment immunity pursuant to its power to regulate interstate commerce, that attempt will fail.² However, Congress may abrogate Eleventh Amendment immunity when its intention to do so is clear and legislation is enacted pursuant to a valid exercise of power under Section 5 of the Fourteenth Amendment.³ Congress usually makes clear its intention to negate States' immunity so the discrimination/immunity conflict typically boils down to the question of whether the legislation constitutes a valid exercise of Congress' powers under the Fourteenth Amendment. It was against this backdrop that the Court decided that States are immune from suit under the ADEA and ADA.

In *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), the Court found Eleventh Amendment immunity was not abrogated by the ADEA. The Court noted that States retain the authority to make age-based classifications without offending the Fourteenth Amendment, if the classification in question has a "rational basis," i.e., is in furtherance of a legitimate State interest. In contrast, race and gender classifications are subject to higher scrutiny under the Fourteenth Amendment. The Court examined whether there was evidence that age classifications by States led to equal protection violations. In analyzing equal protection jurisprudence concerning age claims, the Court concluded that age classifications only very rarely equated to equal protection violations. The Court ruled that with the ADEA, Congress effectively elevated the standard for analyzing age discrimination claims against the States to a heightened scrutiny not supported by the Fourteenth Amendment. The Court thus concluded that the ADEA is broader than the Fourteenth Amendment, not "congruent" and "proportional" to any equal protection violations identified, and therefore not a valid exercise of Fourteenth Amendment power. Basically, in the absence of any legislative record indicating a pattern of age discrimination in employment by the States which equated to an equal protection violation, and

would thus require implementation of the ADEA, Congress' attempt to abrogate States immunity was not a valid exercise of its power under the Fourteenth Amendment.