NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

Supreme Court Preview: 2011-2012 Term

Since Chief Justice Roberts and Justice Alito joined the Supreme Court five years ago, the Court has delivered a number of decisions devastating to women. During that time, the Court has turned back the clock on women's constitutional right to reproductive choice, limited their ability to redress pay discrimination and other sex-based discrimination in the workplace, and closed the courthouse door to many workers' and consumers' claims. In many of these cases, including last Term's infamous decisions in *Wal-Mart Stores v. Dukes* and *AT&T v. Concepcion*, the Court has taken the side of big corporations and powerful interests, reflecting a failure to adequately consider a law's intended purpose or the real-world impact of its decisions on ordinary people.

During the 2011-2012 Supreme Court term, advocates for women's rights will be closely following several cases that involve issues of critical importance to women, in which the Court will either affirm the broad scope and purpose of federal laws intended to help individuals, or further erode women's rights. The questions presented by these cases include whether state employees have full redress for violations of the Family and Medical Leave Act, the scope of a religious exception to civil rights laws, and the ability of individuals receiving important benefits like Medicaid to challenge state actions in court. In addition, advocates will be watching to see whether the Court decides to review the constitutionality of the new health reform law, race-conscious admissions policies, and, possibly, state or federal same-sex marriage restrictions.

Family and Medical Leave

The Family and Medical Leave Act (FMLA) requires large employers to give employees unpaid, job-protected leave if they need time off because of the birth or adoption of a child, or to care for a child, spouse, or parent with a serious health condition (the "family care provisions") or if they themselves cannot perform their jobs because of a serious health condition, including pregnancy (the "self-care provision"). In 2003, in *Nevada Department of Human Resources v. Hibbs*, the Court held that monetary damages could be awarded to a state employee under the FMLA's family care provisions. The Court found that Congress had the power to require states to pay damages based on evidence that Congress intended to address gender discrimination by enacting the FMLA: the Court explained that the "FMLA aims to protect the right to be free from gender-based discrimination in the workplace," by removing "the pervasive sex-role stereotype that caring for family members is women's work." As a result, the Fourteenth Amendment, which gives Congress the authority to enforce the protection against discrimination provided by the Equal Protection Clause, empowered Congress to impose liability for damages on state governments.

This term, the Court will return to the question of whether state employees can sue for damages under the FMLA. In ***Coleman v. Maryland Court of Appeals***, it will decide whether damages can be awarded to state employees who need leave for their own medical condition under the self-care provision.

The Center joined an amicus brief arguing that, as with the family care provisions, Congress enacted the self-care provision of the FMLA in response to a record of sex discrimination in the administration of leave benefits, including leave for pregnancy-related conditions. Moreover, the FMLA made self-care leave equally available to male and female workers to counter the perception that women, because they bear children, are more likely than men to be absent from work. The brief argues that Congress's exercise of its authority under Section 5 of the Fourteenth Amendment to ensure equal protection under the law by providing full relief for state employees was therefore appropriate.

Exemptions from the Civil Rights Laws for Employees of Religious Institutions

The courts have established a "ministerial exception" that prevents the application of the civil rights laws to some employees of religious institutions, based on concerns that otherwise rights of religious freedom might be compromised. In ***Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,*** a teacher in a religious school took medical leave after developing a disability. The school refused to take her back during the school term when her doctor told her she could return to work. She was fired after she complained that the school's refusal violated the Americans with Disabilities Act (ADA). The EEOC filed a retaliation case on her behalf, in response to which the school argued that the ADA was not applicable to the teacher because of the ministerial exception.

If the school prevails in this case, thousands of teachers in religious schools– not to mention other employees – will lose the protections against discrimination and retaliation provided not only by the ADA, but also by laws that protect against sex discrimination, including sexual harassment, in employment. Moreover, statistics suggest that the vast majority of teachers in religious K-12 schools are women. Therefore, the National Women's Law Center joined an amicus brief in support of the teacher and the EEOC, arguing that no categorical exception from the civil rights laws is necessary to protect religious freedom.

Access to the Courts

Douglas v. Indep. Living Center of S. CA. presents the question of whether the Supremacy Clause of the Constitution offers an avenue for recipients and providers of Medicaid services to challenge state actions that are inconsistent with the federal Medicaid law. In these difficult times, many states are seeking to cut back on their Medicaid programs, and the outcome of this case could affect the ability of women and children, who make up the majority of Medicaid beneficiaries, to directly challenge the effects of these, and possibly other, cutbacks in court.

Other Potential Cases Before the Court

In addition to the cases described above, which the Supreme Court has already agreed to hear, the Court will be deciding whether to review several significant cases over the next few months. In particular:

- Constitutional challenges to the health care reform law (the Affordable Care Act, or ACA) were filed around the country. To date, two courts of appeal have rejected challenges to the ACA (the Sixth Circuit and the Fourth Circuit) while one has found the ACA to be unconstitutional (the Eleventh Circuit). Plaintiffs in the Sixth and Eleventh Circuit cases, as well as the Administration, have asked the Court to review the constitutionality of the ACA, and their petitions are pending. The Court is widely expected to take up one or more of these cases. If it does so, its decision could have a profound impact upon the ACA's effectiveness in addressing the obstacles that women in particular face in obtaining health insurance and health care and may have implications for the validity of other federal laws on which women depend.
- The Fifth Circuit, *en banc*, recently upheld the University of Texas' admissions policies that take the race of the applicants into account, and the unsuccessful challengers to that policy have petitioned the Supreme Court to review the Fifth Circuit's decision, asking the Court to again weigh in on the legality of affirmative action in college admissions.
- It is also possible that one or more appeals dealing with challenges to state and federal restrictions on same-sex marriage could be decided in time to be appealed to the Supreme Court this Term.

The decisions of the Court have a profound, and lasting, impact on the women of this nation for generations to come. Women are watching the decisions that the Court will make during the 2011-2012 term.