IN THE COURT OF APPEALS OF IOWA

No. 8-821 / 07-1879
Filed February 19, 2009

TINA LEE,
Plaintiff-Appellee,

vs.

STATE OF IOWA, POLK COUNTY CLERK OF COURT,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, James Richardson, Judge.

The State of Iowa appeals a judgment in favor of a terminated employee, maintaining that her lawsuit under the Family and Medical Leave Act was barred by the doctrine of sovereign immunity. **AFFIRMED.**

Thomas J. Miller, Attorney General, and Grant K. Dugdale, Assistant Attorney General, for appellant.

Paige Fiedler and Brooke Timmer of Fiedler & Newkirk, PLC, Urbandale, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield, JJ, and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VAITHESWARAN, J.

The State of Iowa appeals a judgment in favor of a terminated employee, maintaining that her lawsuit under the Family and Medical Leave Act was barred by the doctrine of sovereign immunity. We agree with the district court that Congress validly abrogated the State's immunity to suit and, in any event, the State waived its immunity to suit.

I. Background Facts and Proceedings

Tina Lee worked for the Polk County Clerk of Court from mid-1981 until late 2004. Her employment was effectively terminated after she provided her employer with a physician's notification that she was receiving treatment for a medical condition.

Lee filed suit against the State of Iowa and Polk County Clerk of Court, alleging she was terminated in violation of the Family and Medical Leave Act (FMLA).[1] In its answer, the State of Iowa[2] denied Lee's claim and asserted the following affirmative defense: "The Eleventh Amendment to the United States Constitution bars Lee's FMLA claims against the State of Iowa." The State subsequently moved for summary judgment on this ground. The district court dismissed the motion, finding "the self-care provision [of the FMLA] was enacted pursuant to a valid exercise of power under § 5 of the Fourteenth Amendment, which in turn validly abrogated state Eleventh Amendment Immunity."

Following trial, the jury found in favor of Lee and awarded damages of $165,122. Issues of reinstatement and front pay were reserved for later

[1] The State of Iowa was added in an amended petition.
[2] The State of Iowa, as Lee's employer, answered on behalf of "Defendant State of [] Iowa, Polk County Clerk of Court."

determination by the court. In a post-trial ruling, the court again ruled that sovereign immunity did not bar Lee's claims against the State. The court denied the State's motion for judgment notwithstanding the verdict and awarded Lee prejudgment interest, lost wages and benefits, a credit for retirement and FMLA benefits, attorneys fees and expenses, and post-judgment interest. The State moved for a stay of all proceedings pending appeal. The parties stipulated to a voluntary stay of collection of the monetary judgment. The district court found good cause did not exist to stay Lee's reinstatement to her position and denied that part of the State's motion.

After filing a notice of appeal, the State sought a stay from the Iowa Supreme Court. That court granted the motion to stay Lee's reinstatement pending disposition of the appeal. The court subsequently transferred the appeal to this court for disposition.

II. Standard of Review

The court reviews the district court's denial of a motion for judgment notwithstanding the verdict for correction of errors at law. *Bredberg v. Pepsico, Inc.*, 551 N.W.2d 321, 326 (Iowa 1996). Likewise, review of a grant or denial of summary judgment is at law. *Hill v. McCartney*, 590 N.W.2d 52, 55 (Iowa Ct. App. 1998).

III. FMLA

The FMLA generally affords an eligible employee

> a total of 12 workweeks of leave during any 12-month period for one or more of the following:
> **(A)** Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

> **(B)** Because of the placement of a son or daughter with the employee for adoption or foster care.
> **(C)** In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
> **(D)** Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.
> **(E)** Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.

29 U.S.C. § 2612(a)(1). The Act makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. § 2615(a)(1). The Act affords an employee a private right of action against the employer for damages, interest, and other equitable relief. 29 U.S.C. § 2617(a)(1). The action "may be maintained against any employer (including a public agency)." 29 U.S.C. § 2617(a)(2).

Lee alleged a violation of 29 U.S.C. § 2612(a)(1)(D) pertaining to leave for "a serious health condition." That subsection relates to the care of the employee, and has come to be known as the "self-care provision." *See, e.g., Toeller v. Wisconsin Dep't of Corr.*, 461 F.3d 871, 877 (7th Cir. 2006); *Brockman v. Wyoming Dep't of Family Servs.*, 342 F.3d 1159, 1164 (10th Cir. 2003). It may be distinguished from subsection C, for example, which relates to the care of family members and has been referred to as a "family-care provision." *See Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 724, 123 S. Ct. 1972, 1976, 155 L. Ed. 2d 953, 961 (2003).

The appeal raises a challenge to the district court's predicate conclusion that the doctrine of sovereign immunity did not bar Lee's suit against the State. We will proceed to that issue.[3]

IV. Sovereign Immunity

The principle of sovereign immunity embodied in the Eleventh Amendment to the United States Constitution bars suits by citizens against their own States. *Bd. of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 363, 121 S. Ct. 955, 962, 148 L. Ed. 2d 866, 876 (2001). Congress may abrogate this immunity when it "both unequivocally intends to do so and 'act[s] pursuant to a valid grant of constitutional authority.'" *Id.* at 363-64, 121 S. Ct. at 962, 148 L. Ed. 2d at 877 (quoting *Kimel v. State Bd. of Regents*, 528 U.S. 62, 73, 120 S. Ct. 631, 640, 145 L. Ed. 2d 522, 535 (2000)).

There is no question that Congress unequivocally intended to abrogate immunity; as noted, it explicitly stated that employee lawsuits for money damages could be maintained against "any employer (including a public agency)." 29 U.S.C. § 2617(a)(2); *Hibbs*, 538 U.S. at 726, 123 S. Ct. at 1976, 155 L. Ed. 2d at 962 ("The clarity of Congress' intent here is not fairly debatable."). The key question is whether Congress "acted pursuant to a valid grant of constitutional authority" in abrogating the States' immunity for money lawsuits that allege a violation of the self-care provision. *See Kimel*, 528 U.S. at 73, 120 S. Ct. at 640, 145 L. Ed. 2d at 535 (2000). The United States Supreme Court has not answered this precise question. The Court, however, has

[3] Lee argues that the State failed to preserve error on this issue. We are not persuaded by this argument or her related argument that the State waived error by failing to cite to the portions of the record showing it preserved error.

answered a related question: whether Congress acted pursuant to a valid grant of constitutional authority in abrogating the States' immunity from money lawsuits that allege a violation of one of the family-care provisions of the FMLA. *See Hibbs*, 538 U.S. at 727, 123 S. Ct. at 1977, 155 L. Ed. 2d at 962-63. Therefore, we begin our analysis with *Hibbs.*

In *Hibbs*, the Supreme Court held that state employees may recover money damages for a State's failure to comply with the family-care provision of the FMLA set forth in subsection C. *Id.* at 725, 123 S. Ct. at 1976, 155 L. Ed. 2d at 961. The court reasoned that, in enacting subsection C, Congress exercised its power under section five of the Fourteenth Amendment to the United States Constitution, which affords it authority to enforce the substantive rights contained in section one of that Amendment. *Id.* at 727, 123 S. Ct. at 1977, 155 L. Ed. 2d at 962-63.

The Court began by defining the scope of the substantive right at issue. *Id.* (citing *Garrett*, 531 U.S. at 365, 121 S. Ct. at 963, 148 L. Ed. 2d at 878). Section one of the Fourteenth Amendment, in part, prohibits States from denying persons within its jurisdiction the equal protection of the laws. *Id.* (citing U.S. Const. amend XIV, § 1). The Court stated that "[t]he FMLA aims to protect the right to be free from gender-based discrimination in the workplace." *Id.* at 728, 123 S. Ct. at 1978, 155 L. Ed. 2d at 963. That type of discrimination by States, the Court noted, was "chronicled in—and, until relatively recently, was sanctioned by—this Court's own opinions." *Id.* at 729, 123 S. Ct. at 1978, 155 L. Ed. 2d at 964. Given the pervasiveness of sex discrimination, the Court explained that

measures making distinctions on the basis of gender warranted heightened scrutiny. *Id.* at 730, 736, 123 S. Ct. at 1979, 1982, 155 L. Ed. 2d at 964, 968.

With that background, the Court turned to the FMLA's legislative record. *Id.* at 730, 123 S. Ct. at 1979, 155 L. Ed. 2d at 964-65. According to the Court, the record showed that "stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread." *Id.* at 730, 123 S. Ct. at 1979, 155 L. Ed. 2d at 965. The Court stated that the differential leave policies "were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work." *Id.* at 731, 123 S. Ct. at 1979, 155 L. Ed. 2d at 965.

Having reviewed the legislative record, the Court returned to the purpose behind the family-care provision of the FMLA set forth in subsection C. The Court stated that Congress "sought to adjust family-leave policies in order to eliminate their reliance on, and perpetuation of, invalid stereotypes, and thereby dismantle persisting gender-based barriers to the hiring, retention, and promotion of women in the workplace." *Id.* at 734 n.10, 123 S. Ct. at 1981 n.10, 155 L. Ed. 2d at 967 n.10. The Court concluded this was "prophylactic § 5 legislation." *Id.* at 735, 123 S. Ct. at 1981, 155 L. Ed. 2d at 967. Additionally, the Court concluded "the family-care leave provision of the FMLA" was "congruent and proportional to the targeted violation." *Id.* at 737, 123 S. Ct. at 1982, 155 L. Ed. 2d at 969. This was the test for determining whether Congress abrogated sovereign immunity pursuant to a valid grant of constitutional authority under

section five of the Fourteenth Amendment. *Id.* at 728, 123 S. Ct. at 1978, 155 L. Ed. 2d at 963.

Relying on *Hibbs*, the district court in this case concluded that Congress "properly abrogated sovereign immunity through enactment of the . . . self-care provision." The State contends this was error. It notes that (1) *Hibbs*, by its terms, was limited to the family-care provision of subsection C, (2) a majority of courts have decided that *Hibbs* does not apply to the self-care provision, and (3) the FMLA does not need to be treated as a whole in deciding the sovereign immunity question. We will address each of these arguments.

1. Effect of Hibbs

The State is correct that, in *Hibbs*, the United States Supreme Court limited its holding to the family-care provision contained in subsection C. *Id.* at 725, 123 S. Ct. at 1976, 155 L. Ed. 2d at 961. This does not end our inquiry, however, if the Court's rationale could apply equally to the self-care provision contained in subsection D.

As noted, the Court began with a broad statement that the FMLA was enacted to protect employees from gender discrimination in the workplace. The Court did not state that this purpose was limited to the family-care provision, nor can such a limitation be gleaned from the language of the Act.

The FMLA lists several purposes of the Act, including the following:

> to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis . . . .

29 U.S.C.A. § 2601(b)(4). This purpose makes specific mention of alleviating sex-discrimination in employment by providing gender-neutral leave for "eligible medical reasons" as well as "compelling family reasons." The language of the Act, therefore, makes clear that the FMLA applies with the same force to the self-care provision contained in subsection D as it does to the family-care provision of subsection C.

We turn to *Hibbs* and its discussion of the legislative record. As the district court pointed out, *Hibbs* referred to a portion of the legislative record that tied sex discrimination to "medical leave policies" as well as parental leave policies. *Id.* at 732, 123 S. Ct. at 1980, 155 L. Ed. 2d at 966. The legislative record is in fact replete with references to such ties. For example, the Senate Report states:

> The need for job protected medical leave arose long before the dramatic new changes in the workforce. Workers and their families have always suffered when a family member loses a job for medical reasons. But such losses are felt more today because of the dramatic rise in single heads of household who are predominantly women workers in low-paid jobs. For these women and their children, the loss of a job because of illness can have devastating consequences.

S. Rep. No. 103-3, at 7 (1993). The Senate specifically cited the disparate impact of job loss due to illness on women in low-paid jobs. Under its explanation of the purpose for the self-care provision, the report continued:

> The fundamental rationale for such a policy is that it is unfair for an employee to be terminated when he or she is struck with a serious illness and is not capable of working. Job loss because of illness has a particularly devastating effect on workers who support themselves and on families where two incomes are necessary to make ends meet or where a single parent heads the household. As Eleanor Holmes Norton testified:

> For the single parent, usually a woman, losing her job when she is unable to work during a time of serious health condition can often mean borrowing beyond prudence, going on welfare, or destitution for herself and her family. Indeed, it is hard to understand how single parents, who have no choice but to work to support their families, have survived under the present system. For this highly vulnerable group, whose numbers have exploded, a job guarantee for periods when they or their children have serious health conditions is urgently necessary. The high rates of single parenthood among minority families and of labor force participation by minority single mothers make job-guaranteed leaves especially critical for minorities.

S. Rep. No. 103-3, at 11-12 (1993). Again, the report made reference to the disparate impact of serious illnesses on women.

A committee report on a precursor to the FMLA highlighted the disparate effect of a woman's serious health condition on her family. It stated:

> Women are in the workforce out of economic necessity. Two out of every three women working outside the home today are either the sole providers for their children or have husbands who earn less than $18,000 a year. Women are the sole parent in 16 percent of all families. In March 1988, there were approximately 13 million children living in more than 7.7 million single-parent families, about one-fourth of all American children. Nearly 6.7 million of these families were headed by mothers. The new economic reality is that today's families depend on a woman's income to survive.

S. Rep. No. 102-68, at 26 (1991). Much of this data was incorporated into the rationale for the "serious health condition" provision contained in that earlier version:

> The need for medical leave has become even more imperative with the demographic and work force changes described earlier in this report. The number of two-earner families has increased by more than 50 percent since 1966. Two out of three women working outside the home today are either the sole providers for their children or have husbands who earn less than $18,000 a year. Twenty million workers today are either single heads of household or living alone. The proportion of children in families headed by a single parent has increased from 9 percent in 1960 to 24 percent in 1987. Job loss because of illness has devastating effects on

> workers who support themselves and on families where two incomes are necessary to make ends meet or where a single parent heads the household.

S. Rep. No. 102-68, at 32 (1991). And, much of this rationale was incorporated into the legislative record of the FMLA. *See* S. Rep. No. 103-3, at 11-12 (1993).

Similarly, a House committee report on a precursor bill contained the following language: "Perhaps most importantly, [the Act] addresses the needs of the most vulnerable of wage earners, the single woman head of household." H.R. Rep. No. 103-8(II), at 25 (1993).

Notably, "serious health condition" includes "[a]ny period of incapacity due to pregnancy, or for prenatal care." 29 C.F.R. § 825.114(a)(2)(ii). The legislative record contains several references to gender discrimination based on pregnancy and childbirth. *See generally* Sabra Craig, Note, *The Family and Medical Leave Act of 1993: A Survey of the Act's History, Purposes, Provisions, and Social Ramifications*, 44 Drake L. Rev. 51 (1995) (noting leave to care for an employee's own illness intertwined with issue of pregnancy leave). It is clear, therefore, that in enacting the self-care provision, Congress was attempting to alleviate the disparate impact of serious illness on women wage earners. This was the same rationale used to support passage of the family-care provisions.

The next question is whether the self-care provision is prophylactic legislation that is "congruent and proportional" to the targeted violation. In *Hibbs*, the Court focused on the many limitations contained in the FMLA, including its mandate of only unpaid leave, absence of coverage for new employees, exclusion of coverage for certain employees, the requirement of advance notice by the employee, certification by a health care provider of the need for leave, and

limitations on recoverable damages. *Hibbs*, 538 U.S. at 739, 123 S. Ct. at 183-84, 155 L. Ed. 2d at 970. Those limitations apply with equal force to the self-care provision. For this reason, we conclude the FMLA's self-care provision is "congruent and proportional" prophylactic legislation that is a valid exercise of the constitutional power authorized by section five of the Fourteenth Amendment.

2. Case law from Other Jurisdictions

The State correctly points out that several courts have declined to follow *Hibbs* with respect to the self-care provision of the FMLA. *See Nelson v. Univ. of Texas at Dallas*, 535 F.3d 318 (5th Cir. 2008)*; Miles v. Bellfontaine Habilitation Ctr.*, 481 F.3d 1106 (8th Cir. 2007), *Toeller v. Wis. Dep't of Corr.*, 461 F.3d 871 (7th Cir. 2006); *Touvell v. Ohio Dept. of Mental Retardation & Dev. Disabilities*, 422 F.3d 392 (6th Cir. 2005); *Brockman v. Wyoming Dep't of Family Serv.*, 342 F.3d 1159 (10th Cir. 2003); *Wennihan v. AHCCCS*, 515 F. Supp. 2d 1040, (D. Az. 2005); *Bryant v. Mississippi State Univ.*, 329 F. Supp. 2d 818 (N.D. Miss 2004). We are not persuaded that these opinions require a different outcome.

In *Brockman*, the Tenth Circuit Court of Appeals held that "through subsection (D), Congress did not effect a valid abrogation of state sovereign immunity." *Brockman*, 342 F.2d at 1165. The Court reasoned that *Hibbs'*s contrary holding "rested squarely on the 'heightened level of scrutiny' afforded gender discrimination . . . requiring that congressional remedies be narrowly targeted to alleviate the effects of such discrimination." *Id.* at 1164 (citation omitted). The court continued, "Because the Supreme Court's analysis in *Hibbs* turned on the gender-based aspects of the FMLA's § 2612(a)(1)(C), the self-care provision in subsection (D) is not implicated by that decision." *Id.*

As we have discussed above, our review of the legislative record leads us to conclude that gender discrimination was as much a basis for the self-care provision of the FMLA as it was for the family-care provision at issue in *Hibbs*. We recognize that Congress also sought to alleviate the economic hardship associated with serious illnesses. However, the many references in the legislative record to the disproportionate economic effect of illness on women suggest that the economic purpose was not inconsistent with, and indeed was integrally related to, gender-discrimination.

Because gender-discrimination was at the heart of the self-care provision, the heightened scrutiny standard applied. Accordingly, Congress was not obligated to show "a widespread pattern" of irrational reliance on gender as it would have been had the classification been unprotected. *Hibbs*, 538 U.S. at 735, 123 S. Ct. at 1982, 155 L. Ed. 2d at 968. For this reason, we are not persuaded by the *Brockman* court's reasons for declining to follow *Hibbs*.

For the same reason, we are not persuaded by the Sixth Circuit's opinion in *Touvell.* As in *Brockman*, the court found that the self-care provision of the FMLA was not "intended to remedy gender-based discrimination." *Touvell*, 422 F.3d at 401. The court acknowledged evidence of gender-based stereotypes, but stated, "[T]here is virtually no evidence that those stereotypes also concern the behavior of men and women regarding personal medical leave." *Id.* The court then cited data before Congress showing that men and women are out of work about the same amounts of time.

That data in fact appears immediately after the following paragraph of a House Committee Report explaining how a preliminary FMLA bill addressed equal protection concerns:

> A law providing special protection to women or any narrowly defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. Employers might be less inclined to hire women or some other category of worker provided special treatment. For example, legislation addressing the needs of pregnant women only would give employers an economic incentive to discriminate against women in hiring policies; legislation addressing the needs of all workers equally does not have this effect. The FMLA avoids providing employers the temptation to discriminate by addressing the serious leave needs of all employees.

H.R. Rep. No. 101-28(I), at 14-15 (1989). This language can leave no doubt that the FMLA was enacted to alleviate gender-discrimination, and its equal application to both men and women was a means to that end.

Significantly, the same report referred to the changing demographics of the workforce and the disparate impact of serious illness on female wage earners:

> The traditional family which depended on the salary of a sole wage earner was and is severely affected by the loss of the ill-worker's job. But while this family has traditionally had a second parent available to help meet such emergencies, today a new class of workers exists without such backup support: single heads of household, who are predominately women workers in low-paid jobs. For these women and their children, the loss of the women's job when she is sick can have devastating consequences.

H.R. Rep. No. 101-28(I), at 13 (1989). The report continued:

> There are many similar stories of pregnant workers who have been fired when their employers refused to provide an adequate leave of absence. Just when a mother faces increased medical and family expenses from the arrival of a new baby, she is forced out of the labor market.

H.R. Rep. No. 101-28(I), at 13-14 (1989). As noted, pregnancy-related illnesses are covered under the self-care provision.

In a second report filed two weeks after the report cited in *Touvell*, Congress also discussed the history leading up to this bill, making specific mention of "unprotected women wage earners":

> [W]hile Title VII, as amended by the Pregnancy Discrimination Act, has required that benefits and protection be provided to millions of previously unprotected women wage earners, it leaves gaps which an antidiscrimination law by its nature cannot fill. H.R. 770 is designed to fill those gaps.

H.R. Rep. No. 101-28(II), at 8 (1989). This congressional record supports a conclusion that the self-care provision was enacted to alleviate gender-discrimination, a conclusion that, as noted, triggers a heightened standard of review and does not require Congress to show the same nexus that it would have to show if the classification were not suspect. *See Tennessee v. Lane*, 541 U.S. 509, 528, 124 S. Ct. 1978, 1991-92, 158 L. Ed. 2d 820, 840 (2004) ("Just last Term in *Hibbs*, we approved the family-care leave provision of the FMLA as valid § 5 legislation based primarily on evidence of disparate provision of parenting leave, little of which concerned unconstitutional state conduct.").

Other opinions are unpersuasive for the same reasons. *See Nelson*, 535 F.3d at 321 (conceding that neither party raised the issue of sovereign immunity but that *Hibbs* applied only to subsection C); *Miles*, 481 F.3d at 1106 (stating district court properly dismissed an FMLA claim against the State brought under the self-care provision); *Toeller*, 461 F.3d at 879 (concluding "we see nothing in either the text or the legislative history of the FMLA to indicate that Congress found" women more likely to have a serious medical condition than men);

Wennihan, 515 F. Supp. 2d at 1046 (adopting rationale of *Brockman*); *Bryant*, 329 F. Supp. 2d at 825 (citing absence of a pattern of sex discrimination in the administration of medical leave); *Nicholas v. Attorney General*, 168 P.3d 809, 813 (Utah 2007) (finding self-care provision unconstitutional on the ground that Congress failed to establish required relationship between provision and gender-discrimination and failed to identify a widespread pattern of state discrimination against the disabled).

We conclude the district court did not err in declining to follow this line of cases.[4]

3. Treating Act as a Whole

We are left with the State's argument that the FMLA need not be viewed as a whole. We agree with the State in principle. *See Garrett*, 531 U.S. at 360 n.1, 121 S. Ct. at 960 n.1, 148 L. Ed. 2d at 874-75 n.1 (deciding only whether Title I, not Title II, of the Americans with Disabilities Act was appropriate legislation under section 5 of the Fourteenth Amendment); *see also Lane*, 541 U.S. at 522, 124 S. Ct. at 1988, 158 L. Ed. 2d at 836 (deciding the issue as to Title II of the ADA). However, as discussed above, neither the language of the FMLA nor the legislative record provides an indication that the self-care provision should be treated differently from the family-care provision at issue in *Hibbs*. In

---

[4] In addition to *Hibbs*, the district court cited the following two opinions in support of its ruling: *Montgomery v. Maryland*, 72 Fed. App'x 17 (4th Cir. 2003) and *Bylsma v. Freeman*, 346 F.3d 1324 (11th Cir. 2003). We decline to rely on *Montgomery* because it is unpublished. We also decline to rely on *Bylsma* because the underlying claim was based on retaliation for exercising family care leave rather than self-care leave. *See Bylsma v. Bailey*, 127 F. Supp. 2d 1211, 1233 (M.D. Ala. 2001) ("The Plaintiff is, however, claiming that she was retaliated against for having exercised her right to take FMLA leave to care for family members."), *aff'd in part and rev'd in part sub nom. Bylsma v. Freeman*, 346 F.3d 1324 (11th Cir. 2003).

contrast, the remedial provisions of Title I and Title II of the ADA were different, justifying different outcomes under *Garrett.* *See Garrett*, 531 U.S. at 360 n.1, 121 S. Ct. at 960, 148 L. Ed. 2d at 874-75 n.1. For this reason, we find the court's treatment of the ADA unpersuasive. We conclude the district court did not err in treating subsection D in the same manner as subsection C was treated.

V. Waiver

The district court also concluded that the State waived its immunity under the FMLA. It stated:

> The FMLA is explained in their personnel policies handbook and posted in the Clerk of Court's office. Employees are aware that they have the right under the FMLA to take leave for their own illnesses. Nowhere did Defendants indicate that one specific type of leave, self-care leave, is not permitted or that employees would have no recourse if they were terminated or retaliated against for taking self-care leave. Furthermore, State employees testified they knew it was illegal to terminate or retaliate against someone for using FMLA leave. Thus, the State has waived any immunity through its conduct.

The State contends this ruling was error. While it concedes that the executive branch promulgated an administrative rule implementing the FMLA, it claims it has not waived immunity in the absence of an Iowa statute that clearly states its intention to subject itself to suit in federal court for FMLA claims, or any statute that demonstrates an intention to be sued in state court for FMLA claims.

Immunity need not be expressly waived by statute. *See Kersten Co. v. Dep't of Soc. Servs.*, 207 N.W.2d 117, 118 (Iowa 1973). The State may impliedly waive immunity to suit. *Id.* at 119. Conduct of the State through its agencies, officers, or employees may effectuate waiver or manifest consent. *State v. Dvorak*, 261 N.W.2d 486, 489 (Iowa 1978).

The executive branch promulgated regulations that afford State employees FMLA leave. Iowa Admin. Code r. 11-63.4. We agree with Lee that these regulations together with the remaining actions cited by the district court amounted to a waiver of sovereign immunity. *See Anthony v. State*, 632 N.W.2d 897, 902 (Iowa 2001).

VI. Standard for Stay

As noted, the Iowa Supreme Court granted a stay of the order reinstating Lee pending disposition of the appeal. In its order, the court stated:

> The issue regarding the correct standard for determining the good cause necessary to grant a stay under Iowa Rule of Appellate Procedure 6.7(3) shall be submitted with the appeal. The parties shall incorporate their arguments on this issue into their appellate briefs.

The parties did so, but because the request for stay was granted, we find it unnecessary to address the good cause standard.

AFFIRMED.