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# Litigating Age and Disability Claims Against State and Local Government Employers in the New "Federalism" Era

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# Litigating Age and Disability Claims Against State and Local Government Employers in the New "Federalism" Era

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I.	INTRODUCTION.....	99
II.	PROPOSED COURSES OF ACTION TO ENFORCE THE ADEA AGAINST STATE AND LOCAL GOVERNMENT .....	102
	A. <i>Local Government Employers</i> .....	102
	B. <i>Naming State Governmental Officials in Their Official Capacity</i> .....	105
	C. <i>State Court Actions to Enforce the ADEA</i> .....	113
	D. <i>Suits by the EEOC</i> .....	120
III.	PROPOSED COURSES OF ACTION AGAINST STATE AND LOCAL GOVERNMENT EMPLOYERS TO ENFORCE FEDERALLY PROTECTED RIGHTS OF PERSONS WITH A DISABILITY.....	120
	A. <i>Kimel Should Not Control the ADEA</i> .....	120
	B. <i>Other Federal Claims</i> .....	124
	1. <i>Section 504 of the Rehabilitation Act of 1973</i> .....	124
	2. <i>Section 1983—Equal Protection Clause of the     Fourteenth Amendment</i> .....	127
IV.	CONCLUSION .....	128

## I.

### INTRODUCTION

On January 11, 2000, the Supreme Court, in *Kimel v. Florida Board of*

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*Regents*,<sup>1</sup> held a federal civil rights statute unconstitutional for the first time in 50 years.<sup>2</sup> As a result of *Kimel* and several other recent Supreme Court decisions, the ADEA<sup>3</sup> and ADA<sup>4</sup> claims of state government employees are in jeopardy. First, in *Seminole Tribe of Florida v. Florida*,<sup>5</sup> the Court decided that Congress, when acting pursuant to the Commerce Clause,<sup>6</sup> does not have the authority to abrogate the states' Eleventh Amendment<sup>7</sup> immunity. Second, in *City of Boerne v. Flores*,<sup>8</sup> the Court restricted the power of Congress to pass civil rights legislation when acting pursuant to Section 5 of the Fourteenth Amendment. Third, the "spirit" of the Eleventh Amendment was expanded to make state court enforcement of federal statutory rights dependent upon the states' waiver of their own immunity from suit in state court.<sup>9</sup> In *Kimel*, the Court applied these principles to the ADEA, holding that Congress did not have the power under Section 5 of the Fourteenth Amendment to extend the ADEA to state employers and, therefore, did not have the power to abrogate the states' Eleventh Amendment immunity.<sup>10</sup> During its 2000 term, the Court may extend *Kimel* to the ADA, even though the ADA can be distinguished from the ADEA.<sup>11</sup>

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1. 528 U.S. 62 (2000).

2. *A Major Change in Civil Rights Litigation*, 36 TRIAL 94, March 2000.

3. Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*

4. Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (1994).

5. 517 U.S. 44 (1996).

6. U.S. CONST. art. I, § 8, cl. 3.

7. U.S. CONST. amend. XI.

8. *City of Boerne v. Flores*, 521 U.S. 507, 519-32 (1997) (holding that because the Free Exercise Clause of the First Amendment required that neutral laws only be rational whereas the Religious Freedom Restoration Act required states to accommodate religion unless it met a compelling interest test, the Act could not be sustained as enforcing a constitutional norm and thus was invalid). *See also* *United States v. Morrison*, 120 S. Ct. 1740, 1755-58 (2000) (holding the Violence Against Women Act, which provides a federal civil remedy for victims of gender-motivated violence, could not be validly enacted under Section 5 of the Fourteenth Amendment because, even if there had been evidence of gender-biased disparate treatment by state authorities, the law is aimed at private individuals whereas the amendment prohibits only state action and is not restricted to states where discrimination against victims of gender-motivated crimes exist); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 640 (1999) (holding that because there was no evidence of any widespread pattern of patent infringement by states, Congress was precluded from invoking its Fourteenth Amendment power to abrogate state immunity from patent infringement suits); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 670-75 (1999) (holding that because protection against false advertising does not even implicate property rights protected by the due process clause, Congress could not rely on its Section 5 remedial power to abrogate state sovereign immunity under the Lanham Act, which addresses false advertising).

9. *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Congress lacks the power to waive the states' immunity to Fair Labor Standards Act claims brought in state court).

10. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 82-90 (2000).

11. *University of Alabama at Birmingham Board of Trustees v. Garrett*, *cert. granted*, 120 S. Ct. 1669 (2000). *See* discussion of this issue, *infra* notes 98-126 and accompanying text. Other Acts of Congress are threatened as a result of the decision in *Kimel*. *See, e.g.,* *Townsel v. Missouri*, 233 F.3d 1094 (8th Cir. 2000); *Chittister v. Dep't of Community and Econ. Dev.*, 226 F.3d 223 (3<sup>rd</sup> Cir. 2000); *Kazmier v. Widman*, 225 F.3d 519 (5<sup>th</sup> Cir. 2000); *Sims v. University of Cincinnati*, 219 F.3d 559 (6<sup>th</sup>

Several good arguments challenge the reasoning in each of these cases.<sup>12</sup> However, it is not the purpose of this article to make those arguments. Rather, this article explores the status of ADEA and ADA litigation against state and local government and suggests ways of possibly limiting the effect of *Kimel*. Each of the following propositions will be addressed in Section II. First, *Kimel* does not affect ADEA litigation against local government because the ADEA represents a valid exercise of Congress' power under the Commerce Clause and because local governmental entities enjoy no Eleventh Amendment immunity.<sup>13</sup> Second, by naming state governmental officials in their official capacity and utilizing the *Ex parte Young*<sup>14</sup> exception to the Eleventh Amendment, state government employees can still obtain prospective injunctive relief under the ADEA in federal court.<sup>15</sup> Third, in states that have waived immunity from employment-related claims in their own courts, state employees can bring ADEA claims in state court.<sup>16</sup> Fourth, the EEOC can bring suits in federal court on behalf of state government employees to enforce their rights under the ADEA.<sup>17</sup> Some of these potential avenues are more

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Cir. 2000); *Hale v. Mann*, 219 F.3d 61 (2d Cir. 2000) (all holding Congress lacked Section 5 power to abrogate the Eleventh Amendment in passing the Family and Medical Leave Act).

12. Each of the decisions of the Supreme Court on the issues referred to was by a 5-4 vote. For instance, in *Seminole Tribe of Florida*, where the Court overruled the holding in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), decided only seven years earlier, Justice Souter stated in his dissent that "[i]n holding the State of Florida immune to suit under the Indiana Gaming Regulatory Act, the Court today holds for the first time since the founding of the Republic that Congress has no authority to subject a state to the jurisdiction of a federal court at the behest of an individual asserting a federal right." 517 U.S. at 100. The dissenting opinions of Justice Stevens and Justice Souter more than adequately explain why *Seminole Tribe of Florida* is wrong.

Second, the decisions from *City of Boerne* through *U.S. v. Morrison*, *supra* note 8, seriously restrict the power of Congress under Section 5 of the Fourteenth Amendment. If Congress, acting pursuant to Section 5 of the Fourteenth Amendment, can take no action beyond that which the Court either has or would find to be in violation of Section 1 of the Fourteenth Amendment, then Section 5 is relatively meaningless. While the majority in *Morrison* says "Section 5 is 'a positive grant of legislative power,' . . . that includes authority to 'prohibit conduct which is not itself unconstitutional and [to] intrud[e] into 'legislative spheres of autonomy previously reserved to the States,'" *Morrison*, 120 S. Ct. at 1755, its recent decisions seem inconsistent with that view of Section 5. Instead, the Court holds that "prophylactic legislation under Section 5 must have a 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* at 1758. Third, the Court's decision to close the door to state courts to enforce federal rights is contrary to earlier cases and, as explained in Justice Souter's lengthy dissenting opinion in *Alden*, 527 U.S. at 760-814, the historical and *stare decisis* arguments refute the majority's Eleventh Amendment jurisprudence. See also Roger Hartley, *The Alden Trilogy: Praise and Protest*, 23 HARV. J. L. & PUB. POL'Y, 323 (2000); *Symposium: State Sovereign Immunity & The Eleventh Amendment*, 75 NOTRE DAME L. REV. 817 (2000) (critiquing the Supreme Court's sovereign immunity decisions from the 1998 term).

13. See *infra* notes 18-37 and accompanying text.

14. 209 U.S. 123 (1908).

15. See *infra* notes 38-58 and accompanying text.

16. See *infra* notes 59-91 and accompanying text.

17. See *infra* notes 92-97 and accompanying text.

problematic than others, but none has been precluded by the Supreme Court. Section III will explain why *Kimel* should not be extended to claims of disability discrimination by state employers and will discuss avenues other than the ADA for litigating such claims.

## II.

### PROPOSED COURSES OF ACTION TO ENFORCE THE ADEA AGAINST STATE AND LOCAL GOVERNMENT

#### A. Local Governmental Employees

Nothing in *Kimel* suggests Congress did not have the authority to pass the ADEA pursuant to its Commerce Clause power.<sup>18</sup> Indeed, the Supreme Court had already flatly rejected a Tenth Amendment state sovereignty defense in *EEOC v. Wyoming*,<sup>19</sup> where it sustained as a valid exercise of the Commerce Clause power the 1974 amendment to the ADEA, which extended the Act to include state and local government employers.<sup>20</sup> *Kimel* addressed an Eleventh Amendment problem, but the Supreme Court has never suggested that the Eleventh Amendment protects local governmental entities.<sup>21</sup> In *Alden v. Maine*,<sup>22</sup> the Court recently reaffirmed that a core

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18. *Kimel* holds only that Congress did not have the power to pass the 1974 amendment extending the ADEA to state and local government pursuant to its power under Section 5 of the Fourteenth Amendment and, therefore, did not have the power to abrogate the states' Eleventh Amendment immunity. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91.

19. *EEOC v. Wyoming*, 460 U.S. 226, 236-39 (1983). See also *Garcia v. San Antonio Metro Transit*, 469 U.S. 528 (1985).

In two recent decisions, the Supreme Court has recognized state sovereignty as a limitation on Congress' Commerce Clause power, but only in the narrow circumstance where Congress is compelling the state legislative or executive branch of government to enforce a federal regulatory program. See *New York v. United States*, 505 U.S. 144 (1992) (holding that federal environmental law impermissibly coerced state legislatures into enacting laws addressing low level radioactive waste); *Printz v. United States*, 521 U.S. 898 (1997) (holding that Brady Handgun Act impermissibly commanded the states' chief law enforcement officers to search records to ascertain whether a person could lawfully purchase a handgun). The limited nature of this restriction was confirmed in *Condon v. Reno*, 528 U.S. 141 (2000), when the Court unanimously upheld the validity of the Driver's Privacy Protection Act, which regulates the dissemination and use of information contained in state motor vehicle records and prohibits state departments from disclosing personal information. The Court determined that the Act did not violate the Tenth Amendment or principles of federalism because it did not "require the states in their sovereign capacity to regulate their own citizens." *Id.* at 151. Because federal anti-discrimination laws, such as the ADA and ADEA do not single out states or force them to enact or implement federal statutes, they remain unaffected by these recent federalism rulings.

20. *EEOC v. Wyoming*, 460 U.S. at 243. See also *Humenansky v. Regents of University of Minnesota*, 152 F.3d 822, 826 (8th Cir. 1998); *Timmer v. Michigan Dept. of Commerce*, 104 F.3d 833, 840 n.9 (6th Cir. 1997).

21. See *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70 (1989). See also *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) (holding that the Eleventh Amendment does not bar a federal suit against a county).

22. 527 U.S. 706 (1999).



principle of the sovereign immunity doctrine "is that it bars suit against states, but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity that is not an arm of the state."<sup>23</sup> Thus, Congress need neither abrogate Eleventh Amendment immunity when regulating local government nor look for congressional power to do so in Section 5 of the Fourteenth Amendment.

In her majority opinion in *Kimel*, Justice O'Connor remarks that Congress lacked authority to adopt the 1974 amendment to the ADEA pursuant to Section 5 of the Fourteenth Amendment because "Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age."<sup>24</sup> This does not mean, however, that the 1974 amendment is invalid as an exercise of Commerce Clause power; the Court does not overturn the holding in *EEOC v. Wyoming* that age discrimination, even if not contrary to the Equal Protection Clause, adversely affects interstate commerce and thus falls within Congress' power. Section 5 of the Fourteenth Amendment, as a source of congressional authority for the 1974 amendment of the ADEA, became important only after the Court determined that Congress could not abrogate Eleventh Amendment immunity when acting pursuant to the Commerce Clause,<sup>25</sup> and thus state employers cannot be sued in federal court without their consent. Aside from this restriction, the 1974 amendment to the ADEA remains valid as to both state and local government employers, and it can be enforced in federal court when suing a local governmental unit.<sup>26</sup>

The decision in *Kimel* may cause local governmental employers to argue that they are really state agencies or arms of the state in order to take advantage of Eleventh Amendment protection.<sup>27</sup> Determining the status of state agencies requires a careful review of state law<sup>28</sup> and, since the primary

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23. *Id.* at 756.

24. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91 (2000).

25. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

26. *See, e.g., Conley v. Village of Bedford*, 215 F.3d 703 (7th Cir. 2000) (holding that municipality is not entitled to Eleventh Amendment immunity and ADEA suit could proceed in federal court); *Narin v. Lower Merion School Dist.*, 206 F.3d 323 (3rd Cir. 2000) (holding that plaintiff's ADEA claim is allowed to proceed as school district is not arm of the state entitled to Eleventh Amendment immunity); *Gavigan v. Clarkstown Central School Dist.*, 84 F.Supp.2d 540 (S.D.N.Y. 2000) (holding that school district is not entitled to Eleventh Amendment immunity from ADEA suit).

27. *See, e.g., Conley*, 215 F.3d 703; *Narin*, 206 F.3d 323; *Gavigan*, 84 F.Supp.2d 540.

28. *See, e.g., Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 280 (1977) (explaining that state law defined a school board as a political subdivision); *Rounds v. Oregon State Board of Higher Education*, 166 F.3d 1032, 1035-36 (9th Cir. 1999) (holding that the University of Oregon, as well as the Oregon State Board of Higher Education, is an arm of the state for Eleventh Amendment purposes because the university is not an independent legal entity and it performs central government functions under the control of the Board of Education); *Ambus v. Granite Board of Education*, 975 F.2d 1555,

purpose of the Eleventh Amendment was to protect state treasuries, the source of funds to satisfy any judgment becomes important.<sup>29</sup> However, other factors may also be important to the analysis. For example, in *Mt.*

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1559-62 (10th Cir. 1992) *modified en banc* 995 F.2d 992 (10th Cir. 1993) (holding that because of substantial autonomy from state government and financial independence from state treasury, local school board in Utah is not arm of state for Eleventh Amendment purposes); *Carr v. City of Florence, Ala.*, 916 F.2d 1521, 1525-26 (11th Cir. 1990) (holding that because under state law sheriff is viewed as executive officer of state and his deputies are under significant control of sheriff, official capacity suits against such officials are shielded by Eleventh Amendment even though officials are paid by county and county personnel board exercises some control over terms and conditions of deputies' employment; since there is no clear evidence that counties will pay damage award against sheriff or his deputies, they are immune from suit under Eleventh Amendment); *Meade v. Grubbs*, 841 F.2d 1512, 1525 (10th Cir. 1988) (holding that the Eleventh Amendment issue is determined by examining powers, nature and characteristics of agency under state law); *Darlak v. Bobear*, 814 F.2d 1055, 1059-60 (5th Cir. 1987) (holding that the state Department of Health and Human Resources and its hospital were alter egos of state entitled to immunity where state law characterized department as arm of state and any judgment against either party would be paid from state funds).

29. *Lake County Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401-02 (1979) (finding bi-state authority is not an arm of the state based on independence of agency, fact that funding was provided by neighboring counties, and fact that judgments against the agency were expressly not going to bind either state); *Edelman v. Jordan*, 415 U.S. 651, 665 (1974) (holding that Eleventh Amendment is triggered where monetary relief will inevitably come from the general revenues of the state); *Dover Elevator Co. v. Arkansas State Univ.*, 64 F.3d 442, 446-47 (8th Cir. 1995) (holding that state university, which could not spend funds without appropriation by general assembly, is state agency protected by Eleventh Amendment); *Christy v. Pennsylvania Turnpike Comm'n*, 54 F.3d 1140, 1145 (3rd Cir. 1995) (placing special emphasis on funding factor, and finding that, based on funding, status at state law, and autonomy, as well as totality of factors, Commission is subject to suit in federal court); *Baxter by Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 732-33 (7th Cir. 1994) (noting that most significant factor is whether entity has power to raise its own funds and concluding after review of Indiana statutory scheme, that, even though state exercises some supervision over county welfare departments, they are not protected by Eleventh Amendment because they have their own taxing and bonding power and ability to satisfy judgments by means other than resorting to state treasury); *Sherman v. Curators of Univ. of Missouri*, 16 F.3d 860 (8th Cir. 1994) (holding that whether or not state university is protected by Eleventh Amendment is determined by looking to degree of local autonomy and control, and most importantly whether funds to pay judgment could come from state treasury; case remanded for determination in light of plaintiff's allegations that only one-third of university budget comes from state appropriation and a judgment would not necessarily be paid from the state funds); *Hutsell v. Sayre*, 5 F.3d 996, 999-1002 (6th Cir. 1993) (holding that University of Kentucky is an arm of the state entitled to Eleventh Amendment protection because budget is set by the legislature as part of the governor's executive budget and a monetary judgment would be paid from the state treasury); *Bockes v. Fields*, 999 F.2d 788, 790-91 (4th Cir. 1993) (holding that County Department of Social Services protected from damage awards by Eleventh Amendment because the judgment would be paid from a self-insurance program that is 80% state funded); *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 991 F.2d 935, 940-41 (1st Cir. 1993) (holding that sewer authority has no access to Commonwealth treasury and therefore Eleventh Amendment does not protect it even though it receives part of its funds from Commonwealth; inability to draw on public fisc "cripples" immunity defense); *Rivas v. Freeman*, 940 F.2d 1491, 1495 (5th Cir. 1991) (holding that because funds used to satisfy liability of sheriff and deputies do not come from state treasury, there is no Eleventh Amendment protection); *Holley v. Lavine*, 605 F.2d 638, 644 (2nd Cir. 1979) (holding that local service agency may be sued as an independent political entity which bears "ultimate responsibility" for public assistance payments, since state was under no requirement to indemnify counties for judgments rendered against it).

*Healthy City School District v. Doyle*,<sup>30</sup> the Court held that a school board does not enjoy Eleventh Amendment immunity because state law defined a school board as a political subdivision and because the school board was given the power to issue bonds and levy taxes under state law.<sup>31</sup> Although the school board was subject to guidance from the State Board of Education and received a significant amount of funding from the state, it could be sued in federal court.<sup>32</sup> In *Edelman v. Jordan*, the Court stressed that the Eleventh Amendment is triggered where monetary relief will inevitably come from the general revenues of the state, indicating that a raid on the state treasury is the primary concern.<sup>33</sup> Later, in a case involving a bi-state authority,<sup>34</sup> while the Court identified several factors to be considered in determining the immunity issue, it emphasized that the twin reasons for the Eleventh Amendment—the states' dignity and prevention of federal court judgments that must be paid from the state treasury—remain the "prime guide."<sup>35</sup> The latter of these reasons was referred to as the "impetus for the Eleventh Amendment,"<sup>36</sup> which was enacted in the wake of a Supreme Court decision allowing a damage action to proceed against a state in federal court.<sup>37</sup>

Once it is determined that a governmental employer is, in fact, not protected by the Eleventh Amendment, ADEA claims against such an employer should be allowed to proceed in federal court. However, the plaintiffs in such cases should be prepared to address the threshold question relating to the status of the governmental employer.

### *B. Naming State Governmental Officials in Their Official Capacity*

This would be a relatively non-controversial avenue into federal court for state employees seeking to enforce the ADEA were it not for recent circuit court decisions holding that liability under the federal employment discrimination statutes—ADEA, Title VII, and the ADA—is generally limited to the employer and does not include agents of the employer.<sup>38</sup>

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30. 429 U.S. 274 (1977).

31. *Id.*, 429 U.S. at 280-81.

32. *Id.*

33. *Edelman v. Jordan*, 415 U.S. 651, 665-66 (1974).

34. The *Port Authority*, established by New York and New Jersey pursuant to the Interstate Commerce Clause of the U.S. Constitution, Art. I, § 10, cl. 3.

35. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994).

36. *Id.* at 48.

37. *Chisholm v. Georgia*, 2 Dall. 419 (1793), which holds that Article III authorized a private citizen of another state to sue the state of Georgia without its consent, is generally viewed as the catalyst for the Eleventh Amendment. See, e.g., *Welch v. State Dept. of Highways and Pub. Transp.*, 483 U.S. 468, 484-85 (1987).

38. See, e.g., *Silk v. City of Chicago*, 194 F.3d 788 (7th Cir. 1999) (holding that ADA provides only for employer, not individual liability); *Wathen v. General Elec. Co.*, 115 F.3d 400, 405 (6th Cir.



These decisions are questionable because the definition of "employer" in these statutes includes agents of the employer.<sup>39</sup> The circuits, in fact, were divided on the individual liability question<sup>40</sup> until Congress added a damage remedy to Title VII in 1991.<sup>41</sup> The concern reflected in many post-1991 decisions seems to be to avoid individual liability for damages on the part of corporate officials.<sup>42</sup> For example, in the context of sexual harassment

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1997) (holding that individual liability is prohibited under Title VII); *Mason v. Stallings*, 82 F.3d 1007 (11th Cir. 1996) (holding that Title I of ADA does not provide for individual liability, only for employer liability); *Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir. 1996) (holding that the ADEA provides no basis for individual liability for supervisory employees); *Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 267 n.2 (7th Cir. 1995) (referring to its ruling in ADA case, court indicates "it is likely that Stephen Marcus, as an individual, could not be liable under the ADEA"); *E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1279-82 (7th Cir. 1995), *reh en banc denied*, June 28, 1995 (holding that owner of company not individually liable under ADA); *Smith v. Lomax*, 45 F.3d 402, 403-404 n.4 (11th Cir. 1994) (holding that county commissioners may not be held individually liable under ADEA); *Birbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510-11 (4th Cir. 1994), *cert. denied*, 513 U.S. 1058 (1994) (holding that the ADEA does not provide for individual liability of supervisor who made decision to discharge plaintiffs); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994) (recognizing contrary authority, court holds that Congress did not intend to impose individual liability on employees under ADEA); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) (holding that discharged black city police officer could not maintain Title VII action against Mayor, Police Captain, and Chief in their individual capacity because individual capacity suits are inappropriate under Title VII).

39. Age Discrimination in Employment Act, 29 U.S.C. § 630(b); Americans With Disabilities Act, 42 U.S.C. § 12111(5)(A); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b).

40. See, e.g., *Shager v. Upjohn Co.*, 913 F.2d 398, 404 (7th Cir. 1990) (holding that statutory language of ADEA could mean that supervisor is liable along with employer, or even possibly instead of employer); *Paroline v. Unisys Corp.*, 879 F.2d 100, 106 (4th Cir. 1989) (holding that individual qualifies as an "employer" under Title VII if he or she serves in a supervisory position and exercises significant control over plaintiff's hiring, firing, or conditions of employment, and such an employee may be held liable for any actionable sexual harassment in which he or she personally participated); *Jones v. Continental Corp.*, 789 F.2d 1225, 1231 (6th Cir. 1986) (listing several cases holding that individuals may be held personally liable as agents of employers under Title VII); *Barkley v. Carraux*, 533 F.Supp. 242, 245 (S.D. Tex. 1982) (holding that individual department managers of corporate defendant are not entitled to dismissal when sued under ADEA).

41. The statutory authorization for damages is found in 42 U.S.C. § 1981a, which applies to Title VII actions as well as those brought to enforce the ADA. Both Title VII and the ADA define the word "employer" to include "agents." See *supra* note 39.

42. See, e.g., *Ortez v. Washington County, State of Oregon*, 88 F.3d 804, 808 (9th Cir. 1996) (holding that Title VII claims against individuals sued in their individual capacities were dismissed, but claims against individuals in their official capacities were allowed); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995) (holding that an interpretation of Title VII to allow for individual supervisor liability would produce a result at odds with congressional intent to protect small employers and, therefore, an employer's agent should not be held individually liable under Title VII); *Welch v. Laney*, 57 F.3d 1004, 1009 (11th Cir. 1995) (holding that Title VII plaintiff has a cause of action against the sheriff in his official capacity, but not his individual capacity); *Lehardt v. Basic Inst. of Tech.*, 55 F.3d 377, 380 (8th Cir. 1995) (holding that although individuals cannot be sued in their individual capacities under Title VII, such actions can be brought against individual employees in their official capacities); *Birbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir. 1994) ("It would be incongruous to hold that the ADEA does not apply to the owner of a business employing, for example, ten people, but that it does apply with full force to a person who supervises the same number of workers in a company employing twenty or more."); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993) (holding that under Title VII, suits must proceed against individuals in their official capacities only; individual

claims under Title VII, the individual responsible for the harassment cannot be required to satisfy a monetary judgment.<sup>43</sup>

The exclusion of suits against "agents" is not a major roadblock where

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capacity suits are inappropriate); *Harvey v. Blake*, 913 F.2d 226, 227-28 (5th Cir. 1990) (explaining that the provision in Title VII, 42 U.S.C. § 2000e(b), means that individuals acting as an employer's "agents" will be liable in their official capacities only). See also Kristi Lappe, "I Just Work Here": Precluding Supervisors' Individual Liability Under the Federal Antidiscrimination Statutes and the Arizona Civil Rights Act, 27 ARIZ. ST. L. J. 1301, 1311 (1996) ("Most circuits that have addressed the issue of individual liability pursuant to the antidiscrimination acts properly concluded that courts should not impose individual liability. In declining to impose such liability, the courts examined the antidiscrimination statutes, the doctrine of respondeat superior, the economic ramifications of imposing individual liability, and the policy considerations underlying the statutes."); Christopher Greer, Note, "Who, Me?": A Supervisor's Individual Liability for Discrimination in the Workplace, 62 FORDHAM L. REV. 1835, 1836 (1994) ("Based on the purposes of the Acts, their statutory language, and the case law, individuals can and should be held liable for their discriminatory acts under both Title VII and the ADEA.").

*Cf. Canderlaria v. Cunningham*, 2000 WL 798636 (S.D.N.Y. 2000) (rejecting the distinction based on capacity, the court held that individuals may not be held liable under the ADA in either capacity); *Bottage v. Suburban Propane*, 77 F. Supp. 2d 310, 313 (N.D.N.Y. 2000) (holding that an employee could not bring Title VII or ADEA claims against individual defendants in their personal or official capacities even if she was seeking prospective injunctive relief against such defendants; any distinction between holding individuals liable in their official or personal capacity would place the court in a position of holding an individual liable without providing the employee with a remedy at law); *Pemrick v. Stracher*, 67 F. Supp. 2d 149, 169 (E.D.N.Y. 1999) (holding that individual liability bar applies to individual defendants in their official capacities, as well as to situations where the plaintiff seeks prospective injunctive relief against such individuals); *McBride v. Routh*, 51 F. Supp. 2d 153, 156 (D. Conn. 1999) (questioning the utility of the official/individual capacity distinction).

43. See, e.g., *Grant v. Lode Star Co.*, 21 F.3d 649, 651-53 (5th Cir. 1994), cert. denied, 513 U.S. 1015 (1994) (holding that the district court improperly held employee's superior liable for sexually harassing her because Title VII contemplates liability only for the employer); *Smith v. St. Bernard's Reg'l Med. Ctr.*, 19 F.3d 1254, 1255 (8th Cir. 1994) (holding that claims against individual defendants were properly dismissed because liability under Title VII can attach only to employers); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993) (holding that since individual capacity suits are inappropriate under Title VII, suit against county attorney could proceed only in his official capacity and, thus, operated as suit against county itself; thus, plaintiff's initial complaint failing to name the county should be deemed to relate back to original complaint where county attorney was named as defendant); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), cert. denied, 510 U.S. 1107 (1994) (holding that although the term "employer" under Title VII is defined to include any agent of the employer, this language was included to incorporate respondeat superior liability and does not justify imposing individual liability on supervisory employees; statutory scheme of Title VII, which limits liability of small employers even as amended, indicates that Congress did not intend to impose individual liability on employees); *Harvey v. Blake*, 913 F.2d 226, 227-28 (5th Cir. 1990) (holding that any recovery against supervisor must be in her official rather than individual capacity, because supervisor's liability under Title VII is premised upon her role as an agent of the city); *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982) (holding that back pay awards are to be paid by the employer, not individual defendants); *Johnson v. N. Indiana Pub. Serv. Co.*, 844 F. Supp. 466, 468 (N.D. Ind. 1994) (finding no individual liability); *Pelech v. Klaff-Joss, L.P.*, 828 F. Supp. 525, 529 (N.D. Ill. 1993) (holding that individual supervisors are not "employers" who can be sued under Title VII in their individual capacity); *Pommier v. James L. Edelstein Enter's*, 816 F. Supp. 476, 480 (N.D. Ill. 1993) (holding that supervisor may not be individually liable for Title VII sexual discrimination, but is an agent liable only in his official capacity); *Weiss v. Coca Cola Bottling Co. of Chicago*, 772 F. Supp. 407, 410-11 (N.D. Ill. 1991) (finding supervisor is liable for sexual harassment only in his official capacity, i.e., as a surrogate for the employer).

a private sector employer is sued. However, because *Kimel* forecloses suit against state employers, litigants and courts should revisit the question of whether "agents" may be named, at minimum, to enjoin continuing violations of the ADEA. In suits against government officials, there is a long-standing recognition that the capacity in which the individual is sued is important. Beginning with *Ex parte Young*, the Supreme Court recognized that state officials could be sued in their official capacity, providing an opportunity for injunctive relief without individual liability.<sup>44</sup> This well-established exception to the Eleventh Amendment was confirmed in *Alden*.<sup>45</sup> However, the Court has made it clear that the *Ex parte Young* "fiction" allows only prospective injunctive relief designed to end the illegal action, not retroactive relief that results in a raid on the state treasury.<sup>46</sup> Damages may not be awarded by the federal courts against the governmental officials, in their official capacity, because such suits are, in effect, suits against the government.<sup>47</sup>

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44. *Ex parte Young*, 209 U.S. 123, 155-56 (1908). See also *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70 n. 10 (1989).

45. *Alden v. Maine*, 527 U.S. 706, 757 (1999) (holding that the Eleventh Amendment "does not bar certain actions against state officers for injunctive or declaratory relief.").

46. See *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 102-03 (1984); *Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Elderman v. Jordan*, 415 U.S. 651, 668 (1974).

47. See *Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *Brandon v. Holt*, 469 U.S. 464, 472-73 (1985). See also *Campbell v. Arkansas Dept. of Corr.*, 155 F.3d 950, 962 (8th Cir. 1998) (holding that while state officials can be sued in federal court in their official capacities for prospective injunctive relief, including reinstatement, the alternative remedy of front pay is not analogous to prospective relief because it must be paid from the state treasury); *Barber v. State of Hawaii*, 42 F.3d 1185, 1198 (9th Cir. 1994) (holding that the Eleventh Amendment bars award of damages against state officials in their official capacity); *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1511-13 (9th Cir. 1994) (finding that order requiring state commissioner to disburse funds to plaintiff, when funds were held pursuant to court order pending outcome of litigation, is not prospective relief and would affect state treasury; therefore Eleventh Amendment bars plaintiff's claim to disputed funds); *Estate of Porter by Nelson v. State of Illinois*, 36 F.3d 684, 690 (7th Cir. 1994) (holding that suits naming state officials in their official capacity are barred by Eleventh Amendment if they seek retroactive relief (damages) from state treasury); *Arnold v. McClain*, 926 F.2d 963, 966 (10th Cir. 1991) (holding that district attorney is state officer and claim for damages against him in his official capacity is barred); *Chrissy F. by Medley v. Mississippi Dept. of Pub. Welfare*, 925 F.2d 844, 849 (5th Cir. 1991) (holding that claim for damages against state officer in official capacity is barred by Eleventh Amendment); *Hughes v. Savell*, 902 F.2d 376, 378 (5th Cir. 1990) (holding that state is real party in interest if decision rendered would operate against sovereign, expending itself on the public treasury, interfering with public administration, or compelling the state to act or to refrain from acting); *DeYoung v. Patten*, 898 F.2d 628, 635 (8th Cir. 1990) (holding that where complaint states claim against officials in their official capacity, it is not sufficiently clear to give them notice that they are being sued in their individual capacity; where complaint failed to specify whether a third official is being sued in official or individual capacity or both, complaint must be construed as stating only official capacity claim barred by Eleventh Amendment), *overruled on other grounds by* *Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d 1423 (8th Cir. 1994); *Holloway v. Conger*, 896 F.2d 1131, 1136 (8th Cir. 1990) (holding that suit against state board and its members in their official capacity, which seeks only damages, is barred by Eleventh Amendment); *Free v. Granger*, 887 F.2d 1552, 1557 (11th Cir. 1989) (holding that suits against officials in their official capacity for damages are effectively suits against the

Even if one accepts the circuit court opinions designed to protect corporate officials from individual liability in actions under the federal anti-discrimination statutes, there is no reason why these decisions should be expanded to claims for prospective injunctive relief against state governmental officials in their official capacity.<sup>48</sup> In *Alden*, the Court invoked *Ex parte Young* and reiterated that sovereign immunity "does not bar certain actions against state officers for injunctive or declaratory relief."<sup>49</sup> While such suits are, in reality, suits against the state, the *Ex parte Young* fiction avoids some of the effects of the current Court's expansive interpretation of the Eleventh Amendment, and it has long been recognized that this fiction is critical in ensuring state compliance with federal statutes.<sup>50</sup> As part of its federalism agenda, the Supreme Court has chipped away at the *Ex parte Young* exception, but the damage appears to be minor and, for the majority of Justices, the rule remains alive.<sup>51</sup> Suits against state

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entity which are prohibited by the Eleventh Amendment absent waiver since any damage award would be paid out of the state treasury); *Lenea v. Lane*, 882 F.2d 1171, 1178 (7th Cir. 1989) (holding that although plaintiff sued individual defendants in their individual capacities for back pay, claim was really one for retroactive award of monetary relief from state treasury and did not have merely an "ancillary" effect on state treasury and is thus barred by Eleventh Amendment); *Meadows v. Indiana*, 854 F.2d 1068, 1069 (7th Cir. 1988) (holding that where complaint fails to designate whether action against individual defendants is official capacity or personal capacity, court will assume official capacity complaint barred by Eleventh Amendment); *Wisconsin Hosp. Ass'n v. Reivitz*, 820 F.2d 863, 867 (7th Cir. 1987) (holding that suit brought against state officials, but with object of obtaining pecuniary relief from state itself, is squarely within the scope of Eleventh Amendment); *Graham v. Nat'l Collegiate Athletic Ass'n*, 804 F.2d 953, 959-60 (6th Cir. 1986) (holding that where plaintiffs seek to impose no liability on university officials as individuals, but have directed all their arguments against university, suit is essentially one for recovery of money from state treasury).

48. See employment cases cited *supra* note 42, see also *Armstrong v. Wilson*, 124 F.3d 1019, 1026 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (holding, in action seeking prospective injunctive relief to end discrimination against inmates with disability, that such relief fits within *Ex parte Young* exception to Eleventh Amendment); *Welch v. Laney*, 57 F.3d 1004, 1008-09 (11th Cir. 1995) (holding based on state law that sheriff is state, rather than county, official; Eleventh Amendment applies but does not bar prospective injunctive relief against sheriff); *Uttilla v. Tennessee Highway Dept.*, 40 F. Supp. 2d 968, 975-77 (W.D. Tenn. 1999), *aff'd* 208 F.3d 216 (6th Cir. 2000) (holding that plaintiffs may pursue declaratory and injunctive relief against commissioner in his official capacity in suit brought under Title II of ADA); *Henrietta D. v. Guiliani*, 81 F. Supp. 2d 425, 430 (E.D.N.Y. 2000) (holding that the Eleventh Amendment does not preclude suit against Commissioner of the New York State Department of Social Services seeking access to publicly subsidized benefits).

49. *Alden v. Maine*, 527 U.S. at 757.

50. CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 292 (1983) ("[T]he doctrine of *Ex parte Young* seems indispensable to the establishment of constitutional government and the rule of law.")

51. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court held that courts should hesitate before allowing use of the *Ex parte Young* exception "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right[.]" *Id.* at 74. An Indian tribe was not allowed to use the *Ex parte Young* exception in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), a case described as "unusual in that the Tribe's suit is the functional equivalent of a quiet title action which implicates special sovereignty interests." *Id.* at 281. Here, the Tribe sought a determination that certain lands are not within the regulatory jurisdiction of the state and it sought injunctive relief barring state officials from exercising their governmental powers and authority over the disputed area. If the Tribe were to prevail, the Court indicated "Idaho's sovereign interest in its



government officials in their official capacity, where the plaintiff seeks injunctive relief, thus provide a viable approach to ADEA claims by state government employees.

Of course, such suits do not provide full relief to ADEA plaintiffs. Because the *Ex parte Young* fiction allows only prospective injunctive relief, back pay is not available.<sup>52</sup> Compensatory and punitive damages are generally not available under the ADEA in any case.<sup>53</sup> Prospective

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lands and water would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable." *Id.* at 287 (emphasis added). Although Justice Kennedy, joined by Justice Rehnquist, argued in favor of a more drastic revision where courts would engage in an ad hoc "balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case," *id.* at 278, the majority rejected this approach.

Lower courts have recognized that these two cases impose a narrow exception and that *Ex parte Young* remains the rule. See, e.g., *Sandoval v. Hagan*, 197 F.3d 484, 500 (11th Cir. 1999), cert. granted, 121 S. Ct. 28 (2000) (*Seminole* does not bar *Ex parte Young* action because Section 602 of Title VI contains no explicit remedial scheme); *Hart v. Valdez*, 186 F.3d 1280, 1286 (10th Cir. 1999) (explaining that *Coeur d'Alene* is distinguished because a state's interest in administering a welfare program partially funded by the federal government is not such a core sovereign interest as to preclude *Ex parte Young*); *Summit Med. Assocs. v. Pryor*, 180 F.3d 1326, 1340 (11th Cir. 1999) (explaining that *Coeur d'Alene* is distinguished because the state's real property interests are not at stake; although Alabama has an interest in regulating the abortions of viable fetuses, a declaratory judgment would not prevent the state from regulating late-term abortions in other ways and should not be barred by Eleventh Amendment); *Ellis v. Univ. of Kansas Med. Ctr.*, 163 F.3d 1186, 1197 (10th Cir. 1998) (holding that *Seminole's* detailed remedial scheme analysis does not apply because *Seminole* did not limit the use of *Ex parte Young* as the means of enforcing constitutional rights); *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 632 (10th Cir. 1998) (holding that fundamental sovereignty issues are not implicated when plaintiff seeks the functional equivalent of a breach of trust action seeking only prospective injunctive relief against state officials, so *Ex parte Young* is applicable); *Buchwald v. Univ. of New Mexico Sch. of Med.*, 159 F.3d 487, 496 (10th Cir. 1998) (holding that *Coeur d'Alene* limitation only applies in "unique circumstances" and not when requested relief will not affect the core aspects of state sovereignty; it only applies in "unique circumstances"); *Marie O. v. Edgar*, 131 F.3d 610, 617 (7th Cir. 1997) (distinguishing *Coeur d'Alene* because no important sovereignty interests are at stake when plaintiff is seeking to enforce compliance with a federal program).

52. Back pay is available under the ADEA in cases where the Eleventh Amendment is not a consideration. See, e.g., *Banks v. Travelers Cos.*, 180 F.3d 358, 364 (2nd Cir. 1999); *Morse v. S. Union Co.*, 174 F.3d 917, 927 (8th Cir. 1999); *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1251 (11th Cir. 1997); *Newhouse v. McCormick & Co., Inc.*, 110 F.3d 635, 639 (8th Cir. 1999); *EEOC v. Kentucky State Police Dept.*, 80 F.3d 1086, 1097 (6th Cir. 1996); *Smith v. Officer of Personnel Mgmt.*, 778 F.2d 258, 261 (5th Cir. 1985).

53. See, e.g., *Espinueva v. Garrett*, 895 F.2d 1164, 1165 (7th Cir. reh'g. denied, 498 U.S. 891 (1990)); *Bruno v. Western Elec. Co.*, 829 F.2d 957, 966-67 (10th Cir. 1987); *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1446 (11th Cir. 1985); *Johnson v. Al Tech Specialty Steel Corp.*, 731 F.2d 143, 148 (2nd Cir. 1984); *Perrell v. Finance American Corp.*, 726 F.2d 654, 657 (10th Cir. 1984); *Hill v. Spiegel, Inc.*, 708 F.2d 233, 235 (6th Cir. 1983); *Kolb v. Goldring, Inc.*, 694 F.2d 869, 872 (1st Cir. 1982); *Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684, 687-88 (7th Cir. 1982); *Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 809 (8th Cir. 1982); *Naton v. Bank of California*, 649 F.2d 691, 698 (9th Cir. 1981); *Slatin v. Stanford Research Inst.*, 590 F.2d 1292, 1296 (4th Cir. 1979); *Dean v. Am. Sec. Ins. Co.*, 559 F.2d 1036, 1039-39 (5th Cir. 1977); *Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834, 841-42 (3rd Cir. 1977). *But see Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 802 (8th Cir. 1994) (affirming award of "compensatory" damages in amount of \$74,811 under ADEA; this may have been lost wages); *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1334-35 (6th Cir. 1994) (upholding award



injunctive relief could include reinstatement,<sup>54</sup> an order requiring that an applicant be hired,<sup>55</sup> front pay as an alternative to reinstatement,<sup>56</sup> and/or

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of \$85,000 for "mental distress," apparently under ADEA, but note that plaintiff included claim under Tennessee Human Rights Act).

54. See, e.g., *Woodhouse v. Magnolia Hosp.*, 92 F.3d 248, 257-58 (5th Cir. 1996) (holding that the trial court did not abuse its discretion in ordering reinstatement, even though plaintiff's previous position had been eliminated, because evidence indicated she was qualified to maintain variety of jobs); *Phillipp v. ANR Freight Sys., Inc.*, 61 F.3d 669, 674 (8th Cir. 1995) (holding that there was no abuse of discretion in trial court's determination that reinstatement rather than front pay was appropriate absent showing that reinstatement was either impracticable or impossible); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 996-97 (10th Cir. 1994) (holding no abuse of discretion in ordering reinstatement instead of front pay, absent a showing that hostility would make it unworkable; plaintiffs' refusal to accept reinstatement precludes front pay); *Brunnemann v. Terra Int'l, Inc.*, 975 F.2d 175, 180 (5th Cir. 1992) (holding that absent evidence of animosity or hostility, court did not abuse its discretion in reinstating plaintiff, even though his position has been filled by someone else); *Farber v. Massillon Bd. of Educ.*, 908 F.2d 65, 70-71, corrected at 917 F.2d 1391, 1396-97 (6th Cir. 1990) (holding that reinstatement is clearly preferred and, absent exceptional circumstances carefully articulated in record, should be ordered instead of front pay; workplace tensions insufficient unless they manifest themselves in public functions of employer); *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 638 (10th Cir. 1988) (holding reinstatement clearly appropriate instead of front pay where no hostility exists, plaintiff could have been transferred to comparable position and plaintiff was at least 25 years from retirement; trial court must articulate evidence and rationale for awarding front pay).

55. See, e.g., *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 279-80 (8th Cir. 1983); *Leftwich v. Harris-Stowe State College*, 540 F. Supp. 37, 45 (E.D. Mo. 1982), *aff'd in part and rev'd in part on other grounds*, 702 F.2d 686, 693 (8th Cir. 1983).

56. See, e.g., *Cox v. Dubuque Bank & Trust Co.*, 163 F.3d 492, 498-99 (8th Cir. 1998) (holding that before awarding front pay in lieu of reinstatement, trial court is required only to find the animosity so extreme that it makes an amicable and productive work relationship impossible, not that the animosity arises from discriminatory animus); *Kelley v. Airborne Freight Corp.*, 140 F.3d 335, 352-54 (1st Cir. 1998) (holding that trial court did not abuse its discretion in rejecting the defendant's post-trial motion asking court to order the plaintiff reinstated in lieu of front pay; the court found that reinstatement was "impracticable in the extreme" where the antipathy the employer's top management held for the plaintiff went beyond the animosity engendered by the litigation, the employer's vilification of the plaintiff undermined his value as a manager, the plaintiff's supervisor would be the person who had signed his discharge letter, and the position offered was indefinite and "make-work" and part of another strategic move by the employer); *Newhouse v. McCormick & Co., Inc.*, 110 F.3d 635, 641-42 (8th Cir. 1997) (holding that trial court did not abuse its discretion in rejecting reinstatement where plaintiff testified that he did not think he could go back to work for employer because of strained relationship; fact that plaintiff was receiving Social Security retirement benefits due to his inability to secure full-time employment rendered reinstatement impractical); *Weaver v. Amoco Prod. Co.*, 66 F.3d 85, 88-89 (5th Cir. 1995) (holding that trial court must articulate reason for its conclusion that reinstatement was not feasible); *Ray v. Juka Special Mun. Separate Sch. Dist.*, 51 F.3d 1246, 1253-55 (5th Cir. 1995) (holding no abuse of discretion in denying reinstatement, based on discord and antagonism that would result and awarding front pay); *Acrey v. Am. Sheep Indus. Ass'n*, 981 F.2d 1569, 1576 (10th Cir. 1992) (holding that, based on defendant's hostility toward plaintiff, trial court properly concluded relationship had been irreparably damaged and that productive and amicable working relationship was not feasible; thus award of front pay was not abuse of discretion); *Price v. Marshall Erdman & Assocs., Inc.*, 966 F.2d 320, 325-26 (7th Cir. 1992) (holding that after jury rejected employer's claim incompetence in finding for plaintiff, trial court cannot then rely on employer's continuing belief of incompetence in denying reinstatement; but reinstatement of high-level employee performing discretionary functions could lead to constant judicial supervision and this justifies denial of reinstatement unless front pay cannot be computed); *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 729-30 (8th Cir. 1992), *cert. denied*, 506 U.S. 1014 (1992) (holding that failure of plaintiff to request reinstatement in pleadings is not absolute bar to award of front pay); *EEOC v. Century Broadcasting*

restoration of benefits.<sup>57</sup> Also, attorney fees may be awarded.<sup>58</sup> Because of the limitations on the available relief, state employees seeking to enforce the ADEA will want to consider the alternative, addressed in the next section, of filing a state court action.

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Corp., 957 F.2d 1446, 1462-64 (7th Cir. 1992) (upholding denial of reinstatement where it would have disrupted operation of radio station and displaced announcers currently employed, but reversing denial of front pay); *Reneau v. Wayne Griffin & Sons, Inc.*, 945 F.2d 869, 870 (5th Cir. 1991) (holding that award of front pay is appropriate when reinstatement is not feasible, even where complaint did not expressly seek front pay); *Wilson v. S&L Acquisitions Co., L.P.*, 940 F.2d 1429, 1438 (11th Cir. 1991) (holding that while trial court has broad discretion to grant equitable relief, if it refuses such relief "it must carefully articulate its rationale;" here front pay should have been awarded); *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1421-24 (4th Cir. 1991) (holding that when reinstatement is not appropriate, front pay is available as remedy to avoid potential of future loss); *Spulak v. KMart Corp.*, 894 F.2d 1150, 1157-58 (10th Cir. 1990) (upholding front pay award, even though reinstatement preferred, based on plaintiff's assertion that he would have problems returning to managerial position because he had been humiliated in front of his employees and because he feared retaliation based on what he observed in the past); *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1065-66 (8th Cir. 1988) (holding that district court did not abuse its discretion in awarding front pay in lieu of reinstatement where there was substantial animosity between parties and nature of business required high degree of mutual trust and confidence); *Anastasio v. Schering Corp.*, 838 F.2d 701, 708 (3rd Cir. 1988) (holding front pay discretionary); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1553 (10th Cir. 1988) (holding that front pay appropriate where tension between plaintiff and defendant precludes reinstatement); *Bruno v. Western Elec. Co.*, 829 F.2d 957, 966 (10th Cir. 1987) (finding front pay available as a substitute for reinstatement.)

While it is clear that front pay is available under the ADEA, whether this constitutes prospective equitable relief for purposes of the Eleventh Amendment is less clear. In actions under other statutes, courts have decided that front pay, in contrast to reinstatement, is barred by the Eleventh Amendment. *See, e.g., Campbell v. Arkansas Dept. of Corr.*, 155 F.3d 950, 962 (8th Cir. 1998); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 697-98 (3rd Cir. 1996); *Freeman v. Michigan Dept. of State*, 808 F.2d 1174, 1179 (6th Cir. 1987). However, these cases are suspect because they did not fully explore the nature of front pay, such as the fact that it is an alternative to the preferred remedy of reinstatement and is usually triggered by the employer's assertion that reinstatement is not feasible for some reason, such as animosity. If the plaintiff seeks and is entitled to reinstatement, but the court awards front pay because of the employer's resistance to reinstatement, the Eleventh Amendment should not bar the alternative form of relief invited by the employer. Front pay, in this situation, has either been consented to by the employer or it is, like attorney fees, ancillary to prospective injunctive relief. *See infra* note 58. In *Edelman v. Jordan*, 415 U.S. 651, 668 (1974), the Court recognized the permissible "ancillary effect on the state treasury" of prospective injunctive relief. ADEA plaintiffs should pursue reinstatement and address front pay as an alternative only after the employer argues that, from its perspective, reinstatement is not feasible.

57. *Sharkey v. Lasmo*, 214 F.3d 371, 375 (2nd Cir. 2000) (finding that plaintiff is entitled to lost pension benefits, either as a form of equitable relief - lost service and salary credits restored to his pension plan - or an award of damages to compensate him for the value of the lost pension benefits); *Banks v. Travelers Cos.*, 180 F.3d 358, 365 (2nd Cir. 1999) (holding that restoration of benefits is equitable relief and should be decided by judge, not jury). To lessen Eleventh Amendment concerns, ADEA plaintiffs should seek such relief as part of prospective equitable relief, e.g., protecting a future benefit.

58. *See* 29 U.S.C. § 626(b), incorporating 29 U.S.C. § 216(b). *See also* BODENSTEINER AND LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 7:37 (1987 and 2000 Supp.). The Eleventh Amendment does not bar a fee award because fees are ancillary to prospective injunctive relief. *Missouri v. Jenkins*, 491 U.S. 274, 279-80 (1989). *See also* *Hutto v. Finney*, 437 U.S. 678, 693-97 (1978).

### C. State Court Actions to Enforce the ADEA.

It appears counterintuitive that an individual's ability to enforce rights provided by a federal statute such as the ADEA should depend on the state in which the challenged employment decision is made, but this does seem to be the effect of the Supreme Court decision in *Alden*.<sup>59</sup> The *Alden* Court held that Congress, in passing the Fair Labor Standards Act (FLSA), did not have the authority to mandate that states open their courts to lawsuits brought under that Act.<sup>60</sup> This decision marked another major step by a five-justice majority purportedly interested in restoring the proper balance of power between the federal and state governments.<sup>61</sup> The Court reasoned that the Eleventh Amendment should not be read literally to bar only suits against states in a federal forum.<sup>62</sup> Historically, the purpose of the Amendment was to clarify that the Constitution did not alter the "universal" doctrine that a sovereign cannot be sued without its consent.<sup>63</sup> The Court found no evidence in the text or history of the Constitution that the states were required "to relinquish this portion of their sovereignty," and it saw no basis to restrict the immunity based on the forum.<sup>64</sup> Thus, it concluded that "the Constitution reserves to the states a constitutional immunity from private suits in their own courts which cannot be abrogated by Congress."<sup>65</sup>

While the earlier decision of *Howlett v. Rose*<sup>66</sup> indicated that the states could not close their doors to Section 1983 claims<sup>67</sup> by imposing a state-created immunity,<sup>68</sup> the Court in *Alden* emphasized that *Howlett* involved a school board, not an arm of the state, and thus the constitutional defense of sovereign immunity was not at issue.<sup>69</sup> The Court in *Howlett* simply rejected an immunity defense that would have been unavailable to the board if the action had been brought in a federal forum.<sup>70</sup> *Howlett*, therefore,

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59. *Alden v. Maine*, 527 U.S. 706 (1999).

60. *Id.* at 712.

61. *Id.* at 748 ("[O]ur federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."); *Id.* at 758 ("Congress must accord States the esteem due to them as joint participants in a federal system.").

62. *Id.* at 736 ("[T]he bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit.").

63. *Id.* at 715-16.

64. *Id.* at 731-48.

65. *Id.* at 739-40. The Court clarified that it was addressing only congressional power under Article I. It noted that Section 5 of the Fourteenth Amendment may confer broader authority. See *id.* at 756.

66. 496 U.S. 356 (1990).

67. 42 U.S.C. § 1983 creates a cause of action against persons acting under color of state law who violate rights created by the Constitution or federal law. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION 448 (1999). See also BODENSTEINER AND LEVINSON, *supra* note 58, ch. 1.

68. *Howlett v. Rose*, 496 U.S. at 380-81.

69. *Alden*, 527 U.S. at 740.

70. *Id.*

cannot be read to mean that Congress can open the state courts to suits against states. Rather, it means that states cannot discriminate against federal claims and cannot change the scope of federally provided rights by creating immunity barriers.<sup>71</sup>

Although rejecting congressional power to abrogate the states' immunity from private suit in their own courts by Article I legislation, the Court recognized that "sovereign immunity bars suits only in the absence of consent."<sup>72</sup> It proceeded summarily to conclude, however, that Maine had not waived its immunity from suit to enforce the FLSA in its own courts because the Maine judiciary adheres to the general rule that "a specific authority conferred by an enactment of the legislature is requisite if the sovereign is to be taken as having shed the protective mantle of immunity."<sup>73</sup> Although Maine had consented to certain classes of suits while maintaining its immunity from others, there was no evidence that the State had "manipulated its immunity in a systematic fashion to discriminate against federal causes of action."<sup>74</sup> Applying the *Alden* analysis to ADEA claims, it appears clear that state courts may look to their own law on sovereign immunity in determining whether there has been a waiver regarding federal claims, but states cannot discriminate "in a systematic

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71. *Id.* at 754-55. Although the Court in *Alden* notes that Congress has broader power to authorize private suits against non-consenting States pursuant to its Section 5 enforcement power, the Court's holdings in *Boerne, Florida Savings Bank* and *Kimel* suggest that even legislation enacted under Section 5 is in jeopardy if it does not meet the restrictive "congruence and proportionality" test. See discussion of these cases and their application to the ADA, *infra* notes 95-121 and accompanying text.

72. *Id.* at 755. States may also waive their Eleventh Amendment immunity from suit in federal court, but the Supreme Court has emphasized that any consent to suit must be "unequivocally expressed." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). Thus, in *Florida Dept. of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981), the Court held that even though Florida law specifically provided that the Department of Health was a "body corporate" with the capacity to sue and be sued, this provision waived only the State's common law sovereign immunity, not its constitutional immunity from suit in federal court under the Eleventh Amendment. Similarly, California's general consent to suit, absent a specific waiver applicable to federal court, would not eliminate the Eleventh Amendment problem. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985). These cases suggest that a state's general waiver of sovereign immunity may subject it to suit in state court, but that a more stringent standard is applied to waive Eleventh Amendment immunity. To date, only one state has broadly waived its Eleventh Amendment immunity. See *Grotta v. State of Rhode Island*, 781 F.2d 343, 347 (1st Cir. 1986) (holding that State's highest court has authoritatively found that Rhode Island law was intended to waive immunity from suit in federal court). Thus, federal discrimination claims against state employers in Rhode Island may be pursued in a federal forum, although because of the Supreme Court's later ruling in *Will v. Michigan*, *supra* note 21, the state itself cannot be named as a defendant in a Section 1983 suit. Waiver will also be found in a specific case where the state fails to object and proceeds to respond to the complaint. See, e.g., *In re Jackson*, 184 F.3d 1046, 1048-50 (9th Cir. 1999) (holding that California Franchise Tax Board waived its Eleventh Amendment immunity when it filed a proof of claim for unpaid state income taxes in a bankruptcy proceeding); *Hill v. Blind Indus. & Servs of Maryland*, 179 F.3d 754, 758-763 (9th Cir. 1999) (holding that by defending the case on the merits and proceeding to trial, state agency unequivocally indicated its consent to the jurisdiction of the federal court and waived its Eleventh Amendment immunity).

73. *Alden*, 527 U.S. at 757-58, citing *Cushing v. Cohen*, 420 A.2d 919, 923 (Me. 1980).

74. *Id.* at 758.



fashion" against federal claims when they waive their immunity. Aside from these two principles, the Court's abbreviated analysis of the state waiver issue has provided little guidance to state courts.

Since *Alden* leaves the state courts free to determine their own immunity law as long as they do not discriminate, a state that traditionally follows a specific waiver rule could decide that ADEA rights can be enforced in state court only if the state has waived its immunity to age discrimination claims. Some courts in the wake of *Alden* have interpreted their immunity law to require plain, clear, and unmistakable language regarding consent to FLSA claims.<sup>75</sup> On the other hand, a state with a statute prohibiting age discrimination in employment by state government, and providing a right of action in state court to enforce the law, could not close its courts to ADEA claims against the state. To do so would violate the anti-discrimination principle set forth in *Howlett* and *Alden*. In *Howlett*, the Court emphasized that under the Supremacy Clause, state courts have a responsibility to enforce federal law "in the absence of a valid excuse," and concluded that there is no valid excuse for discriminating against federal law.<sup>76</sup> The petitioners in *Alden* argued Maine had discriminated against federal rights, in violation of *Howlett*, because the state waived its sovereign immunity with respect to certain statutory wage and hour provisions while refusing to waive its immunity from suit with regard to FLSA's wage and hour provisions. Although the Supreme Court summarily concluded that the State had not "manipulated its immunity in a systematic fashion to discriminate against federal causes of action," it is important to note that the Maine Supreme Court found no waiver because the state statute explicitly excluded public employees from the state's overtime provision.<sup>77</sup> The Maine Supreme Court, in fact, acknowledged that under state law "a legislative waiver of the sovereign's immunity from suit may be found implicit in a general scheme plainly contemplating that the State will become party to certain kinds of contracts," but it concluded

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75. For example, in *Lawson v. University of Tennessee*, 2000 WL 116312 (Tenn. Ct. App. 2000), the court held that a statute allowing the Tennessee Claims Commission to entertain suits against the state by employees claiming deprivation of statutory rights under Tennessee law could not provide the basis for bringing an FLSA claim. The court reasoned that under Tennessee law, any legislation authorizing suits against the state, whether for monetary or declaratory relief, had to contain plain, clear and unmistakable language "as to leave nothing to surmise or conjecture." The court reasoned that the legislature expressly allowed the Claims Commission to assume jurisdiction only for claims alleging deprivation of state statutory rights, not federal rights. Although arguably this permits the Claims Commission to discriminate against federal statutory claims, the court nonetheless concluded that the statutory scheme creating the Claims Commission could not be interpreted to reflect state waiver of its sovereign immunity to FLSA claims.

76. 496 U.S. at 369-81. See also *McKnett v. St. Louis & S.F. R. Co.*, 292 U.S. 230, 233-34 (1934) ("The federal Constitution prohibits state courts of general jurisdiction from refusing [to hear a case] solely because the suit is brought under a federal law.").

77. *Alden v. Maine*, 715 A.2d 172, 175 (Me. 1998).



that an implied waiver cannot be found when the legislature makes an unambiguous statement preserving the State's sovereign immunity from suit.<sup>78</sup>

The concept of implied state waiver of its immunity may mean that litigants will have a state forum for vindicating federal statutory rights even when the doors to the federal courts have been closed. The Seventh Circuit has indeed acknowledged the availability of a state forum regarding claims brought against the State of Illinois under the Americans with Disabilities Act. In *Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois University*,<sup>79</sup> it concluded that although the ADA was not a valid abrogation of the state's Eleventh Amendment immunity from suit in a federal forum, the plaintiff could proceed in state court. The Seventh Circuit reasoned that "although states may implement a blanket rule of sovereign immunity, Illinois has not done this."<sup>80</sup> To the contrary, Illinois had opened its courts to claims based on state law, including state laws prohibiting disability discrimination by units of state government, and thus Illinois could not exclude claims based on federal law. Because Illinois had a specific statute prohibiting disability discrimination, the court did not address the question whether a more general waiver would suffice. However, states without an age discrimination statute, or with a statute that provides for administrative enforcement only, will not have to hear ADEA claims against the state. This result is ironic in light of Justice O'Connor's statement in *Kimel* that cutting off claims under the ADEA does not leave state employees without a remedy since they are "protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union."<sup>81</sup> In those states that provide no meaningful remedy for age discrimination under state law, the absence of a state remedy may actually provide the justification for cutting off the federal ADEA remedy in a state forum. This narrow approach

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78. *Id.* at 175-76, citing *Drake v. Smith*, 390 A.2d 541, 545.

79. 207 F.3d 945, 952 (7th Cir. 2000).

80. *Id.*

81. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91 (2000). Justice O'Connor's list of state statutes in *Kimel*, 528 U.S. at 92 n. \* is misleading. For example, Indiana has a law prohibiting age discrimination, IND. CODE § 22-9-2-1, *et. seq.*, but in defining who is a covered employer the act specifically excludes any person or government entity that is subject to the ADEA. Thus, in any case where the ADEA applies, there is no state cause of action for age discrimination in employment. See *Keitz v. Lever Bros. Co.*, 563 F. Supp. 230, 233-34 (N.D. Ind. 1983) (holding that because suit could be brought under federal law, relief under state law is unavailable; therefore, Indiana is not a deferral state for purposes of the ADEA and age bias claims in Indiana are governed by the shorter 180-day limitations period). After *Kimel*, the critical question is how to interpret the statutory exclusion of employers "subject to the federal age discrimination in employment act." IND. CODE § 22-9-2-1. If, as this article contends, the ADEA is valid as an enactment under the Commerce Clause—the EEOC may enforce the Act in federal court and Indiana state courts may entertain ADEA suits against a state employer—state employers are still "subject to" the federal law and the state remedy is still unavailable.

appears to be the position adopted by a few states interpreting their waiver law in the context of post-*Alden* FLSA claims brought in state court.<sup>82</sup>

States which have traditionally recognized a broader waiver principle should not be permitted to cut off federal statutory claims. Litigants should carefully research state law to determine whether it generally allows plaintiffs to sue the state.<sup>83</sup> Although the Supreme Court in *Alden*

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82. See *Lawson*, *supra* note 75. Also in *Virginia v. Luzik*, 524 S.E.2d 871 (Va. 2000), the Virginia Supreme Court ruled that only action by the state legislature, and not the conduct of an attorney for the commonwealth, could constitute a waiver of the state's sovereign immunity and consent to FLSA suits. Many states share this view. 72 AMJUR STATES § 119 (1974, 1999 Supp.) The court then rejected the notion that the legislative waiver of immunity regarding debts owed under a contractual relationship could be construed to include claims for unpaid wages by state employees. The court reasoned that even if the state waiver statute could be extended to allow FLSA actions, the suit "was not brought in the style of a contract claim or in the manner prescribed for such claims by the statutory scheme." *Id.* at 207. Invoking *Alden's* assertion that sovereign immunity was a right reserved to the states by the United States Constitution, the court refused to give a broad interpretation to what it described as a limited waiver of sovereign immunity. *Id.* at 208. Similarly, in *Allen v. Fauver*, 742 A.2d 594 (N.J. Super. Ct. App. Div. 2000), the court held that New Jersey's Contractual Liability Act, pursuant to which New Jersey waived its sovereign immunity from liability for claims arising from contract disputes, would not constitute the state's waiver of actions brought under the FLSA. First, the court reasoned that plaintiffs characterized the defendants' obligations to them as "quasi-contractual," and the statute specifically excluded the state's liability for contracts implied in law. Additionally, the court ruled that even if the act could be construed as waiving immunity for FLSA claims, it required filing a notice of claim within 90 days, and thus the plaintiff's claim was time-barred.

Although the Supreme Court's decision in *Alden* dictates that state law is critical in assessing the waiver issue, the notice question is less clear. In *Felder v. Casey*, 487 U.S. 131 (1988), the Supreme Court held that plaintiffs need not comply with state notice requirements as a precondition to bringing a Section 1983 suit in state court. The Court reasoned that the notice provision conflicted with the remedial objectives of Section 1983, and thus was pre-empted under the Supremacy Clause. See also *Rogers v. Saylor*, 760 P.2d 232, 238-39 (1988) (holding that Oregon statute that places cap on general damages and precludes punitive damages in tort actions against a state cannot be applied to Section 1983 actions brought in a state forum). Superficially, the analysis in *Felder* appears to conflict with that in *Alden*. In *Felder*, the Court reasoned that although state procedural rules apply to federal claims brought in state court, it also found that the state notice-of-claim statute is "more than a mere rule of procedure... the statute is a substantive condition on the right to sue governmental officials and entities." 487 U.S. at 152. On the other hand, by definition Section 1983 claims cannot be brought against a state, see *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), and thus *Felder* and its progeny do not address the newly invigorated state sovereign immunity question.

83. See, e.g., *Bachmeier v. Hoffman*, 1 P.3d 1236, (Wyo. 2000), concluding that the State had waived its sovereign immunity from an FLSA claim by enacting a limited waiver of immunity under the Wyoming Governmental Claims Act.

The issue of state waiver may be quite complex. For example, the Indiana Supreme Court broadly abrogated common law sovereign immunity in 1972 and held that Indiana could be liable in damages for a breach of duty owed to a private individual. *Campbell v. State*, 284 N.E.2d 733, 737 (Ind. 1972). See also *Burr v. Duckworth*, 547 F. Supp. 192, 195 (N.D. Ind. 1982) (holding that Indiana no longer adheres to the doctrine of sovereign immunity and thus generally the state cannot assert immunity from liability in state court proceedings for damages resulting from the exercise of proprietary or governmental functions). Although this appears straightforward, the Indiana Supreme Court in *Campbell* cautioned that sovereign immunity remains a viable doctrine for judicial and legislative governmental activities, and also cited as authoritative the basic principle that sovereign immunity continues to exist for discretionary acts or omissions. *Id.* Indiana courts, however, have interpreted the discretionary function exception quite narrowly, and these decisions should not foreclose employees from bringing age

recognized that a state may "consent to certain classes of suits while maintaining its immunity from others,"<sup>84</sup> the question will be how broadly or narrowly the "class" of suits is defined under state law. For example, under a broad interpretation the availability of workers' compensation claims, wage claims, unemployment compensation claims, wrongful discharge claims or any other statutory or common law claims against state government would be sufficient to open the door to ADEA claims. Although the State of Maine allowed some wage suits by state employees, its highest court determined that since state law specifically excluded public employees from the overtime provision, Maine had not waived its immunity from state or FLSA actions seeking overtime wages even if it recognized the doctrine of implied waiver.<sup>85</sup> The Supreme Court in *Alden* did not

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discrimination claims against a state employer. For example, in *Orem v. Ivy Tech State College*, 711 N.E.2d 864 (Ind. App. 1999), the court permitted a suit against a state college for breach of contract. On the other hand, *Orem* suggests that age discrimination claims may be characterized as torts since Indiana law broadly defines a tort as "a legal wrong committed upon a person or property independent of contract." *Id.* at 868. Further, Indiana courts have ruled that employees alleging "retaliatory discharge" are, in essence, bringing a claim that sounds in tort. *Biens v. Bloom*, 674 N.E.2d 998, 1002-03 (Ind. App. 1996) (holding that retaliatory discharge of an at will employee gives rise to a cause of action in tort, rather than a claim for breach of contract).

This characterization is important because the Indiana legislature enacted the Tort Claims Act, IND. CODE § 34-13-3-1, *et seq.*, in response to *Campbell* and this Act imposes several restrictions on government liability. First, it grants immunity where the loss results from certain listed activities, most importantly "the performance of a discretionary function," thus codifying the common law notion referred to in *Campbell*. IND. CODE § 34-13-3-3(6). Second, the Act requires that for any claim against the state, notice must be filed within 270 days after the loss occurs, IND. CODE § 34-13-3-6 (stating that, as to other political subdivisions, notice must be filed within 180 days, IND. CODE § 34-13-3-8). Third, the Act imposes limitations on liability, i.e., a cap on compensatory damages and a prohibition on any punitive damages against governmental entities. IND. CODE § 34-13-3-4.

The first restriction, the "discretionary function" exception, should not be a problem with regard to particularized employment decisions. In *Peavler v. Monroe City Board of Commissioners*, 528 N.E.2d 40 (Ind. 1988), the Indiana Supreme Court ruled that the discretionary functions exception "insulates only those significant policy and political decisions which cannot be assessed by customary tort standards." *Id.* at 45. The court emphasized that, "discretionary immunity must be narrowly construed because it is an exception to the general rule of liability." *Id.* at 46. Immunity is justified only where the tort involves basic planning and policymaking functions, and the government bears the burden of showing that a policy decision where risks and benefits must be balanced has occurred. *Id.* at 47. See also *DFI v. Worthington Bancshares, Inc.*, 728 N.E.2d 899, 903 (Ind. App. 2000) (determining whether a government act is discretionary, Indiana courts apply a planning test and ask whether the challenged act involves "the formulations of basic policy characterized by official judgment, discretion, weighing of alternatives, and public policy choices.").

In short, Indiana courts should be open to ADEA suits because the state has adopted a broad waiver theory, limited only by specific statutes, such as the Indiana Tort Claims Act, which are to be narrowly construed; and employment claims, even if characterized as tort actions, do not fall within any of the statutory exceptions to the Tort Claims Act. Litigants should note, however, that waiver of sovereign immunity may be conditioned on compliance with the terms of a specific statute, and thus notice provisions and other restrictions should be strictly observed. State courts have noted these limitations with regard to FLSA claims. See cases discussed *supra* note 82.

84. *Alden v. Maine*, 527 U.S. 706, 758 (1999).

85. *Alden v. State*, 715 A.2d 172, 175 (Me. 1998).

address the specifics of Maine law, but the opinion suggests that states will be given broad discretion in deciding when they will consent to suit, absent evidence "the state has manipulated its immunity in a systematic fashion to discriminate against federal causes of action."<sup>86</sup> Although the *Alden* Court noted that "[m]any States, on their own initiative, have enacted statutes consenting to a wide variety of suits," thus purportedly mitigating the "rigors of sovereign immunity", the decision has been read by some states as an invitation to adopt a restrictive approach to the waiver issue.<sup>87</sup> Nonetheless, in those states that have taken a less stringent approach to state sovereignty, it may be argued that since civil rights claims are often viewed as analogous to state tort claims,<sup>88</sup> a broad waiver of governmental immunity from state tort claims should be sufficient to open the door to a federal statutory claim to enforce the ADEA.<sup>89</sup>

This battle will have to be fought in the state courts. Based on *Alden*, the courts of each state will have to determine whether the state has waived its immunity to an ADEA claim. Presumably, the determination of the highest state court could be reviewed by the U.S. Supreme Court only if there is a federal question, e.g., whether there is a discrimination problem.<sup>90</sup> On the other hand, if a state decides that waiver of general tort immunity opens its doors to ADEA claims, there would be no basis for Supreme Court review.<sup>91</sup>

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86. *Alden*, 527 U.S. at 758.

87. *Id.* at 755. In the wake of *Alden*, some state courts have overruled earlier decisions rejecting a sovereign immunity defense to federal FLSA claims. See, e.g., *Lawson v. University of Tennessee*, 2000 WL 116312, discussed *supra* note 75. In this case, the Tennessee Supreme Court held that a state employee's action under the FLSA in state court was not barred by the doctrine of sovereign immunity, but that ruling, the court now reasoned, was premised on a belief - since discredited by *Alden* - that Congress validly waived the state's immunity. *Id.* at 3. Other courts, such as the Virginia Supreme Court, have relied on *Alden* to justify a restrictive interpretation of the waiver issue. See *Virginia v. Luzik*, *supra* note 82.

88. *Wilson v. Garcia*, 471 U.S. 261, 268-70 (1985). See also discussion of Indiana law, *supra* note 83.

89. The federal courts have taken this position when state sovereign immunity defenses have been raised as a defense to Section 1983 claims. See, e.g., *Bishop v. John Doe No. 1*, 902 F.2d 809, 810 (10th Cir. 1990) (holding that state consent to suit in its tort claims acts allows federal civil rights actions to be commenced in state courts, though not in federal court); *Weller v. Dept. of Soc. Serv's. for Baltimore*, 901 F.2d 387, 397 (4th Cir. 1990) (holding that the State's waiver of sovereign immunity in tort claims precludes this defense in § 1983 actions brought in state court); *Giancola v. State of W. Virginia Dept. of Pub. Safety*, 830 F.2d 547, 552 (4th Cir. 1987) (holding that, although insufficient to waive Eleventh Amendment immunity, general waiver of sovereign immunity subjects State to suit under Section 1983 in state court). Although the Supreme Court in *Will*, *supra* note 82, has now ruled that states are not subject to suit under Section 1983 because Congress did not intend to include them under that statute, the discussion of state waiver law is still valid.

90. *Murdock v. City of Memphis*, 87 U.S. 590 (1875).

91. *Michigan v. Long*, 463 U.S. 1032, 1039-40 (1983).



#### D. Suits by the EEOC

The ADEA gives the EEOC authority to bring actions to enforce the rights of private individuals<sup>92</sup> and, in such actions, the full range of ADEA relief is available.<sup>93</sup> *Kimel* does not change the feasibility of such actions brought by the EEOC because the 1974 amendment to the ADEA extending it to state and local government is a valid exercise of Congress' Commerce Clause power,<sup>94</sup> and because suits by the EEOC are not barred by the Eleventh Amendment.<sup>95</sup> In an analogous situation, the Supreme Court in *Alden* explicitly recognized that the FLSA remains enforceable against state government in actions brought by the U.S. Department of Labor.<sup>96</sup>

The decision in *Kimel* suggests that the EEOC should make actions on behalf of state government employees a priority in order to promote the intention of Congress to end age discrimination in employment by state government. While the EEOC obviously cannot devote all of its litigation resources to ADEA claims against state government employers, these suits should become a priority because the *Kimel* limitations on private enforcement do not affect state employees with other discrimination claims,<sup>97</sup> except possibly state employees with ADA claims.

### III.

#### PROPOSED COURSES OF ACTION AGAINST STATE AND LOCAL GOVERNMENT EMPLOYERS TO ENFORCE FEDERALLY PROTECTED RIGHTS OF PERSONS WITH A DISABILITY

##### A. *Kimel Should not Control the ADA.*

In view of the Court's recent federalism decisions, including those dealing with the Eleventh Amendment, it is likely that the result in the pending ADA case<sup>98</sup> will be controlled by *Kimel*. Prior to *Kimel*, several

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92. 29 U.S.C. § 626(c)(1); 29 C.F.R. § 1626.15(a)(8). However, commencement of an action by the EEOC terminates the right to bring a private action. 29 U.S.C. § 626(c)(1) see also *Settino v. City of Chicago*, 642 F. Supp. 755, 758 (N.D. Ill. 1986); *Jones v. City of Jonesville, Wis.*, 488 F. Supp. 795, 797 (D. Wis. 1980) ("[C]learly Congress intended to bar an individual suit under the ADEA when the EEOC had already commenced suit.").

93. See, e.g., *EEOC v. O'Grady*, 857 F.2d 383, 386 (7th Cir. 1988); *EEOC v. Prudential Fed. Sav. & Loan Admin.*, 763 F.2d 1166, 1171-73 (10th Cir. 1985), cert. denied, 474 U.S. 946 (1985); *Jones v. City of Jonesville, Wis.*, 488 F. Supp. 795, 797 (D. Wis. 1980).

94. See *supra* note 20.

95. *Alden*, 527 U.S. at 759-60.

96. *Id.*

97. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding that, in extending Title VII of the Civil Rights Act of 1964 to state government employers, Congress abrogated their Eleventh Amendment immunity).

98. See *supra* note 11.



circuits had ruled that Congress acted within its power in extending the ADA to include state and local government employers. Decisions from the Second, Third, Fourth, Fifth, Seventh, Ninth, Tenth and Eleventh Circuits all held that the ADA was appropriately enacted by Congress under Section 5 of the Fourteenth Amendment.<sup>99</sup> Only the Eighth Circuit had clearly ruled otherwise.<sup>100</sup> Since *Kimel*, however, some courts have begun to reevaluate the issue. For example, in *Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois University*,<sup>101</sup> the Seventh Circuit reversed its position and concluded that Title I of the ADA was not authorized by the enabling clause of the Fourteenth Amendment because it goes beyond the rational basis test that applies to distinctions on the ground of disability and "presumptively forbid[s] consideration of attributes that the Constitution permits states to consider."<sup>102</sup> Other lower courts have found this analysis persuasive.<sup>103</sup>

There is, however, a strong argument that this result is not dictated by

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99. *Muller v. Costello*, 187 F.3d 298, 307-11 (2d Cir. 1999) (holding that Congress properly abrogated the states' Eleventh Amendment immunity in enacting the ADA); *Yeskey v. Pennsylvania Dept. of Corrs.*, 118 F.3d 168, 172-73 (3d Cir. 1997) (holding that prisoner may seek injunctive relief against the state under Title II of the ADA); *Amos v. Maryland Dept. of Pub. Safety & Corr. Servs.*, 178 F.3d 212, 216-23 (4th Cir. 1999), *reh. granted en banc*, judgment vacated (Dec. 28, 1999) (holding that the ADA is valid exercise of Congress' power under Section 5 of the Fourteenth Amendment, and thus there is no Eleventh Amendment protection from suit by disabled state prisoners); *Coolbaugh v. Louisiana*, 136 F.3d 430, 441 (5th Cir.), *cert. denied*, 525 U.S. 819 (1998) (rejecting Eleventh Amendment immunity defense); *Crawford v. Indiana Dept. of Corrs.*, 115 F.3d 481, 487 (7th Cir. 1997) (holding that Title II of the ADA was validly enacted under Congress' Section 5 power); *Dare v. California*, 191 F.3d 1167, 1173-76 (9th Cir. 1999) (holding that the ADA is valid exercise of congressional authority, and thus suit is permitted under Title II); *Martin v. Kansas*, 190 F.3d 1120, 1125-28 (10th Cir. 1999) (holding that the ADA's abrogation of Eleventh Amendment immunity was a valid exercise of Congress' Section 5 power); *Seaborn v. Florida Dept. of Corrs.*, 143 F.3d 1405, 1407 (11th Cir. 1998) (upholding Title II claim).

100. *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1005-10 (8th Cir. 1999), *cert. granted*, 528 U.S. 1146, *dismissed*, 120 S. Ct. 1265 (2000) (holding that Congress lacked the power to abrogate state immunity under Title II of the ADA); *DeBose v. Nebraska*, 186 F.3d 1087, 1088 (8th Cir. 1999) (extending *Alsbrook* to include claims brought under Title I of the ADA). Note that although the Fourth Circuit in *Amos*, *supra* note 99, generally upheld congressional waiver, in *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698, 705-08 (4th Cir. 1999), it invalidated an ADA regulation prohibiting public entities from charging a fee to cover costs of "accessibility programs" because it found this did not fall within the remedial scope of Congress' enforcement power.

101. 207 F.3d 945, 952 (7th Cir. 2000).

102. *Id.* at 949. The Eighth Circuit has reaffirmed its previous holdings that both Title I and Title II of the ADA cannot be sustained under the abrogation doctrine. *Walker v. Missouri Dept. of Corrs.*, 213 F.3d 1035 (8th Cir. 2000). See also *Lavia v. Pennsylvania Dept. of Corrs.*, 224 F.3d 190 (3<sup>rd</sup> Cir. 2000) (holding that ADA not valid under Section 5 of the Fourteenth Amendment).

103. In *Cooley v. Mississippi Dept. of Transp.*, 96 F. Supp.2d 565 (S.D. Miss. 2000), the court predicted that if again faced with the issue, the Fifth Circuit would follow the Seventh Circuit's lead in *Erickson* and hold that states are immune from damages suits under the ADA. Compare *Neinast v. Texas*, 217 F.3d 275, 280-82 (5<sup>th</sup> Cir. 2000) (assuming the ADA as a whole is within the Section 5 power of Congress, a regulation that goes beyond requiring states to provide access to their facilities and programs exceeds Section 5 power).

*Kimel*.<sup>104</sup> The ultimate question of congressional power under Section 5 of the Fourteenth Amendment turns on whether the substantive requirements of a statute are proportionate to any unconstitutional conduct that the statute has targeted.<sup>105</sup> In determining that the ADEA failed this test, the Supreme Court in *Kimel* emphasized three factors: (1) the Supreme Court has never found age discrimination to be in violation of the equal protection clause;<sup>106</sup> (2) the legislative record did not identify constitutional violations either generally or specifically by state government;<sup>107</sup> and (3) the remedy imposed by the ADEA was disproportionate to any problem identified.<sup>108</sup> The ADA can be distinguished on all three grounds.

In *Cleburne v. Cleburne Living Center, Inc.*,<sup>109</sup> the Supreme Court struck down a local ordinance that unconstitutionally discriminated against the mentally retarded by requiring a special use permit for a group home for their use, even though such a permit was not required for many similar uses.<sup>110</sup> Although the Court insisted that rational basis review governs disability claims, it determined the permit requirement "rested on an irrational prejudice against the mentally retarded."<sup>111</sup> A close reading of the decision reveals that the Court, in essence, subjected the city's proffered reasons in defense of the ordinance to careful scrutiny, concluding that irrational fear and prejudice are not sufficient justifications for disability

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104. The Second Circuit in *Kilcullen v. New York State Dept. of Labor*, 205 F.3d 77 (2d Cir. 2000), reaffirmed its pre-*Kimel* holding that the ADA was a valid congressional abrogation of Eleventh Amendment immunity. Similarly, in *Botosan v. Paul McNally Realty*, 216 F.3d 827 (9th Cir. 2000), the court affirmed the Ninth Circuit's pre-*Kimel* holding that the ADA is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment. See also *Cisneros v. Wilson*, 226 F.3d 1113 (10<sup>th</sup> Cir. 2000) (reaffirming the Court's pre-*Kimel* holding); *Davis v. Utah State Tax Comm'n*, 96 F. Supp. 2d 1271, 1279 (D. Utah 2000) (finding that *Kimel* did not alter the Tenth Circuit position that Congress validly abrogated the Eleventh Amendment in enacting the ADA); *Schall v. Wichita State Univ.*, 7 P.3d 1114, 1157 (Kan. 2000) ("Recent trends would lead us to believe the Supreme Court will hold the ADA is a congruent and proportional exercise of Congress' enforcement powers under § 5 of the Fourteenth Amendment, thereby abrogating Kansas' sovereign immunity."); *Jones v. Pennsylvania*, No. CIV. A. 99-4212, 2000 WL 15073 (E.D. Pa. 2000) (holding that Eleventh Amendment offers no protection to states from the ADA and a "strong majority" has held likewise); *Lewis v. New Mexico Dept. of Health*, 94 F. Supp. 2d 1217, 1228-1229 (D. New Mexico 2000) (distinguishing *Kimel* and holding Title II of the ADA is a valid exercise of Congress' Section 5 powers).

105. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000).

106. *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (holding that federal law that mandated retirement at age 60 for participants in the Foreign Service Retirement System was rational because Congress could reasonably believe that conditions overseas are more demanding); *Massachusetts Retirement Bd. v. Murgia*, 427 U.S. 307, 315 (1976) (finding that state law that required police officers to retire at age 50 was rational since physical ability generally declines with age).

107. *Kimel*, 528 U.S. at 89-90.

108. *Id.* at 90-91.

109. 473 U.S. 432 (1985). Compare *Heller v. Doe by Doe*, 509 U.S. 312 (1993) (upholding Kentucky's different standards for involuntary commitment of mentally retarded and mentally ill).

110. 473 U.S. at 450.

111. *Id.*

discrimination.<sup>112</sup> The Court in *Kimel* observed that the elderly are less likely to be singled out for unconstitutionally discriminatory treatment because all persons who live out their normal life span will experience old age.<sup>113</sup> In contrast, our society has tended to isolate and segregate individuals with disabilities.

The second way to distinguish *Kimel* is to look at the legislative findings supporting the ADA. The Supreme Court in *Kimel* determined that the legislative record did not reveal either a pattern of age discrimination committed by the states or "any discrimination whatsoever that [rises] to the level of constitutional violation."<sup>114</sup> The House report on the ADA indicated that "inconsistent treatment of people with disabilities by state or local government agencies is both inequitable and illogical."<sup>115</sup> The congressional findings refer to pervasive discrimination against persons with disabilities by many institutions that are controlled to a significant degree by state and local government, such as education, health services, and transportation.<sup>116</sup> In *Erickson*, Judge Wood noted in a dissenting opinion that the congressional findings regarding disability discrimination "explain in painstaking detail the extent of the evil."<sup>117</sup> Further, since the Supreme Court in *Cleburne*, in fact, stated that the task of determining appropriate treatment of the disabled was one for the legislature,<sup>118</sup> Judge Wood argued that deference should be given to the congressional judgment. Thus, unlike the ADEA where Congress did not identify "any discrimination whatsoever that rose to the level of constitutional violation,"<sup>119</sup> Congress compiled an immense legislative record demonstrating the severity and pervasiveness of discrimination against people with disabilities.

Third, unlike the ADEA which prohibits all age-based employment discrimination against persons in the protected class, the ADA is a much more proportional response to the problem of disability discrimination. An employer is entitled to treat a disabled person differently if there is no reasonable accommodation that will permit the individual to do the job. As Judge Wood explains in *Erickson*, "while an employer discriminating on the basis of age must demonstrate that it would be 'highly impractical' not to do so, an employer making distinctions on the basis of disability need

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112. *Id.*

113. *Kimel*, 528 U.S. at 83-85.

114. *Id.*

115. H.R. Rep. No. 101-485 (II), at 37 (1990), reprinted in U.S.C.C.A.N. 319.

116. 42 U.S.C. § 12101(a)(3).

117. *Erickson v. Board of Governors of State Colleges and Univ. for Northeastern Ill. Univ.*, 207 F.3d 945, 958 (7th Cir. 2000).

118. *Id.* at 957-58, citing *Cleburne*, 473 U.S. at 442-43.

119. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 89 (2000).

only show that 'reasonable steps' of accommodation, such as modifying work schedules, training materials, facilities, or policies, will not work."<sup>120</sup> Wood concludes that the incorporation of this reasonable standard in the duty to accommodate is "essentially a legislative incorporation of the proportionality test required under the Constitution."<sup>121</sup>

In short, the ADA only prohibits discrimination against "qualified individuals," and it requires only "reasonable accommodations" that do not impose an "undue burden" on the employer.<sup>122</sup> Further, the Court in *Kimel* recognized the well-established principle that legislation that deters or remedies constitutional violations is permitted even if it reaches some conduct which is not itself unconstitutional provided Congress is not making a substantive constitutional change.<sup>123</sup> The *Kimel* Court did not announce a new test for analyzing whether Congress appropriately exercised its Section 5 enforcement power in abrogating states' immunity. In fact, it cited case precedent that the circuits had already considered when they determined that the ADA was valid.<sup>124</sup> There is no reason for these circuits to switch their position based on *Kimel*.

For these reasons, the Court should hold that Congress' prohibition of disability discrimination by state governments as employers is within its power conferred by Section 5 of the Fourteenth Amendment and that, therefore, Congress' clear abrogation of Eleventh Amendment immunity in suits under the ADA is valid.<sup>125</sup> Such a ruling would eliminate the need for ADA plaintiffs alleging discrimination by state government to explore the alternatives discussed in Section II above.<sup>126</sup>

## B. Other Federal Claims

### 1. Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973<sup>127</sup> prohibits discrimination against individuals with a disability in "any program or activity receiving federal financial assistance."<sup>128</sup> The term "program or activity" is defined to mean all of the operations of "a department, agency,

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120. *Erickson*, 207 F.3d at 957.

121. *Id.*

122. *Id.* at 959.

123. *Kimel*, 528 U.S. at 88-89.

124. *Id.*

125. 42 U.S.C. § 12202.

126. While Section II addresses ADEA claims, each of the alternatives would apply to ADA claims as well, although the arguments may differ.

127. 29 U.S.C. § 794.

128. 29 U.S.C. § 794(a).



special purpose district, or other instrumentality of a state or of a local government," or "the entity of such state or local government that distributes such assistance and each department or agency. . . to which the assistance is extended."<sup>129</sup> In Section 504 cases alleging employment discrimination, "the standards applied under Title I of the [ADA]" shall control.<sup>130</sup> Because many agencies or departments of state and local government receive federal financial assistance, Section 504 will be a useful alternative to the ADA.

Plaintiffs alleging disability discrimination by state employees in violation of Section 504 are likely to face an Eleventh Amendment defense. In *Atascadero State Hospital v. Scanlon*, the Court held that the State of California could not be sued in federal court for violating the Rehabilitation Act.<sup>131</sup> Shortly after the decision in *Scanlon*, Congress explicitly abrogated Eleventh Amendment immunity for suits brought under Section 504, as well as other spending statutes.<sup>132</sup> This Act applies "to violations that occur in whole or in part after October 21, 1986."<sup>133</sup> However, based on *Kimel*, state employers sued under Section 504 may argue that Congress did not validly abrogate the states' Eleventh Amendment immunity.

Prior to the decision in *Kimel*, the lower courts routinely upheld the power of Congress to eliminate the Eleventh Amendment defense in claims brought pursuant to the federal funding statutes.<sup>134</sup> Some courts concluded that Congress had the power under Section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity,<sup>135</sup> while others held that Congress permissibly conditioned receipt of federal funds on an unambiguous waiver of Eleventh Amendment immunity.<sup>136</sup> The Supreme Court has consistently ruled that Congress has broad power to impose

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129. 29 U.S.C. § 794(b), incorporating 42 U.S.C. § 2000d-4a.

130. 29 U.S.C. § 794(d).

131. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

132. 42 U.S.C. § 2000d-7.

133. 42 U.S.C. § 2000d-7(b).

134. See *infra* notes 135 and 136.

135. See, e.g., *Fuller v. Rayburn*, 161 F.3d 516, 518 (8th Cir. 1998) (Title VI); *Lesage v. State of Texas*, 158 F.3d 213, 216-19 (5th Cir. 1998), *rev'd on other grounds and remanded*, 528 U.S. 18 (1999) (Title VI); *Franks v. Kentucky Sch. for the Deaf*, 142 F.3d 360, 362-63 (6th Cir. 1998) (Title IX); *Clark v. California*, 123 F.3d 1267, 1269-71 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (Section 504); *Lam v. Curators of Univ. of Missouri, Kansas City Dental Sch.*, 122 F.3d 654, 655-56 (8th Cir. 1997) (Title IX).

136. *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000) (Title IX); *Sandoval v. Hogan*, 197 F.3d 484, 492-500 (11th Cir. 1999) (Title VI), *cert. granted*, 121 S. Ct. 28 (2000); *Litman v. George Mason Univ.*, 186 F.3d 544, 549-57 (4th Cir. 1999) (Title IX); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 654 (5th Cir. 1997) (Title IX).

Compare *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (holding that mere acceptance of federal funds does not constitute a waiver; decided before Congress passed abrogation statute containing the "clear language" mandated by the Supreme Court decision).



conditions on its monetary allotments,<sup>137</sup> and that state sovereignty is not violated since states are free to reject the funds.<sup>138</sup> Provided the terms are clear, the program promotes the general welfare, the conditions are properly related to the purpose of the expenditure, and the program is not "coercive," it will be upheld.<sup>139</sup> In fact, the Court has not invalidated a conditional spending program since the 1930's.<sup>140</sup> In light of *Kimel* and the new federalism, reliance on spending power as the source for anti-discrimination measures is less problematic, and several courts have now utilized this approach in holding that states are subject to suit under Section 504 and other federal funding statutes.<sup>141</sup>

When suing under Section 504, employees should name the entity that receives the federal financial assistance as the defendant.<sup>142</sup> While administrative complaints may be filed with the federal agency disbursing the federal funds,<sup>143</sup> exhaustion of such remedies is not required before

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137. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987). See also *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *Massachusetts v. United States*, 435 U.S. 444, 461 (1978); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958); *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937); *United States v. Butler*, 297 U.S. 1, 65 (1936). This holding in *Dole* was confirmed in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 686-87 (1999).

138. *South Dakota v. Dole*, 483 U.S. at 211; *Pennhurst State Sch. & Hosp.*, 451 U.S. at 17.

139. *South Dakota v. Dole*, 483 U.S. at 206.

140. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV., 1413, 1417 (1989).

141. See *supra* note 136.

142. See *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 610-11 (8th Cir. 1999) (holding that a teacher involved in a sexual relationship with a student could not be held liable under Title IX in her individual capacity); *Floyd v. Waiters*, 133 F.3d 786, 789-90 (11th Cir. 1998) (holding that only grant recipient, in this case the local school district, can be held liable under Title IX); *Smith v. Metropolitan Sch. Dist. Perry Tp.*, 128 F.3d 1014, 1018-21 (7th Cir. 1997), *cert. denied*, 527 U.S. 951 (1998) (holding that only grant recipient can violate Title IX and, therefore, the principal and assistant principal could not be sued in either their individual or official capacity; as to the official capacity, the Court looked to Indiana law and concluded it does not give principals and assistant principals administrative control over educational programs or activities); *Grzan v. Charter Hosp. of N.W. Ind.*, 104 F.3d 116, 119-20 (7th Cir. 1997) (holding that employees of recipients of federal financial assistance are not recipients of such assistance and, therefore, are not proper defendants in an action under Section 504); *Buchanan v. Bolivar, Tenn.*, 99 F.3d 1352, 1356 (6th Cir. 1996) (holding that Title VI action could not be maintained against individuals responsible for the challenged action, but only against the entity receiving federal financial assistance); *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1449 (9th Cir. 1995) (explaining that the lower court held that school counselor, whose inaction in a peer sexual harassment case, could not be sued as an individual under Title IX, but could be sued for Title IX violations through Section 1983; Court of Appeals did not reach the issue).

*Compare Grune v. Rodriguez*, 176 F.3d 27, 33-34 (2d Cir. 1999) (holding, without discussing whether individuals were proper defendants under Section 504, they could not be liable for knowing inaction in the face of discrimination perpetrated by others, at least where the defendants were not supervisors of the perpetrators); *Mennone v. Gordon*, 889 F. Supp. 53, 57 (D. Conn. 1995) (holding that, in a Title IX action by a female high school student alleging sexual harassment by a male student, a teacher and superintendent, who were asked to intervene but refused, had sufficient control over the institution that they were proper defendants).

143. See 42 U.S.C. § 2000d-1 (Title VI); 20 U.S.C. § 1682 (Title IX); 29 U.S.C. § 794a(a)(2)

proceeding in court.<sup>144</sup> The forum state's general personal injury statute of limitations may control, but courts use a variety of limitations periods.<sup>145</sup> The full range of relief, including injunctive relief,<sup>146</sup> compensatory damages,<sup>147</sup> and attorney fees<sup>148</sup> is available under Section 504; however, punitive damages are generally not available.<sup>149</sup> The Seventh Amendment right to trial by jury applies to actions for damages under Section 504.<sup>150</sup>

Because of the uncertainty about the application of *Kimel* to the ADA, employment discrimination claims against state government should include a claim under Section 504, assuming the threshold requirement of federal financial assistance is met.<sup>151</sup>

## 2. Section 1983 - Equal Protection Clause of the Fourteenth Amendment

Persons alleging disability discrimination in employment by state government should also consider a Section 1983 claim to enforce the equal

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(making available the "remedies, procedures, and rights set forth in Title VI" to persons aggrieved by the failure of recipients of federal financial assistance to comply with Section 504). The federal agencies distributing the federal funds also have the authority to promulgate regulations. See 42 U.S.C. § 2000d-1 (Title VI); 20 U.S.C. § 1682 (Title IX); 29 U.S.C. § 794(a) (Rehabilitation Act).

144. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 706 (1979). See also BODENSTEINER AND LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY, § 8:36 (1987 and 2000 Supp.).

145. For cases using a personal injury statute of limitations, see, e.g., *Everett v. Cobb County Sch. Dist.*, 138 F.3d 1407, 1409-10 (11th Cir. 1998); *Southerland v. Hardyway Mgmt., Inc.*, 41 F.3d 250, 253-55 (6th Cir. 1995); *Cheaney v. Highland Cmty. Coll.*, 15 F.3d 79, 81 (7th Cir. 1994); *Bates v. Long Island R. Co.*, 997 F.2d 1028, 1036-37 (2d Cir.), cert. denied, 510 U.S. 992 (1993); *Baker v. Board of Regents of Kansas*, 991 F.2d 628, 631-32 (10th Cir. 1993); *Hickey v. Irving Independence Sch. Dist.*, 976 F.2d 980, 982-84 (5th Cir. 1992); *Morse v. Univ. of Vt.*, 973 F.2d 122, 124-27 (2d Cir. 1992); *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402, 407-08 (6th Cir. 1991); *Fleming v. New York Univ.*, 865 F.2d 478, 481 n. 1 (2d Cir. 1989) (applying most appropriate state statute (three-year)).

Compare *McCullough v. Branch Banking & Trust Co.*, 35 F.3d 127, 130-32 (4th Cir. 1994), cert. denied, 513 U.S. 1151 (1995) (holding that Section 504 actions governed by North Carolina's 180-day limitations period contained in its statute prohibiting discrimination based on disability, since it is the most analogous state statute and is not inconsistent with federal policies underlying Section 504); *Wolsky v. Med. Coll. of Hampton Rds.*, 1 F.3d 222, 224 (4th Cir. 1993), cert. denied, 510 U.S. 1073 (1994) (holding that one-year statute of limitations in Virginia Rights of Persons With Disabilities Act, rather than its two-year personal injury statute, governs a Section 504 action).

146. BODENSTEINER AND LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 8:40 (1987 and 2000 Supp.).

147. *Id.* at § 8:37.

148. See 29 U.S.C. § 794a(b). See also *id.* at § 8:42.

149. BODENSTEINER AND LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 8:39 (1987 and 2000 Supp.).

150. See, e.g., *Waldrop v. S. Co. Servs., Inc.*, 24 F.3d 152, 156 (11th Cir. 1994); *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823, 832-33 (4th Cir. 1994); *Smith v. Barton*, 914 F.2d 1330, 1337 (9th Cir. 1990).

151. See BODENSTEINER AND LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 8:12-8:15 (1987 and 2000 Supp.).

protection clause of the Fourteenth Amendment.<sup>152</sup> While the Eleventh Amendment prohibits such cases against the state or its agencies, government officials, in their official capacity, are subject to suit for prospective relief in accordance with the *Ex parte Young* doctrine.<sup>153</sup> Further, officials may be sued in their individual capacity for damages<sup>154</sup> subject, however, to a possible qualified immunity defense.<sup>155</sup> The primary hurdle in such cases is that only a rational basis standard will be utilized.<sup>156</sup> Although in the context of age discrimination, employees have not fared well in establishing that age bias is irrational,<sup>157</sup> *Cleburne* holds that certain fears and prejudice against the disabled may not withstand even rational basis review.<sup>158</sup>

#### IV.

#### CONCLUSION

Employees of local governmental agencies should have no problem enforcing ADEA rights in the same manner as employees of private employers. In contrast, enforcement of ADEA rights has become quite complex for state employees. However, the options discussed in Section II

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152. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). Compare *Heller v. Doe*, 509 U.S. 312 (1993).

153. See *supra* notes 44 and 49.

154. *Alden v. Maine*, 527 U.S. 706, 757 (1999); *Hafer v. Melo*, 502 U.S. 21, 25-31 (1999).

155. The so-called "good faith" immunity gives government officials an affirmative defense to individual liability where the rights asserted by the plaintiff were not clearly established at the time of the challenged action. See *BODENSTEINER AND LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY* §§ 1:40-1:41 (1987 and 2000 Supp.). An absolute immunity defense is also available to government officials, sued for damages in their individual capacity, if they were performing legislative, judicial or prosecutorial functions when taking the challenged actions. *Id.* at §§ 1:36-1:39. The absolute immunity defense generally will not be available in cases challenging employment decisions. See, e.g., *Forrester v. White*, 484 U.S. 219 (1988) (holding that absolute judicial immunity does not extend to judge's decision to terminate employee).

156. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

157. See *supra* note 106. However, despite the deferential standard applied to review claims of age bias, some lower courts have found classifications based on age to violate equal protection. See *Indus. Claim Appeals Office of the State of Colorado v. Romero*, 912 P.2d 62, 67 (Colo. 1996) (holding that statute providing that permanent total disability benefits paid to workers' compensation claimants terminate when claimant reaches 65, while allowing all other persons who sustain work-related injuries to retain workers' compensation benefits, violates equal protection provisions of federal and state constitutions); *McMahon v. Barclay*, 510 F. Supp. 1114, 1116 (S.D.N.Y. 1981) (holding that New York Civil Service Law prohibiting employment of persons over age 29 as police officers was invalid because statute bore no rational relationship to any legitimate state purpose and was violative of equal protection).

158. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). See also *Martell v. Estado Libre Asociado de Puerto Rico*, 48 F. Supp. 2d 81, 89-90 (D. P.R. 1999) (holding that former teacher who claimed disability discrimination stated § 1983 claim based on equal protection); *Wright v. City of Tampa*, 998 F. Supp. 1398, 1403 (M.D. Fla. 1998) (denying defendant's motion for summary judgment where plaintiff, a city employee, claimed disability discrimination in violation of equal protection).

above should enable state employees to enforce all, or at least a portion of, their rights guaranteed by the ADEA. The fate of state employees with ADA claims remains uncertain until the next term of the Supreme Court. However, even if the Court decides the ADA is controlled by *Kimel*, ADA plaintiffs will be able to use the alternatives explored in Section II and Section III-B.

## Strikes to Economic Strikes

Michael D. Moberly<sup>11</sup>

I. INTRODUCTION	121
II. THE EMPLOYER'S RIGHT TO CURB UNFAIR LABOR PRACTICES	
A. THE NATIONAL LABOR RELATIONS BOARD'S <i>ALLEN HOSPITAL</i> DECISION	143
B. THE BOARD'S STRIKE RECOVERY CASES	147
1. <i>The United Brotherhood of Carpenters &amp; Joiners of America</i>	147
2. <i>Nelson v. Aflac</i>	147
3. <i>Planned Parenthood v. American Family Association</i>	149
4. <i>United Brotherhood of Carpenters &amp; Joiners of America v. International Brotherhood of Teamsters</i>	150
5. <i>Chicago Beef Packers v. Chicago Beef Packers</i>	153
6. <i>The Board's Strike Recovery Decision: Low Immediacy Prior to the Board's Decision in Chicago Beef</i>	154
C. EMPLOYER'S RECOVERY IN STRIKE RECOVERY CASES: <i>Chicago Beef</i>	
1. <i>Chicago Beef Packers v. Chicago Beef Packers</i>	155
2. <i>The Board's Initial Post-Chicago Beef Recovery Decision</i>	157
3. <i>Chicago Beef Packers v. Chicago Beef Packers</i>	159
4. <i>Chicago Beef Packers v. Chicago Beef Packers</i>	161
5. <i>Chicago Beef Packers v. Chicago Beef Packers</i>	161

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<sup>12</sup> See, e.g., *Chicago Beef Packers v. Chicago Beef Packers*, 352 U.S. 102 (1956); *Chicago Beef Packers v. Chicago Beef Packers*, 352 U.S. 102 (1956); *Chicago Beef Packers v. Chicago Beef Packers*, 352 U.S. 102 (1956); *Chicago Beef Packers v. Chicago Beef Packers*, 352 U.S. 102 (1956).