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# Legal Issues Affecting the Right of State Employees to Bring Suit Under the Age Discrimination in Employment Act and Other Federal Labor Laws

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## ABSTRACT

This report discusses recent legal developments regarding the right of state employees to bring suit under federal law. The report focuses on labor and employment laws. On January 11, 2000, the United States Supreme Court held in *Kimel v. Florida Board of Regents* that state employees could not bring suit against a state under the Age Discrimination in Employment Act (ADEA) because of sovereign immunity. This issue has a direct impact on Congress' ability to enact legislation, particularly labor laws, that apply to state employees. This report also discusses *Seminole Tribe of Florida v. Florida*, *Alden v. Maine*, *City of Boerne v. Flores*, *Ex Parte Young*, and *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*. This report will be updated as developments warrant. For information on related topics see CRS Report RS20472, *The Americans with Disabilities Act: Eleventh Amendment Issues*, by Nancy Jones (February 16, 2000) and CRS Report RL30315, *Federalism and the Constitution: Limits on Congressional Power*, by (name redacted) (Sept. 21, 1999).

# Legal Issues Affecting the Right of State Employees to Bring Suit Under the Age Discrimination in Employment Act and Other Federal Labor Laws


## Summary

This report discusses recent legal developments regarding the right of state employees to bring suit under federal law. On January 11, 2000, the United States Supreme Court decided *Kimel v. Florida Board of Regents*. The case addressed the right of state employees to bring suit under the Age Discrimination in Employment Act (ADEA). The ADEA prohibits discrimination in employment based on age. The Court held that state employees cannot bring suit against the state to enforce the ADEA because of sovereign immunity. A related case brought by a state employee under the Americans with Disabilities Act (ADA) is awaiting response from the Supreme Court. Under the 11th Amendment of the U.S. Constitution, states are immune from suit unless the state consents or an exception applies. This is not the first time the Court has addressed the scope of states' rights. The *Kimel* case reflects a growing jurisprudence governing the interaction between the federal government and states. This issue has a direct impact on Congress' ability to enact legislation, particularly labor laws, that apply to state employees. This report also discusses *Seminole Tribe of Florida v. Florida, Alden v. Maine, City of Boerne v. Flores, Ex Parte Young,* and *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank.*

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# Legal Issues Affecting the Right of State Employees to Bring Suit Under the Age Discrimination in Employment Act and Other Federal Labor Laws

On January 11, 2000, the United States Supreme Court held in *Kimel v. Florida Board of Regents* that state employees could not bring suit against a state under the Age Discrimination in Employment Act (ADEA) because of sovereign immunity.[1] The ADEA prohibits discrimination in employment based on age.[2] Under the 11th Amendment of the U.S. Constitution, states are immune from suit unless the state consents or an exception applies. This is not the first time the Court has addressed the scope of states' rights. The *Kimel* case reflects a growing jurisprudence governing the interaction between the federal government and states. This issue has a direct impact on Congress' ability to enact legislation, particularly labor laws, that apply to state employees. This report discusses the cases that have preceded *Kimel* and then provides a discussion of the *Kimel* decision.

## 11th Amendment and Recent U.S. Supreme Court Decisions

The Eleventh Amendment of the U.S. Constitution states that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[3]

The U.S. Supreme Court has interpreted this constitutional provision in a number of decisions. A long history precedes the present series of cases.[4] The most significant of recent cases includes *Seminole Tribe of Florida v. Florida* in which the Court held that the "Eleventh Amendment prevents congressional authorization of suits by

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[1]139 F.3d 1426 (11th Cir. 1998), *reh'g denied*, 157 F.3d 908 (11th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3464 (U.S. Jan. 25, 1999)(No. 98-791)(No. 98-796), *aff'd*, No. 98-791, No. 98-796, slip op. (U.S. Jan. 11, 2000).

[2]For a detailed discussion of the Age Discrimination in Employment Act, see CRS Report 97-479, *The Age Discrimination in Employment Act (ADEA): Overview and Current Legal Developments*, by (name redacted).

[3]U.S. Const. amend. XI.

[4]For a detailed discussion of the evolution of the 11th Amendment, see CRS Report RL30315, *Federalism and the Constitution: Limits on Congressional Power*, by (name redacted) (Sept. 21, 1999).

private parties against unconsenting States."[5] The Court used a two-part test to determine whether Congress had properly "abrogated the State's immunity from suit."[6] The first part of the test was whether Congress explicitly expressed its intent to unilaterally abrogate state immunity, and the second was whether Congress had exercised proper authority in doing so. According to the *Seminole Tribe* Court, "Congress' intent to abrogate the States' immunity from suit must be obvious from a 'clear legislative statement.'"[7] The Court stated that authorizing suit in federal court is not enough to show Congress intended to abrogate state immunity.[8] Further, the Court noted that "mere receipt of federal funds cannot establish that a State has consented to suit in federal court."[9] After finding express intent to abrogate state immunity in the text of the statute in question, the Court turned its attention to whether Congress had exercised valid authority. Chief Justice Rehnquist, writing for the majority, "held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment."[10] Section 5 of the Fourteenth Amendment gives Congress the power to enforce the provisions of the Fourteenth Amendment.[11] However, the statute in question was enacted pursuant to Congress' power under the Indian Commerce Clause of the Constitution.[12] The Court held that neither the Indian Commerce Clause nor the Interstate Commerce Clause provided Congress authority to abrogate a state's sovereign immunity under the 11th Amendment.[13]

In its most recent term, the Court revisited the scope of the 11th Amendment in a series of cases. In *Alden v. Maine*, a group of state employees filed suit against the state to recover under the Fair Labor Standards Act (FLSA).[14] The federal district court dismissed the action based on the Court's decision in *Seminole Tribe*. The employees re-filed the case in state court which also dismissed the case on grounds of sovereign immunity. However, the Maine Supreme Court's decision conflicted with a decision by the Arkansas Supreme Court. The U.S. Supreme Court took the

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[5]517 U.S. 44, 72 (1996). According to the Court, "The Eleventh Amendment prohibits Congress from making the State of Florida capable of being sued in federal court." Id. at 76.

[6]517 U.S. at 55.

[7]517 U.S. at 55 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).

[8]517 U.S. at 56.

[9]517 U.S. at 59 (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238-239 (1985)).

[10]517 U.S. at 59. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 452-456 (1976).

[11]Section 1 of the Fourteenth Amendment states in part that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

[12]U.S. Const. art. 1, § 8, cl. 3.

[13]517 U.S. at 72-73.

[14]527 U.S. ____, No. 98-436 (U.S. June 23, 1999).

appeal to decide whether such claims could proceed in state court, even though the 11th Amendment applies only to federal courts. Ultimately, the Court held that "the powers delegated to Congress under Article I [Interstate Commerce Clause] of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."[15]

In conclusion, the Court noted that states can be sued under limited circumstances: states may be sued if they consent;[16] the United States may bring suit against a state; and a state may be sued to enforce legislation enacted pursuant to § 5 of the Fourteenth Amendment. The Court also noted that the 11th Amendment only concerns suits against states, but it did not "extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."[17] Nor does the 11th Amendment "bar all suits against state officers."[18] The Court stated:

> The rule, however, does not bar certain actions against state officers for injunctive or declaratory relief. . . . Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally.[19]

The rule established under *Ex Parte Young* allows an individual to bring suit for prospective or injunctive relief against a state officer to prevent the officer from continued violations of the statute.[20] Such an injunction preventing future violation by a state official could be enforced in federal or state court and would effectively prevent the state, through its officers, from continuing to violate federal law.

In *Alden*, the Court noted that the federal government retains the right to sue a state to enforce federal law. A logical extension of this could be the United States bringing suit under federal law against a state on behalf of affected citizens. But, it

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[15]No. 98-436, slip op. at 2.

[16] The Court has made it clear in numerous decisions that a "State's consent to suit must be 'unequivocally expressed.'" No. 98-149, slip op. at 8 (quoting Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 (1984). *See also* Atascadero State Hospital v. Scanlon, 473 U.S. 234, 241(1985). See also *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S.____, No. 98-149 (U.S. June 23) (rejecting argument that Florida voluntarily or impliedly waived its sovereign immunity by participating in interstate commerce activities regulated by federal law.). In *Seminole Tribe,* the Court stated that "mere receipt of federal funds cannot establish that a State has consented to suit in federal court." 517 U.S. at 59 (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238-239 (1985). Consent may be shown where "the State voluntarily invokes [federal court] jurisdiction or else if the State makes a 'clear declaration' that it intends to submit itself to [federal court] jurisdiction." No. 98-149, slip op. at 8 (citations omitted).

[17]No. 98-436, slip op. at 47.

[18]No. 98-436, slip op. at 48. *See* Ex parte Young, 209 U.S. 123 (1908).

[19]No. 98-436, slip op. at 48.

[20]209 U.S. 123 (1908)

is not completely clear whether the government could do so. The issue may be addressed by the Court in its current term when it will decide whether the United States can authorize citizens to sue states in the name of the United States.[21]

## Suit under Section 5 of the Fourteenth Amendment

A state's sovereign immunity may be abrogated if an individual is suing under a federal law that was enacted pursuant to Congress' power under Section 5 of the Fourteenth Amendment. Section 1 of the Fourteenth Amendment states in part that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[22] Section 5 of the Fourteenth Amendment states that, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[23]

In *City of Boerne v. Flores*, the Court struck down the Religious Freedom Restoration Act (RFRA) on the grounds that the enactment of RFRA exceeded Congress' power.[24] RFRA provided that the government could not burden a person's exercise of religion, even by a generally applicable law, unless the government showed that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[25] RFRA applied to any federal, state, or local government statute, ordinance or regulation. RFRA was enacted in response to the Court's decision in *Employment Div., Dept. Of Human Resources of Oregon v. Smith*,[26] which "held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."[27]

The issue before the Court was whether RFRA was "a proper exercise of Congress' § 5 power 'to enforce' by 'appropriate legislation' the constitutional

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[21] *See* Vermont Agency of Natural Resources v. United States ex rel. Stevens, 162 F.3d 195 (2nd Cir. 1998), *cert. granted*, 67 U.S.L.W. 3717 (U.S. Jun. 24, 1999) (No. 98-1828). This case was brought under the False Claims Act which imposes liability on a person for filing a false monetary claim with the United States government. FCA allows an individual to bring suit under the act in the name of the United States. The United States is notified of the action and given an opportunity to intervene or to dismiss the suit. The action remains in the name of the United States, but an individual that is allowed to proceed may recover a portion of the recovery; the remainder goes to the United States. The lower court held that such suits were not a violation of the 11th Amendment because the 11th Amendment does not prevent suits against states by the U.S.

[22] U.S. Const. amend. XIV, § 1.

[23] U.S. Const. amend. XIV, § 5.

[24] 521 U.S. 507 (1997).

[25] Id. at 516.

[26] 494 U.S. 872 (1990).

[27] 521 U.S. at 514.

guarantee that no State shall deprive any person of 'life, liberty, or property, without due process of law,' nor deny any person 'equal protection of the laws.'"[28] The Court looked to the history of Section 5 and found that it granted Congress the power to enact legislation that would enforce Section 5, but not the power to create new rights under Section 5.[29] RFRA did not apply merely to laws targeting religious discrimination or bigotry, but to any law that had the effect of burdening the free exercise of religion. The Court found that the legislative history did not reflect a recent history of religious persecution or a "widespread pattern of religious discrimination in this country."[30] Aside from the legislative history, the Court found that RFRA's sweeping application was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[31] RFRA, according to the Court, was not remedial legislation to enforce an existing constitutional right, but instead created a new right and therefore was beyond Congress' power to enact.[32]

In *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, the Court again addressed the scope of Congress' authority under Section 5 of the Fourteenth Amendment.[33] Reiterating the holding in *Boerne*, the Court noted that the term "enforce" used in Section 5 should be taken seriously. Section 5 should not be used to create a new federal right, but only to enforce a right under the 14th Amendment. The Court stated, "We thus hold that for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."[34]

To summarize, the Court's recent cases hold that Congress may not authorize an individual to bring suit against a state in federal or state court to enforce a federal statute without: (1) the state's consent or (2) express Congressional abrogation of state sovereign immunity subject to legislation enacted pursuant to an appropriate exercise of jurisdiction under § 5 of the Fourteenth Amendment. The Court's cases note that the 11th Amendment does not bar suit against a state by the federal government. The issue of whether an individual may bring suit against a state in the name of the federal government will be decided during the Court's current term. The Court has also held that the 11th Amendment does not bar suits against state officers for injunctive or declaratory relief or even damages if the damages are sought individually from the state officer. The Eleventh Amendment does not apply to

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[28]521 U.S. at 517.

[29]The Court in *Boerne* stated, "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." Id. at 519.

[30]Id. at 531.

[31]Id. at 532.

[32]Id. at 532-534.

[33]527 U.S. ____, No. 98-531 (U.S. June 23, 1999).

[34]Id.

municipal corporations or other governmental entities, i.e., a city or county government.

## *Kimel v. Florida Board of Regents*

In *Kimel v. Florida Board of Regents*, plaintiffs in two separate ADEA cases appealed to the U.S. Supreme Court for a review of the 11th Circuit's holding that the state was not subject to suit under the ADEA because of sovereign immunity.[35] The Court considered whether: (1) the ADEA contains a clear abrogation of states' immunity and (2) whether Congress' extension of the ADEA to states was a proper exercise of Congress' power under Section 5 of the 14th Amendment to abrogate immunity.[36] Ultimately, the U.S. Supreme Court held that Congress did give notice of its intent to abrogate state immunity, but lacked the constitutional authority under Section 5 of the 14th Amendment to do so.[37]

According to the Court, the issue boiled down to two questions: "first, whether Congress unequivocally expressed its intent to abrogate [a state's sovereign immunity]; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority."[38] As to the first question, the Court found that Congress' amendments to the ADEA that expanded the definition of employer to include states and that incorporated provisions of the Fair Labor Standards Act (FLSA), which authorized suits in any Federal or State court of competent jurisdiction, "clearly demonstrates Congress' intent to subject the States to suit . . . at the hands of individual employees."[39] The Court rejected the argument that Congress was in any way unclear about its intention to subject states to suit under the ADEA.

Turning to the second question, the Court reiterated its holding from *Seminole Tribe* and later cases, that "Congress lacks power under Article I to abrogate the

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[35]139 F.3d 1426 (11th Cir. 1998), *reh'g denied*, 157 F.3d 908 (11th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3464 (U.S. Jan. 26, 1999) (No. 98-796) (No. 98-791). The district court opinions in two of the cases, Kimel v. Florida Board of Regents and Dickson v. Florida Department of Corrections, are unreported. The district court opinion in MacPherson v. University of Montevallo is reported at 938 F. Supp. 785 (N.D. Ala. 1996). The three-judge panel that heard the appeal for the 11th Circuit issued a split decision. Judge Edmondson, writing the decision for the court, held that the ADEA expressly abrogated state immunity but that Congress did not have authority under Section 5 to do so, and therefore there was no abrogation. This decision was joined by Judge Cox, but Chief Judge Hatchett dissented finding both a congressional intent to abrogate and congressional authority under section 5.

[36]67 U.S.L.W. 3464 (U.S. Jan. 26, 1999) (No. 98-791) (No. 98-796).

[37]No. 98-791, slip op. at 2. Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas joined in parts I, II, and IV of the decision. Part III was joined by Chief Justice Rehnquist and Justices Stevens, Scalia, Souter, Ginsburg and Breyer. Justice Stevens wrote separately, dissenting in part and concurring in part, which was joined by Justices Souter, Ginsburg, and Breyer. Justice Thomas wrote an opinion concurring and dissenting in part joined by Justice Kennedy.

[38]No. 98-791, slip op. at 8.

[39]No. 98-791, slip op. at 9.

States' sovereign immunity."[40] The majority opinion states that authority to abrogate does exist under Section 5 of the Fourteenth Amendment.[41] However, this authority is limited. According to the majority, Congress "has been given the power 'to enforce,' not the power to determine *what constitutes* a constitutional violation."[42] Noting that it is a difficult line that Congress must follow, the Court "held that '[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[43]

Applying the congruence and proportionality test in this instance, the Court found that the ADEA was a disproportionate response "to any unconstitutional conduct that conceivably could be targeted by the Act."[44] The Court noted that in three previous cases, it had "held that the age classifications at issue did not violate the Equal Protection Clause."[45] Moreover, the Court stated that age classifications may be tailored to meet a legitimate state interest, particularly since age, unlike race or sex, is not a suspect classification.[46] It fails to be a suspect classification because older people "have not been subjected to a 'history of purposeful unequal treatment' and old age . . . does not define a discrete and insular minority . . . "[47] Finally, the majority opinion concluded that "the ADEA is: 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'"[48] The original plaintiffs argued that the ADEA was enacted to eliminate arbitrary age discrimination which would likely violate the Equal Protection Clause. The Court disagreed, finding "that the ADEA's protection extends beyond the requirements of the Equal Protection Clause."[49]

The Court observed that although the behavior targeted by the ADEA is unlikely to be unconstitutional, the analysis does not end there. Congress may enact prophylactic legislation. The Court then questioned whether the ADEA is a form of "enforcement" or an attempt by Congress to redefine the substance of Section 5. After reviewing the ADEA's legislative history and finding a dearth of a pattern or history of age discrimination, the Court concluded that "Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem."[50]

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[40]No. 98-791, slip op. at 14.

[41]Id. at 15.

[42]Id. at 17. (Emphasis in text).

[43]Id. (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1998)).

[44]Id. at 18.

[45]Id.

[46]Id. at 19.

[47]Id. at 19.

[48]Id. at 22 (quoting City of Boerne v. Flores, 521 U.S. 507, 532)).

[49]Id. at 24.

[50]Id. at 25. Justice O'Connor noted, "Congress never identified any pattern of age (continued...)

Ultimately, the Court stated, "[We] hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. The ADEA's purported abrogation of the States' sovereign immunity is accordingly invalid."[51] However, the Court pointed out that state employees are still able to seek recourse under state age discrimination laws.[52]

Justice Stevens wrote a separate opinion, dissenting and concurring in part, joined by Justices Souter, Ginsburg and Breyer. He took issue with the "judge-made doctrine of sovereign immunity" and argued that if Congress has the authority to enact legislation that is applicable to the states, it also has the authority to determine who may bring enforcement proceedings.[53]

Justice Thomas dissented from the part of the Court's decision that found clear congressional intent to abrogate under the ADEA.[54] He argued that it is not clear that Congress understood or was aware that the changes it made to abrogate state immunity under FLSA would also apply to the ADEA because of the ADEA's incorporation of the enforcement provisions of FLSA.[55] Justice Thomas concurred with the remaining parts of the decision that Congress did not have authority under Section 5 of the 14th Amendment to abrogate state immunity under the ADEA.

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[50](...continued)
discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." Id.

[51]Id. at 27.

[52]Id. at 25.

[53]No. 98-791, slip op. at 5 (Stevens, J., concurring in part, dissenting in part). Justice Stevens stated, "There is not a word in the text of the Constitution supporting the Court's conclusion that the judge-made doctrine of sovereign immunity limits Congress' power to authorize private parties, as well as federal agencies, to enforce federal law against the States." Id.

[54]No. 98-791, slip op. at 3 (Thomas, J., concurring in part, dissenting in part ). Justice Thomas referred to the Court's decision in Employees of Dept. of Public Health & Welfare of Mo. v. Department of Public Health & Welfare of Mo., 411 U.S. 279, 285 (1973). He noted that, "In *Employees*, we confronted the pre-1974 version of the [FLSA and] . . . held that this language fell short of a clear statement of Congress' intent to abrogate." Id. at 3.

[55]Justice Thomas wrote:

> This sequence of events suggests, in my view, that we should approach with circumspection any theory of 'clear statement by incorporation.' Where Congress amends an Act whose provisions are incorporated by other Acts, the bill under consideration does not necessarily mention the incorporating references in those other Acts, and so fails to inspire confidence that Congress has deliberated on the consequences of the amendment for the other Acts. That is the case here. The legislation that amended [the FLSA] . . . did not even acknowledge [the enforcement provision of the ADEA]. And, given the purpose of the clear statement rule to 'assur[e] that the legislature has in fact faced' the issue of abrogation, . . . I am unwilling to indulge the fiction that Congress, when it amended [FLSA], recognized the consequences for a separate Act (the ADEA) that incorporates the amended provision. Id. at 5.

## Impact of the *Kimel* Decision

The impact of the *Kimel* decision is still being debated. While state employees may continue to bring suit under state law, *Kimel* does foreclose an avenue of enforcement that had been available to approximately 5 million employees since 1974. It also effectively eliminates the ability of state employees to bring suit under other federal labor laws in which the state has not consented or where Congress does not have § 5 authority. In a larger sense, *Kimel* and *Alden* shift to the federal government a greater role in ensuring state compliance with federal labor law. The *Kimel* decision implies that only suspect classifications such as race or gender would likely meet the "congruence and proportionality" test. However, that proposition as it applies to gender has been put into question after the Court requested that lower courts reevaluate the application of the Equal Pay Act, a federal statute that prohibits gender-based wage discrimination, to states.[56]

The Court has ordered two lower courts to reconsider, in light of its decision in *Kimel*, their decisions to allow an Equal Pay Act claim to proceed against two state universities.[57] It is not clear if this issue will reach the Court. Also, on January 21, 2000, the Court agreed to hear *Dickson v. Florida Department of Corrections* to determine if the 11th Amendment prohibits state employees from bringing suit under the Americans with Disabilities Act (ADA).[58] In *Kimel*, a three-judge panel of the 11th Circuit Court of Appeals heard a consolidated appeal of three cases regarding 11th Amendment immunity. Two of the cases dealt with the ADEA and that issue was addressed by the U.S. Supreme Court in *Kimel*. The remaining case, *Dickson*, dealt with the ADA. The lower court panel was split with two of the judges finding abrogation of sovereign immunity under the ADA.

In light of the Court's recent decisions, state employees are unable to bring suit under the Fair Labor Standards Act and the Age Discrimination in Employment Act. However, these statutes may be enforced by administrative action. State employees may also have recourse under an applicable state law. Whether state employees can bring suit under the Equal Pay Act or the Americans with Disabilities Act is a question that the Court is likely to address in the near future

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[56]29 U.S.C.A. § 206(d) (West Supp. 1999).

[57]Varner v. Illinois State University, 150 F.3d 706 (7th Cir. 1998), *cert. granted and judgment vacated and remanded*, 67 U.S.L.W. 3469 (Jan. 18, 2000) (No. 98-1117); Anderson v. State University of New York at New Paltz, 169 F.3d 117 (2nd Cir. 1999), *cert. granted and judgment remanded*, 2000 WL 29247 (Jan. 18, 2000) (No. 98-1845). The Equal Pay Act prohibits wage discrimination based on sex. 29 U.S.C.A. § 206 (West Supp. 1999). See also Timmer v. Michigan Department of Commerce, 104 F.3d 833 (6th Cir. 1997)(holding that Equal Pay Act abrogated state's immunity pursuant to valid Congressional power); O'Sullivan v. Minnesota, 191 F.3d 965 (8th Cir. 1999)(holding that Congress properly abrogated state's immunity under the Equal Pay Act).

[58]139 F.3d 1426 (11th Cir. 1998), *reh'g denied*, 157 F.3d 908 (11th Cir. 1998), *cert. granted*, 2000 WL 46077 (U.S. Jan. 21, 2000) (No. 98-829). The district court opinion in Dickson v. Florida Department of Corrections is unreported. For a detailed discussion of the 11th Amendment and the ADA see CRS Report RS20472, *The Americans with Disabilities Act: Eleventh Amendment Issues*, by Nancy Jones (February 16, 2000).