

SOVEREIGN IMMUNITY UNDER THE ELEVENTH AMENDMENT: KIMEL AND GARRETT, WHAT NEXT FOR STATE EMPLOYEES?

Hillina Tadesse Tamrat

The Eleventh Amendment guarantees the states immunity from suits by private individuals in federal court. Congress can abrogate this sovereign immunity by using its enforcement powers under the Fourteenth Amendment, but in recent years the Supreme Court has placed significant limitations upon exercises of this authority, first in Kimel v. Florida Board of Regents in 2000 and then in Board of Education v. Garrett in 2001. These cases affected the ability of elderly and disabled Americans employed by state government agencies to sue to enforce their rights under the Age Discrimination in Employment Act and the Americans with Disabilities Act. In this Note, Hillina Tadesse Tamrat examines federal and state remedies still available to elderly state employees in the wake of Kimel and Garrett. Ms. Tadesse Tamrat studies the states' antidiscrimination statutes, sovereign immunity statutes, and case law to find the paths still remaining for victims of age discrimination who wish to bring suit against their state employers. She concludes, inter alia, that legislative changes within the states are necessary to secure rights under the ADEA and the ADA, specifically through explicit, voluntary waivers of sovereign immunity by the states, either by their own initiative or in response to federal influences, such as the congressional spending power.

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I. Introduction

By law, the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary.¹

[T]he law ascribes to the king the attribute of sovereignty . . . no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power.²

The Eleventh Amendment principle of sovereign immunity is said to derive from the British common-law maxim “the King can do no wrong.”³ The Eleventh Amendment provides, “[t]he 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.”⁴ This amendment was ratified in 1798⁵ as a reaction⁶ to *Chisholm v. Georgia*,⁷ which held that there was federal jurisdiction over suits against a state by citizens of another state for the payment of damages.⁸ The Eleventh Amendment precludes suits against states in federal court

1. JOHN C. DEVEREUX, *THE MOST MATERIAL PARTS OF BLACKSTONE'S COMMENTARIES REDUCED TO QUESTIONS AND ANSWERS* 27 (1860).

2. WILLIAM BLACKSTONE, *COMMENTARIES* 49 (William Sprague ed., Sprague Correspondence School of Law 1904) (7th ed. 1892). However, English law did not leave the subjects of the king without remedy for an invasion of their rights. *Id.* at 50. “[I]f any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion.” *Id.* In addition, “as the king cannot misuse his power, without the advice of civil counselors, and the assistance of wicked ministers, these men may be examined and punished.” *Id.*

3. Christine M. Royer, *Paradise Lost? State Employees' Rights in the Wake of "New Federalism"*, 34 AKRON L. REV. 637, 640 (2001); see also *Nieting v. Blondell*, 235 N.W.2d 597, 599 (Minn. 1975) (abolishing Minnesota's tort immunity recognized since 1877). But see Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 488-89 (2001) (arguing that the United States independently developed the doctrine because “immunity is an inherent attribute of sovereignty”).

4. U.S. CONST. amend. XI.

5. *Id.*

6. RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW* 43 (6th ed. 2000) [hereinafter ROTUNDA, *CONSTITUTIONAL LAW*].

7. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

8. See *id.* at 469-80.

when the opposing party is not another state or the federal government.⁹

In *Kimel v. Florida Board of Regents*,¹⁰ the Supreme Court held that the Age Discrimination in Employment Act¹¹ (ADEA) did not validly abrogate states' Eleventh Amendment immunity from suit by private individuals.¹² In *Board of Trustees v. Garrett*,¹³ the Supreme Court further held that Congress, when enacting the Americans with Disabilities Act¹⁴ (ADA), had not validly abrogated the states' sovereign immunity from suits by private parties.¹⁵ The question remains, however: do state employees have any rights against the states enforceable in federal court after *Garrett*?

This Note examines the federal and state remedies still available to elderly state employees despite the recent sovereign immunity jurisprudence of the U.S. Supreme Court.¹⁶ Part II furnishes background information on the Eleventh Amendment and discusses the significance of *Kimel* and *Garrett*. Part III addresses the various avenues still open for suing states under the ADEA. Part III also identifies state antidiscrimination statutes, which are present in all fifty states, and provide redress to victims of age discrimination. In addition, Part III examines state statutes and cases for the principle of sovereign immunity. Finally, the Note will conclude with legal policy recommendations for dealing with age discrimination by state employers.

9. Ronald D. Rotunda, *The 1999 Term: The New States' Rights, the New Federalism, the New Commerce Clause, and the Proposed New Abdication*, 25 OKLA. CITY U. L. REV. 869, 907 (2000) [hereinafter Rotunda, *Federalism*].

10. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

11. 29 U.S.C. §§ 621–634 (1995).

12. *Kimel*, 528 U.S. at 91.

13. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

14. 42 U.S.C. §§ 12101–12213 (1990).

15. *Garrett*, 531 U.S. at 374 n.9.

16. This note is a very modest attempt to identify state age discrimination statutes in response to *Kimel*'s assertion that state statutes provide adequately for elderly state employees. For an excellent and thorough analysis of state public access discrimination statutes in response to *Garrett*, see Ruth Colker & Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 ALA. L. REV. 1075 (2002).

II. Background

A. History of the Eleventh Amendment

The text of the Eleventh Amendment only bars suits against a state by citizens of another state.¹⁷ In *Hans v. Louisiana*,¹⁸ however, the Supreme Court held that the amendment applies equally to suits against a state by its own citizens.¹⁹ Judge Gibbons²⁰ argues that the Eleventh Amendment was nothing but an amendment to Article III, Section 2²¹ of the Constitution.²² He contends that the amendment was intended to eliminate the power of federal courts to hear suits against states where the status of the parties was the only basis for jurisdiction.²³ Accordingly, the Eleventh Amendment was not intended to affect the power of federal courts to hear cases involving federal question jurisdiction.²⁴ Judge Gibbons attributes the amendment to “the desire of the Federalists to assuage the Republican clamor over . . . *Chisholm v. Georgia*.”²⁵

There are opposing views as to whether state sovereign immunity was a dominant doctrine at the time of the Constitution’s ratification.²⁶ For Judge Gibbons, the Eleventh Amendment did not reinstate “an original understanding of state sovereign immunity.”²⁷ In fact,

17. U.S. CONST. amend. XI.

18. *Hans v. Louisiana*, 134 U.S. 1 (1890).

19. *Id.* at 9–10. John J. Gibbons characterizes *Hans v. Louisiana* as “one of the boldest examples of judicial activism in [the Supreme Court’s] history.” John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1893 (1983). Gibbons argues that the Supreme Court used *Hans* to “rewrite the amendment, giving it a meaning that its framers never intended it to have.” *Id.* Gibbons provides a thorough discussion of the Eleventh Amendment, starting with its historical development. *Id.*

20. John J. Gibbons is a judge on the U.S. Court of Appeals for the Third Circuit and Adjunct Professor of Law at Rutgers University Law School and Seton Hall University Law School. See Gibbons, *supra* note 19, at 1889.

21. Article III, Section 2, of the Constitution provides in part: “[t]he Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made . . . between a State and Citizens of another State . . . and between a State . . . and foreign States, Citizens or Subjects.” U.S. CONST. art. III, § 2, cl. 1.

22. Gibbons, *supra* note 19, at 1894.

23. *Id.*

24. *Id.*

25. *Id.*; see also *supra* text accompanying notes 5–8.

26. See *Edelman v. Jordan*, 415 U.S. 651, 660 n.9 (1974) (majority referring to doctrine of state sovereign immunity as “the prevailing view at the time of the ratification of the Constitution”). See generally Gibbons, *supra* note 19, at 1890–1914.

27. Gibbons, *supra* note 19, at 1898–99; see also Royer, *supra* note 3, at 641–42. Royer argues that the reason the Constitution is silent on sovereign immunity is

none of the newly created states then had a constitution embodying the principle of sovereign immunity.²⁸ For Professor Hill, although “the leading statesmen of the time” disagreed as to whether states could be sued in federal court, the general consensus was that they could not.²⁹ He points to the “speedy and angry” reaction to *Chisholm* as indicative of the understanding that states enjoyed sovereign immunity.³⁰ What appears uncontested is that the Eleventh Amendment was intended to bar suits against states in federal court by non-citizens for the payment of debt and damages for past actions.³¹ This level of immunity was sufficient to reverse *Chisholm*.³²

B. What the Eleventh Amendment Bars and What It Does Not

An analysis under the Eleventh Amendment involves five basic inquiries.³³ These are: (1) the identity of the plaintiff; (2) the identity of the defendant; (3) the nature of the relief; (4) any waiver of immunity; and (5) the existence of a congressional grant of authority.³⁴ First, the amendment is implicated only when citizens sue a state.³⁵ It does not apply when another state or the United States sues a state.³⁶ In fact, the United States can sue a state in federal court to establish the rights of individuals.³⁷ Second, the amendment applies only when the state or its agencies are the defendants.³⁸ The state’s political subdivisions such as school boards, counties, and cities are not covered.³⁹ The Eleventh Amendment also does not bar federal suits against state officers in their personal capacities for the payment of damages.⁴⁰ How-

that the constitutional grant of broad powers to the federal judiciary dispelled any notion that states were immune as sovereign entities. *Id.*

28. *Gibbons*, *supra* note 19, at 1897–98. *But see, e.g.*, ALA. CONST. art. I, § 14 (granting sovereign immunity to the State of Alabama).

29. Hill, *supra* note 3, at 493–97.

30. *Id.* at 496–97. Hill argues there is overwhelming academic animosity to sovereign immunity and gives a detailed list of journal articles for evidence. *Id.* at 487 n.1.

31. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 2.11, at 45 (5th ed. 1995).

32. *Id.*

33. *Id.* at 46.

34. *Id.* at 46–47.

35. *Id.* at 47 (citing *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981)).

36. *Id.* (citations omitted).

37. *Id.* (citations omitted).

38. *Id.* (citations omitted).

39. *Id.* (citations omitted).

40. *Id.* at 48.

ever, the court cannot order a state officer to make payment from the state's treasury.⁴¹ Third, the Eleventh Amendment serves as a bar if the relief sought from the state includes damages, past debts, or retroactive relief.⁴² However, the *Ex parte Young*⁴³ doctrine provides an exception to the extent that the court can order state officers to comply prospectively with federal law, even if it involves the use of state funds.⁴⁴ To avoid the Eleventh Amendment restriction, the official must be sued in his personal, not official, capacity.⁴⁵ The amendment "was never intended, nor held, to grant the states the ability to subvert the supremacy clause" by relieving the states or their officials of their obligation to comply with federal law.⁴⁶ Fourth, a state may explicitly waive its Eleventh Amendment immunity through consent.⁴⁷

Finally, Congress can use its enforcement powers under the Fourteenth Amendment⁴⁸ to abrogate the states' Eleventh Amendment immunity.⁴⁹ In *Fitzpatrick v. Bitzer*,⁵⁰ the Supreme Court held that Congress may validly create federal causes of action for retroactive damages by using its power under Section 5 of the Fourteenth Amendment.⁵¹ The Fourteenth Amendment was enacted in part to give Congress more authority over the states.⁵² However, the Supreme Court held in *Seminole Tribe of Florida v. Florida*⁵³ that Congress cannot use its powers under the previously enacted Commerce

41. *Id.*

42. *Id.*

43. *Ex parte Young*, 209 U.S. 123 (1908).

44. NOWAK & ROTUNDA, *supra* note 31, § 2.11, at 48 (citations omitted).

45. Ronald D. Rotunda, *The Eleventh Amendment, Garrett, and Protection for Civil Rights*, 53 ALA. L. REV. 1183, 1184 (2002) (citations omitted) [hereinafter Rotunda, Garrett].

46. NOWAK & ROTUNDA, *supra* note 31, § 2.11, at 49 (citations omitted).

47. Rotunda, Garrett, *supra* note 45 (citing *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999)).

48. Section 1 of the Fourteenth Amendment provides in part, "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, cl. 2. Section 5 of the Fourteenth Amendment provides, "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* § 5.

49. NOWAK & ROTUNDA, *supra* note 31, § 2.11, at 51-54 (citations omitted).

50. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

51. *Id.* at 456. *Fitzpatrick* extended Title VII of the Civil Rights Act of 1964 to the states. *Id.* at 445.

52. See ROTUNDA, CONSTITUTIONAL LAW, *supra* note 6, at 44.

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

Clause⁵⁴ to abrogate a state's Eleventh Amendment immunity.⁵⁵ While the Fourteenth Amendment may trump Eleventh Amendment immunity, the Commerce Clause may not.⁵⁶

C. Abrogation of Eleventh Amendment Immunity

The Supreme Court requires two elements for a valid congressional abrogation of state sovereign immunity.⁵⁷ Congress must “unambiguously express its intent to abrogate the immunity” and must act “pursuant to a valid exercise of power.”⁵⁸ A “valid exercise of power” is Congress's use of Section 5 of the Fourteenth Amendment.⁵⁹ Section 5 is an affirmative grant of power to Congress.⁶⁰ Congress has the ability to “determin[e] . . . what legislation is needed to secure the guarantees of the Fourteenth Amendment.”⁶¹ Congress can use Section 5 to remedy and deter constitutional violations under the Fourteenth Amendment.⁶² In enacting legislation under Section 5, Congress must show “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁶³ Thus, although Congress can protect civil rights against the states, its authority under Section 5 is not plenary.⁶⁴

D. *Kimel*: The Eleventh Amendment and the ADEA

The Age Discrimination in Employment Act was enacted in 1967 to “prohibit arbitrary age discrimination in employment.”⁶⁵ The

54. Article 1 of the Constitution grants Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. 1, § 8, cl. 3.

55. *Seminole Tribe*, 517 U.S. at 47, 72–73; see also *College Sav. Bank*, 527 U.S. at 672; *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 636 (1999); *Alden v. Maine*, 527 U.S. 706, 712 (1999). The Commerce Clause cannot be used to grant individuals the right to sue nonconsenting states in federal court for injunctive or retroactive monetary relief. ROTUNDA, CONSTITUTIONAL LAW, *supra* note 6, at 44–45.

56. See Rotunda, *Garrett*, *supra* note 45.

57. *Seminole Tribe*, 517 U.S. at 55 (citations omitted).

58. *Id.*

59. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

60. *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997) (citing *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

61. *Id.* at 536 (quoting *Katzenbach*, 384 U.S. at 651).

62. *Id.* at 518.

63. *Id.* at 520.

64. Rotunda, *Federalism*, *supra* note 9, at 911.

65. 29 U.S.C. § 621 (1994).

ADEA makes it unlawful for an employer to “fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual’s age.”⁶⁶ When originally enacted, the ADEA’s definition of “employer” did not include states.⁶⁷ However, later amendments extended its coverage to the state and its political subdivisions.⁶⁸ The ADEA protects those individuals who are “at least 40 years of age.”⁶⁹

In *Kimel*, the Supreme Court granted certiorari to resolve a split among the circuits as to whether the ADEA validly abrogated states’ Eleventh Amendment immunity.⁷⁰ *Kimel* was a consolidation of three different cases involving Florida and Alabama state employers.⁷¹ The three sets of plaintiffs sued under the ADEA seeking, inter alia, injunctive relief, back pay, and damages.⁷² The Court held that the ADEA contained “a clear statement of Congress’ intent to abrogate the States’ immunity, but that the abrogation exceeded Congress’ authority under § 5 of the Fourteenth Amendment.”⁷³

The Court first reiterated its holding in *Seminole Tribe* that Congress could not use the Commerce Clause to remove the states’ immunity.⁷⁴ Regarding Section 5 of the Fourteenth Amendment, the Court applied the “congruence and proportionality” test.⁷⁵ It reasoned that because age was not a suspect classification under the Equal Protection Clause, the standards the ADEA imposed on states were disproportionate to “any unconstitutional conduct that conceivably could be targeted by the Act.”⁷⁶ That is, the elderly have not suffered a “history of purposeful unequal treatment,”⁷⁷ and the elderly are not a “discrete and insular minority.”⁷⁸ Unlike race and gender, age classifications are permissible under the Equal Protection Clause if “rationally related to a legitimate state interest.”⁷⁹ If the

66. *Id.* § 623(a)(1).

67. 29 U.S.C. § 630(b) (1973) (current version at 29 U.S.C. § 630(b) (1994)).

68. 29 U.S.C. § 630(b) (1994).

69. *Id.*

70. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72 (2000).

71. *Id.* at 69–71.

72. *Id.*

73. *Id.* at 67.

74. *Id.* at 80.

75. *Id.* at 82–83.

76. *See id.* at 83.

77. *Id.* at 83 (citing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976)).

78. *Id.* at 83 (citing *Murgia*, 427 U.S. at 313–14).

79. *Id.*

ADEA prohibits conduct that is constitutional under the Equal Protection Clause, it cannot be “appropriate legislation” to “enforce” the Equal Protection Clause under Section 5 of the Fourteenth Amendment.⁸⁰

The *Kimel* Court rationalized that even if the ADEA prohibited “very little conduct likely to be held unconstitutional,” it could still be a valid exercise of Congress’s power if the ADEA was “reasonably prophylactic legislation.”⁸¹ The Court cautioned that Congress cannot abrogate Eleventh Amendment immunity by “redefin[ing] the States’ legal obligations with respect to age discrimination.”⁸² The Court examined the ADEA’s legislative record and found that Congress “never identified any pattern of age discrimination by the States.”⁸³ Thus, the ADEA could not be justified as a remedial measure against unconstitutional age discrimination by the states.⁸⁴

The Supreme Court in *Kimel* concluded that its decision did “not signal the end of the line” for state employees subjected to age discrimination.⁸⁵ There are state age discrimination statutes under which money damages can be recovered “in almost every State of the Union.”⁸⁶

E. *Garrett*: The Eleventh Amendment and the ADA

The Americans with Disabilities Act was enacted in 1990 under “the sweep of congressional authority, including the power to enforce the fourteenth amendment.”⁸⁷ Title I of the ADA prohibits employers from discriminating against qualified individuals with a disability.⁸⁸ Discrimination includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.”⁸⁹ Unlike the ADEA, the ADA explicitly

80. See U.S. CONST. amend. XIV, § 5.

81. See *Kimel*, 528 U.S. at 88.

82. See *id.*

83. *Id.* at 89.

84. See *id.* at 88–91.

85. *Id.* at 91.

86. *Id.* The Court listed citations to antidiscrimination statutes in every state except Alabama and South Dakota. *Id.* at 92 n.*.

87. 42 U.S.C. § 12101(b)(4) (2000).

88. *Id.* § 12112(a).

89. *Id.* § 12112(b)(5)(A).

provides that “[a] State shall not be immune under the eleventh amendment.”⁹⁰

In *Garrett*, the Supreme Court granted certiorari to resolve a conflict among the circuits as to whether a person may sue a state in federal court for damages under the ADA.⁹¹ In other words, *Garrett* is to the ADA what *Kimel* is to the ADEA. True to its holding in *Kimel*, the Court held that the Eleventh Amendment was a bar to suits in federal court for money damages under the ADA.⁹² Thus, the state of Alabama could not be forced to pay damages to its employees for failure to comply with Title I of the ADA.⁹³

In *Garrett*, employees of the state of Alabama sued the state for money damages under Title I of the ADA.⁹⁴ The Court first determined, by reference to prior case law, that the disabled are not treated as a suspect class under the Equal Protection Clause.⁹⁵ In addition, while the ADA imposes the duty to make reasonable accommodations, the Equal Protection Clause does not require special accommodations for the disabled.⁹⁶ States are only compelled to act rationally with regards to policies and actions affecting the disabled.⁹⁷ The Court then found that the ADA’s legislative record did not “identify a pattern of irrational state discrimination in employment against the disabled.”⁹⁸ The Court concluded that the requirements imposed by the ADA were not congruent and proportional to any violations of the Fourteenth Amendment.⁹⁹

The *Garrett* Court explained that persons with disabilities still had “federal recourse against discrimination”¹⁰⁰ because Title I of the ADA still applied to the states.¹⁰¹ The federal government can enforce the ADA in actions for money damages.¹⁰² The provisions of the ADA can also be enforced through the *Ex parte Young* doctrine in actions for

90. *Id.* § 12202.

91. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001).

92. *See id.* at 360.

93. *Id.*

94. *Id.* at 362.

95. *Id.* at 365–67.

96. *Id.* at 367–68.

97. *Id.*

98. *Id.* at 368.

99. *See id.* at 374.

100. *Id.* at 374 n.9.

101. *Id.*

102. *Id.*

injunctive relief.¹⁰³ In addition, as in *Kimel*, the Supreme Court in *Garrett* observed that by the time Congress enacted the ADA, “every State in the Union” had its own statute requiring special accommodations for the disabled.¹⁰⁴ Professor Rotunda argues that “*Garrett* is not a break with precedent but part of it, and that Congress still has plenty of power [to protect civil rights] and alternative methods of exercising it.”¹⁰⁵

According to another view, although the rational basis test is used for age and disability classifications by the legislature, heightened scrutiny should be used when *state officials* use animus and stereotypes to make individual decisions.¹⁰⁶ Accordingly, different levels of scrutiny would be used depending on the case, with rational basis for legislative classifications and heightened scrutiny for individualized determinations.¹⁰⁷ Consequently, Congress would be able to abrogate state sovereign immunity because a stricter scrutiny might result in constitutional violations requiring action under Section 5 of the Fourteenth Amendment.¹⁰⁸

III. Analysis

A. Federal Redress Under the ADEA After *Kimel* and *Garrett*

The ADEA provides several remedies to an employee who proves age discrimination,¹⁰⁹ including back pay, liquidated damages, and injunctive relief.¹¹⁰ Injunctive relief includes “judgments compelling employment, reinstatement or promotion.”¹¹¹ A court may also issue an injunction prohibiting prospective violations.¹¹² As discussed earlier, there are federal remedies after *Kimel* and *Garrett*,¹¹³ but it is unclear which of these are still available.

103. *Id.*; see also *supra* text accompanying notes 42–46.

104. *Garrett*, 531 U.S. at 368 n.5.

105. Rotunda, *Garrett*, *supra* note 45.

106. Harvard Law Review Ass’n, *The Irrational Application of Rational Basis: Kimel, Garrett, and Congressional Power to Abrogate State Sovereign Immunity*, 114 HARV. L. REV. 2146, 2148 (2001).

107. *Id.*

108. *Id.* at 2148–49.

109. See 29 U.S.C. § 626(b) (1995).

110. *Id.*

111. *Id.*

112. LAWRENCE A. FROLIK & RICHARD L. KAPLAN, ELDER LAW IN A NUTSHELL § 15.7, at 390 (2d ed. 1999).

113. See, e.g., *supra* text accompanying notes 100–03.

For one thing, the Eleventh Amendment would not be implicated, and *all* remedies would be available if the state employer is a county, city, or school board.¹¹⁴ Also, although the employee herself cannot get damages from the state, the federal government can.¹¹⁵ The federal government could sue the states to enforce federal law because, under the Constitution, the states have consented to suits by the federal government.¹¹⁶ The ADEA is still valid law. The issue decided by *Kimel* was whether the ADEA validly abrogated the states' Eleventh Amendment immunity.¹¹⁷ *Kimel's* decision in the negative only meant that *individuals* could not collect money damages from the state in federal court.¹¹⁸ The employee can obtain injunctive relief by suing the offending state officers in their *personal capacities* under the *Ex parte Young* doctrine, even if compliance requires the use of state funds.¹¹⁹ The employee can arguably also get damages from the officials in their personal capacities, provided state funds are not used.¹²⁰ Professor Rotunda writes that the "flesh and blood" agent of the state in the event of a constitutional violation "is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."¹²¹ Finally, a state employer can waive its sovereign immunity and consent to be sued.¹²² It is argued that this possibility might not be as conjectural as it sounds because the state may bow to the will of its citizens.¹²³

"The Eleventh Amendment thus places some important, but not insurmountable limits on the power of the federal government to im-

114. See, e.g., *supra* text accompanying notes 38–39.

115. See, e.g., *supra* text accompanying notes 36–37; see also *supra* note 102 and accompanying text.

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

117. See, e.g., *supra* text accompanying note 70.

118. See, e.g., *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring); see also *Alden*, 527 U.S. at 706 (holding that the "Constitution's structure and history" demonstrate that Congress cannot subject nonconsenting states to private suits in *state court* without use of Section 5 of the Fourteenth Amendment).

119. Rotunda, *Garrett*, *supra* note 45, at 1186; see, e.g., *supra* text accompanying notes 44–46. But see Evelyn C. McCafferty, *Age Discrimination and Sovereign Immunity: Does Kimel Signal the End of the Line for Alabama's State Employees*, 52 ALA. L. REV. 1057, 1070 (2001) (arguing that in suits for injunctive relief, the plaintiff must show "a substantial likelihood that he or she will be subjected in the future to the alleged discrimination" for constitutional standing purposes (citations omitted)).

120. See, e.g., *supra* text accompanying notes 40–41; see also Rotunda, *Garrett*, *supra* note 45, at 1184; NOWAK & ROTUNDA, *supra* note 31, § 2.11, at 48.

121. Rotunda, *Garrett*, *supra* note 45, at 1184–85 (citing *Ex parte Young*, 209 U.S. 123 (1908)).

122. See *supra* text accompanying note 47.

123. See Rotunda, *Garrett*, *supra* note 45, at 1184.

pose restrictions on the states.”¹²⁴ On the other hand, research has shown that mere injunctive relief is not an effective method of enforcing the ADA.¹²⁵

B. State Age Discrimination Statutes: Coverage and Sovereign Immunity

Every state has some kind of antidiscrimination statute.¹²⁶ The enactment of the ADEA did not preclude the states from passing their

124. *Id.* at 1187.

125. Ruth Colker, *The Section Five Quagmire*, 47 *UCLA L. REV.* 653, 660 n.32 (2000).

126. See ALA. ADMIN. CODE §§ 25-1-20 to -40 (2000); ALASKA STAT. §§ 18.80.010–.300 (Michie 2002); ARIZ. REV. STAT. ANN. §§ 41-1401 to -1484 (West 1999); ARK. CODE ANN. §§ 21-3-201 to -203, -205 (Michie 1996); CAL. GOV'T CODE §§ 12900–12996 (West 1992 & Supp. 2003); COLO. REV. STAT. ANN. §§ 24-34-301 to -804 (West 2001); CONN. GEN. STAT. ANN. §§ 46a-51 to -104 (West 1995); DEL. CODE ANN. tit. 19, §§ 710–728 (1995); FLA. STAT. ANN. §§ 112.042–.044 (West 2002); GA. CODE ANN. §§ 45-19-20 to -46 (2002); HAW. REV. STAT. ANN. §§ 378-1 to -6 (Michie 1999); IDAHO CODE §§ 67-5901 to -5912 (Michie 1995 & Supp. 2000); 775 ILL. COMP. STAT. 5/1-101 to 5/8B-104 (1998); IND. CODE ANN. §§ 22-9-2-1 to -11 (West 1993); IOWA CODE ANN. §§ 216.1–.20 (West 2000); KAN. STAT. ANN. §§ 44-1111 to -1121 (1993); KY. REV. STAT. ANN. §§ 344.010–.500 (Michie 1997 & Supp. 2002); LA. REV. STAT. ANN. §§ 23.301–.314 (West 1998); ME. REV. STAT. ANN. tit. 5, §§ 4551–4576 (West 1998 & Supp. 2002); MD. ANN. CODE art. 49B, §§ 1–51 (1998 & Supp. 1999); MASS. ANN. LAWS ch. 151B, §§ 1–10 (Law. Co-op. 1999 & Supp. 2002); MICH. COMP. LAWS ANN. §§ 37.2101–.2803 (West 2001 & Supp. 2003); MINN. STAT. §§ 363.01–.20 (1991 & Supp. 2003); MISS. CODE ANN. § 25-9-149 (1999); MO. ANN. STAT. §§ 213.010–.137 (West 1996 & Supp. 2003); MONT. CODE ANN. §§ 49-1-101 to -3-315 (2001); NEB. REV. STAT. §§ 48-1001 to -1126 (1998); NEV. REV. STAT. ANN. §§ 613.310–.435 (Michie 2000); N.H. REV. STAT. ANN. §§ 354-A:1 to :26 (1995 & Supp. 2002); N.J. STAT. ANN. §§ 10:5-1 to 10:5-49 (West 2002); N.M. STAT. ANN. §§ 28-1-1 to -15 (Michie 1978 & Supp. 2002); N.Y. EXEC. LAW §§ 290–301 (McKinney 1993 & Supp. 1999); N.C. GEN. STAT. §§ 126-16 to -21 (2001); N.D. CENT. CODE §§ 14-02.4-01 to -23 (1997 & Supp. 2001); OHIO REV. CODE ANN. §§ 4112.01-.99 (Anderson 1997 & Supp. 2001); OKLA. STAT. tit. 25, §§ 1301–1311 (1991 & Supp. 2003); OR. REV. STAT. §§ 659.010–.110 (2001); PA. CONS. STAT. ANN. §§ 951–963 (West 1991 & Supp. 2002); R.I. GEN. LAWS §§ 28-5-1 to -42 (2000 & Supp. 2002); S.C. CODE ANN. §§ 1-13-10 to -110 (Law. Co-op. 1986); S.D. CODIFIED LAWS § 20-13-10 (Michie 1995 & Supp. 2002); TENN. CODE ANN. §§ 4-21-101 to -1004 (1998); TEX. LAB. CODE ANN. §§ 21.001–.556 (Vernon 1996 & Supp. 2003); UTAH CODE ANN. §§ 34A-5-101 to -108 (2000 & Supp. 2002); VT. STAT. ANN. tit. 21, §§ 495–496 (1987 & Supp. 2002); VA. CODE ANN. §§ 2.2-3900 to -3902 (Michie 2001); WASH. REV. CODE ANN. §§ 49.60.010–.401 (West 2002 & Supp. 2003); W. VA. CODE §§ 5-11-1 to -21 (2002); WIS. STAT. ANN. §§ 111.31–.395 (West 2002); WYO. STAT. ANN. §§ 27-9-101 to -106 (Michie 2001).

own age discrimination statutes.¹²⁷ State age discrimination statutes have also survived Commerce Clause challenges.¹²⁸

1. ALABAMA: CONSTITUTIONAL SOVEREIGN IMMUNITY

Alabama has an age discrimination statute.¹²⁹ However, the state of Alabama enjoys sovereign immunity under the state constitution.¹³⁰ The statute does not even include the state within its definition of “employer.”¹³¹ The Alabama Constitution also prohibits suits against state officials in their official and personal capacities if “a contract or property right of the State” would be affected thereby.¹³² None of the enumerated exceptions allow a state employee to recover money damages against a state official for age discrimination.¹³³ In *Ex parte Cranman*,¹³⁴ the Alabama Supreme Court held that neither the Alabama legislature nor the state supreme court had the power to waive the state’s sovereign immunity.¹³⁵ In *Williams v. Hank’s Ambulance Service*,¹³⁶ the court again held that the constitution “prohibits the State from being made a defendant in any court of this State and neither the State nor any individual can consent to a suit against the State.”¹³⁷ A constitutional amendment is the only option.¹³⁸

In both *Kimel* and *Garrett*, the state of Alabama was a defendant. In both cases, the Supreme Court observed that state statutes provided independent redress. However, just as Eleventh Amendment immunity shielded Alabama from ADEA liability in *Kimel*, so will Alabama’s constitutional sovereign immunity shield it from liability under the Alabama age discrimination statute. “[D]espite the *Kimel* Court’s statement that its decision does not ‘signal the end of the line’

127. Cara Yates, Annotation, *Application of State Law to Age Discrimination in Employment*, 51 A.L.R. 5TH 1 (1997) (citing *Simpson v. Alaska State Comm’n for Human Rights*, 423 F. Supp. 552 (D. Alaska 1976)).

128. *Id.* at 38–39.

129. ALA. CODE §§ 25-1-20 to -40 (2000).

130. See McCafferty, *supra* note 119, at 1072 (citing ALA. CODE §§ 25-1-20 to -29 (2000); ALA. CONST. art. I, § 14).

131. ALA. CODE § 25-1-20.

132. *Southall v. Stricos Corp.*, 153 So. 2d 234, 235 (Ala. 1963).

133. McCafferty, *supra* note 119, at 1074.

134. *Ex parte Cranman*, 792 So. 2d 392 (Ala. 2000).

135. *Id.* at 399.

136. *Williams v. Hank’s Ambulance Serv.*, 699 So. 2d 1230 (Ala. 1997).

137. *Id.* at 1232.

138. See McCafferty, *supra* note 119, at 1075 (referring to unsuccessful attempts to amend the constitution to make certain suits against the state allowable).

for state employees, Alabama's state employees have no corresponding state remedy."¹³⁹

2. ALASKA: BACK PAY AND DAMAGES

Unlike Alabama, Alaska has a statute that prohibits state employers from discriminating on the basis of age.¹⁴⁰ In *Simpson v. Alaska State Commission for Human Rights*,¹⁴¹ the district court held that "Congress intended only to establish 'minimum' standards in the [ADEA]" and that it had not "created an area of federal exclusivity."¹⁴²

The Alaska statute allows for the "award of compensatory and punitive damages" as well as "equitable remedies such as enjoining illegal employment activities and ordering back pay as a form of restitution."¹⁴³

3. ARKANSAS: SOVEREIGN IMMUNITY

Arkansas has an age discrimination statute that deals specifically with public employers.¹⁴⁴ The Age Discrimination Prohibition Act (ADPA) defines "public employer" to include "any agency, department, board, commission, . . . of the state supported by appropriation of state or federal funds, or any county or municipality or other political subdivision of this state."¹⁴⁵ In addition, the ADPA provides that "[p]ublic employer" specifically includes public universities, colleges, and public school districts."¹⁴⁶

At first glance, the ADPA appears to provide generously for state employees subjected to age discrimination. However, in *Arkansas v. Goss*,¹⁴⁷ the Arkansas Supreme Court held that although the "ADPA prohibits public employers from discriminating on the basis of age," there was "no declaration of legislative intent to waive the State's sovereign immunity."¹⁴⁸ It found that "[n]othing in the ADPA subjects the State to liability for monetary damages for violations of

139. *Id.* at 1076.

140. ALASKA STAT. §§ 18.80.220(a)(1), 300(4) (2002).

141. *Simpson v. Alaska State Comm'n for Human Rights*, 423 F. Supp. 552 (D. Alaska 1976).

142. *Id.* at 556.

143. *Loomis Elec. Prot., Inc., v. Schaefer*, 549 P.2d 1341, 1343 (Alaska 1976); see also ALASKA STAT. § 18.80.130.

144. ARK. CODE ANN. §§ 21-3-201 to -203, -205 (Michie 2001).

145. *Id.* § 21-3-201.

146. *Id.*

147. *Arkansas v. Goss*, 42 S.W.3d 440 (Ark. 2001).

148. *Id.* at 443.

the Act.”¹⁴⁹ The court debated whether the ADPA even provides a private cause of action.¹⁵⁰ Arkansas, despite its generous-sounding ADPA, therefore echoes the sovereign immunity bar enunciated in *Kimel*.

4. ARIZONA AND OTHERS: PLAINLY COVER THE STATE

Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Wisconsin, and Wyoming all have statutes prohibiting age discrimination in employment that clearly cover the state and its agencies.¹⁵¹ Except for the statutes of Kansas, Mississippi, and Wyoming, all the others clearly provide for some form of monetary relief.¹⁵² Back pay is known to be recoverable in all except Kansas and Wyoming.¹⁵³ In addition, ten states—Arizona, Connecticut, Florida, Hawaii, Idaho, Louisiana, Maine, Michigan, Missouri, and Nebraska—clearly provide for a civil action

149. *Id.*

150. *See* *Palmer v. Ark. Council on Econ. Educ.*, 40 S.W.3d 784, 793 (Ark. 2001) (Glaze, J., dissenting in part, concurring in part).

151. ARIZ. REV. STAT. ANN. §§ 14-1401 to -1484 (West 1995); CAL. GOV'T CODE §§ 12900-12996 (West 1992 & Supp. 1999); COLO. REV. STAT. ANN. §§ 24-34-301 to -804 (West 2001); CONN. GEN. STAT. ANN. §§ 46a-51 to -104 (West 1995); DEL. CODE ANN. tit. 19, §§ 710-728 (1995); FLA. STAT. ANN. §§ 112.042-.044 (West 2002); GA. CODE ANN. §§ 45-19-20 to -46 (2002); HAW. REV. STAT. ANN. §§ 378-1 to -10.2 (Michie 1999); IDAHO CODE §§ 67-5901 to -5912 (Michie 1995 & Supp. 2000); 775 ILL. COMP. STAT. 5/1-101 to /8-104 (1998); IOWA CODE ANN. §§ 216.1-.20 (West 2000); KAN. STAT. ANN. §§ 44-1111 to -1121 (1993); LA. REV. STAT. ANN. §§ 23:311-.314 (West 1998); ME. REV. STAT. ANN. tit. 5, §§ 4551-4576, 4611-4614 (West 1998 & Supp. 2002); MASS. ANN. LAWS ch. 151B, §§ 1-10 (Law. Co-op. 1999 & Supp. 2002); MICH. COMP. LAWS ANN. §§ 37.2101-.2803 (West 2001 & Supp. 2003); MISS. CODE ANN. §§ 25-9-107, -149 (1997); MO. ANN. STAT. §§ 213.010-.137 (West 1996 & Supp. 2003); MONT. CODE ANN. §§ 49-2-308, 3-201 (2001); NEB. REV. STAT. §§ 48-1001 to -1126 (1998); NEV. REV. STAT. ANN. §§ 613.310-.435 (Michie 2000); N.H. REV. STAT. ANN. §§ 354-A:1 to :26 (1995 & Supp. 2002); N.M. STAT. ANN. §§ 28-1-1 to -15 (Michie 1978 & Supp. 2002); WIS. STAT. §§ 111.31-.395 (1997 & Supp. 1998); WYO. STAT. ANN. §§ 27-9-101 to -106 (Michie 2001).

152. However, Mississippi case law indicates that back pay is recoverable under the statute. *Gill v. Miss. Dep't of Wildlife Conservation*, 574 So. 2d 586 (Miss. 1990).

153. For instance, the Montana statute allows “any reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise.” MONT. CODE ANN. § 49-2-506(1)(b). For application to the state, see *id.* § 49-3-315. The relevant commission’s award of back pay and damages have been upheld. *Vainio v. Brookshire*, 852 P.2d 596 (Mont. 1993); *European Health Spa v. Human Rights Comm’n*, 687 P.2d 1029 (Mont. 1984). For Nevada, see NEV. REV. STAT. ANN. § 233.170 (Michie 2000).

in court.¹⁵⁴ Damages are statutorily provided for everywhere except Colorado, Delaware, Kansas, Mississippi, and Wyoming.¹⁵⁵ Furthermore, attorney's fees are specifically made available in Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Louisiana, Maine, Massachusetts, Michigan, Missouri, and New Mexico.¹⁵⁶ The statutes of Arizona, California, Florida, Idaho, Nebraska, Nevada, New Hampshire, and Wisconsin contain language indicating that the enumerated relief is not exhaustive, suggesting that attorney's fees are available.¹⁵⁷ However, under the Kansas and Wyoming statutes, it is not clear if attorney's fees are recoverable.¹⁵⁸

Among the states which expressly cover the state employer in their age discrimination statutes, Arkansas is the only one which clearly upholds the state's sovereign immunity.¹⁵⁹ For instance, in Michigan, case law suggests that defining "employer" to include the state indicates a waiver of immunity.¹⁶⁰ Nebraska's age discrimination statute has a section providing that the state employer is to be treated the same as other employers.¹⁶¹ Similarly, a bill is pending in the Illinois legislature to amend the state's immunity act to allow state employees to sue the state for ADEA and ADA violations.¹⁶² In addition, the equitable relief of reinstatement and back pay, available under the Colorado statute, is not barred by the state's governmental immu-

154. For instance, the Connecticut statute provides a number of situations which may be redressed in a civil action. CONN. GEN. STAT. §§ 46a-99, 46a-102 (West 1995).

155. For instance, the Arizona statute provides that the court may "order such affirmative action as may be appropriate. Affirmative action may include, but is not limited to, reinstatement or hiring of employees with or without back pay . . . or any other equitable relief as the court deems appropriate." ARIZ. REV. STAT. § 41-1481(G) (West 1995). Courts have awarded damages under this section. *Civil Rights Div. of Ariz. Dep't of Law v. Superior Court*, 706 P.2d 745, 751 (Ariz. Ct. App. 1985). For Nevada, see NEV. REV. STAT. ANN. § 233.170 (Michie 2000).

156. For instance, Massachusetts expressly allows fees. MASS. ANN. LAWS ch. 151B, § 9 (Law Co-op 1999 Supp 2002).

157. For instance, the Nebraska statute provides "the court shall have jurisdiction to grant such legal or equitable relief as the court may deem appropriate to effectuate the purposes of [the act]." NEB. REV. STAT. § 48-1009 (1998). For New Hampshire, see N.H. REV. STAT. ANN. § 354-A:21 (1995 & Supp. 2002).

158. See, e.g., WYO. STAT. ANN. § 27-9-104 (Michie 2001). This section grants the relevant department the power to "receive, investigate, and determine the validity of complaints alleging discrimination in employment." *Id.* Interestingly, prior to amendments made in 2001, the department had the power to independently order a remedy, such as back pay, to effectuate the purposes of the statute. *Id.*

159. See *supra* text accompanying notes 147-49.

160. *Anzaldua v. Band*, 578 N.W.2d 306, 315 (Mich. 1998).

161. NEB. REV. STAT. § 48-1010 (1998).

162. H.B. 3772, 92 Gen. Assem., 1st Sess. (Ill. 2001).

nity.¹⁶³ Moreover, Florida's waiver of sovereign immunity for tort liability likely extends to civil rights actions.¹⁶⁴ Likewise, the New Mexico statute clearly provides that "the state shall be liable the same as a private person" for actual damages and reasonable attorney's fees.¹⁶⁵

5. INDIANA: STATUTE APPLIES ONLY WHEN THE ADEA DOES NOT

Indiana has an age discrimination statute that prohibits the state from discriminating against employees on account of age.¹⁶⁶ "Employer" is defined as a person or governmental entity employing one or more individuals, but explicitly excludes those persons and entities covered by the ADEA.¹⁶⁷ The Indiana statute is thus patterned after the ADEA and is intended to apply only when proceeding under the ADEA is not possible.¹⁶⁸ The pertinent commission is authorized to order "wages, salaries or commissions."¹⁶⁹

In *Keitz v. Lever Bros. Co.*,¹⁷⁰ the Indiana court held that state jurisdiction in an age discrimination case is determined by the existence of federal jurisdiction over the employer under the ADEA.¹⁷¹ An open question is whether the Indiana statute can be interpreted as applicable in cases where Indiana invokes Eleventh Amendment immunity under the ADEA. Although states are "employers" within the definition of the ADEA, when a state asserts its sovereign immunity, the court then lacks jurisdiction to proceed with the case. It could be argued that when Indiana invokes the Eleventh Amendment, it is not covered by the ADEA and, therefore, the statutory exclusion of those covered by the ADEA is inapplicable. This result would be in line with the statute's purpose of providing redress to plaintiffs who are unable to proceed under the federal act.

163. *City of Colorado Springs v. Conners*, 993 P.2d 1167, 1173-74 (Colo. 2000).

164. See Colker & Milani, *supra* note 16 (citing FLA. STAT. § 768.28, which caps damages at \$100,000).

165. N.M. STAT. ANN. § 28-1-13 (Michie 1978 & Supp. 2002) (applies to de novo appeals from commission decisions).

166. IND. CODE ANN. § 22-9-2-1 to -11 (West 1993).

167. *Id.* § 22-9-2-1(2); see also *id.* § 22-9-1-3(h) (defining "employer" to specifically include the state and its subdivisions).

168. *Town of S. Whitley v. Cincinnati Ins. Co.*, 724 F. Supp. 599, 603 (N.D. Ind. 1989).

169. IND. CODE § 22-9-1-6(k)(A) (West 1993).

170. *Keitz v. Lever Bros. Co.*, 563 F. Supp. 230 (N.D. Ind. 1983).

171. *Id.* at 234 (stating that "state jurisdiction exists where there is no federal EEOC jurisdiction").

6. KENTUCKY: WAIVER OF SOVEREIGN IMMUNITY

The Kentucky Civil Rights Act¹⁷² includes age among the impermissible grounds for employment discrimination.¹⁷³ The state and its agencies are covered as employers.¹⁷⁴ The Act authorizes the pertinent commission to order back pay and damages, “including compensation for humiliation and embarrassment.”¹⁷⁵ In addition, a civil cause of action is authorized under which damages, costs, and attorney’s fees are recoverable.¹⁷⁶

In *Department of Corrections v. Furr*,¹⁷⁷ the Kentucky Supreme Court decided whether the state of Kentucky enjoys sovereign immunity under the Act.¹⁷⁸ The court held that “[t]o immunize the Commonwealth from the application of the Kentucky Civil Rights Act frustrates the act’s purpose and intent, deprives many of its citizens of its protection, and renders meaningless its pledge to safeguard all individuals from discrimination. Such a construction is neither tenable nor tolerable.”¹⁷⁹

7. MARYLAND: EXPLICIT WAIVER OF SOVEREIGN IMMUNITY

The Maryland Discrimination in Employment Act prohibits discrimination on the basis of age.¹⁸⁰ The Act includes the state of Maryland in its definition of employer.¹⁸¹ Unlike similar statutes from other states, such as Kentucky, whose waiver of sovereign immunity was judicially crafted, the Maryland statute explicitly waives sovereign immunity.¹⁸² “This state, its officers, and its units may not raise sovereign immunity as a defense against a salary award in an employment discrimination case”¹⁸³ However, this explicit waiver of immunity refers only to salary awards, remaining silent on other types of awards.

172. KY. REV. STAT. ANN. § 344.010–.650 (Michie 1997 & Supp. 2002).

173. *Id.* § 344.040(1) (stating “It is unlawful practice for an employer . . . to discriminate . . . with respect to . . . age forty (40) and over . . .”).

174. *See id.* §§ 344.010(1), 344.030(2).

175. *Id.* § 344.230(3)(h).

176. *Id.* § 344.450.

177. *Dep’t of Corr. v. Furr*, 23 S.W.3d 615 (Ky. 2000).

178. *Id.*

179. *Id.* at 617 (emphasis omitted).

180. MD. ANN. CODE art. 49B, § 14 (1998).

181. *Id.* § 15(b).

182. *Id.* § 17A.

183. *Id.*

8. MINNESOTA: RECENT WAIVER OF ELEVENTH AMENDMENT IMMUNITY

Unlike Kentucky and Maryland, whose immunity waivers were confined to the state level, Minnesota specifically waived immunity for violations of federal statutes in 2001, including the ADEA and the ADA.¹⁸⁴ Accordingly, “an employee . . . of the state who is aggrieved by the state’s violation of the [ADEA], may bring a civil action against the state in any court of competent jurisdiction for any such legal or equitable relief as will effectuate the purposes of the act.”¹⁸⁵

In addition, the Minnesota Human Rights Act (MHRA) has an age discrimination in employment provision that protects anyone over the age of twenty-five years.¹⁸⁶ The definition of employer includes the state and its agencies.¹⁸⁷ In *Nieting v. Blondell*,¹⁸⁸ the Minnesota Supreme Court abolished the state’s tort immunity, reasoning that where “harm is wrongfully inflicted upon an individual . . . he should have an opportunity to obtain a reasonable and adequate remedy”¹⁸⁹ The principle of sovereign immunity was held inapplicable to the MHRA.¹⁹⁰

*Regents of the University of Minnesota v. Raygor*¹⁹¹ illustrates how *Kimel* affected cases under the MHRA. In *Raygor*, university employees filed charges with the Minnesota Department of Human Rights alleging age discrimination.¹⁹² Upon receiving right-to-sue letters, the employees filed suit in federal rather than state court.¹⁹³ The employees alleged violations of the ADEA and the MHRA in federal court.¹⁹⁴ The University invoked Eleventh Amendment immunity,¹⁹⁵ as Minnesota had not waived its immunity at the time. While an appeal was pending before the Eighth Circuit, the Supreme Court issued its decision in *Kimel*.¹⁹⁶ Following *Kimel*, the federal case was dismissed.¹⁹⁷

184. MINN. STAT. §1.05 (2003).

185. *Id.*

186. *Id.* § 363.01-3.

187. *Id.* §§ 363.01-17, -28.

188. *Nieting v. Blondell*, 235 N.W.2d 597 (Minn. 1975).

189. *Id.* at 602.

190. *Davis v. Hennepin County*, 559 N.W.2d 117, 121 (Minn. Ct. App. 1997).

191. *Regents of the Univ. of Minn. v. Raygor*, 620 N.W.2d 680 (Minn. 2001).

192. *Id.* at 681.

193. *Id.*

194. *Id.*

195. *Id.* at 681–82.

196. *Id.*

197. *Id.*

While the federal case was still pending, plaintiffs filed another suit in state court.¹⁹⁸ However, the statute of limitations for that claim had expired.¹⁹⁹ The issue in *Raygor* was thus whether the period of limitations was tolled for the state action while the federal action was pending.²⁰⁰ The court held that in light of the Eleventh Amendment, “[a]llowing tolling . . . would alter the University’s position in state court by requiring the University to answer a claim in state court that would otherwise be barred by the state statute of limitations.”²⁰¹ The court held that a state defendant could not be penalized “for being named, without its consent, as a defendant in federal court.”²⁰²

Minnesota’s waiver of sovereign immunity may have been motivated by the outcome in *Raygor*. Indeed, *Raygor* was decided on January 4, 2001, and the bill for the immunity waiver was introduced in Minnesota’s House of Representatives on March 12, 2001.²⁰³

9. NEW JERSEY: BACK PAY AND INTEREST REQUIREMENT

New Jersey’s statute deals specifically with age discrimination in public employment.²⁰⁴ In addition to prohibiting discrimination on the basis of age, the statute provides that no person other than a justice, judge, or a member of a police or fire department “shall be required to retire upon the attainment of a particular age unless the public employer can show that the retirement age bears a manifest relationship to the employment in question or that the person in the service of the State . . . is unable to adequately perform the person’s duties.”²⁰⁵ Any person forced to retire in violation of the statute is “entitled to reinstatement with back pay and interest.”²⁰⁶

The statute does not specifically address the issue of sovereign immunity, but it appears that New Jersey has consented to being sued. This statute would otherwise be worthless because it deals specifically with discrimination in public employment. On the other hand, New Jersey has expressly waived immunity for liability arising

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 685.

202. *Id.*

203. H.F. 1655, 82 Reg. Sess. (Mn. 2001), <http://www.revisor.leg.state.mn.us/cgi-bin/bldbill.pl?bill=H1655.0+session=1s82>. (last visited Feb. 3, 2003).

204. N.J. STAT. ANN. § 10:3-1 (West 1999).

205. *Id.*

206. *Id.* (emphasis added).

out of contracts.²⁰⁷ Still, an express waiver was unnecessary for the age discrimination statute because the only way it could be effective is if it applied to the state.

10. NEW YORK: INTERPRETED AS IMMUNITY WAIVER

New York's Human Rights Law (HRL) prohibits an employer from discriminating on the basis of age.²⁰⁸ Besides creating an administrative forum to challenge discriminatory practices, the HRL provides for "a cause of action in any court of appropriate jurisdiction for damages . . . and such other remedies as may be appropriate."²⁰⁹ "Employer," however, is simply defined on the basis of number of employees.²¹⁰ In *Board of Higher Education v. Carter*,²¹¹ the court held that the term "employer" applied to the public school system as it did to other areas of public employment.²¹² Also, in *Koerner v. State of New York*,²¹³ the New York Court of Appeals reiterated "the State is clearly subject to the provisions of the Human Rights Law," and that "[i]n granting . . . power to award compensatory damages against an employer . . . the Legislature must be deemed to have waived . . . the State's immunity to suit."²¹⁴

11. NORTH CAROLINA: PUBLIC EMPLOYMENT STATUTE PROVIDES BACK PAY

North Carolina's State Personnel Act prohibits age discrimination by state employers.²¹⁵ The Act provides administrative procedures to redress violations of its provisions.²¹⁶ The State Personnel Commission is authorized to order reinstatement, employment, promotion, salary adjustment, or "other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improperly discriminatory action."²¹⁷

207. *Id.* § 59:13-3.

208. N.Y. EXEC. LAW § 296.1 (McKinney 1993 & Supp. 1999).

209. *Id.* § 297.9.

210. *Id.* § 292.5.

211. *Bd. of Higher Educ. of N.Y. v. Carter*, 199 N.E.2d 141 (N.Y. 1964).

212. *Id.* at 143 (decided in the context of race discrimination).

213. *Koerner v. New York*, 467 N.E.2d 232 (N.Y. 1984).

214. *Id.* at 235.

215. N.C. GEN. STAT. § 126-16 (2001).

216. *Id.* §§ 126-34, -37.

217. *Id.* § 126-37(a).

12. NORTH DAKOTA: SOVEREIGN IMMUNITY WAIVER FOR TORTS

North Dakota's Human Rights Act prohibits age discrimination and includes the state in its definition of "employer."²¹⁸ Besides an administrative process, the Act provides for a cause of action in court.²¹⁹ Amongst the relief recoverable under the Act are back pay, costs, and reasonable attorney's fees.²²⁰ In *Bulman v. Hulstrand Construction Co.*,²²¹ the North Dakota Supreme Court abolished the state's sovereign immunity for tort liability.²²² The court reasoned that sovereign immunity "perpetuates injustice by barring recovery for tortious conduct merely because of the status of the wrongdoer."²²³ The court acknowledged that the doctrine originated in part because of concerns that the diversion of funds could bankrupt and weaken the state, but found these justifications "no longer valid in today's society."²²⁴ It can be argued that the same reasoning should apply to the Human Rights Act.

13. OHIO: EXPLICIT CIVIL CAUSE OF ACTION

Ohio's civil rights law has a section on "age discrimination by employers."²²⁵ The legislation defines the term "employer" to include the state.²²⁶ However, the nondiscrimination principle is textually limited to "any job opening" or "discharge without just cause."²²⁷ Indeed, it had earlier been held that the statute did not apply to demotions because they are not hiring or firing decisions.²²⁸

The statute allows a victim of age discrimination to "institute a civil action against the employer in a court of competent jurisdiction."²²⁹ If there is a finding of discrimination, the court is authorized to order "an appropriate remedy which shall include reimbursement to the . . . employee for the costs, including reasonable attorney's

218. N.D. CENT. CODE §§ 14-02.4-02(7), (12) (1997 & Supp. 2001).

219. *Id.* § 14-02.4-19.

220. *Id.* § 14-02.4-20.

221. *Bulman v. Hulstrand Constr. Co.*, 521 N.W.2d 632 (N.D. 1994).

222. *Id.* at 638–39.

223. *Id.* at 638.

224. *Id.*

225. OHIO REV. CODE ANN. § 4112.14 (Anderson 1997 & Supp. 2001).

226. *Id.* § 4112.01(a)(2).

227. *Id.* § 4112.14(A).

228. *Hawley v. Dresser Indus., Inc.*, 737 F. Supp. 445, 452 (S.D. Ohio 1990), *aff'd in part, rev'd in part*, 958 F.2d 720, 726 (6th Cir. 1992) (distinguishing between a failure to promote, which is covered, and demotion, which is not).

229. OHIO REV. CODE ANN. § 4112.14(B) (Anderson 1997 Supp. 2001).

fees . . . or to reinstate the employee . . . with compensation for lost wages and any lost fringe benefits . . . and to reimburse the employee for the costs, including reasonable attorney's fees, of the action."²³⁰ However, in *Hoops v. United Telephone Co. of Ohio*,²³¹ the court interpreted the statute to exclude compensatory and punitive damages.²³² The court also held that "[b]ecause actions for employment discrimination . . . did not exist at common law, there is no right to a jury trial."²³³ Because the State of Ohio waives its immunity, it consents to being sued in the same way as a private party.²³⁴

14. OKLAHOMA: IMMUNITY FROM DISCRIMINATION LIABILITY UNCLEAR

Oklahoma prohibits age discrimination in employment.²³⁵ The statute defines "employer" as a person with fifteen or more employees and "person" is defined to include the state and its agencies.²³⁶ The stated purpose of the statute is to further the policies of the ADEA, and the statute is construed liberally to achieve those purposes.²³⁷ Once a complainant files before the Human Rights Commission, there is a period of time within which a complainant can elect to pursue the claim in a cause of action.²³⁸ If the proceedings continue before the Commission, and the Commission finds a discriminatory practice, it is authorized to issue a cease and desist order and to "take such affirmative action [to] . . . carry out the purposes of th[e] act."²³⁹ The Commission's action may include reinstatement, with or without back pay, and costs, including attorney's fees.²⁴⁰ The Commission may petition the district court for the enforcement of its orders.²⁴¹

The State of Oklahoma enjoys sovereign immunity under the Governmental Tort Claims Act.²⁴² Although the state waives its immunity for some liabilities, the Act expressly retains Eleventh

230. *Id.*

231. *Hoops v. United Tel. Co. of Ohio*, 553 N.E.2d 252 (Ohio 1990).

232. *Id.* at 256 (arguing that the designation of certain remedies was an exclusion of others under the maxim *expressio unius est exclusio alterius*).

233. *Id.* at 257.

234. OHIO REV. CODE ANN. § 2743.02 (Anderson 1997 & Supp. 2001).

235. OKLA. STAT. tit. 25, § 1302 (1991 & Supp. 2003).

236. *Id.* §§ 1201(5), 1301(1).

237. *Id.* § 1101.

238. *Id.* § 1502.14.

239. *Id.* § 1505(B).

240. *Id.* § 1505(C).

241. *Id.* § 1506.

242. *Id.* tit. 51, § 152.1.

Amendment immunity.²⁴³ It also provides that there is no liability for “any loss to any person covered by . . . any employer’s liability act.”²⁴⁴ It is not clear if the age discrimination statute qualifies as an “employer’s liability act,” despite the instruction to construe the statute liberally.

15. OREGON: \$100,000 LIABILITY LIMIT AGAINST THE STATE

Under Oregon law, it is an unlawful employment practice for the state to discriminate on the basis of age.²⁴⁵ Interestingly, the Oregon statute protects all individuals who are eighteen or older.²⁴⁶ It empowers the Commissioner of the Bureau of Labor to issue cease-and-desist orders to carry out the purposes of the statute.²⁴⁷ In *Ogden v. Bureau of Labor*,²⁴⁸ the court held that an award of lost wages was part of a cease and desist order “reasonably calculated to carry out the purposes of [the statute], eliminate the effects of an unlawful practice found, and protect the rights of the complainant.”²⁴⁹ The statute allows a victim of unlawful discrimination to file a civil suit in court for “injunctive relief and such other equitable relief as may be appropriate, including . . . reinstatement . . . with or without back pay.”²⁵⁰ The court also has discretion to award costs and reasonable attorney’s fees.²⁵¹

The Oregon Tort Claims Act (OTCA) provides a \$100,000 cap on damages against the state and its agencies, limiting the recovery possible under the discrimination law.²⁵² Moreover, the OTCA prohibits the award of punitive damages against the state or its agencies.²⁵³ Case law indicates that the definition of “tort” under the OTCA includes employment discrimination claims.²⁵⁴ In *Griffin v. Tri-County Metro Transportation District*,²⁵⁵ a disability discrimination case, the

243. *Id.* § 152.1(B).

244. *Id.* § 155(14).

245. ORE. REV. STAT. § 659A.030 (2001).

246. *Id.* §§ 659.030(1)(b).

247. *Id.* § 659A.825(2).

248. *Ogden v. Bureau of Labor*, 699 P.2d 189, 192 (Or. 1985) (failure to consider an applicant because she was “too young” was discrimination within the meaning of the statute).

249. *Id.* at 193 (quoting ORE. REV. STAT. § 659.010(2)(a) (2001)).

250. ORE. REV. STAT. § 659A.885(2) (2001).

251. *Id.*

252. *Id.* §§ 30.260(4)(a), 30.270(1)(b).

253. *Id.* § 30.270(2).

254. *See, e.g., Brinkley v. Or. Health Scis. Univ.*, 766 P.2d 1045, 1048 (Or. 1988).

255. *Griffin v. Tri County Metro Transp. Dist.*, 870 P.2d 808 (Or. 1994).

court held that the \$100,000 liability limit in favor of public entities applied not only to tort damages, but also to attorney's fees and costs.²⁵⁶ The court reasoned that the OTCA's liability limit ensures "fiscal stability for public bodies."²⁵⁷

16. PENNSYLVANIA: STATE COURT AND ELEVENTH AMENDMENT IMMUNITY

Under the Pennsylvania Human Relations Act, it is an unlawful discriminatory practice to take age into account when making employment decisions.²⁵⁸ The Commonwealth of Pennsylvania is covered by the statute.²⁵⁹ It also allows a right of action in court with the potential remedies of back pay or "any other legal or equitable relief."²⁶⁰ However, the 1980 Sovereign Immunity Act²⁶¹ revived the judicially abrogated doctrine of state sovereign immunity.²⁶² The Act specifies limited instances where immunity is waived for damages arising from negligence, provided the applicable law would have allowed recovery but for the immunity.²⁶³ Nonetheless, none of the enumerated waiver areas applies to the state's liability as a public employer.²⁶⁴ In addition, the Act's exceptions must be narrowly construed.²⁶⁵ It specifically provides that none of its provisions are to be interpreted as waiving Eleventh Amendment immunity from suit in federal court.²⁶⁶

17. RHODE ISLAND: WAIVER OF SOVEREIGN IMMUNITY IN STATE AND FEDERAL COURT

The Fair Employment Practices Act prohibits the state and its political subdivisions from engaging in age discrimination in employment.²⁶⁷ The Act empowers the pertinent commission to issue a cease-and-desist order and "to take any further affirmative or other action that will effectuate the purposes of this [Act]."²⁶⁸ Remedies include

256. *Id.* at 808.

257. *Id.* at 814.

258. 43 PA. CONS. STAT. ANN. § 955 (1991 & Supp. 2002).

259. *Id.* § 954.

260. *Id.* § 962(c).

261. 42 PA. CONS. STAT. ANN. § 8521 (1998).

262. *See Dean v. Commonwealth*, 751 A.2d 1130, 1132 (Pa. 2000).

263. *Id.* (referring to 42 PA. CONS. STAT. ANN. § 8522) (1998).

264. *See* 42 PA. CONS. STAT. ANN. § 8522 (1998).

265. *Dean*, 751 A.2d at 1132.

266. 42 PA. CONS. STAT. ANN. § 8521(b) (1998).

267. R.I. GEN. LAWS §§ 28-5-6, -7 (2000).

268. *Id.* § 28-5-24.

“hiring, reinstatement, or upgrading of employees with or without back pay.”²⁶⁹ In addition, where there is evidence of malice, ill will, or reckless indifference, punitive damages are available.²⁷⁰ However, the Act specifically insulates the state from the award of punitive damages.²⁷¹

The Rhode Island Tort Claims Act (TCA) further provides that the state is liable “in all actions of tort in the same manner as a private individual.”²⁷² The TCA sets a \$100,000 limit on damages recovered against the state.²⁷³ Case law interprets the TCA as waiving the state’s sovereign immunity for tort actions in both state and federal court.²⁷⁴ In *Rosen v. Chang*,²⁷⁵ a federal district court held that the Eleventh Amendment was not a bar to a respondeat superior claim against the state because the state had consented to suit through the TCA.²⁷⁶

18. SOUTH CAROLINA: WAIVER OF IMMUNITY LIKELY INCLUDES LIABILITY FOR EMPLOYMENT DISCRIMINATION

The South Carolina Human Affairs Law prohibits age discrimination in employment.²⁷⁷ The definition of “employer” encompasses the state and its agencies.²⁷⁸ In addition, the statute specifically addresses discriminatory practices by a state employer.²⁷⁹ If the concerned commission finds that the state employer has engaged in proscribed discrimination, it shall order that the discrimination be discontinued and “requir[e] such other action including . . . hiring, reinstatement or upgrading of employees, with or without back pay.”²⁸⁰ Back pay cannot accrue beyond a period of two years prior to the filing of the complaint with the commission.²⁸¹ Either the state employer or the employee may appeal the decision of the commission to a

269. *Id.*

270. *Id.* § 28-5-29.1.

271. *Id.*

272. *Id.* § 9-31-1.

273. *Id.* § 9-31-2.

274. *See, e.g.,* *You Vang Yang v. Sturner*, 728 F. Supp. 845, 848 (D.R.I. 1990); *Pride Chrysler Plymouth, Inc. v. R.I. Motor Vehicle Dealers License Comm’n*, 721 F. Supp. 17, 22 (D.R.I. 1989); *Laird v. Chrysler Corp.*, 460 A.2d 425, 429 (R.I. 1983).

275. *Rosen v. Chang*, 758 F. Supp. 799 (D.R.I. 1991).

276. *Id.* at 804.

277. S.C. CODE ANN. § 1-13-80 (Law. Co-op. 1986).

278. *Id.* § 1-13-30(d), (e).

279. *Id.* § 1-13-90(c).

280. *Id.* § 1-13-90(c)(16).

281. *Id.*

court.²⁸² The commission is authorized to enforce its order in court.²⁸³ In addition, South Carolina has waived immunity for tort liability subject to certain exceptions, none of which shield the state employer from liability for employment discrimination.²⁸⁴

19. SOUTH DAKOTA: PROCEDURES TO IMPLEMENT PROHIBITION OF AGE DISCRIMINATION UNCLEAR

The South Dakota Human Relations Act applies to the state and does not include age in its list of impermissible grounds for employment discrimination.²⁸⁵ However, under the state career service statute, age discrimination against employees of the State of South Dakota is prohibited and treated as a misdemeanor.²⁸⁶ South Dakota's Career Service Statute also provides that "[t]he career service commission, . . . and all employees shall comply with . . . the South Dakota Human Relations Act."²⁸⁷ Remedies under the Act include reinstatement, with or without back pay, and "compensation incidental to the violation," but punitive and consequential damages are excluded.²⁸⁸ It is not clear if the legislature intended state employees to benefit from all the procedures and remedies under the Act. Case law suggests that age discrimination claims are brought under the ADEA.²⁸⁹

20. TENNESSEE: INTERPRETED TO WAIVE GOVERNMENTAL IMMUNITY

The Tennessee Human Rights Act (THRA) prohibits age discrimination by employers.²⁹⁰ The THRA's stated purposes include the implementation of the principles embodied in the ADEA.²⁹¹ The THRA expressly includes the state in its definition of employer.²⁹² In *Washington v. Robertson County*,²⁹³ the Tennessee Supreme Court held

282. *Id.* § 1-13-90(c)(19)(ii).

283. *Id.* § 1-13-90(c)(19)(iii).

284. *Id.* §§ 15-78-40, -60.

285. S.D. CODIFIED LAWS § 20-13-10 (Michie 1995).

286. *Id.* § 3-6A-15.

287. *Id.*

288. *Id.* § 20-13-42.

289. *See, e.g.,* Lee v. Rapid City Area Sch. Dist., 526 N.W.2d 738 (S.D. 1995). *Kimel* did not even list South Dakota as a state having an age discrimination statute under which state employees could recover money damages. *Kimel*, 528 U.S. at 92 n.*.

290. TENN. CODE ANN. § 4-21-101 (1998).

291. *Id.*

292. *Id.* § 4-21-102(4).

293. *Washington v. Robertson County*, 29 S.W.3d 466 (Tenn. 2000).

that the THRA's "plain language evinces the legislature's intent to remove any governmental immunity in matters involving the THRA."²⁹⁴ The THRA also provides for both administrative and judicial remedies.²⁹⁵ The pertinent state commission is authorized to order, inter alia, back pay and "damages for an injury, including humiliation and embarrassment, caused by the discriminatory practice, and cost, including a reasonable attorney's fee."²⁹⁶ In addition, a court may award "actual damages" and "the costs of the lawsuit."²⁹⁷

21. TEXAS: STATE IS COVERED AND BACK PAY, COSTS, AND DAMAGES PROVIDED

In Texas, it is an unlawful employment practice to make an employment decision on the basis of age.²⁹⁸ The term "employer" includes "a county, municipality, state agency or state instrumentality."²⁹⁹ The employment discrimination chapter of the Texas code was intended to execute the policies of the Federal Civil Rights Act, the ADA, and the ADEA.³⁰⁰ The law allows both the relevant commission and the complainant to bring a civil action in court.³⁰¹ The court can order injunctive and equitable relief, as well as compensatory and punitive damages.³⁰² Equitable relief may include ordering reinstatement, with or without back pay, and payment of court costs.³⁰³ However, punitive damages cannot be recovered against governmental entities.³⁰⁴ In addition, there is a cap placed on the amount of compensatory damages, ranging from \$50,000 to \$300,000, depending on the employer's number of employees.³⁰⁵ Case law suggests that the antidiscrimination statute waives the sovereign immunity of Texas.³⁰⁶

294. *Id.* at 475.

295. *See* TENN. CODE ANN. §§ 4-21-306, -311 (1998); *see also* Puckett v. Tenn. Eastman Co., 889 F.2d 1481 (6th Cir. 1989) (holding that the THRA forces an election of remedies when the administrative process has been initiated but after the administrative process is concluded an appeal is required to get to court).

296. TENN. CODE ANN. § 4-21-306 (1998).

297. *Id.* § 4-21-311.

298. TEX. LAB. CODE ANN. § 21.051 (Vernon 1996).

299. *Id.* § 21.002(8)(D).

300. *Id.* § 21.001.

301. *Id.* §§ 21.251, 21.254.

302. *Id.* §§ 21.258, 21.2585.

303. *Id.* § 21.258.

304. *Id.* § 21.2585(b).

305. *Id.* § 21.2585(d).

306. *See, e.g.,* Kerville State Hosp. v. Fernandez, 28 S.W.3d 1, 3 (Tex. 2000) (reasoning that the passage of a law waives immunity if its provisions would otherwise be without purpose).

22. UTAH: STATE WAIVER OF IMMUNITY EQUIVOCAL

The Utah Antidiscrimination Act (UAA) prohibits age discrimination in employment.³⁰⁷ The UAA encompasses the state and its political subdivisions within its definition of “employer.”³⁰⁸ A complaining party can initiate administrative proceedings and, upon a finding of discrimination, “reinstatement, back pay and benefits, and attorney’s fees and costs” may be ordered.³⁰⁹ The final decision of the administrative agency must be judicially enforced.³¹⁰

In *Hall v. Utah State Department of Corrections*,³¹¹ the Utah Supreme Court held that the Governmental Immunity Act (GIA)³¹² did not protect the state from suits under the Whistleblower Act³¹³ because the Act explicitly authorized claims against governmental entities.³¹⁴ Indeed, the Act defines employer as including a state agency or political subdivision of the state.³¹⁵ On that basis, the court reasoned that immunity can be statutorily waived.³¹⁶ A similar waiver of immunity can be found within the UAA because it also explicitly includes the state in its definition of employer. On the other hand, the GIA expressly provides that there is no waiver of immunity for liability arising from civil rights violations.³¹⁷ The term “civil rights” may or may not cover claims under the UAA. It remains an open question whether the UAA’s state-inclusive definition of employer is a waiver of immunity, just as in *Hall*, or whether the exclusion of claims for “civil rights violations” under the GIA precludes such an interpretation.

23. VERMONT: CAUSE OF ACTION AND DAMAGES

The Vermont Fair Employment Practices Act (VFEPA) prohibits age discrimination.³¹⁸ Its definition of “employer” includes any “gov-

307. UTAH CODE ANN. § 34A-5-106 (2000 & Supp. 2002).

308. *Id.* 34A-5-102(8).

309. *Id.* § 34A-5-107(9)(a)(b).

310. *Id.* § 34A-5-108.

311. *Hall v. Utah State Dep’t of Corr.*, 24 P.3d 958 (Utah 2001).

312. UTAH CODE ANN. §§ 63-30-1 to -38 (1997). The rule under the GIA is that “all government entities are immune from suit for any injury,” unless otherwise provided. *Id.* § 63-30-3(1).

313. *Id.* §§ 67-21-1 to -9.

314. *Hall*, 24 P.3d at 963.

315. *Id.*

316. *Id.* (citing UTAH CODE ANN. § 63-30-3(1) (2000 Supp 2002)).

317. UTAH CODE ANN. § 63-30-10(2) (2000 Supp 2002).

318. VT. STAT. ANN. tit. 21, § 495 (1987 & Supp. 2002).

ernmental body.”³¹⁹ The VFEPA provides for a cause of action and compensatory and punitive damages or “equitable relief including . . . restitution of wages and other benefits, reinstatement, costs, reasonable attorney’s fees and other appropriate relief.”³²⁰ Case law indicates that the state may be sued under the VFEPA without raising sovereign immunity issues.³²¹

24. VIRGINIA: ANY ADEA VIOLATION IS A VIOLATION OF THE STATE STATUTE

The Virginia Human Rights Act (VHRA) provides that “[c]onduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of . . . age . . . shall be an ‘unlawful discriminatory practice.’”³²² Any discrimination under federal laws is thus also a violation of Virginia law.³²³ Moreover, the VHRA stipulates that its provisions shall be interpreted liberally to accomplish its policies.³²⁴ Because the state and its agencies are covered under the ADEA, it can be inferred that the VHRA also prohibits the state employer from discriminating on the basis of age. Furthermore, the VHRA explicitly creates a cause of action for the discriminatory discharge of an employee³²⁵ in which courts may award up to twelve months of back pay with interest.³²⁶

25. WASHINGTON: SOVEREIGN IMMUNITY WAIVER FOR TORTIOUS CONDUCT

The Washington Law Against Discrimination (WLAD) prohibits state employers from discriminating on the basis of age.³²⁷ Relief under an administrative process includes reinstatement with back pay, as well as any other measures necessary to effectuate the purposes of the WLAD.³²⁸ In addition, the WLAD authorizes a civil action to recover actual damages, costs of suit including reasonable attorney’s

319. *Id.* § 495d(1).

320. *Id.* § 495b(b).

321. *See, e.g.,* *McHugh v. Univ. of Vt.*, 758 F. Supp. 945 (D. Vt. 1991).

322. VA. CODE ANN. § 2.2-3901 (Michie 2001).

323. *Grimes v. Canadian Am. Transp.*, 72 F. Supp. 2d 629, 634 (W.D. Va. 1999).

324. VA. CODE ANN. § 2.2-3902 (Michie 2001).

325. *Id.* § 2.2-2639.

326. *Id.*

327. WASH. REV. CODE ANN. §§ 49.60.040(1), .040(3), .180 (West 2002 & Supp. 2003).

328. *Id.* § 49.60.250(5).

fees, or “any other appropriate remedy.”³²⁹ The State of Washington has waived sovereign immunity for tortious conduct and is therefore liable for damages to the same extent as a private entity.³³⁰

26. WEST VIRGINIA: CAUSE OF ACTION AND DAMAGES

The West Virginia Human Rights Act (WVHRA) prohibits employment discrimination by the state.³³¹ The WVHRA mandates that the Human Rights Commission order, inter alia, reinstatement with back pay and any other remedy to effectuate the Act’s purposes.³³² Moreover, a complainant may choose to file an action in court as an alternative to administrative proceedings.³³³ On the other hand, the West Virginia Constitution provides that the state cannot be made a defendant in any suit but a garnishment proceeding.³³⁴ Despite this prohibition, case law suggests that employees do recover money damages from the state under the WVHRA.³³⁵

IV. Recommendation

There are two levels at which post-*Kimel* and post-*Garrett* age discrimination can be addressed: the federal level and the state level.

A. What the Federal Government Can and Should Do

Congress should try to identify a pattern of age discrimination by the states and enact a new age discrimination statute which would pass the Supreme Court’s congruence and proportionality test. Congress’s failure to identify a pattern of age discrimination by the states was one reason why the Supreme Court in *Kimel* held that the ADEA did not validly abrogate Eleventh Amendment immunity.³³⁶ If such a pattern of discrimination exists, Congress’s new statute could remedy and deter unconstitutional age discrimination under Section 5 of the

329. *Id.* § 49.60.030(2).

330. *Id.* § 4.92.090.

331. W. VA. CODE ANN. § 5-11-9, -2 (2002).

332. *Id.* § 5-11-10.

333. *See* *FMC Corp. v. W. Va. Human Rights Comm’n*, 403 S.E.2d 729 (W. Va. 1991).

334. W. VA. CONST. art. VI, § 35.

335. *See* *W. Va. Univ. v. Decker*, 447 S.E.2d 259, 262 (W. Va. 1994) (reversing Commission’s award of back pay and damages for other reasons).

336. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000); *see also supra* text accompanying notes 81–84.

Fourteenth Amendment. The measures in the new statute would need to be proportional to the violations committed by the states, qualifying Congress's action as an exercise of its remedial powers to enforce the Equal Protection Clause. However, the Supreme Court is likely to be distrustful of any congressional attempt to circumvent its decision in *Kimel*³³⁷ because the Supreme Court, and not Congress, has the power to define the scope of constitutional rights.³³⁸

In addition, or in the alternative, Congress should use its spending power³³⁹ under Article 1, Section 8 of the Constitution to condition federal grants to the states on their waiver of immunity against suits under the ADEA. This ability to condition funds is an independent source of congressional power.³⁴⁰ "Requiring states to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty."³⁴¹

As the Supreme Court stated in *Garrett*, the federal government can also sue the states for monetary damages.³⁴² This option, of course, is not as effective as allowing private individuals to sue the state because the money does not then go to the individual victims.

B. What States Can and Should Do

States should follow the lead of Minnesota³⁴³ and Illinois³⁴⁴ and statutorily waive their sovereign immunity from suit under the ADEA in federal court. If all states likewise waive their immunity, state employees nationwide would be uniformly protected by the ADEA. If

337. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act as an unconstitutional endeavor to bypass holding of *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990)).

338. *Kimel*, 528 U.S. at 88.

339. "The Congress shall have Power . . . to pay the Debts and provide for the common Defence [sic] and general Welfare of the United States." U.S. CONST. art. I, § 8.

340. NOWAK & ROTUNDA, *supra* note 31, § 2.11.

341. *Bell v. New Jersey*, 461 U.S. 773, 790 (1983).

342. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001).

343. See MINN. STAT. §1.05 (2001); see also *supra* text accompanying notes 207–08.

344. See H.B. 3772, 92 Gen. Assem., 1st Gen. Sess. (Ill. 2001); see also *supra* text accompanying note 185.

states are apprehensive about waiving immunity in federal court, they should consent to suit under the ADEA in state court.³⁴⁵

In addition, states should enact state age discrimination statutes providing for strong enforcement mechanisms and adequate monetary damages. Indeed, the Supreme Court's premise in *Kimel* was that money damages were recoverable in virtually all the states.³⁴⁶ However, strong state statutes are not per se sufficient. States must also ensure that they waive their sovereign immunity from monetary liability in state court under state statutes. Like Maryland, states can expressly include their waiver of immunity in the age discrimination statute itself³⁴⁷ or, like Kentucky and New York, they might rely upon their courts to interpret a waiver from the statutes.³⁴⁸ Finally, states must ensure that a right as fundamental as the right to be free from irrational discrimination does not depend upon whether the individual works for a private or a public employer.

C. What the Elderly and Elderly Rights Advocates Can and Should Do

Challenging age discrimination by states requires a multiplicity of approaches.³⁴⁹ Advocates should lobby both at the state and federal levels to realize the changes outlined above. If all else fails, individuals can resort to the *Ex parte Young* doctrine and sue state officials for injunctive relief.³⁵⁰ Individuals can also sue state officials for monetary damages.³⁵¹

345. See *Erickson v. Bd. of Governors*, 207 F.3d 945, 952 (7th Cir. 2000) (suggesting suits may be brought under the ADA in state court).

346. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000); see also *supra* text accompanying notes 85–86.

347. MD. ANN. CODE art. 49B, § 17A (1998); see also text accompanying notes 205–06.

348. For Kentucky, see *Department of Corrections v. Furr*, 23 S.W.3d 615, 617 (Ky. 2000) and *supra* notes 200–02 and accompanying text. For New York, *Koerner v. New York*, 467 N.E.2d 232, 235 (1984) and *supra* notes 236–37 and accompanying text.

349. For similar approaches towards disability discrimination, see Barry Taylor, *The ADA and the Eleventh Amendment* (2000) (unpublished article on file with Equip for Equality, Inc., www.equipforequality.org).

350. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001); see also *supra* text accompanying notes 44–46, 119.

351. See *supra* text accompanying notes 40–41, 120–21.

V. Conclusion

The Supreme Court is unlikely to retreat from its *Kimel* and *Garrett* jurisprudence. The elderly and the disabled will have to campaign for changes and, in the meantime, make the best of the remaining federal and state protections.

All the states do prohibit age discrimination. In fact, except for Alabama,³⁵² all states have statutes that clearly apply to the state or have case law interpreting the statutes as applying to the state. In addition, some form of monetary relief is recoverable under all but four states' statutes. However, several states invoke the principle of sovereign immunity to defeat a claim of monetary liability. On the other hand, there are states which waive immunity in both state and federal court. For the sake of fairness and uniformity, states are urged to waive immunity for ADEA and ADA purposes, while also providing for monetary relief under state statutes. The fundamental right to be free from discrimination should not be contingent upon such arbitrary factors as state of residence or choice of employer.

352. ALA. CODE § 25-1-20 (2000); *see also supra* text accompanying notes 129–38.