Oral Argument Not Requested

No. 98-2215

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

_____

REBECCA CISNEROS,

Plaintiff-Appellant,

v.

HEATHER WILSON, as Secretary of the Department of Children, Youth and Families, in her official capacity, and THE DEPARTMENT OF CHILDREN, YOUTH AND FAMILIES, as a branch of the State of New Mexico,

Defendants-Appellees

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(Honorable C. LeRoy Hansen)

_____

BRIEF FOR THE UNITED STATES AS INTERVENOR

_____

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STATEMENT OF RELATED CASES

There are no prior appeals.

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STATEMENT OF THE ISSUES

The United States will address the following questions:

1. Whether the abrogation of States' Eleventh Amendment immunity in the Americans with Disabilities Act is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment.

2. Whether the Eleventh Amendment bars an individual from suing a state official in her official capacity to enjoin continuing violations of Title I of the Americans with Disabilities Act.

STATEMENT OF THE CASE

1. The Americans with Disabilities Act (ADA) targets three particular areas of discrimination against persons with

disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities. This case arises under Title I.

Title I provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). A "covered entity" is defined to include an "employer," which in turn is defined as a "person engaged in an industry affecting commerce who has 15 or more employees * * * and any agent of such person." 42 U.S.C. 12111(2) and (5)(A). The term "person" incorporates the definition from Title VII of the Civil Rights Act of 1964, which includes States. 42 U.S.C. 12111(7); 42 U.S.C. 2000e(a); Fitzpatrick v. Bitzer, 427 U.S. 445, 449 & n.2 (1976).

Title I incorporates by reference the enforcement provisions of Title VII. 42 U.S.C. 12117(a). Title VII provides that after filing a charge with the Equal Employment Opportunity Commission against any "respondent" (defined to include an "employer," 42 U.S.C. 2000e(n)), and receiving a right-to-sue notice, "a civil action may be brought against the respondent named in the charge

* * * by the person claiming to be aggrieved." 42 U.S.C. 2000e-5(f). A successful plaintiff is entitled to reinstatement, back pay, and "any other equitable relief as the court deems appropriate," 42 U.S.C. 2000e-5(g), as well as compensatory damages and attorneys fees. See 42 U.S.C. 1981a; 42 U.S.C. 2000e-5(k). In the ADA, Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202 (a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter").

2. Plaintiff was employed by the New Mexico Department of Children, Youth and Families. In 1995, she had a breakdown due to work-related stress. She requested various accommodations from her employer, all of which were denied. Subsequently, she was terminated. She brought suit under, inter alia, Title I of the ADA against the Department and two of its officials in their individual and official capacities. The district court granted summary judgment for defendants, holding that plaintiff was not qualified to perform the essential functions of her position.

3. A timely appeal followed. Briefing was completed on February 24, 1999. On August 19, 1999, this Court issued its opinion in Martin v. Kansas, 190 F.3d 1120, 1126 (1999), which held "that Congress's statutory abrogation of Eleventh Amendment immunity in the ADA was a valid exercise of its Section 5 enforcement powers." Oral argument in this case was held on

November 18, 1999, at which time the issue of Eleventh Amendment immunity was raised. On January 26, 2000, after the Supreme Court granted a writ of certiorari in Florida Department of Corrections v. Dickson, 120 S. Ct. 976 (2000), the panel sua sponte abated the appeal pending the outcome of Dickson and certified to the Attorney General that the constitutionality of the abrogation had been drawn into question and granted the United States leave to intervene.

On April 19, 2000, after the Dickson case had been dismissed due to settlement, see 120 S. Ct. 1236 (2000), the panel reactivated the case and ordered the parties to file supplemental memoranda addressing the possible application of the Supreme Court's decision in Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000), on any potential Eleventh Amendment issue. The order also provided that "the Department of Justice may file such a memorandum on behalf of the United States as intervenor addressing the Eleventh Amendment issue and authorities it may deem pertinent."

A subsequent motion by plaintiff to abate the appeal pending the Supreme Court's disposition of University of Alabama Board of Trustees v. Garrett, 120 S. Ct. 1669 (2000), was denied on May 15, 2000.

SUMMARY OF ARGUMENT

This case should be held in abeyance until the Supreme Court issues its opinion in University of Alabama Board of Trustees v. Garrett, No. 99-1240, which will definitively resolve the validity of the abrogation in the Americans with Disabilities Act (ADA). If this Court elects to proceed before Garrett is decided, it should adhere to its prior decision in Martin v. Kansas that Title I of the ADA is a valid exercise of Congress' Section 5 authority and validly abrogates States' Eleventh Amendment immunity.

Even if this Court holds that the ADA's abrogation is not valid, it can consider the claims for injunctive relief against those defendants who are state officials and are being sued in their official capacity because those claims are not barred by the Eleventh Amendment. Under the doctrine of Ex parte Young, a state official sued for prospective relief to enjoin a continuing violation of federal law is not entitled to invoke the State's sovereign immunity.

As defendants conceded below, in enacting Title I of the ADA, Congress intended to authorize suits against state officials in their official capacity. The statute specifically authorizes suits against "agents," which easily encompasses official-capacity suits. Title I incorporates the definitions and remedial scheme of Title VII of the Civil Rights Act of 1964, which has consistently been found by this Court to permit suits against government officials in their official capacity. To hold

otherwise would cast aside clear precedent of this circuit and would deprive individuals of an established tool to vindicate federal rights without intruding on States' sovereign immunity.

ARGUMENT

The Supreme Court has granted a writ of certiorari to address whether the Americans with Disabilities Act (ADA) validly abrogates Eleventh Amendment immunity in University of Alabama Board of Trustees v. Garrett, 120 S. Ct. 1669 (2000). This Court should hold this appeal until Garrett is decided. For if this Court issues an opinion that addresses the Eleventh Amendment issue before Garrett is resolved, the losing party will likely seek certiorari, adding further delay and costs to this action. Should this Court nonetheless elect to proceed in advance of the Supreme Court's decision in Garrett, the Eleventh Amendment is no bar to this case proceeding because the ADA validly abrogates the States' immunity and, regardless of whether the abrogation is valid, this case may proceed on plaintiff's claim for injunctive relief against the state official in her official capacity.

I

THE AMERICANS WITH DISABILITIES ACT
VALIDLY ABROGATES ELEVENTH AMENDMENT IMMUNITY

The Americans with Disabilities Act provides that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. 12202. In Martin v. Kansas, 190 F.3d 1120, 1126 (1999), this Court held "that Congress's statutory

abrogation of Eleventh Amendment immunity in the ADA was a valid exercise of its Section 5 enforcement powers."

Under normal circumstances, a panel of this Court lacks the power to reconsider another panel's published decision. See Berry v. Stevinson Chevrolet, 74 F.3d 980, 985 (10th Cir. 1996); Haynes v. Williams, 88 F.3d 898, 900 n.4 (10th Cir. 1996). Even when there has been an intervening Supreme Court decision, respect for other panels of this Court requires adherence to the prior panel decision unless and until the Supreme Court's case law "mandate[s] a contrary rule." Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1234 (10th Cir. 1999); see also United States v. Jones, 194 F.3d 1178, 1185-1186 (10th Cir. 1999) (panel must follow prior panel opinions unless intervening Supreme Court decision "mandates" different conclusion), petition for cert. pending, No. 99-8176; United States v. Smith, 122 F.3d 1355, 1359 (11th Cir.) ("even where it has been weakened, but not overruled, by a Supreme Court decision, prior panel precedent must be followed"), cert. denied, 522 U.S. 1021 (1997). This is especially true when the intervening Supreme Court decision does not alter the legal standard used by the panel, but simply applies the same legal standard in a different context. See United States v. Brittain, 41 F.3d 1409, 1416 (10th Cir. 1994) (so long as a panel "purported to apply the proper test," intervening Supreme Court decision applying same test did not permit subsequent panel to disregard prior panel's holding).

The Supreme Court's decision in Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000), holding that the Age Discrimination in Employment Act (ADEA) was not a valid exercise of Congress' Section 5 authority, did not alter the legal analysis used in assessing the validity of congressional legislation enacted under Section 5 of the Fourteenth Amendment. To the contrary, the Court expressly noted (id. at 645) that it was "[a]pplying the same 'congruence and proportionality' test" that it had in City of Boerne v. Flores, 521 U.S. 507 (1997), and Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999). Thus, this Court's holding in Martin that "the ADA does not run afoul of the 'congruent and proportional' requirement" articulated in those cases, 190 F.3d at 1127, is dispositive.

Martin relied on several grounds for distinguishing the Supreme Court's prior opinions that are equally applicable in distinguishing Kimel. The Court in Kimel relied on the fact that it had never held that an age classification violated the Equal Protection Clause. See 120 S. Ct. at 645-647. But as Martin noted, "[t]he Supreme Court has held that arbitrary discrimination by the state against disabled persons violates the Equal Protection Clause. Thus, under [City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)], the disabled are protected by the Fourteenth Amendment, and Congress is entitled to enforce this protection against the states." 190 F.3d at 1127-1128; see also Alexander v. Choate, 469 U.S. 287, 295 n.12

(1985) ("well-cataloged instances of invidious discrimination against the handicapped do exist").

Second, the Court in Kimel explained that Congress had not, in either the statute or the legislative history of the ADEA, identified unconstitutional conduct by the States relating to older workers. See 120 S. Ct. at 648-650. In contrast, the ADA includes express findings that people with disabilities "continually encounter various forms of discrimination, including outright intentional exclusion * * * and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities," as well as having been subject to "a history of purposeful unequal treatment," and "unfair and unnecessary discrimination and prejudice" that continues to exist. 42 U.S.C. 12101(a)(5), (7), and (9). These findings were based on substantial evidence: 14 congressional hearings and 63 field hearings held by a special congressional task force were held in the three years prior to passage of the Disabilities Act. See S. Rep. No. 116, 101st Cong., 1st Sess. 4-5, 8 (1989); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess., at 24-28, 31 (1990); id., Pt. 3, at 24-25; id., Pt. 4, at 28-29; see also T. Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp. L. Rev. 393, 393 & nn.1-3 (1991) (listing the individual hearings). Congress also drew upon reports submitted to Congress by the Executive Branch. See S. Rep. No. 116, supra, at 6 (citing United States Comm'n on Civil Rights, Accommodating the Spectrum of Individual Abilities (1983); National Council on

Disability, Toward Independence (1986); and National Council on Disability, On the Threshold of Independence (1988)); H.R. Rep. No. 485, supra, Pt. 2, at 28 (same).[1] In Martin, this Court relied on the fact that "Congress, when it enacted the ADA, made numerous findings of fact regarding the pervasiveness of discrimination against disabled persons" and properly determined that the findings "establishing the existence of widespread discrimination against the disabled are entitled to deference." 190 F.3d at 1127, 1128.

Finally, the Court in Kimel held that the remedial scheme enacted by the ADEA was not proportionate to the constitutional problem Congress was addressing. See 120 S. Ct. at 647-648. But the remedial scheme of the ADA is very different. As this Court explained:

> the remedial purposes of the ADA are tailored to remedying and preventing the discriminatory conduct, and are thus congruent and proportional to the injury to be prevented or remedied. The Act only prohibits discrimination against "qualified individuals," and it requires only "reasonable accommodations" that do not impose an "undue burden" on the employer.
>
> In sum, [t]he ADA, unlike [the Religious Freedom Restoration Act], is not attempting to impose a strict scrutiny standard

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[1] To give but one example of the evidence regarding state discrimination against persons with disabilities, the report of the Advisory Commission on Intergovernmental Relations, Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal (Apr. 1989), reflects the results of a survey of state officials on the perceived impediments to employment of persons with disabilities in state governments. Forty-eight percent of state officials considered negative attitudes and misconceptions to be a moderate impediment to employment of persons with disabilities, while thirty-four percent considered those reasons to be strong impediments, for a total of eighty-two percent. Id. at 72-73.

> on all state laws or actions in the absence of evidence of discrimination. . . . Rather, the ADA seeks to impose a scheme that will adequately prevent or remedy a well-documented problem of discrimination without unduly burdening the state prison system. It subjects some laws and official actions to a "reasonable accommodation" requirement only to the point that the accommodation is not unduly burdensome. Such a scheme, unlike RFRA, does not redefine or expand [disabled persons'] constitutional protections, but simply proportionally acts to remedy and prevent documented constitutional wrongs.

Martin, 190 F.3d at 1127-1128 (citation omitted).

Kimel thus provides no basis for deviating from this Court's previous decision in Martin. The Eleventh Amendment is therefore no bar to this suit continuing in toto because the abrogation in the ADA is valid Section 5 legislation.

II

PLAINTIFF MAY SEEK INJUNCTIVE RELIEF AGAINST STATE OFFICIALS SUED IN THEIR OFFICIAL CAPACITY TO ENJOIN CONTINUING VIOLATIONS OF TITLE I OF THE AMERICANS WITH DISABILITIES ACT

A. The Eleventh Amendment Is No Bar To Private Suits Against State Officials To Enjoin Future Violations Of Federal Law

Even if this Court disagrees and holds the abrogation invalid, that does not require that the entire case be dismissed. The absence of a valid abrogation or waiver does not mean that States no longer need to comply with the ADA or that private parties cannot seek relief in federal court. The Supreme Court reaffirmed in Alden v. Maine, 527 U.S. 706 (1999), that Eleventh Amendment immunity does not authorize States to violate federal law. "The constitutional privilege of a State to assert its sovereign immunity * * * does not confer upon the State a

concomitant right to disregard the Constitution or valid federal law." Id. at 754-755.

It was to reconcile these very principles--that States have Eleventh Amendment immunity from private suits, but are still bound by federal law--that the Supreme Court adopted the rule of Ex parte Young. Id. at 756-757.[2] Ex parte Young, 209 U.S. 123 (1908), held that when a state official acts in violation of the Constitution or federal law (which the Constitution's Supremacy Clause makes the "supreme Law of the Land"), he is acting ultra vires and is no longer entitled to the State's immunity from suit. The doctrine permits only prospective injunctive relief. See Edelman v. Jordan, 415 U.S. 651, 664, 667-668 (1974). Because any monetary award against state officials in their official capacity to remedy past injuries "must inevitably come from the general revenues of the State," such an award "resembles far more closely the monetary award against the State itself" and thus is prohibited by the Eleventh Amendment. Id. at 665. By limiting relief to prospective injunctions of officials, the Court avoided a judgment directly against the State but, at the same time, prevented the State (through its officials) from continuing illegal action.

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[2] The Eleventh Amendment is also no bar to the United States suing the State. See Alden, 527 U.S. at 755 ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government."); id. at 759-760 (noting that United States could sue a State to recover damages under the Fair Labor Standards Act). The United States is not a party to this action in that sense, however, and takes no position on the merits.

The Ex parte Young doctrine has been described as a legal fiction, but it was adopted by the Supreme Court almost a century ago to serve a critical function in permitting federal courts to bring state policies and practices into compliance with federal law. "Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in Ex parte Young gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." Green v. Mansour, 474 U.S. 64, 68 (1985); see also Alden, 527 U.S. at 757 ("The principle of sovereign immunity as reflected in our jurisprudence strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States. Established rules provide ample means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause." (citations omitted)).

This Court has consistently recognized that even without resolving whether there was a valid abrogation of Eleventh Amendment immunity, a private suit may proceed to enforce statutory rights against state officials in their official capacity. See, e.g., J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1283 n.2, 1287 (10th Cir. 1999) (Title II of the ADA); Ellis v. University of Kan. Med. Ctr., 163 F.3d 1186, 1196-1198 (10th Cir. 1999); Johns v. Stewart, 57 F.3d 1544, 1552, 1555 (10th Cir. 1995). In addition to back pay and compensatory damages that

would be barred by the Eleventh Amendment absent abrogation or waiver, plaintiff's complaint seeks accommodations to permit reinstatement to her job. This is clearly the type of forward-looking relief permissible under Ex parte Young. See Buchwald v. University of N.M. Sch. of Med., 159 F.3d 487, 495 n.5 (10th Cir. 1998). Thus, the Eleventh Amendment is no bar to a suit proceeding against defendant state officials in their official capacity for such relief.[3]

B. State Officials In Their Official Capacity Are Appropriate Defendants In An Action To Enforce Title I

In the district court, defendants properly recognized that a state official sued in her official capacity was an appropriate defendant under Title I. Because the statement on the cover of their opening brief suggests some equivocation on this point, we will briefly address it.

Title I, by incorporating the enforcement scheme of Title VII of the Civil Rights Act of 1964, see 42 U.S.C. 12117(a), authorizes private suits against a "respondent," which is defined to include an "employer." 42 U.S.C. 2000e-5(f), 2000e(n). The

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[3] The Seventh Circuit in Walker v. Snyder, No. 98-3308, 2000 WL 626752, at *2 (May 16, 2000), held that a suit for prospective injunctive relief under the doctrine of Ex parte Young was not available under the ADA because such a suit may only be brought against a state official in his individual capacity. Such a holding is inconsistent with a long line of Supreme Court decisions permitting injunctive suits against state officials in their official capacity, see, e.g., Blatchford v. Native Village of Noatak, 501 U.S. 775, 785 n.3 (1991); Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985); Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 737 n.16 (1980); Hutto v. Finney, 437 U.S. 678, 690 (1978), as well as similar holdings of this Court cited in the text.

term "employer" is defined in both Title I and Title VII to include a "person engaged in an industry affecting commerce who has 15 or more employees * * * and any agent of such [a] person." 42 U.S.C. 12111(5)(A); 42 U.S.C. 2000e(b) (emphasis added).

In Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993), this Court held that "[u]nder Title VII, suits against individuals must proceed in their official capacity; individual capacity suits are inappropriate." Accord Haynes v. Williams, 88 F.3d 898, 899-901 (10th Cir. 1996). In Butler v. City Prairie Village, 172 F.3d 736, 744 (10th Cir. 1999), this Court recognized that there was "no meaningful distinction between the definitions of 'employer' in Title VII and the ADA" and extended the holding of Sauers and Haynes to Title I. Thus, suits against state employees in their official capacity are permissible under Title I.

According to the caption of the complaint, plaintiff sued defendant Heather Wilson, Secretary of the Department of Children, Youth and Families, in her "official and individual capacities." In the district court, defendants argued that the ADA claim "should only have been filed against the Department of Children, Youth and Families and Heather Wilson in her official capacity, and maintain that the claims made against the defendants in their individual capacities should be dismissed." Aplt. App. 28-29. The district court granted their motion, dismissing "Heather Wilson, only in [her] individual capacit[y]." Aplt. App. 31 (emphasis added).

Defendants now contend on the cover of their Response Brief that Wilson is not an appropriate appellee because "[a]ll claims against both individuals were dismissed." But this glosses over the distinction between suing an individual in his or her personal capacity and suing an individual in his or her official capacity. "Official-capacity suits * * * 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity." Kentucky v. Graham, 473 U.S. 159, 165-166 (1985) (citations omitted); cf. id. at 167 n.14 (noting absence of Eleventh Amendment immunity to suits for injunctive relief when state officials sued in their official capacity). As defendants properly understood below, an official sued in his or her official capacity is an "agent" of the state employer and a proper defendant under Title I of the ADA.

The Supreme Court has "frequently acknowledged the importance of having federal courts open to enforce and interpret federal rights." Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 293 (1997) (O'Connor, J., joined by Scalia, J., and Thomas, J., concurring in part and concurring in judgment). As Congress intended to allow a Title I suit to proceed against a state official in her official capacity, this case may proceed against

the defendant official for injunctive relief even absent a valid abrogation of Eleventh Amendment immunity.

CONCLUSION

This Court should hold this case pending the decision of the Supreme Court in University of Alabama Board of Trustees v. Garrett, No. 99-1240. In the alternative, this Court should adhere to the holding of Martin v. Kansas and reaffirm that the Americans with Disabilities Act validly abrogates States' Eleventh Amendment immunity. If this Court holds otherwise, it should permit this appeal to proceed against defendant Wilson in her official capacity under the doctrine of Ex parte Young.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2000 two copies of the foregoing Brief for the United States as Intervenor were served by Federal Express Delivery, postage prepaid, on the following counsel:

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