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IN THE WAKE OF *GARRETT*: STATE LAW
ALTERNATIVES TO THE AMERICANS WITH
DISABILITIES ACT

Joseph J. Shelton^{*}

“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”¹

I. INTRODUCTION

On May 4, 1776, the General Assembly of the Colony of Rhode Island formally declared its independence from England.² Rhode Island’s bold, historic action occurred two months before twelve of the original thirteen colonies followed suit and created the first free republic in the New World.³ More than 200 years later, Rhode Islanders, and the rest of the country, could be forgiven for thinking that they had rid themselves of the idiosyncrasies and trappings of monarchical rule.

On July 3, 2001, however, a group of protesters gathered at the Rhode Island State House to object to a series of recent United States Supreme Court decisions.⁴ Collectively, these decisions hold that under the Eleventh Amendment to the United States Constitution, state employees cannot use certain federal anti-discrimination laws to sue an allegedly discriminating state for damages.⁵ Although Rhode Island state law also prohibits discrimination, the protesters argued that racial minorities and the disabled are entitled to the wider protections and greater damage

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

2. WILLIAM MCLOUGHLIN, *RHODE ISLAND, A HISTORY* 94-95 (1978).

3. *Id.*

4. Ariel Sabar, *Almond Urged To Sign Right-To-Sue Bill*, PROVIDENCE J.-BULL. (R.I.), July 4, 2001, at B1.

5. *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

remedies available under federal law, and by denying them this right, the Supreme Court had effectively disenfranchised them.⁶ To gain these rights, the protesters demanded that the governor sign a bill waiving the state's sovereign immunity.⁷ Bob Cooper, Executive Secretary of the Governor's Commission on Disabilities, argued that "[s]overeign immunity dates back to King George III."⁸ Cooper explained: "We're calling on the governor to declare independence from English common law and give up the philosophy that the king can do no wrong."⁹

The doctrine of sovereign immunity stems from the ancient rule that the king is infallible. Blackstone noted that the "[k]ing . . . is not only incapable of *doing* wrong, but even of *thinking* wrong: he can never mean to do an improper thing: in him is no folly or weakness."¹⁰ The monarchical infallibility expressed by Blackstone is not, however, without its dissenters.¹¹ In *Great Northern Life Insurance Co. v. Read*,¹² Justice Frankfurter stated: "Whether this immunity is an absolute survival of the monarchical privilege, or is a manifestation merely of power, or rests on abstract logical grounds . . . it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State."¹³ More recently, dissenting in *Seminole Tribe v. Florida*,¹⁴ Justice Stevens noted that the concept that the "[k]ing can do no wrong" has always been absurd; the bloody path trod by English monarchs both before and after they reached the throne demonstrated the fictional character of any such assumption."¹⁵

The protest at the Rhode Island State House, which sought a waiver of the state's sovereign immunity, evidenced a reaction to the Supreme Court's recent decision in *Board of Trustees of the University of Alabama v. Garrett*.¹⁶ In a five-to-four decision, the Supreme Court ruled that suits against the states to recover money damages under Title I of the Americans with Disabilities Act (ADA) are precluded by the Eleventh Amendment.¹⁷ The consequence of *Garrett*, which is only the

6. Sabar, *supra* note 4; see also R.I. GEN. LAWS § 28-5-7 (2000); R.I. GEN. LAWS § 36-4-50 (1991).

7. Sabar, *supra* note 4.

8. *Id.*

9. *Id.*

10. 1 WILLIAM BLACKSTONE, COMMENTARIES 239 (Oxford, Clarendon Press 1765).

11. See discussion *infra* notes 12-15 and accompanying text.

12. 322 U.S. 47 (1944).

13. *Id.* at 59 (Frankfurter, J., dissenting) (citation omitted).

14. 517 U.S. 44 (1996).

15. *Id.* at 95 (Stevens, J., dissenting).

16. 531 U.S. 356 (2001).

17. *Id.*; see also Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12111-12117 (2000); U.S. CONST. amend. XI ("The Judicial power of the United States shall not

latest in a line of similar cases, is alarming: approximately 4,826,897 state employees are now prohibited from pursuing monetary damages against states for violations of their rights under certain federal civil rights statutes.¹⁸ In addition to the ADA, the Court has reached similar decisions regarding the Fair Labor Standards Act (FLSA)¹⁹ and the Age Discrimination in Employment Act (ADEA).²⁰ The Family and Medical Leave Act (FMLA),²¹ the Pregnancy Discrimination Act (PDA),²² and some aspects of Title VII of the Civil Rights Act of 1964 are also in danger of a similar fate.²³

Perhaps cognizant that federal statutory rights may be seen as illusory, the Supreme Court has noted a number of alternatives to private monetary damage actions that are available to individuals with claims against a state.²⁴ The alternatives include: (1) waiver of sovereign immunity by the states;²⁵ (2) suits against “lesser entities” that are not “arm[s] of the state;”²⁶ (3) suits brought by the federal government;²⁷ (4) suits for prospective relief brought against state officials in their official capacities;²⁸ and (5) suits for damages brought against state officers in their individual capacities.²⁹

Others have recently explored the efficacy of official capacity suits for prospective relief, suits against “lesser entities,” and suits brought by the

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.”).

18. *A Few States Consider Bills Waiving Immunity to ADA Lawsuits*, 37 FAIR EMP. NEWSL. 926 (2001) (quoting 1999 U.S. Census Bureau statistics).

19. *See, e.g., Alden v. Maine*, 527 U.S. 706 (1999); *see also* Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (2000).

20. *See, e.g., Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *see also* Age Discrimination in Employment Act of 1967, 20 U.S.C. § 621 (2000).

21. *See, e.g., Hibbs v. Dep’t of Human Res.*, 273 F.3d 844, 873 (9th Cir. 2001), *cert. granted sub nom. Nevada Dep’t of Human Res. v. Hibbs*, 536 U.S. 938 (2002) (mem.) (discussing the possible immunity of state employers from Family and Medical Leave Act claims); *see also* Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (2000).

22. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2000).

23. *See* Roger C. Hartley, *Enforcing Federal Civil Rights Against Public Entities After Garrett*, 28 J.C. & U.L. 41, 82-83 (2001) (discussing the potential effect of *Garrett* on other federal civil rights legislation).

24. *See Alden*, 527 U.S. at 755-57.

25. *See id.* at 757-58.

26. *Id.* at 756.

27. *See* Bd. of Trs. of Univ. of Ala. v. *Garrett*, 531 U.S. 356, 374 n.9 (2001); *Alden*, 527 U.S. at 759-60; *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996).

28. *Garrett*, 531 U.S. at 374 n.9; *Alden*, 527 U.S. at 756-57; *see also* Hartley, *supra* note 23, at 73.

29. *Alden*, 527 U.S. at 757; *see also* Hartley, *supra* note 23, at 73.

federal government.³⁰ Relatively little research, however, has been conducted concerning the number of states that have voluntarily waived their sovereign immunity and the effectiveness of these waivers to secure monetary damage actions. Similarly, comparatively little scholarship has explored the effectiveness of remedies provided to individuals under state disability statutes and whether such state law remedies might constitute an efficacious alternative to suits under the ADA. This Article will focus on both of these issues. To fully appreciate the magnitude of these issues, it is important to understand the concept of sovereign immunity as well as the sources of congressional authority to abrogate state sovereign immunity.

II. THE SUPREME COURT'S SECTION FIVE JURISPRUDENCE

It is well established that Congress possesses authority to abrogate state judicial immunity "when it both unequivocally intends to do so and 'act[s] pursuant to a valid grant of constitutional authority.'"³¹ Accordingly, congressional legislation passed in accordance with this authority is enforceable against the states.³² Previously, Congress has been understood to possess two valid grants of constitutional authority: (1) Section 5 of the Fourteenth Amendment, and (2) the Commerce Clause.³³ Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."³⁴ The Supreme Court has interpreted this enforcement power "both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."³⁵ The Commerce Clause, on the other hand, provides that Congress has the power "[t]o regulate commerce . . . among the several states."³⁶ In *Pennsylvania v. Union Gas Co.*,³⁷ a plurality of the Supreme Court held that the Commerce Clause granted Congress the power to abrogate state sovereign immunity.³⁸

30. See Michael H. Gottesman, *Disability, Federalism, and a Court with an Eccentric Mission*, 62 OHIO ST. L.J. 101 (2001); Roger C. Hartley, *The Alden Trilogy: Praise and Protest*, 23 HARV. J.L. & PUB. POL'Y 324, 367-92 (2000); Hartley, *supra* note 23, at 82.

31. *Garrett*, 531 U.S. at 363 (citation omitted).

32. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000).

33. Hartley, *supra* note 23, at 45; see also U.S. CONST. amend. XIV, § 5; U.S. CONST. art. I, § 8.

34. U.S. CONST. amend. XIV, § 5.

35. *Kimel*, 528 U.S. at 81.

36. U.S. CONST. art. I, § 8.

37. 491 U.S. 1 (1989).

38. *Id.* at 19, 23.

A number of recent Supreme Court decisions have turned this traditional understanding of Congress' constitutional authority to abrogate state sovereign immunity on its head.³⁹ Collectively, these decisions stand for the proposition that, in the absence of Congress having validly abrogated state sovereign immunity, individuals seeking to vindicate their federal statutory rights through monetary damage actions against a state are precluded from doing so in state court; they are also precluded from suing in federal court.⁴⁰ This line of cases raises the specter of state employees continuing to possess federal statutory rights, while lacking a judicial forum to vindicate those rights through suits for monetary damages.⁴¹

In *Seminole Tribe*,⁴² the Supreme Court rejected the Commerce Clause as a source of abrogation authority, thereby expressly overruling its earlier decision in *Union Gas*.⁴³ At issue in *Seminole Tribe* was a lawsuit brought by the Seminole Indian Tribe against the state of Florida under the Indian Gaming Regulatory Act (IRGA).⁴⁴ The Act permits an Indian tribe to conduct gaming activities provided that the tribe has reached a compact with the applicable state.⁴⁵ The Act further provides that states have a duty to negotiate in good faith with a tribe toward the formation of a compact.⁴⁶ To ensure good faith, the Act authorizes tribes to bring suit in federal court against a state in order to compel performance of the state's duty to negotiate in good faith.⁴⁷

The precise question before the Court in *Seminole Tribe* was whether "the Eleventh Amendment prevent[s] Congress from authorizing suits by Indian tribes against States for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause."⁴⁸ The petitioner argued that Congress abrogated the states' sovereign immunity through the enactment of the IRGA.⁴⁹ On this point, the Court agreed, concluding that "Congress has in § 2710(d)(7) provided an

39. See, e.g., *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647-48 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 572, 536 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996).

40. See *supra* note 39 and accompanying text.

41. See Hartley, *supra* note 30, at 339.

42. 517 U.S. 44 (1996).

43. *Id.* at 72; see also *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989).

44. *Seminole Tribe*, 517 U.S. at 44; see also 25 U.S.C. § 2710(d)(1)(C) (2000).

45. 25 U.S.C. § 2710(d)(1)(C) (2000).

46. *Id.* § 2710(d)(3)(A).

47. *Id.* § 2710(d)(7).

48. *Seminole Tribe*, 517 U.S. at 53.

49. *Id.* at 55.

‘unmistakably clear’ statement of its intent to abrogate.”⁵⁰ The Court then considered whether the IRGA “was passed pursuant to a constitutional provision granting Congress the power to abrogate.”⁵¹ Here, the Court concluded that Congress did not have the power under Article I of the Indian Commerce Clause to abrogate states’ Eleventh Amendment immunity in order to permit suits to enforce rights under the IRGA.⁵² In reaching its decision, the Court noted that the Eleventh Amendment restricts Article III judicial power and that Congress cannot use Article I “to circumvent the constitutional limits placed on federal jurisdiction.”⁵³ Accordingly, the Court’s decision left Congress’ Section 5 power as the only source of abrogation authority.⁵⁴

In *Alden v. Maine*,⁵⁵ the Supreme Court addressed whether a group of state probation officers could sue the state of Maine for money damages in state court under the FLSA.⁵⁶ The state probation officers had initially filed suit against the state of Maine in U.S. District Court.⁵⁷ The U.S. District Court, however, dismissed the officers’ FLSA suit against the state of Maine because of the Supreme Court’s decision in *Seminole Tribe*.⁵⁸ Consequently, the probation officers filed the same action in state court, which dismissed the suit on the basis of sovereign immunity.⁵⁹ The Maine Supreme Court affirmed the trial court’s decision.⁶⁰ Subsequently, the Supreme Court held that Congress may not subject non-consenting states to private suits for damages in state courts.⁶¹ In reaching its decision, the Court noted that requiring states to defend suits in their own state courts would be more offensive to the states than forcing them to defend themselves in federal court, which the Eleventh Amendment prohibits.⁶² Accordingly, as a result of the Supreme Court’s decisions in *Seminole Tribe* and *Alden*, and in the absence of a valid

50. *Id.* at 56.

51. *Id.* at 59.

52. *Id.* at 72-73.

53. *Id.*

54. *Id.*; see also discussion *supra* notes 33-38 and accompanying text.

55. 527 U.S. 706 (1999).

56. *Id.* at 711-12. The Fair Labor Standards Act was enacted pursuant to the Commerce Clause. Accordingly, as a result of the Supreme Court’s decision in *Seminole Tribe*, this suit against the state for money damages in federal court was not available. *Id.* at 712.

57. *Id.* at 711.

58. *Id.* at 712.

59. *Id.*

60. *Id.*

61. See *id.*

62. *Id.* at 749.

exercise of Congress' Section 5 power, state employees are precluded from bringing suit in state court as well as federal court.

In *City of Boerne v. Flores*,⁶³ the Court examined the scope of Congress' Section 5 power to enforce the provisions of the Fourteenth Amendment.⁶⁴ At issue was the constitutionality of the Religious Freedom Restoration Act of 1993 (RFRA).⁶⁵ Congress enacted the RFRA in an effort to reverse the effects of the Supreme Court's holding in *Employment Division v. Smith*,⁶⁶ where the Supreme Court held that the Free Exercise Clause did not bar Oregon from prohibiting the religious use of peyote.⁶⁷ In *Boerne*, the Archbishop of San Antonio brought suit against Boerne, Texas under the RFRA because the city denied the Archbishop's application for a building permit to enlarge St. Peter Catholic Church.⁶⁸ Reversing the Fifth Circuit's decision, the United States Supreme Court stated that there must be "congruence" and "proportionality" between the statute and the constitutional injuries the statute was intended to remedy.⁶⁹ At the same time, the Court acknowledged that legislation preventing or remedying constitutional violations could fall within the "sweep" of Congress' power.⁷⁰ This assertion holds even if, in the process, the legislation prohibits some conduct that is constitutional.⁷¹ In *Boerne*, the Court noted that RFRA's legislative record contained little evidence that the states were engaging in the type of unconstitutional conduct that the RFRA was enacted to prevent.⁷² Applying the congruence and proportionality test to the RFRA, however, the Court concluded that "[t]he stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved."⁷³

In *Kimel v. Florida Board of Regents*,⁷⁴ the Court explored the scope of the *Boerne* congruence and proportionality test.⁷⁵ In *Kimel*, the issue concerned Congress' exercise of its Section 5 power to make states subject to money damages in federal court for violating the Age

63. 521 U.S. 507 (1997).

64. *Id.* at 517.

65. *Id.* at 511; *see also* 42 U.S.C. §§ 2000bb-2000cc (2000).

66. 494 U.S. 872 (1990).

67. *See id.* at 878-90.

68. *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997); *see also* 42 U.S.C. §§ 2000bb-2000cc (2000).

69. *City of Boerne*, 521 U.S. at 520.

70. Hartley, *supra* note 30, at 351.

71. *Id.*

72. *City of Boerne*, 521 U.S. at 530-31.

73. *Id.* at 533.

74. 528 U.S. 62 (2000).

75. *Id.* at 80-82.

Discrimination in Employment Act (ADEA).⁷⁶ Applying the *Boerne* congruence and proportionality test, the Court held that while the ADEA “contain[ed] a clear statement of Congress’ intent to abrogate the States’ immunity, that abrogation exceeded Congress’ authority [pursuant to] Section 5 of the Fourteenth Amendment.”⁷⁷ According to the Court, the ADEA was not proportional to the harm the statute was meant to prevent or remedy.⁷⁸ In reaching its decision, the Court noted that the ADEA’s legislative record confirmed that Congress found no evidence of age discrimination by the states, “much less any discrimination whatsoever that rose to the level of constitutional violation.”⁷⁹

The Court’s holding in *Kimel* marked the first time in over fifty years that the Court held a civil rights statute unconstitutional.⁸⁰ Perhaps in recognition of the magnitude of its decision, the majority opinion was careful to note that its holding did “not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. . . . State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union.”⁸¹

*Board of Trustees of the University of Alabama v. Garrett*⁸² is the Supreme Court’s most recent case addressing the scope of Congress’ power to abrogate state sovereign immunity pursuant to Section 5 of the Fourteenth Amendment.⁸³ The petitioner, a registered nurse employed by the University of Alabama, was diagnosed with breast cancer that required her to undergo a lumpectomy, radiation treatment, and chemotherapy.⁸⁴ As a result, her medical condition required substantial leave from work.⁸⁵ Upon returning to work, Garrett was informed that she could no longer work as a director, but that she could return in a

76. *Id.* at 82-83 (deciding specifically whether state employees could sue states for money damages for age discrimination by state employers); *see also* 29 U.S.C. § 630(b) (2000).

77. *Kimel*, 528 U.S. at 62.

78. *Id.* at 83.

79. *Id.* at 88-91.

80. Ivan E. Bodensteiner & Rosalie B. Levinson, *Litigating Age and Disability Claims Against State and Local Government Employers in the New “Federalism” Era*, 22 BERKELEY J. EMP. & LAB. L. 99, 100 (2001) (citing *A Major Change in Civil Rights Litigation*, 36 TRIAL 94 (March 2000)).

81. *Kimel*, 528 U.S. at 91 (2000).

82. 531 U.S. 356 (2001).

83. *See id.* at 363-66.

84. *Id.* at 362.

85. *Id.*

lower-paying position as a nurse manager.⁸⁶ Garrett then filed a lawsuit in U.S. District Court seeking money damages under the ADA.⁸⁷ At issue in *Garrett* was whether state employees could recover money damages for the state's failure to comply with Title I of the ADA.⁸⁸ The Court held that under the Eleventh Amendment, state employees may not sue in federal court to recover money damages under Title I of the ADA.⁸⁹ The Court further noted that the legislative record of the ADA failed to show a pattern of state discrimination in employment against persons with disabilities.⁹⁰ As a result, the Court concluded that Congress' "failure to mention states in the legislative findings addressing discrimination in employment reflects that body's judgment that no pattern of unconstitutional state action had been documented."⁹¹

In sum, the Court has concluded that Congress failed to abrogate state sovereign immunity with the RFRA, ADEA, and under Title I of the ADA.⁹² In light of these rulings, a number of civil rights statutes are presently in danger of sharing a similar fate.⁹³ If, however, the alternatives proffered by the Court turn out to be as effective as monetary damage actions, it could be argued that little in the form of protection of individual civil rights has been lost from this line of cases. On the other hand, if it turns out that the alternatives suggested by the Court are significantly less effective than monetary damage actions in vindicating federal statutory rights, it could be argued that this recent line of cases has made some federal statutory rights illusory.⁹⁴

86. *Id.*

87. *Id.*

88. *Id.* at 360.

89. *Id.* at 370-72.

90. *Id.* at 368.

91. *Id.* at 372.

92. *See id.*; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999).

93. *See* discussion *supra* notes 17-23 and accompanying text.

94. *See* Roger C. Hartley, *The New Federalism and the ADA: State Sovereign Immunity From Private Damage Suits After Boerne*, N.Y.U. REV. L. & SOC. CHANGE 481, 541 (1998) ("[L]imiting public employees to injunctive relief while permitting private sector employees to bring damage actions against employers that violate the ADA creates two classes of covered employees. Each has identical substantive federal rights but the two classes have decidedly different remedial rights."); *see also* Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 211 (2002) (arguing that "[t]o the extent that the Supreme Court's doctrine of state sovereignty prevents the federal government from bestowing rights on its citizens . . . that doctrine threatens one of the core functions of the federal government").

III. WAIVER BY STATES

States may waive their Eleventh Amendment immunity from suit in state and federal courts.⁹⁵ In *Atascadero State Hospital v. Scanlon*,⁹⁶ the Court stated that the Eleventh Amendment does not provide immunity when a state waives its immunity and consents to suit in federal court.⁹⁷ In *Atascadero*, the plaintiff argued that the state had waived its immunity through a general waiver found in the state constitution.⁹⁸ Rejecting this argument, the Court held that a state's general waiver is not sufficient to waive the immunity guaranteed by the Eleventh Amendment.⁹⁹ Accordingly, *Atascadero* stands for the proposition that a state may waive its immunity only if it does so expressly.¹⁰⁰

In addition to determining that general waivers are not sufficient to abrogate a state's sovereign immunity, the Supreme Court has reached a similar conclusion concerning the doctrine of constructive waiver.¹⁰¹ In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,¹⁰² the Court rejected the doctrine of constructive waiver as a permissible constitutional principle.¹⁰³ In reaching its decision, the Court stated that "there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation."¹⁰⁴ Moreover, the Court reasoned that "[r]ecognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would . . . as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*."¹⁰⁵

95. See *Alden*, 527 U.S. at 755 (citing *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944) for the proposition that "[t]he rigors of sovereign immunity are thus 'mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign'"); see also U.S. CONST. amend. XI.

96. 473 U.S. 234 (1985).

97. *Id.* at 238.

98. *Id.* at 240 (citing CAL. CONST. art. III, § 5).

99. *Id.* at 241.

100. *Id.*; see also *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990) (stating that explicit waiver is found only when a state specifically and unmistakably expresses its willingness to be sued in federal court).

101. Under the doctrine of constructive waiver, sovereign immunity was deemed waived as soon as states engaged in a federally regulated activity. See *Parden v. Terminal Ry. of the Ala. Docks Dep't*, 377 U.S. 184, 192 (1964) (holding that the state of Alabama waived its sovereign immunity from suit under the Federal Employees Liability Act (FELA) when it chose to operate an interstate railroad).

102. 527 U.S. 666 (1999).

103. *Id.* at 680; see also Hartley, *supra* note 30, at 356.

104. *College Sav. Bank*, 527 U.S. at 680.

105. Hartley, *supra* note 30, at 356 (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Bd.*, 527 U.S. 666, 681-83 (1999)).

Notwithstanding these limitations, the Court in *Alden* noted that “[m]any states, on their own initiative, have enacted statutes consenting to a wide variety of suits. The rigors of sovereign immunity are thus ‘mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign.’”¹⁰⁶ Recent events, however, appear to lead to a contrary conclusion.¹⁰⁷

Ironically, following the Supreme Court’s decision in *Alden*, “both houses of the Maine legislature passed legislation to waive Maine’s sovereign immunity to suits brought by Maine’s state employees under the FLSA;” yet, the waiver legislation was vetoed by Governor Angus King.¹⁰⁸ It has been suggested that at least some states have read *Alden* as an invitation to adopt a more restrictive approach to the waiver issue.¹⁰⁹ These actions seem to belie much of the Court’s rhetoric concerning the states’ “continuing sense of justice.”¹¹⁰ In fact, one scholar has cautioned that “[u]ntil such a complete evaluation has been undertaken, it is premature to conclude that ‘[t]he rigors of sovereign immunity are thus mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign.’”¹¹¹ Moreover, “[i]f anything, the evidence to date contradicts that conclusion.”¹¹²

As of March 23, 2002, almost a year after the Supreme Court rendered its decision in *Garrett*, and nearly four years since it decided *Alden*, only

106. *Alden v. Maine*, 527 U.S. 706, 755 (1999) (quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)).-

107. See discussion *infra* notes 108-112 and accompanying text.

108. Timothy S. McFadden, Note, *The New Age of the Eleventh Amendment: A Survey of the Supreme Court’s Eleventh Amendment Jurisprudence and a Review of Kimmel v. Board of Regents*, 27 J.C. & U.L. 519, 536 (2000). The article quotes Governor King’s veto statement:

It is not necessary to surrender the State’s sovereign immunity in this fashion in order to afford state employees full and adequate protection. The State is already subject to the FLSA, and has a long history of compliance with it. The FLSA is fully enforceable against the State by the United States Department of Labor, which can bring an enforcement action in federal court. The Maine Human Rights Act affords state employees the same protections for age discrimination or other discrimination claims. Sovereign immunity is not a current bar to Title VII or Americans with Disability Act claims, and state employees are able to pursue such claims against the state under either federal law or state law equivalents.

Id.

109. Bodensteiner & Levinson, *supra* note 80, at 116-17 (citing *Virginia v. Luznik*, 524 S.E.2d 871 (Va. 2000) for the proposition that some courts have relied on *Alden* to justify a restrictive interpretation of the waiver issue).

110. *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944); see also *Alden*, 527 U.S. at 755.

111. Hartley, *supra* note 30, at 370 (quoting *Alden*, 527 U.S. at 755).

112. *Id.*

two states, Minnesota and North Carolina, have waived their sovereign immunity and consented to be sued in federal court pursuant to federal civil rights statutes.¹¹³ A bill, however, was recently introduced in the Illinois House of Representatives that would waive that state's sovereign immunity under the ADA, ADEA, FMLA, and FLSA.¹¹⁴ The Majority Leader of the Illinois House has indicated that the bill will be amended to include a provision permitting suits under Title VII of the 1964 Civil Rights Act.¹¹⁵ Similar efforts have failed in four other states.¹¹⁶

It is instructive to explore the reasoning of lawmakers who either support or oppose enacting state waiver statutes to understand the competing interests at work. These competing interests often make reliance on voluntary waivers to vindicate federal statutory rights an unrealistic "alternative." In the wake of the Supreme Court's decision in *Garrett*, New York legislators introduced bill A. 5971, which waived the state's sovereign immunity to liability for ADA violations.¹¹⁷ The bill contained a "justification" clause noting that the Court's decision in *Garrett* "effectively took away protection for state workers under the ADA while upholding the same protection for privately employed individuals, creating a disparity."¹¹⁸ Sponsors of the recently introduced waiver legislation in the Illinois House of Representatives similarly reasoned that "[r]ecent Supreme Court decisions have really turned state employees into second-class citizens."¹¹⁹ Even the title of the North Carolina waiver statute, "The State Employee Federal Remedy Restoration Act,"¹²⁰ demonstrates a belief that the federal statutory civil rights of state employees have been diminished.

Conversely, in his veto message rejecting Rhode Island's proposed waiver bill, Governor Lincoln Almond argued that submitting the state to federal damage actions in state court "undermines our state's

113. MINN. STAT. ANN. § 1.05 (West 2002); N.C. GEN. STAT. § 143-300.35 (2002).

114. H.B. 3772, 92nd Gen. Assem., Reg. Sess. (Ill. 2002) (failed in the Senate Rules Committee); see also *Sovereign Immunity: Illinois Legislators Introduce Bill To Waive Immunity From State Employee Bias Suits*, 40 GOV'T EMPL. REL. REP. 133 (BNA) (Feb. 5, 2002) [hereinafter *Sovereign Immunity*].

115. *Sovereign Immunity*, *supra* note 114, at 133.

116. A.B. 5971, 224th Annual Legislative Sess. (N.Y. 2001) (died in Senate 1/9/02); H.B. 915, 91st Gen. Assem., Reg. Sess. (Mo. 2001) (died in Senate); S.B. 1196, 2001-2002 Reg. Sess. (Cal. 2001) (vetoed by Gov. Davis); H.B. 5815, 2001-2002 Legislative Sess. (R.I. 2001) (vetoed by Gov. Almond); S.B. 262, 2001-2002 Legislative Sess. (R.I. 2001) (vetoed by Gov. Almond).

117. A.B. 5971, 224th Annual Legislative Sess. (N.Y. 2001).

118. *Id.*

119. *Sovereign Immunity*, *supra* note 114, at 133 (quoting Mary Dixon, a lobbyist for the American Civil Liberties Union).

120. State Employee Federal Remedy Restoration Act, N.C. GEN. STAT. § 143-300.35 (2002).

sovereignty, disrespects our state courts and juries and the legislative process, and could expose Rhode Island taxpayers to unlimited money damages under laws not our own.”¹²¹ Nevertheless, where the legislative and executive branches of New York, Missouri, California, and Rhode Island have failed to find common ground to correct the “disparity” created by *Garrett* and its progeny, Minnesota and North Carolina have succeeded.¹²²

A. *Minnesota – Minnesota Statute § 1.05*

Minnesota was the first state to take action in the wake of the Supreme Court’s decision in *Garrett*.¹²³ On May 22, 2001, Minnesota Governor Jesse Ventura signed into law a bill designed to undo the damage of *Garrett*.¹²⁴ The law provides:

An employee, former employee, or prospective employee of the state who is aggrieved by the state’s violation of the Americans with Disabilities Act of 1990[, the Age Discrimination in Employment Act of 1967, Fair Labor Standards Act of 1938, or Family and Medical Leave Act.] may bring a civil action against the state in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the act[s].¹²⁵

As a result of the law, Minnesota state employees, unlike their counterparts in forty-eight other states, have the right to sue the state for violations of the ADA, ADEA, FLSA, and FMLA in state or federal court.¹²⁶

B. *North Carolina – The State Employee Federal Remedy Restoration Act*¹²⁷

North Carolina is the only other state to have waived its sovereign immunity to suit under selected federal civil rights statutes.¹²⁸ The State

121. *Several States Respond to Garrett Decision, Consider Waiving Immunity to ADA Lawsuits*, 70 U.S. L. WKLY. 2003, 2004 (BNA) (July 3, 2001) (quoting Governor Lincoln Almond’s veto message to Rhode Island House Bill 01-H 5815).

122. See discussion *supra* note 116 and accompanying text.

123. *A Few States Consider Bills Waiving Immunity to ADA Lawsuits*, *supra* note 18, at 926.

124. *Id.*

125. MINN. STAT. § 1.05 (2002).

126. See *A Few States Consider Bills Waiving Immunity to ADA Lawsuits*, *supra* note 18, at 926. This assumes, of course, that the phrase “any court of competent jurisdiction” constitutes a clear and unambiguous waiver of the state’s Eleventh Amendment immunity as required by cases such as *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). See discussion *supra* notes 95-100 and accompanying text.

127. State Employee Federal Remedy Restoration Act, N.C. GEN. STAT. § 143-300.35 (2002).

Employee Federal Remedy Restoration Act restores the remedial scheme offered under the ADA, ADEA, FMLA, and FLSA to North Carolina's state employees.¹²⁹ Like Minnesota's waiver statute, the North Carolina Act permits state employees to sue in state and federal court.¹³⁰

C. Summary

With only two states having waived their sovereign immunity under the ADA, state waiver statutes cannot be relied upon to fill the vacuum left by the Court's decisions in *Garrett* and *Kimel*. While Minnesota and North Carolina are to be commended, their waivers have created a disparity among employees in other states. For example, in Minnesota and North Carolina, state employees enjoy a choice of remedies for violations of certain federal civil rights statutes, some of which are unavailable to state employees in forty-eight other states. Similarly, except in Minnesota and North Carolina, private sector employees enjoy a level of protection greater than public employees. This disparity can only be justified if state laws guarantee adequate alternative relief. Margaret A. McCann, Associate General Counsel of the AFL-CIO, has argued that "[t]he key is monetary damages. A remedy such as a cease and desist order doesn't affect the employer economically and doesn't act as deterrent."¹³¹ In essence, state employees in the remaining forty-eight states are denied full federal legal rights and adequate alternative relief under state law. The states' limited response in voluntarily enacting waiver statutes has done little to mitigate the rigors of sovereign immunity unless the record demonstrates that state law has filled the void.

128. See *infra* notes 129, 130 and accompanying text.

129. N.C. GEN. STAT. § 143-300.35 (2002). The statute provides:

The sovereign immunity of the State is waived for the limited purpose of allowing State employees, except for those in exempt policy-making positions . . . to maintain lawsuits in State and federal courts and obtain and satisfy judgments against the State or any of its departments, institutions, or agencies under:

- (1) The Fair Labor Standards Act
- (2) The Age Discrimination in Employment Act
- (3) The Family and Medical Leave Act
- (4) The Americans with Disabilities Act.

Id. (citations omitted).

130. *Id.* In addition, like the Civil Rights Act of 1991, damages are capped at \$300,000 for employers with more than 500 employees. See *id.* §§ 143-299.2, 143-300.35. Thus, plaintiffs bringing suit under the North Carolina waiver statute will continue to operate under the same damage caps operating in the ADA. See *id.* § 143-300.35.

131. See *Minnesota Responds to Garrett Decision, Other States Consider Waiving Immunity to ADA Lawsuits*, 167 LAB. REL. REP. (BNA) 233, 234 (June 25, 2001).

IV. STATE DISABILITY STATUTES

Before it can be said that state disability statutes offer an effective alternative to private damage actions against states, a thorough state-by-state analysis is required. In *Garrett*, the Supreme Court suggested that disabled state employees could turn to state discrimination laws for protection. The Court stated: “It is worth noting that by the time that Congress enacted the ADA in 1990, every State in the Union had enacted such measures.”¹³² Likewise, in *Kimel*, Justice O’Connor noted: “State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State.”¹³³

The coverage offered by state disability statutes has been characterized as “highly varied, often uncertain, and inadequately enforced,” and the protection provided has been described as “potluck.”¹³⁴ Some state statutes provide substantive protections greater than those provided by the ADA.¹³⁵ For example, California¹³⁶ and Massachusetts¹³⁷ require that one’s status of being disabled under state law be considered without mitigating measures.¹³⁸ Conversely, several states offer much less protection than the ADA.¹³⁹ Alabama¹⁴⁰ and Mississippi¹⁴¹ cover only physical conditions, leaving a large gap in coverage for those suffering from mental illnesses and disabilities.¹⁴² This “potluck” characteristic of state statutory schemes – combined with Congress’ finding that

132. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 n.5 (2001).

133. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (citing statutory provisions from forty-seven states).

134. Stephen D. Erf, *Potluck Protection for Handicapped Discriminatees: The Need To Amend Title VII To Prohibit Discrimination on the Basis of Disability*, 8 LOY. U. CHI. L.J. 814, 844 (1977).

135. See *infra* note 138 and accompanying text.

136. CAL. GOV’T CODE § 12940(a) (West Supp. 2002).

137. MASS. GEN. LAWS ANN. ch. 151b, §4(16) (West 2001); see also *Dahill v. Police Dep’t of Boston*, 748 N.E.2d 956, 963 (Mass. 2001) (concluding that corrective devices should not be considered in determining whether an individual has a handicap within the meaning of the Massachusetts Fair Employment Act).

138. *Contra Sutton v. United Airlines*, 527 U.S. 471, 475 (1999). The Supreme Court held that under the Americans with Disabilities Act, an individual’s impairment is to be assessed by taking into consideration the effects of any mitigating measures that the person employs or is taking, including medications. *Id.*

139. See discussion *supra* notes 124-26.

140. ALA. ADMIN. CODE r. 670-x-4.01 (2002).

141. MISS. CODE ANN. § 43-6-15 (1999).

142. *Contra* 42 U.S.C. § 12102(2) (2000) (defining disability to include any “physical or mental impairment that substantially impairs a major life activity, a record of such impairment, or being regarded as having such impairment.”); ARIZ. REV. STAT. § 41-1461(4) (West Supp. 2002) (defining disability as a “mental or physical impairment”).

“discrimination against individuals with disabilities continue[s] to be a serious and pervasive problem”¹⁴³ – moved Congress to enact the ADA.¹⁴⁴

The ADA’s remedial scheme incorporates the remedies available under the Civil Rights Act of 1964.¹⁴⁵ These remedies include injunctive relief, reinstatement, backpay, and attorneys’ fees and costs.¹⁴⁶ Compensatory and punitive damages may also be awarded where the employer has engaged in unlawful or intentional discrimination.¹⁴⁷ In contrast, states’ enforcement mechanisms often fall well below the protection offered by the ADA.¹⁴⁸ Increased reliance on state disability statutory schemes raises additional problems for state employees that might not exist if federal monetary damages were available.¹⁴⁹ In addition, few enforcement options are available to a person who has suffered discrimination by the state judiciary in its role as employer.¹⁵⁰ For example, under Pennsylvania state law, a victim of such disability-based discrimination is without remedy.¹⁵¹

A. *Private Right of Action*

The state is considered a covered employer under every state disability statute in the nation. Despite their collective status as covered employers, states may be considered exempt from certain aspects of state statutes.¹⁵² In particular, the remedies available to a state employee who has suffered discrimination on the basis of disability are often more

143. 42 U.S.C. § 12101(a)(2) (2000).

144. See discussion *infra* notes 145-47 and accompanying text.

145. JONATHAN MOOK, AMERICANS WITH DISABILITIES ACT: PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES § 6.02(4) (2003).

146. *Id.*

147. 42 U.S.C. § 1981(a)(b)(1) (2000).

148. See discussion *supra* notes 134-44 and *infra* notes 152-63.

149. See discussion *supra* notes 145-47.

150. See *infra* note 151.

151. First Judicial Dist. of Pa. v. Pa. Human Relations Comm’n, 727 A.2d 1110, 1112 (Pa. 1999). The Supreme Court of Pennsylvania held that the Human Relations Commission has no jurisdiction to adjudicate complaints against the judicial branch. *Id.*

152. See ARIZ. REV. STAT. ANN. § 41-1481(D) (West Supp. 2002) (establishing that the division may bring a civil action, other than one against the state); ARK. CODE ANN. § 16-123-107 (Supp. 2001) (establishing that the state disability statute is not applicable to the state); WASH. REV. CODE ANN. § 49.60.320 (West 2002) (providing that in any case where the commission issues an order against any political or civil subdivision of the state, the commission shall transmit a copy of the order to the governor of the state). The Washington statute also requires the governor to take such action to secure compliance with such order as the governor deems necessary. WASH. REV. CODE ANN. § 49.60.320 (West 2002); see also accompanying appendix.

limited than the remedies available to a private sector employee.¹⁵³ For example, Arizona's Civil Rights Act covers state and other public employers.¹⁵⁴ The state, however, is immune from suit in state court.¹⁵⁵ Thus, Arizona state employees are precluded from vindicating their state-based disability rights in state court.¹⁵⁶

Even where the state is not exempt from any provision in the statute, state employees still are not guaranteed a judicial forum.¹⁵⁷ In fact, many state disability statutes fail to provide those who have suffered discrimination with a private right of action altogether.¹⁵⁸ Conversely, under the ADA, an individual discriminated against because of a disability has a private right of action in federal court after exhausting the administrative remedies provided by the Equal Employment Opportunity Commission.¹⁵⁹ In sixteen states, individuals who have suffered discrimination because of their disabilities are precluded from bringing a private right of action under their state disability statutes.¹⁶⁰ This leaves limited review of state administrative action as the only possibility for access to judicial review.¹⁶¹ Thus, notwithstanding the fact that states may be covered "employers" in these sixteen states, state employees are still not permitted to sue their employers because there is

153. See discussion *infra* notes 164-84 and accompanying text.

154. ARIZ. REV. STAT. ANN. § 41-1461.2 (West 1999).

155. *Id.* § 41-1481(D).

156. *Id.*; see also FLA. STAT. ANN. § 760.11(5) (West 1997) (stating that the "state and its agencies and subdivisions shall not be liable for punitive damages"); ME. REV. STAT. ANN. tit. 5, § 5-4613(2)(B)(8)(i) (West 2002) (finding that no punitive damages are permitted against a governmental entity or against an employee of a governmental entity if within scope of employment); accompanying appendix.

157. See discussion *infra* notes 160-63 and accompanying text.

158. See discussion *infra* notes 160-63 and accompanying text.

159. See *Maynard v. Pneumatic Products Corp.*, 256 F.3d 1259, 1262 (11th Cir. 2001); *Bonilla v. Alvarez*, 194 F.3d 275, 278 (1st Cir. 1999).

160. Private lawsuits are precluded in Connecticut, Delaware, Illinois, Indiana, Kansas, Maryland, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Utah, Virginia, Wisconsin, and Wyoming. See accompanying appendix.

161. The typical standard of judicial review of state administrative action is the substantial evidence standard, not *de novo* review of law or fact. See *Md. Human Relations Comm'n v. Mayor and City Council of Balt.*, 586 A.2d 37 (Md. Ct. Spec. App. 1991) (finding that decisions of the Maryland Commission on Human Relations will be upheld where they are based upon substantial evidence); *Morris Mem'l Nursing Home v. W. Va. Human Rights Comm'n*, 431 S.E.2d 353, 355 (W. Va. 1993) (recognizing that the respondent may appeal an order of the Human Rights Commission to the state Supreme Court and that a finding of discrimination will be upheld if supported by substantial evidence based on the record as a whole); *Kamen v. Rosa*, 636 N.Y.S.2d 59, 60 (App. Div. 1996) (clarifying that the scope of judicial review is limited to whether the "Commissioner's determination is, upon the whole record, supported by substantial evidence" and that the division's determination is to be accorded substantial deference).

no private right of action under the state disability statutes.¹⁶² The concomitant result in these sixteen states is that all access to a judicial forum, whether it is a state or federal court, is foreclosed for state employees.¹⁶³

B. Compensatory Damages

Just as states have impeded discriminatees' access to the courts, they have also limited the realm of available damages. Compensatory damages may be obtained under the ADA when an employer engages in "unlawful intentional discrimination" or violates the provisions concerning reasonable accommodation.¹⁶⁴ In contrast, disability discrimination statutes in six states – Arizona,¹⁶⁵ Arkansas,¹⁶⁶ Mississippi,¹⁶⁷ North Carolina,¹⁶⁸ North Dakota,¹⁶⁹ Utah,¹⁷⁰ and Wisconsin¹⁷¹ – do not provide compensatory damages under any circumstances. A number of other states have capped damages at amounts well below that provided under the ADA, including Kansas,¹⁷² South Carolina,¹⁷³ Washington,¹⁷⁴ and West Virginia.¹⁷⁵ Before *Garrett*, state employees in these states were permitted to obtain compensatory damages under the ADA as an alternative to, or in addition to, their state statutory remedies. After *Garrett*, these state employees are faced with limited caps that provide meager compensatory damages or none at all.

C. Punitive Damages

The ADA provides that punitive damages may be awarded only where the complaining party demonstrates that the employer engaged in an

162. See discussion *supra* note 160 and accompanying text.

163. See discussion *supra* note 160 and accompanying text.

164. 42 U.S.C. § 1981(a) (2000).

165. ARIZ. REV. STAT. ANN. § 41-1481(6) (West 1999) (precluding recovery of compensatory and punitive damages).

166. ARK. CODE ANN. § 16-123-107 (Michie 1987).

167. MISS. CODE ANN. §§ 25-9-131, 25-9-132 (2000).

168. N.C. GEN. STAT. § 168(A)-11(b) (2002).

169. See N.D. CENT. CODE §§ 14-02.4-19 to -21 (1997).

170. UTAH CODE ANN. § 34-35-1 (2001).

171. See WIS. STAT. ANN. §§ 111.31 to .395 (West 2002).

172. KAN. STAT. ANN. § 44-1005(k) (1993) (emotional damages limited to \$2,000).

173. S.C. CODE ANN. § 43-33-540 (Law. Co-op. 1985) (actual damages limited to \$5,000).

174. WASH. REV. CODE ANN. § 46.60.250(5) (West 2002) (compensatory damages limited to \$10,000).

175. W. VA. CODE ANN. §§ 5-11-1 to -19 (Michie 1999) (compensatory damages in administrative proceedings limited to the equivalent of \$1,000 in 1977 dollars).

intentional discriminatory practice “with malice or with reckless indifference to the federally protected rights” of the person bringing the claim.¹⁷⁶ Conversely, thirty-two states preclude individuals from recovering punitive damages under their state statutes.¹⁷⁷ Even in those states that allow for punitive damages against private employers, state employees seeking punitive damages face significant obstacles.¹⁷⁸ Where a statute expressly applies to the state as an employer, a number of states have concluded that the state is nevertheless immune from liability for punitive damages.¹⁷⁹ In *Johnson v. State Department of Fish & Game*,¹⁸⁰ the Alaska Supreme Court concluded that although the state was a covered entity under the statute, the state was immune from liability for punitive damages in lieu of express statutory authority.¹⁸¹ Similarly, in *Kline v. City of Kansas City, Fire Department*,¹⁸² the court refused to award punitive damages against a municipality under the Missouri Human Rights Act.¹⁸³ The court reasoned that punitive damages were not available because the burden of payment ultimately fell on taxpayers and thus did not have the requisite deterrent effect.¹⁸⁴

D. Right to Trial by Jury

In addition to the difficulties state employees may face while seeking compensatory and punitive damages against the state, state statutory schemes also dissolve discriminatees’ right to a jury trial, which the ADA provides. In most states, a plaintiff seeking compensatory or punitive damages against the state is either precluded from doing so or must do so without the benefit of a trial by jury.¹⁸⁵ For example, North Carolina’s state disability statute originally provided that a handicapped person aggrieved by a discriminatory practice may bring a *nonjury* civil action in the superior court in the county where the alleged discriminatory practice occurred or where the plaintiff or defendant resides.¹⁸⁶ As a

176. 42 U.S.C. § 1981(b)(1) (2000); *see also* MOOK, *supra* note 145.

177. *See* accompanying appendix.

178. *See* discussion *infra* notes 180-84 and accompanying text.

179. *See* discussion *infra* notes 180-84 and accompanying text.

180. 836 P.2d 896 (Alaska 1991).

181. *Id.* at 906.

182. 175 F.3d 660 (8th Cir. 1999).

183. *Id.* at 670.

184. *Id.* at 669-70; *see also* James L. Buchwalter, Annotation, *Availability and Scope of Punitive Damages Under State Employment Discrimination Law*, 81 A.L.R. 5TH 367, 436 (2000); Curran v. Phila. Hous. Auth., 1997 WL 587371, at *2 (E.D. Pa. 1997) (concluding that there is a long-standing Pennsylvania public policy against holding a government agency liable for punitive damages).

185. *See* discussion *supra* notes 164-84 and accompanying appendix.

186. 2001 N.C. Sess. Laws 467, § 3.

result of the State Employee Federal Remedy Restoration Act, however, North Carolina state employees seeking compensatory damages against the state are now entitled to jury trials.¹⁸⁷ Conversely, at least nine states disallow their employees the right to a jury trial when seeking to enforce their rights under the applicable state disability statute.¹⁸⁸

V. CONCLUSION

Neither the option of a state waiver of Eleventh Amendment rights nor the states' own anti-discrimination statutes provide an effective alternative to enforcing the rights of the disabled under the ADA. In theory, waiver statutes provide state employees with the perfect solution to restore federal enforcement rights precluded under *Garrett* and *Kimel*. To date, however, only two states have voluntarily waived their immunity in the wake of *Garrett*.¹⁸⁹ Moreover, reliance on the remedies offered under the state disability legislation is highly problematic.¹⁹⁰ After all, as noted by the National Association of Protection and Advocacy Systems and United Cerebral Palsy Associations in their briefs as amici curiae in *Garrett*, “[i]t is hard to believe . . . that if the [fifty] state legislatures had adequately addressed the problem of discrimination against individuals with disabilities, the ‘Fifty State Governors’ committees’ on whose reports Congress relied would have concluded that ‘existing State laws do not adequately counter such acts of discrimination.’”¹⁹¹ Clearly, Congress intended to apply the ADA to the states as employers because state coverage was deemed inadequate.

Indeed, although state disability laws may prove to be an effective alternative for some state employees, the “potluck” nature of the state statutory disability scheme renders it an ineffective alternative.¹⁹² The majority of state employees do not enjoy the same level of protection under their state statutes as that offered by the ADA.¹⁹³ Accordingly, it

187. N.C. GEN. STAT. § 143-300.35 (2002).

188. These states include Arizona, Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, North Carolina, and Pennsylvania. See accompanying appendix.

189. See discussion *supra* note 113 and accompanying text.

190. See Brief of Amicus Curiae National Association of Protection and Advocacy Systems and United Cerebral Palsy Ass'ns, Inc., Bd. of Trs. of the Univ. of Ala. v. *Garrett*, 531 U.S. 356 (2001) (No. 99-1240) (arguing that “[t]here is no reason to think that the state legislatures will act now to rectify the deficiencies in their laws, given that they have not done so in the ten years since the ADA was enacted”).

191. *Id.* at 4.

192. See H.R. REP. NO. 101-485(II), at 47 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 329 (stating that “[s]tate laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing”).

193. See *id.* (noting that “[t]he fifty State Governor’s Committees, with whom the President’s Committee on Employment of People with Disabilities works, report that

is crucial that interested parties organize and lobby their state legislators to enact statutes analogous to those in Minnesota and North Carolina. In the alternative, efforts need to be made to strengthen the existing state disability statutory schemes in order to fill the vacuum created by the Supreme Court in *Garrett* and its progeny. The same is true concerning other federal civil rights statutes, which courts may find to have failed to abrogate the states' Eleventh Amendment sovereign immunity. The welfare of 4.8 million state employees depends on it.

existing state laws do not adequately counter acts of discrimination against people with disabilities”).

STATE STATUTORY REMEDY CHART

STATE	STATUTE	COMPENSATORY CAPS	LIMITS ON PUNITIVE DAMAGES	ATTORNEY'S FEES	JURY TRIAL	COMMENTS
Alabama	ALA. ADMIN. CODE r. 670-x-4-.01 to .03(2002); ALA. CODE § 21-7-8 (1997).	No Compensatory damages available. See ALA. ADMIN. CODE r. 670-x-4-03 (2002).	No Punitive damages available. See ALA. ADMIN. CODE r. 670-x-4-03 (2002).	No attorney's fees available.	No Jury Trial.	State cannot be sued. See <i>Avery</i> v. Doyle, 456 So. 2d 1096, 1098-99 (Ala. Civ. App. 1984)(interpreting ALA. CODE § 21-7-8). Statute does not cover mental disabilities. See ALA. CODE § 21-7-8 (1997).
Alaska	ALASKA STAT. §§ 18.80.120(e), 18.80.220 (Michie 2002).	Yes. See <i>Johnson v. Alaska State Dep't of Fish & Game</i> , 836 P.2d 896 (Alaska 1991).	No punitive damages against state. See <i>Johnson v. Alaska State Dep't of Fish & Game</i> , 836 P.2d 896 (Alaska 1991)(noting that the general authorization of damage awards under subsection (c) is not sufficient to support an award of punitive damages against the state).	Yes. See ALASKA STAT. § 18.80.130(e) (Michie 2002).		

STATE	STATUTE	COMPENSATORY CAPS	LIMITS ON PUNITIVE DAMAGES	ATTORNEY'S FEES	JURY TRIAL	COMMENTS
Arizona	ARIZ. REV. STAT. ANN. §§ 41-1401, 41-1402, 41-1481 (West 1999).	Compensatory damages may be available. ARIZ. REV. STAT. ANN. § 41-1481(G) (West 1999) (front pay only).	No punitive damages available.	Reasonable attorney's fees for prevailing party. ARIZ. REV. STAT. ANN. § 41-1481(J) (West 1999).	No right to jury trial. <i>See</i> <i>Burris v. City of Phoenix</i> 179 Ariz. 35 (App. Div.1 1993).	State immunity from suit: if reasonable cause exists that the cause is true, division may bring a civil action, other than against the state. ARIZ. REV. STAT. ANN. § 1481(D) (West 1999). Note that counties do not share state's immunity from suit under § 41-1481. <i>See</i> Arizona Civil Rights Division, Dep't of Law v. Olson, 643 P.2d 723 (Ariz. App. 1982).
Arkansas	ARK. CODE ANN. § 16-123-107 (Michie 2001).	\$15,000 < 15 \$50,000 > 14 - < 101 \$100,000 <100 - >201 \$200,000 > 200 -< 501 \$300,000 > 500 ARK. CODE ANN. § 16-123-107(c)(1)(B) (Michie 2001).	Yes, for intentional discrimination. <i>See</i> ARK. CODE ANN. § 16-123-107(c)(1)(B) (Michie 2001).	Yes. <i>See</i> ARK. CODE ANN. § 16-123-107(c)(1)(A) (Michie 2001).		
California	CAL. GOV'T CODE § 12940(e) (West 2002). (State covered under §12926(d))	Yes. <i>See</i> CAL. GOV'T CODE § 12960 (West 2002); <i>Peatros v. Bank of America</i> , 22 Cal. 4th 147, 166-67 (2000).	Yes. <i>See</i> CAL. GOV'T CODE § 12960 (West 2002); <i>Peatros v. Bank of America</i> , 22 Cal. 4th 147, 166-67(2000).	Yes. <i>See</i> CAL. GOV'T CODE § 12965(b) (West 2002).		Provides for administrative fines of up to \$50,000. NEED CITE

STATE	STATUTE	COMPENSATORY CAPS	LIMITS ON PUNITIVE DAMAGES	ATTORNEY'S FEES	JURY TRIAL	COMMENTS
Colorado	COLO. REV. STAT. § 24-34-301 to -308 (2002). (State covered under § 24-34-401(3).	No compensatory damages available. See COLO. REV. STAT. § 24-34-405 (2002).	No punitive damages available. See COLO. REV. STAT. § 24-34-405 (2002).	No attorney's fees available. See COLO. REV. STAT. § 24-34-405 (2002).	No. See Continental Title Co. v. Dist. Court for the County of Denver, 645 P.2d 1310, 1318 (Colo. 1982).	Must first exhaust administrative remedies. See COLO. REV. STAT. § 24-34-306(14) (2002).
Connecticut	CONN. GEN. STAT. ANN. § 46a-51-125 (West 2001). (State covered under § 46a-51(10)).	Compensatory damages may be available. See CONN. GEN. STAT. ANN. § 46a-104 (West 2001).	Punitive damages may be available. See CONN. GEN. STAT. ANN. § 46a-104 (West 2001).	Yes. See CONN. GEN. STAT. ANN. § 46a-104 (West 2001).		Limited Private right of action - after 210 days following the filing of charge, complaint may seek release from commission to bring action in superior court. NEED CITE
Delaware	DEL. CODE ANN. tit. 19, § 720 (1995). (State covered under § 722(2)).	No compensatory damages. NEED CITE?	No punitive damages available. NEED CITE?	Reasonable attorney's fees. DEL. CODE ANN. tit. 19, § 712(j) (1995).		No private civil action allowed. However, employer or employee may seek limited judicial review of order. NEED CITE
Florida	FLA. STAT. ANN. §§ 760.01 to .11 (West 2003). (State covered under § 760.02(6)(7)).	\$100,000 is total amount of recovery permitted against the state and its agencies and subdivisions. FLA. STAT. ANN. § 768.28(5) (West 2003).	State and its agencies and subdivisions are not liable for punitive damages. FLA. STAT. ANN. § 760.11(5) (West 2003).	Reasonable attorney's fees. FLA. STAT. ANN. § 760.11(5) (West 2003).	Right to trial by jury if seeking compensatory or punitive damages. FLA. STAT. ANN. § 760.11(5) (West 2003).	Must bring administrative complaint before filing for a private civil action. No compensatory damages in administrative forum. Compensatory damages are possible on court review. See FLA. STAT. ANN. § 760.11 (West 2003).

STATE	STATUTE	COMPENSATORY CAPS	LIMITS ON PUNITIVE DAMAGES	ATTORNEY'S FEES	JURY TRIAL	COMMENTS
Georgia	GA. CODE ANN. §§ 34-6A-1 to -6 (2002) (State covered under §34-6A-2).	Compensatory damages may be available. See GA. CODE ANN. § 34-6A-6A-6(b) (2002).	Punitive damages may be available. See GA. CODE ANN. § 34-6A-6(b) (2002).	Reasonable attorney's fees. See GA. CODE ANN. § 34-6A-6(b) (2002).	No right to jury trial. See <i>Smith v. Milliken & Co.</i> , 377 S.E.2d 916 (Ga. App. 1989).	
Hawaii	HAW. REV. STAT. ANN. §§ 378-1 to -6 (Michie 1999).	Yes. See HAW. REV. STAT. ANN. § 378-5(b) (Michie 1999).	Yes. See HAW. REV. STAT. ANN. § 378-5(b) (Michie 1999).	Reasonable attorney's fees. HAW. REV. STAT. ANN. § 378-5(c) (Michie 1999).		
Idaho	IDAHO CODE § 67-5909(1) (Michie 2001).	Up to \$1,000. NEED CITE	Not exceeding \$1,000 for willful violations. IDAHO CODE § 67-5908(3)(e) (Michie 2001).	Attorney's fees possible. See IDAHO CODE § 67-5908(3) (Michie 2001).		
Illinois	775 ILL. COMP. STAT. ANN. § 5/1-101 (West 2001). (State covered under § 5/1-103L).	775 ILL. COMP. STAT. ANN. § 5/8A-104(B) (West 2001) (providing for actual damages).	No punitive damages. See 775 ILL. COMP. STAT. ANN. § 5/8A-104 (West 2001).	Reasonable attorney's fees. 775 ILL. COMP. STAT. ANN. § 5/8A-104(G) (West 2001).	No right to jury. See <i>Habitat Co. v. McClure</i> , 703 N.E.2d 578 (Ill. App. 1 Dist. 1998).	No private right to civil action until exhaust administrative procedures and judicial review only for abuse of discretion. See <i>Talley v. Wash. Inventory Serv.</i> , 37 F.3d 310 (Ill. 1994).

STATE	STATUTE	COMPENSATORY CAPS	LIMITS ON PUNITIVE DAMAGES	ATTORNEY'S FEES	JURY TRIAL	COMMENTS
Indiana	IND. CODE ANN. §§ 22-9-1-1 to -18 (West 1997). (State covered under § 22-9-5-10).	Restore losses incurred as a result of discriminatory treatment is limited to wages, salary, or commissions. IND. CODE ANN. § 22-9-6(k) (West 1997).	No punitive damages. See Ind. Civil Rights Comm'n v. Alder, 714 N.E.2d 632, 635 (Ind. 1999).	No attorney's fees. See IND. CODE ANN. § 22-9-1-6(k) (West 1997).	No right to jury. See IND. CODE ANN. § 22-9-1-17(c) (West 1997).	No private right to civil action unless both parties agree. If parties agree, may file for civil action which will be tried without a jury. NEED CITE
Iowa	IOWA CODE ANN. § 216.1 to .14 (West 2000). (State covered under §216.2(7)).	Yes. See IOWA CODE ANN. §§ 216.15(8), 216.16 (West 2000).	No punitive damages. See Fink v. Kirtzman, 881 F.Supp. 1347 (N.D. Iowa 1995).	Reasonable attorney's fees. IOWA CODE ANN. § 216.15(8)(b) (West 2000).	No statutory right to jury trial. See Smith v. ADM Feed Corp., 456 N.W.2d 378, 381 (Iowa 1990).	
Kansas	KAN. STAT. ANN. § 44-1009(a)(1) (2001). (State covered under §44-1002(b)).	Commission has no authority to award compensatory or punitive damages. See Woods v. Midwest Conveyor Co., 648 P.2d 234, 245 (Kan. 1982).	No punitive damages. See Woods v. Midwest Conveyor Co., 648 P.2d 234, 245 (Kan. 1982).		No statutory right to jury trial. See Best v. State Farm Mut. Auto. Ins. Co., 953 F.2d 1477, 1478 (10th Cir. 1991).	Damages for incidental pain, suffering, and humiliation so long as damages do not exceed \$2,000; plaintiff must exhaust administrative remedies before proceeding with civil action. KAN. STAT. ANN. § 44-1005(k) (2001).

STATE	STATUTE	COMPENSATORY CAPS	LIMITS ON PUNITIVE DAMAGES	ATTORNEY'S FEES	JURY TRIAL	COMMENTS
Kentucky	KY. REV. STAT. ANN. §§ 207.150, 344.040 (Banks-Baldwin 2002). (State covered under §§ 207.130(1)(3), 344.010, 344.030(2)).	Actual damages only. KY. REV. STAT. ANN. § 207.230(1) (Banks-Baldwin 2002).	No punitive damages. See KY. REV. STAT. ANN. § 207.230(1) (Banks-Baldwin 2002); Messick v. Toyota Mfg., 45 F. Supp 2d, 578, 583 (E.D. K.Y. 1999).	Reasonable attorney's fees in civil action. KY. REV. STAT. ANN. § 207.230 Banks-Baldwin 2002).	"Kentucky Civil Rights Act creates a jural right as well as a right to redress by administrative procedure. To the extent it creates a jural right both plaintiff and defendant are entitled to" jury right. See Meyers v. Chapman Printing Co., 840 S.W.2d 814, 820 (Ky.1992).	
Louisiana	LA. REV. STAT. ANN. §§ 2251-2256 (West 2003). (State covered under §23:302(2)).	Yes. See LA. REV. STAT. ANN. § 23:303 (West 2003).	No Punitive damages.	Reasonable attorney's fees. LA. REV. STAT. ANN. § 2256 (West 2003).		No requirement to exhaust administrative remedies. See <i>Salard v. Lowe's Home Centers</i> , 904 F.Supp.569, 572 (W.D. La. 1995).
Maine	ME. REV. STAT. ANN. tit. 5, § 4551 (West 2002). (State covered under §§ 4553.4, .7).	Yes: +14/-101=50k +100/-201=100k +201/-501=200k +500 = 300k ME. REV. STAT. ANN. tit. 5, § 4613.2(B)(8)(c) (West 2002).	No punitive damages permitted against a government entity or against employee of government entity if within scope of employment. ME. REV. STAT. ANN. tit. 5, § 4613(B)(8)(h) (West 2002).	Reasonable attorneys' fees. See ME. REV. STAT. ANN. tit. 5, § 4613.2(B) (West 2002).	Right to jury trial if seeking compensatory or punitive damages. See ME. REV. STAT. ANN. tit. 5, § 4613 (West 2002).	No civil penal damages or attorney's fees if the complainant did not first file with the Maine Human Rights Commission. NEED CITE

STATE	STATUTE	COMPENSATORY CAPS	LIMITS ON PUNITIVE DAMAGES	ATTORNEY'S FEES	JURY TRIAL	COMMENTS
Maryland	MD. ANN. CODE art. 49B, § 16 (2002).	No compensatory damages available. NEED CITE?	No punitive damages available. NEED CITE?			No private right of action. See <i>Dillon v. Great Atl. & Pac. Tea Co.</i> , 403 A.2d 406, 409 (Md. Ct. Spec. App. 1979).
Massachusetts	MASS. GEN. LAWS ANN. ch. 151B, § 4(16) (West 2002). (State covered under §1(5)).	Commission may award damages not to exceed \$1,000. MASS. GEN. LAWS ANN. ch. 151B, § 5(a) (West 2002).		Reasonable attorney's fees. MASS. GEN. LAWS ANN. ch. 151B, § 5 (West 2002).	Applicant for employment is constitutionally entitled to jury trial. See <i>Whalen v. Nynex Info. Res. Co.</i> , 647 N.E.2d 716, 717 (Mass. 1995).	Damages in administrative hearing not to exceed \$1,000. See MASS. GEN. LAWS ANN. ch. 151B, § 5(a) (West 2002).
Michigan	MICH. COMP. LAWS ANN. §§ 37.1102, 37.1202 (2001). (State covered under §37.1102).	Yes. See MICH. COMP. LAWS ANN. § 37.1606 (2001).		Reasonable attorney's fees. MICH. COMP. LAWS ANN. § 37.1606 (2001).	Plaintiffs bringing suit against state under Civil Rights Act or Michigan Civil Rights Act have right to trial by jury. See <i>Barbour v. Dep't of Soc. Servs.</i> , 431 N.W.2d 482, 484 (Mich. Ct. App. 1988).	
Minnesota	MINN. STAT. ANN. §§ 363.01 to .15 (West supp. 2002). (State covered under §363.03).	Compensatory damages up to three times the amount of actual damages. MINN. STAT. ANN. § 363.071 (West supp. 2002).	\$363,071 - \$8,500 cap.	Yes. See MINN. STAT. ANN. § 363.14 (West supp. 2002); <i>State v. Tasks Unlimited, Inc.</i> , 1992 Minn. App. LEXIS 1076, at *5 (Minn. Ct. App. 1992).		

STATE	STATUTE	COMPENSATORY CAPS	LIMITS ON PUNITIVE DAMAGES	ATTORNEY'S FEES	JURY TRIAL	COMMENTS
Mississippi	MISS. CODE ANN. § 25-9-149 (1999) (only state is covered).	No compensatory damages. See MISS. CODE ANN. §§ 25-9-131 to -132 (1999).	No punitive damages. See MISS. CODE ANN. §§ 25-9-131 to -132 (1999).			Limited to physical disabilities. Only the state is covered.
Missouri	MO. ANN. STAT. § 213.055(1) (West YEAR). (State covered under §213.055(1)).	Yes. See MO. ANN. STAT. § 213.111(2) (West YEAR); <i>Glover v. McDonnell Douglas Corp.</i> , 981 F.2d 388, 395 (8th Cir. 1992).	Yes. MO. ANN. STAT. § 213.111(2) (West YEAR). But, no punitive damages against state. See <i>Kline v. City of Kansas City, Fire Dept.</i> , 175 F.3d 660, 670 (8th Cir. 1999).	Reasonable attorney's fees in civil actions. MO. ANN. STAT. § 213.11 (West YEAR).	No constitutional or statutory right to jury trial. See <i>Wentz v. Indus. Automation</i> , 847 S.W.2d 877, 880 (Mo. App. E.D. 1992)	No constitutional or statutory right to a trial by jury under the Human Rights Act.
Montana	MONT. CODE ANN. §§ 49-1-101, 49-1-102, 49-4-101 (2001). (State covered under § 49-3-201).	Yes. See MONT. CODE ANN. § 49-2-506(b) (2001).	No punitive damages. MONT. CODE ANN. § 49-2-506(c)(2) (2001).	Reasonable attorney's fees in civil actions. MONT. CODE ANN. § 49-4-102 (2001).		No private right of action until administrative remedies are exhausted. Must file civil action within 180 days. MONT. CODE ANN. § 49-2-501(4)(b) (2001).
Nebraska	NEB. REV. STAT. ANN. § 48-1101 (Michie 1998). (State covered under §48-1102(2)).	Yes. NEB. REV. STAT. ANN. § 48-1119(4) (Michie 1998).	No punitive damages. See NEB. REV. STAT. ANN. § 48-1119(4) (Michie 1998).	Attorney's fees on court review only. NEB. REV. STAT. ANN. § 48-1119(4) (Michie 1998).		

STATE	STATUTE	COMPENSATORY CAPS	LIMITS ON PUNITIVE DAMAGES	ATTORNEY'S FEES	JURY TRIAL	COMMENTS
Nevada	NEV. REV. STAT. ANN. §§ 281.370, 613.330 (Michie 2002). (State covered under §§ 281.370, 613.310(2), (5)).	Actual damages not available in administrative proceeding.	No punitive damages.			Actual damages not available in administrative procedures, and recovery for back-pay was limited to two years after most recent unlawful practice. NEV. REV. STAT. ANN. § 233.170(4)(b)(2) (Michie 2002). Also, no private right of action unless complaint is dismissed; state district court may enforce or review orders. NEV. REV. STAT. ANN. § 613.420 (Michie 2002).
New Hampshire	N.H. REV. STAT. ANN. § 354-A:7 (1995). (State covered under § 354-A:2(VII)).	Commission may award compensatory damages and administrative fine not to exceed between 10,000 and 50,000. N.H. REV. STAT. ANN. § 354-A:21 (1995).		Reasonable attorney's fees may be awarded for petitions to enforce commission orders. N.H. REV. STAT. ANN. § 354-A:21(I)(f) (1995).		No private right of action; Limited judicial review of order dismissing complaint or a finding of discrimination. See N.H. REV. STAT. ANN. § 354-A:21 (1995).
New Jersey	N.J. STAT. ANN. §§ 10:5-4.1, 10:5-29.1 (West YEAR). (State covered under § 10:5-13).	All remedies available under tort law. N.J. STAT. ANN. § 10:5-13 (West YEAR).	All remedies provided for under tort law. N.J. STAT. ANN. § 10:5-13 (West YEAR).	Reasonable attorney's fees. N.J. STAT. ANN. § 10:5-13 (West YEAR).	Right to trial by jury. N.J. STAT. ANN. § 10:5-13 (West YEAR).	

STATE	STATUTE	COMPENSATORY CAPS	LIMITS ON PUNITIVE DAMAGES	ATTORNEY'S FEES	JURY TRIAL	COMMENTS
New Mexico	N.M. STAT. ANN. § 28-1-1 to -15 (Michie 2000). (State covered under §§ 28-1-2.A to .B).	Actual damages allowed. N.M. STAT. ANN. § 28-1-13 (Michie 2000).	No punitive damages. See N.M. STAT. ANN. § 28-1-13.D (Michie 2000); Trujillo v. N. Rio Arriba Electric Coop., 41 P.3d 333, 344 (N.M. 2001).	Reasonable attorney's fees available. See N.M. STAT. ANN. §§ 28-1-10.J, 28-1-13.D (Michie 2000).	Right to jury trial. See Trujillo v. N. Rio Arriba Electric Coop., 41 P.3d 333, 344 (N.M. 2001).	No private right of action is available. See N.M. STAT. ANN. §§ 28-1-10.J, 28-1-13 (Michie 2000).
New York	N.Y. EXEC. LAW § 296 (McKinney 2001); N.Y. CIV. SERV. LAW § 55 (McKinney 2001). (State covered under N.Y. Exec. Law § 292).	Yes. See N.Y. EXEC. LAW § 297(4)(c) (McKinney 2001).	No, punitive damages provided for only in housing discrimination cases.		Yes. See Epstein v. Kalvin-Miller International, Inc., 2000 U.S. Dist. LEXIS 17311 (S.D.N.Y. Nov. 29, 2000).	
North Carolina	N.C. GEN. STAT. §§ 126-16, 168A-5 (YEAR). (State covered under §§ 126-37, 168A-3(2), (7)).	2-year back pay. See N.C. GEN. STAT. § 168A-11(b) (YEAR).	No punitive damages. See N.C. GEN. STAT. § 168A-11(b) (YEAR).	Reasonable attorney's fees. N.C. GEN. STAT. § 168A-11 (YEAR).	No right to trial by jury. N.C. GEN. STAT. § 168A-11(a) (YEAR).	Nonjury civil actions permitted. Also only permits back pay and declaratory or injunctive relief. N.C. GEN. STAT. § 168A-11 (YEAR).
North Dakota	N.D. CENT. CODE § 14-02.4-03 (2001). (State covered under §§ 14-02.4-02.6, 14-02.4-02.12).	No compensatory damages. See N.D. CENT. CODE § 14-02.4-20 (2001). *Back pay limited to 2 years.	No punitive damages (See compensatory damages section).	Reasonable attorney's fees. N.D. CENT. CODE § 14-02.4-20 (2001).		Only injunctive relief and back pay are available. N.D. CENT. CODE § 14-02.4-20 (2001).

STATE	STATUTE	COMPENSATORY CAPS	LIMITS ON PUNITIVE DAMAGES	ATTORNEY'S FEES	JURY TRIAL	COMMENTS
Ohio	OHIO REV. CODE ANN. § 4112.02 (Anderson 2001). (State covered under § 4112.02(N)).	No. See OHIO REV. CODE ANN. § 4112.02 (Anderson 2001).	\$10,000 cap. OHIO REV. CODE ANN. § 4112.02 (Anderson 2001).		See Taylor v. National Group of Cos., 65 Ohio St. 3d 482 (1992)(plaintiff filing an independent action under Ohio Fair Employment Practice Law may demand a jury trial. <i>BUT</i> , no jury trial for suit against the state.)	180 days statute of limitations for civil actions. OHIO REV. CODE ANN. § 4112.02(N) (Anderson 2001).
Oklahoma	OKLA. STAT. ANN. tit. 25, § 1302 (2003); OKLA. STAT. ANN. tit. 74, § 840-2.9 A (2002). (State covered under title 25, § 1301.1).	Actual damages provided pursuant to OKLA. STAT. ANN. tit. 25, § 1901(C) (2003).	No punitive damages. See OKLA. STAT. ANN. tit. 25, § 1901(C) (2003).	Yes. See OKLA. STAT. ANN. tit. 25, § 1901(D) (2003).	Yes. See OKLA. STAT. ANN. tit. 25, § 1901(B) (2003).	Back pay limited to two years. OKLA. STAT. ANN. tit. 25, § 1901(C) (2003).
Oregon	OR. REV. STAT. § 659.436 (2001). (State covered under §§ 659.400(4), 659.010(6)).	Yes. See OR. REV. STAT. § 659.436(b)(3)(a) (2001) (providing for compensatory damages or \$200.00, whichever is greater, and punitive damages).	Yes. See OR. REV. STAT. § 659.436(b)(3)(a) (2001).	With approval by the court. See OR. REV. STAT. § 659.436(b)(3)(d) (2001).	Yes. See OR. REV. STAT. § 659.436(b)(3)(b) (2001).	
Pennsylvania	43 PA. CONS. STAT. § 955 (YEAR). (State covered under § 954(b)).	Yes. See 43 PA. CONS. STAT. § 962(c) (YEAR).	Yes. See Rush v. Scott Specialty Gases, 930 F.Supp. 194 (E.D. Pa.1998).	Yes.	No right to jury. See Wertz v. Chapman, 741 A.2d 1272, 1274-79 (Pa. 1999).	

STATE	STATUTE	COMPENSATORY CAPS	LIMITS ON PUNITIVE DAMAGES	ATTORNEY'S FEES	JURY TRIAL	COMMENTS
Rhode Island	R.I. GEN. LAWS §§ 28-5-7, 36-4-50 (2000). (State covered under §§ 28-5-6(6)(i), 36-4-50).	Yes. See R.I. GEN. LAWS § 28-5-24(b) (2000).	Yes. See FUD's Inc., v. State, 727 A.2d 692 (R.I. 1999).	Yes. See R.I. GEN. LAWS § 28-5-24 (2000).	Yes. See FUD's Inc., v. State, 727 A.2d 692 (R.I. 1999).	
South Carolina	S.C. CODE ANN. §§ 1-13-80(a), 1-13-85 (Law. Co-op. 1985). (State covered under §§ 1-13-30 (d), (e)).	Actual damages capped at \$5,000. S.C. CODE ANN. § 43-33-540 (Law. Co-op. 1985).	No punitive damages. S.C. CODE ANN. § 1-12-80(d)(8) (Law. Co-op. 1985).	Attorney's fees available. S.C. CODE ANN. §§ 1-13-90(c), 1-13-90(d)(9) (Law. Co-op. 1985).		
South Dakota	S.D. CODIFIED LAWS §§ 20-13-10, 20-13-23.7, 20-13-10.1, 3-6A-15 (Michie YEAR). (State covered under §§ 20-13-1(7), (11), 3-6A-15).	Yes. See S.D. CODIFIED LAWS § 20-13-35.1 (Michie YEAR).	Yes. See S.D. CODIFIED LAWS § 20-13-35.1 (Michie YEAR).	Only provides for attorneys' fees in housing cases. S.D. CODIFIED LAWS § 20-13-35.1 (Michie YEAR).	Yes. See S.D. CODIFIED LAWS § 20-13-35.1 (Michie YEAR).	
Tennessee	TENN. CODE ANN. § 8-50-103(a) (1998). (State covered under § 8-50-103(a)).	Yes. See TENN. CODE ANN. §§ 4-21-311(b), 4-21-306 (1998).	No punitive damages. See Thomas v. Allen-Stone Boxes, Inc., 925 F. Supp. 1316 (W.D. Tenn. 1995).	Yes. See TENN. CODE ANN. § 4-21-311(b) (1998).	Yes. See Hannah v. Pitney Bowes, 739 F. Supp. 1131 (E.D. Tenn. 1989).	

STATE	STATUTE	COMPENSATORY CAPS	LIMITS ON PUNITIVE DAMAGES	ATTORNEY'S FEES	JURY TRIAL	COMMENTS
Texas	TEX. LAB. CODE ANN. § 21.051 (Vernon YEAR). (State covered under § 21.051).	Yes. Damages capped at: (1) 101 < 50,000; (2) 201 < 100,000; (3) 501 < 200,000; and (4) 500 > 300,000. See TEX. LAB. CODE ANN. § 21.2585(d) (Vernon YEAR).	No punitive damages against the state. See TEX. LAB. CODE ANN. § 21.258(b) (Vernon YEAR).	Yes. See TEX. LAB. CODE ANN. § 21.259(b) (Vernon YEAR).	No automatic right to jury trial. See Southwestern Bell Telephone Co., 800 F. Supp. 495 (W.D. Tex. 1992)(arguing that TCHA did not automatically incorporate right to jury trial created by federal Civil Rights Act).	
Utah	UTAH CODE ANN. § 34A-5-106 (2001). (State covered under § 34A-5-102(8)(a)).	No compensatory damages. See UTAH CODE ANN. § 34A-5-107(9) (2001).	No punitive damages. See UTAH CODE ANN. § 34A-5-107(A)(8) (2001).	Attorney's fees available. UTAH CODE ANN. § 34A-5-107(A)(8)(b) (2001).	No right to a jury trial. See Beehive Medical Electronics, Inc. v. Indus. Comm'n, 573 P.2d 53(Utah 1978).	No private right of action; limited review
Vermont	VT. STAT. ANN. tit. 21, § 495(a)(1) (1998). (State covered under § 496d(1)).	Yes. See VT. STAT. ANN. tit. 21, § 495b(b) (1998).	A plaintiff may seek both legal and equitable relief under Vermont FEPA. See Gadbois v. Rock-Tenn Co., Mill Div. Inc., 984 F. Supp. 811 (D. Vt. 1997); VT. STAT. ANN. tit. 21, § 495b (1998) (annotations).	Attorneys' fees not available. See VT. STAT. ANN. tit. 21, § 495b(b) (1998).		

STATE	STATUTE	COMPENSATORY CAPS	LIMITS ON PUNITIVE DAMAGES	ATTORNEY'S FEES	JURY TRIAL	COMMENTS
Virginia	VA. CODE ANN. § 51.01-1 to -46 (Michie 2002). (State covered under §§ 51.5-41.A).	No compensatory damages for pain and suffering. See VA. CODE ANN. § 51.5-46 (Michie 2002).	No punitive damages. See VA. CODE ANN. § 51.5-46 (Michie 2002).	No attorneys' fees unless court finds that claim was frivolous, unreasonable, or groundless, or brought in bad faith. VA. CODE ANN. § 51.5-46 (Michie 2002).		
Washington	WASH. REV. CODE ANN. § 49.06.010 (West 2002). (State covered under § 49.60.040 (1), (3)).	\$10,000 limit in administrative proceedings in damages for humiliation and mental suffering. WASH. REV. CODE ANN. § 46.60.250(5) (West 2002).	Yes. See <i>McGinnis v. Kentucky Fried Chicken</i> , 51 F.3d 805, 807-08 (9th Cir. 1993)(punitive damages may be obtained for violations that occurred subsequent to November 21, 1991).	Reasonable attorneys' fees provided if the complaint was frivolous, unreasonable, or groundless. See WASH. REV. CODE ANN. § 49.60.250(9) (West 2002).		Judicial review of commission decisions is subject to review by the Governor rather than a court. See WASH. REV. CODE ANN. § 49.60.320 (West 2002) (providing that "in any case in which the commission [issues] an order against any political or civil subdivision of the state, . . . the commission shall transmit a copy of [the] order to the governor of the state. The governor shall take such action to secure compliance with such order as the governor deems necessary").

STATE	STATUTE	COMPENSATORY CAPS	LIMITS ON PUNITIVE DAMAGES	ATTORNEY'S FEES	JURY TRIAL	COMMENTS
West Virginia	W.VA. CODE ANN. § 5-11-9 (Michie 2002). (State covered under § 5-11-3(d)).	Yes. See State Human Rights Comm'n v. Pearlman Realty Agency, 239 S.E.2d 145, 148 (W. Va. 1977).	Punitive damages are available. See Haynes v. Rhone-Poulenc, Inc., 521 S.E.2d 331, 345 (W. Va. 1999).	Reasonable attorney's fees allowed. See Haynes v. Rhone-Poulenc, Inc., 521 S.E.2d 331, 345 (W. Va. 1999).		
Wisconsin	WIS. STAT. ANN. §§ 111.321, 111.322, 111.34 (West 2002). (State covered under § 111.321).	Compensatory damages available. See WIS. STAT. ANN. § 111.39(c) (West 2002).	No punitive damages. See WIS. STAT. ANN. § 111.39(c) (West 2002).	No attorney's fees. See Tanum v. Labor and Indus. Review Comm'n, 392 N.W.2d 840, 843-45 (Wis. Ct. App. 1986).	No jury trial. See WIS. STAT. ANN. § 111.39 (West 2002).	No private right of action. See Bachand v. Conn. Gen. Life Ins. Co., 305 N.W.2d 149, 152-153 (Wis. Ct. App. 1981).
Wyoming	WYO. STAT. ANN. § 27-9-105(a) (Michie 2001). (State covered under §27-9-102(b)).		No punitive damages.	No attorney's fees available. See WYO. STAT. ANN. § 27-9-106(b)-(j) (repealed) (Michie 2001).		

