

107TH CONGRESS
1ST SESSION

S. 928

To amend the Age Discrimination in Employment Act of 1967 to require, as a condition of receipt or use of Federal financial assistance, that States waive immunity to suit for certain violations of that Act, and to affirm the availability of certain suits for injunctive relief to ensure compliance with that Act.

IN THE SENATE OF THE UNITED STATES

MAY 22, 2001

Mr. JEFFORDS (for himself, Mr. KENNEDY, and Mr. FEINGOLD) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To amend the Age Discrimination in Employment Act of 1967 to require, as a condition of receipt or use of Federal financial assistance, that States waive immunity to suit for certain violations of that Act, and to affirm the availability of certain suits for injunctive relief to ensure compliance with that Act.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Older Workers’ Rights
5 Restoration Act of 2001”.

1 **SEC. 2. FINDINGS.**

2 Congress finds the following:

3 (1) Since 1974, the Age Discrimination in Em-
4 ployment Act of 1967 (29 U.S.C. 621 et seq.) has
5 prohibited States from discriminating in employment
6 on the basis of age. In *EEOC v. Wyoming*, 460 U.S.
7 226 (1983), the Supreme Court upheld Congress'
8 constitutional authority to prohibit States from dis-
9 criminating in employment on the basis of age. The
10 prohibitions of the Age Discrimination in Employ-
11 ment Act of 1967 remain in effect and continue to
12 apply to the States, as the prohibitions have for
13 more than 25 years.

14 (2) Age discrimination in employment remains
15 a serious problem both nationally and among State
16 agencies, and has invidious effects on its victims, the
17 labor force, and the economy as a whole. For exam-
18 ple, age discrimination in employment—

19 (A) increases the risk of unemployment
20 among older workers, who will as a result be
21 more likely to be dependent on government re-
22 sources;

23 (B) prevents the best use of available labor
24 resources;

25 (C) adversely effects the morale and pro-
26 ductivity of older workers; and

1 (D) perpetuates unwarranted stereotypes
2 about the abilities of older workers.

3 (3) Private civil suits by the victims of employ-
4 ment discrimination have been a crucial tool for en-
5 forcement of the Age Discrimination in Employment
6 Act of 1967 since the enactment of that Act. In
7 Kimel v. Florida Board of Regents, 120 S. Ct. 631
8 (2000), however, the Supreme Court held that Con-
9 gress lacks the power under the 14th amendment to
10 the Constitution to abrogate State sovereign immu-
11 nity to suits by individuals under the Age Discrimi-
12 nation in Employment Act of 1967. The Federal
13 Government has an important interest in ensuring
14 that Federal financial assistance is not used to sub-
15 sidize or facilitate violations of the Age Discrimina-
16 tion in Employment Act of 1967. Private civil suits
17 are a critical tool for advancing that interest.

18 (4) As a result of the Kimel decision, although
19 age-based discrimination by State employers remains
20 unlawful, the victims of such discrimination lack im-
21 portant remedies for vindication of their rights that
22 are available to all other employees covered under
23 that Act, including employees in the private sector,
24 local government, and the Federal Government. Un-
25 less a State chooses to waive sovereign immunity, or

1 the Equal Employment Opportunity Commission
2 brings an action on their behalf, State employees
3 victimized by violations of the Age Discrimination in
4 Employment Act of 1967 have no adequate Federal
5 remedy for violations of that Act. In the absence of
6 the deterrent effect that such remedies provide,
7 there is a greater likelihood that entities carrying
8 out programs and activities receiving Federal finan-
9 cial assistance will use that assistance to violate that
10 Act, or that the assistance will otherwise subsidize
11 or facilitate violations of that Act.

12 (5) Federal law has long treated nondiscrimina-
13 tion obligations as a core component of programs or
14 activities that, in whole or part, receive Federal fi-
15 nancial assistance. That assistance should not be
16 used, directly or indirectly, to subsidize invidious dis-
17 crimination. Assuring nondiscrimination in employ-
18 ment is a crucial aspect of assuring nondiscrimina-
19 tion in those programs and activities.

20 (6) Discrimination on the basis of age in pro-
21 grams or activities receiving Federal financial assist-
22 ance is, in contexts other than employment, forbid-
23 den by the Age Discrimination Act of 1975 (42
24 U.S.C. 6101 et seq.). Congress determined that it
25 was not necessary for the Age Discrimination Act of

1 1975 to apply to employment discrimination because
2 the Age Discrimination in Employment Act of 1967
3 already forbade discrimination in employment by,
4 and authorized suits against, State agencies and
5 other entities that receive Federal financial assist-
6 ance. In section 1003 of the Rehabilitation Act
7 Amendments of 1986 (42 U.S.C. 2000d-7), Con-
8 gress required all State recipients of Federal finan-
9 cial assistance to waive any immunity from suit for
10 discrimination claims arising under the Age Dis-
11 crimination Act of 1975. The earlier limitation in
12 the Age Discrimination Act of 1975, originally in-
13 tended only to avoid duplicative coverage and rem-
14 edies, has in the wake of the Kimel decision become
15 a serious loophole leaving millions of State employ-
16 ees without an important Federal remedy for age
17 discrimination, resulting in the use of Federal finan-
18 cial assistance to subsidize or facilitate violations of
19 the Age Discrimination in Employment Act of 1967.

20 (7) The Supreme Court has upheld Congress'
21 authority to condition receipt of Federal financial
22 assistance on acceptance by the States or other re-
23 cipients of conditions regarding or related to the use
24 of that assistance, as in *Cannon v. University of*
25 *Chicago*, 441 U.S. 677 (1979). The Court has fur-

1 ther recognized that Congress may require a State,
2 as a condition of receipt of Federal financial assist-
3 ance, to waive the State’s sovereign immunity to
4 suits for a violation of Federal law, as in *College*
5 *Savings Bank v. Florida Prepaid Postsecondary*
6 *Education Expense Board*, 527 U.S. 666 (1999). In
7 the wake of the *Kimel* decision, in order to assure
8 compliance with, and to provide effective remedies
9 for violations of, the Age Discrimination in Employ-
10 ment Act of 1967 in State programs or activities re-
11 ceiving or using Federal financial assistance, and in
12 order to ensure that Federal financial assistance
13 does not subsidize or facilitate violations of the Age
14 Discrimination in Employment Act of 1967, it is
15 necessary to require such a waiver as a condition of
16 receipt or use of that assistance.

17 (8) A State’s receipt or use of Federal financial
18 assistance in any program or activity of a State will
19 constitute a limited waiver of sovereign immunity
20 under section 7(g) of the Age Discrimination in Em-
21 ployment Act of 1967 (as added by section 4 of this
22 Act). The waiver will not eliminate a State’s immu-
23 nity with respect to programs or activities that do
24 not receive or use Federal financial assistance. The
25 State will waive sovereign immunity only with re-

1 spect to suits under the Age Discrimination in Em-
2 ployment Act of 1967 brought by employees within
3 the programs or activities that receive or use that
4 assistance. With regard to those programs and ac-
5 tivities that are covered by the waiver, the State em-
6 ployees will be accorded only the same remedies that
7 are accorded to other covered employees under the
8 Age Discrimination in Employment Act of 1967.

9 (9) The Supreme Court has repeatedly held
10 that State sovereign immunity does not bar suits for
11 prospective injunctive relief brought against State
12 officials, as in *Ex parte Young*, 209 U.S. 123
13 (1908). Clarification of the language of the Age Dis-
14 crimination in Employment Act of 1967 will confirm
15 that that Act authorizes such suits. The injunctive
16 relief available in such suits will continue to be no
17 broader than the injunctive relief that was available
18 under that Act before the *Kimel* decision, and that
19 is available to all other employees under that Act.

20 **SEC. 3. PURPOSES.**

21 The purposes of this Act are—

22 (1) to provide to State employees in programs
23 or activities that receive or use Federal financial as-
24 sistance the same rights and remedies for practices
25 violating the Age Discrimination in Employment Act

1 of 1967 as are available to other employees under
2 that Act, and that were available to State employees
3 prior to the Supreme Court’s decision in *Kimel v.*
4 *Florida Board of Regents*, 120 S. Ct. 631 (2000);

5 (2) to provide that the receipt or use of Federal
6 financial assistance for a program or activity con-
7 stitutes a State waiver of sovereign immunity from
8 suits by employees within that program or activity
9 for violations of the Age Discrimination in Employ-
10 ment Act of 1967; and

11 (3) to affirm that suits for injunctive relief are
12 available against State officials in their official ca-
13 pacities for violations of the Age Discrimination in
14 Employment Act of 1967.

15 **SEC. 4. REMEDIES FOR STATE EMPLOYEES.**

16 Section 7 of the Age Discrimination in Employment
17 Act of 1967 (29 U.S.C. 626) is amended by adding at
18 the end the following:

19 “(g)(1)(A) A State’s receipt or use of Federal finan-
20 cial assistance for any program or activity of a State shall
21 constitute a waiver of sovereign immunity, under the 11th
22 amendment to the Constitution or otherwise, to a suit
23 brought by an employee of that program or activity under
24 this Act for equitable, legal, or other relief authorized
25 under this Act.

1 “(B) In this paragraph, the term ‘program or activ-
2 ity’ has the meaning given the term in section 309 of the
3 Age Discrimination Act of 1975 (42 U.S.C. 6107).

4 “(2) An official of a State may be sued in the official
5 capacity of the official by any employee who has complied
6 with the procedures of subsections (d) and (e), for injunc-
7 tive relief that is authorized under this Act. In such a suit
8 the court may award to the prevailing party those costs
9 authorized by section 722 of the Revised Statutes (42
10 U.S.C. 1988).”.

11 **SEC. 5. SEVERABILITY.**

12 If any provision of this Act, an amendment made by
13 this Act, or the application of such provision or amend-
14 ment to any person or circumstance is held to be invalid,
15 the remainder of this Act, the amendments made by this
16 Act, and the application of such provision or amendment
17 to another person or circumstance shall not be affected.

18 **SEC. 6. EFFECTIVE DATE.**

19 (a) WAIVER OF SOVEREIGN IMMUNITY.—With re-
20 spect to a particular program or activity, section 7(g)(1)
21 of the Age Discrimination in Employment Act of 1967 (29
22 U.S.C. 626(g)(1)) applies to conduct occurring on or after
23 the day, after the date of enactment of this Act, on which
24 a State first receives or uses Federal financial assistance
25 for that program or activity.

1 (b) SUITS AGAINST OFFICIALS.—Section 7(g)(2) of
2 the Age Discrimination in Employment Act of 1967 (29
3 U.S.C. 626(g)(2)) applies to any suit pending on or after
4 the date of enactment of this Act.

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