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KIMEL AND BEYOND: FIFTH CIRCUIT TACKLES SOVEREIGN IMMUNITY AND THE FAMILY AND MEDICAL LEAVE ACT IN *KAZMIER V. WIDMANN*

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SEMINOLE Tribe of Fla. v. Florida marked the advent of a new wave of Eleventh Amendment jurisprudence.[1] Overruling *Pennsylvania v. Union Gas Co.*,[2] the Supreme Court held that the Eleventh Amendment estops Congress from using its Article I power to authorize suits by private individuals against non-consenting states.[3] The Court noted, however, that Section Five of the Fourteenth Amendment affirmatively grants Congress the authority to enforce Equal Protection guarantees by abrogating the states' sovereign immunity.[4] Thus Section Five "curtails the vigor of the Eleventh Amendment."[5] Following *Seminole Tribe* came a significant line of sovereign immunity decisions, the most recent being *Kimel v. Fla. Bd. of Regents*.[6] The first extensive application of *Kimel* in the Fifth Circuit emerged from *Kazmier v. Widmann*.[7] *Kazmier* denied enforcement of certain subsections of the Family and Medical Leave Act (FMLA)[8] against Louisiana in federal court because Congress did not validly lift the states' immunity with respect to those subsections.[9] The Fifth Circuit's holding is a logical and correct application of *Kimel*. *Kazmier*'s requirement of congressional findings sufficient to show a pattern of state-inflicted unconstitutional discrimination mirrors the Supreme Court's analysis in *Kimel*. *Kimel* held that, in the absence of such findings, the enactment of the Age Discrimination in Employment Act (ADEA) was disproportionate to a supposed remedial object. Therefore, Congress did not validly exercise its Section Five

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1. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).
2. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).
3. *See Seminole Tribe*, 517 U.S. at 72.
4. *See id.* at 59.
5. Michael Peter Hatzimichalis, Comment, *Sovereignty, Federalism, and Property in the Balance: A Paradox in the Making*, 8 J.L. & POL'Y 707, 744 (2000).
6. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).
7. Kazmier v. Widmann, 225 F.3d 519 (5th Cir. 2000).
8. Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (1994).
9. *Kazmier*, 225 F.3d at 532.

power and did not validly abrogate immunity.[10] As such, the *Kazmier* dissent incorrectly asserts that the majority misunderstood *Kimel* as restricting Congress's Section Five power.[11]

Janice Kazmier worked for Louisiana Department of Social Services (LDSS).[12] Beginning in May of 1995, she had a series of absences. Specifically, she took one month of leave after breaking her arm. Additionally, she was absent for at least one week in October of the same year to care for her ill father. Finally, after breaking her wrist later in October, she failed to return to work for the remainder of the calendar year. These absences culminated in her termination on January 4, 1996.[13]

Following her termination, Kazmier filed suit against LDSS in the United States District Court for the Eastern District of Louisiana. She alleged that LDSS violated several provisions of the FMLA when it fired her for excessive absences. LDSS moved to dismiss the lawsuit, arguing that the Eleventh Amendment afforded Louisiana sovereign immunity and barred Kazmier from asserting her claim in federal court.[14]

Joining the lawsuit on Kazmier's behalf, the United States posited that Congress validly abrogated the states' sovereign immunity under the relevant subsections of the FMLA; therefore, Kazmier could bring her claim against Louisiana.[15] The district court denied LDSS's motion to dismiss the lawsuit, and LDSS appealed to the United States Court of Appeals for the Fifth Circuit.[16] The Fifth Circuit reversed and remanded the case, instructing the district court to dismiss all claims against LDSS for want of jurisdiction.[17]

Since *Seminole Tribe*, abrogation of states' immunity has arisen in a variety of contexts and has become a major issue in employment litigation arising under federal statutes.[18] To abrogate states' sovereign immu-

10. *Kimel*, 528 U.S. at 87-92.
11. *Kazmier*, 225 F.3d at 535.
12. *Id.* at 522-23.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Kazmier*, 225 F.3d at 533.
18. *See generally* Ill. State Univ. v. Varner, ___ U.S. ___, 120 S. Ct. 928 (2000) (granting certiorari on issue of abrogation of states' immunity from EPA claims); Univ. of Ala. at Birmingham Bd. of Trs. v. Garrett, ___ U.S. ___, 120 S. Ct. 1669 (2000) (granting certiorari on issue of whether Congress validly abrogated states' immunity from ADA claims); Lavia v. Pennsylvania, No. 99-3863, Dep't of Corr., 224 F.3d 190 (3d Cir. 2000) (holding Congress did not validly abrogate states' immunity from suit under the ADA); Kovacevich v. Kent State Univ., 224 F.3d 806 (6th Cir. 2000) (holding the EPA constituted a proper abrogation of immunity); Erickson v. Bd. of Governors, 207 F.3d 945 (7th Cir. 2000) (holding Congress did not validly abrogate states' immunity from ADA claims); Holman v. Indiana, 211 F.3d 399 (7th Cir. 2000) (holding the Eleventh Amendment did not bar employee's Title VII claims); Varner v. Ill. State Univ., 226 F.3d 927 (7th Cir. 2000) (concluding the EPA was a valid exercise of congressional authority, making immunity unavailable as a defense); Cooper v. St. Cloud State Univ., 226 F.3d 964 (8th Cir. 2000) (finding the university was immune from Title VII claim); Walker v. Mo. Dep't of Corr., 213 F.3d 1035 (8th Cir. 2000) (holding the Eleventh Amendment barred employee's ADA claims against Missouri); Cisneros v. Wilson, 226 F.3d 1113 (10th Cir. 2000) (holding the ADA validly abrogated the

nity validly, Congress must meet two requirements. First, it must unequivocally express its intent to lift the immunity.[19] Kazmier and LDSS conceded this point.[20] Second, Congress must act under a valid exercise of power.[21] Stated broadly, the critical issue, then, was whether Congress enacted subsections (C) and (D), found under entitlement to leave,[22] consistent with its power to enforce the Equal Protection Clause. Specifically, *City of Boerne v. Flores* requires that Congress meet the following test: the enactment of subsections (C) and (D) must be congruent with and proportional to the injury that Congress sought to prevent or remedy.[23]

To determine whether subsections (C) and (D) pass the congruence and proportionality test, the court, in accordance with *Kimel*, first decided what constitutional violations these subsections were designed to prevent. Second, it decided whether the legislative record contained actual constitutional violations by the states sufficient to justify the enactment of subsections (C) and (D). Interestingly, the court bifurcated its analysis and conducted two distinct congruence and proportionality tests—one for each subsection. Conceding that case law did not support such a bifurcation, the court nevertheless reasoned that one subsection might validly abrogate immunity, even if the other does not.[24]

Subsection (C) provides leave to an employee needing to care for a spouse, child, or parent with a serious health condition.[25] Noting that subsection (C) is prophylactic legislation, the court determined that Congress's express intent in enacting it was to prevent employers from engaging in sex-based discrimination when granting FMLA leave.[26] Congress potentially has broad freedom to enact such legislation because sex discrimination is subject to heightened scrutiny.[27] The problem, according to the court, is that "[t]he mere invocation by Congress . . . of sex discrim-

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states' immunity); Hundertmark v. Fla. Dep't of Transp., 205 F.3d 1272 (11th Cir. 2000) (holding application of EPA to states was within Congress's enforcement powers); Muller v. Costello, 187 F.3d 298 (2d Cir. 1999) (holding Congress validly abrogated states' immunity in enacting the ADA); O'Sullivan v. Minnesota, 191 F.3d 965 (8th Cir. 1999) (finding Congress properly abrogated states' immunity when it enacted the EPA); Dare v. California, 191 F.3d 1167 (9th Cir. 1999) (concluding that Congress validly abrogated state's immunity from Title II ADA claims); Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 193 F.3d 1214 (11th Cir. 1999) (determining that states do not have Eleventh Amendment immunity from ADA claims); *In re* Employment Discrimination Litig. Against the State of Ala., 198 F.3d 1305 (11th Cir. 1999) (concluding Congress validly abrogated states' immunity from Title VII disparate impact claims); Ussery v. Louisiana, 150 F.3d 431 (5th Cir. 1998) (determining Congress validly abrogated states' immunity from suit under the EPA and concluding that the state was not protected from employee's title VII claims).

19. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996).

20. *FMLA: Divided Fifth Circuit Finds No Abrogation of States' Sovereign Immunity Under FMLA,* 170 DAILY LAB. REP. (BNA), at A-4 (Aug. 31, 2000).

21. *Seminole Tribe*, 517 U.S. at 55.

22. 29 U.S.C. §§ 2612(a)(1)(C)-2612(a)(1)(D) (1994).

23. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

24. *Kazmier*, 225 F.3d at 525.

25. 29 U.S.C. § 2612(a)(1)(C) (1994).

26. *Kazmier*, 225 F.3d at 525.

27. *Id.*

ination . . . is insufficient to support the validity of legislation under Section 5."[28] Prophylactic legislation must be proportional to "actual, identified constitutional violations by the States."[29] Since the court found no such violations in the legislative record, it concluded that Congress did not validly enact subsection (C) and prevented Kazmier from enforcing the subsection.[30]

Subsection (D) allows an employee to take leave because of her own serious health condition.[31] The court rejected Kazmier's argument that this subsection was enacted to prevent sex discrimination; instead, it determined that Congress intended to combat two different types of discrimination. First, it conceded that Congress was somewhat concerned with pregnancy-based discrimination but noted that such discrimination must not be equated with sex discrimination.[32] Furthermore, it stated that Congress could not use its Section Five enforcement power to enact legislation targeting pregnancy discrimination because such discrimination does not violate the Equal Protection Clause.[33] Second, the court determined that the more likely object of subsection (D) was to prevent discrimination based on a temporary disability.[34] The court speculated that the FMLA prohibited significantly more state employment actions than would probably be held unconstitutional under rational-basis review—the applicable level of scrutiny for allegations of disability discrimination.[35] Thus, more likely than not, the subsection was disproportionate to unconstitutional state conduct. More importantly, however, the court found in the record no pattern of discrimination against the temporarily disabled.[36] Finally, the court urged that findings of discrimination in the private sector could not be imputed to the public sector.[37]

Judge Dennis authored a lengthy dissent throughout which he fundamentally disagreed with the majority's analysis. In particular, he asserted that the majority misunderstood *Kimel*'s congruence and proportionality test as limiting Congress's enforcement power.[38] Rather than employing such a test, he explained, the only constitutional yardstick needed for an Eleventh Amendment case is rational-basis scrutiny of the act in question.[39] In other words, were subsections (C) and (D) rational means to an end comprehended by the Fourteenth Amendment? Another point of divergence between the majority and the dissent was precisely what

28. *Id.* at 526 (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 87-92 (2000)).
29. *Id.* at 526.
30. *Id.*
31. 29 U.S.C. § 2612(a)(1)(D) (1994).
32. *Kazmier*, 225 F.3d at 528 (citing Geduldig v. Aiello, 417 U.S. 484 (1974)).
33. *Id.* at 527.
34. *Id.* at 528.
35. *Id.*
36. *Id.* at 529.
37. *Id.*
38. *Kazmier*, 225 F.3d at 528.
39. *Id.* at 535.

"end" Congress intended to reach. Judge Dennis looked at the FMLA as a whole and concluded that Congress's end was to prevent sex discrimination. In considering the FMLA one subsection at a time, the majority, according to Judge Dennis, "fail[ed] to discover the true nature of the creature as a whole."[40] Finally, the dissent's most vigorous point was that Congress is not required to compile a record of constitutional violations before enacting legislation designed to combat race or gender discrimination.[41]

Comparing the majority and the dissent's opinions, the majority's is more consistent with *Kimel* and its predecessors. The majority made a commonsensical response to the dissent. It questioned why, if rational-basis is the only yardstick, would the Supreme Court go to the trouble of formulating and adopting a congruence and proportionality test?[42] Though the Fifth Circuit did not elaborate further, *City of Boerne v. Flores* offers explanation.[43] The Supreme Court conceded that *Katzenbach v. Morgan*[44] suggested Congress may have the power to enact legislation expanding the rights found in Section One of the Fourteenth Amendment.[45] Yet, the Court resisted such an interpretation, calling it unnecessary and less than the best.[46] It appears that Congress attempted to expand Fourteenth Amendment guarantees by enacting subsection (D) at least partially to deter pregnancy-based discrimination. As noted, the Equal Protection Clause does not protect such discrimination.[47] Congress additionally expanded the Fourteenth's guarantees by offering, as the *Kazmier* majority noted, substantially more protection against temporary disability discrimination than would likely be found unconstitutional under rational-basis review.[48] The congruence and proportionality test urged by *Boerne* and adopted by *Kimel* ensures that Congress does not expand the Fourteenth but rather legislates consistently within existing guarantees. Thus, the test limits Congress in a way that the highly deferential rational-basis standard cannot. Indeed, this was the Supreme Court's intention in *Boerne*. It noted that Congress's power is not unlimited, and if Congress could so alter the Fourteenth, the Constitution would no longer be the law of the land.[49] Thus, *Boerne* and *Kimel*'s rationale is important from a separation of powers standpoint; the *Kazmier* majority's adoption of this test and its rationale is likewise important and notably correct.

The majority is also correct in insisting that legislative findings of actual discrimination are needed for a proper exercise of congressional enforce-

40. *Id.* at 544.
41. *Id.* at 534.
42. *Id.* at 530.
43. City of Boerne v. Flores, 521 U.S. 507 (1997).
44. 384 U.S. 641 (1966).
45. *Boerne*, 521 U.S. at 527-28.
46. *Id.*
47. Geduldig v. Aiello, 417 U.S. 484 (1974).
48. *Kazmier*, 225 F.3d at 528.
49. *Boerne*, 521 U.S. at 528-29.

ment power. The language of *Kimel*, admittedly, may suggest that legislative findings are not always a prerequisite. The Court stated that examining the record is "[o]ne means" of determining whether a statute is an appropriate remedy.[50] Yet, when considering the Supreme Court's recent Eleventh Amendment decisions, actions speak louder than words. These cases clarify that the Court relied almost exclusively on the record's insufficiency in determining that the statute in question was not an appropriate remedy. For example, in *Boerne*, the Court determined that the Religious Freedom Restoration Act (RFRA) was an inappropriate remedy because Congress had revealed only anecdotal evidence, and not a pattern, of religious discrimination.[51] Similarly, the Court in *Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank* determined that the Patent Remedy Act failed the congruence and proportionality test because Congress identified no pattern of patent infringement by the states, let alone a pattern of constitutional violations.[52] Finally, the *Kimel* Court concluded that extending the ADEA to the states was an unwarranted response to an inconsequential problem because Congress failed to identify a pattern of age discrimination by the states—much less any discrimination that rose to the level of a constitutional violation.[53] Thus, the Supreme Court requires a substantial record of discrimination for a determination that Congress enacted a remedial statute consistent with its enforcement powers. The dissent's suggestion to the contrary ignores precedent and is unfounded.

The majority's bifurcation of subsections (C) and (D) may prove to be yet another disputable issue surrounding *Kazmier*. As mentioned, the majority relied on no case law in its separate consideration of the subsections. Presumably, a court could determine, as the dissent suggested, that such bifurcation was an improper approach to statutory analysis. Arguably, the majority did miss the forest for the trees, and a different approach to the FMLA could have yielded a different result.

Kazmier v. Widmann is an important precedent for Fifth Circuit parties litigating claims under the FMLA or other federal statutes. *Kazmier's* adoption of the *Kimel* principles, particularly the congruence and proportionality test, serves as a guidepost for lower courts. Additionally, the case is important procedurally. It clarifies that Fifth Circuit plaintiffs suing a state under a remedial federal statute must initially offer congressional findings of discrimination to avoid dismissal for lack of jurisdiction. The *Kazmier* decision is in accord with decisions from other circuit courts of appeal, namely the Second, Third, Sixth, and Eleventh.[54] No circuit

50. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88 (2000).

51. *See Boerne*, 521 U.S. at 531.

52. *See* Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640 (1999).

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

54. *See* Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 193 F.3d 1214 (11th Cir. 1999); Hale v. Mann, 219 F.3d 61 (2d Cir. 2000); Chittister v. Dep't of Cmty. & Econ. Dev., 226 F.3d 223 (3d Cir. 2000); Sims v. Univ. of Cincinnati, 219 F.3d 559 (6th Cir. 2000).

court of appeal has decided differently. It is important to note that neither *Kazmier* nor the other decisions leaves employees without a remedy. Employees can sue states and their agencies in state court under state statutes similar to the FMLA. While *Kazmier* limits plaintiffs' federal court remedies, it serves the more important purpose of limiting congressional power, preserving federalism, and maintaining a balance of power among the branches of federal government.