For Opinion See 117 F.3d 1425

United States Court of Appeals,
Ninth Circuit.
Worth “Buttercup” HALE, et al., Plaintiffs-Appellees,
v.
Kimberly BELSHE, et al., Defendants-Appellants.
No. 97-15177.
March 14, 1997.

On Appeal from the United States District Court for the Northern District of California No. C-96-1804 SAW The Honorable Stanley A. Weigel, Judge

Appellants' Opening Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

42 United States Code

Section 1396a(a) ... 1

1396r ... 1

12101(b)(4) ... 11

12131 *et seq.* ... 1, 2

Other Authorities

U. S. Constitution

Article 1, Section 8, clause 1 ... 9

STATEMENT OF THE ISSUE PRESENTED

Whether the district court erred in concluding that Defendants/Appellants were not entitled to immunity under the Eleventh Amendment.

STATEMENT OF JURISDICTION

On May 15, 1996, Plaintiffs/Appellees (referred to as "Plaintiffs") filed this action as a civil rights complaint under the Medicaid Act, 42 U.S.C. § 1396a(a) and 42 C.F.R. § 431.50, 435.120, 435.930, 440.230, 440.240, the Nursing Home Reform Act (NHRA), 42 U.S.C. § 1396r and 42 C.F.R. § 483.100 to 483.138, and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 et seq. ("ADA") and 38 C.F.R. § 35.130. Plaintiffs have pleaded that jurisdiction of the district court was conferred pursuant to 28 U.S.C. §§ 1331 and 1343. Plaintiffs filed Proofs of Service as of June 28, 1996. (CD 90.)[FN1] On August 6, 1996, Defendants/Appellants (referred to as "State Defendants") filed a Motion to Dismiss and to Disqualify Counsel on August 6, 1996. This appeal is from the district court's December 2, 1996, Order Granting in Part Defendants' Motion to Dismiss (Fed.R.Civ.Proc. 12(b)(6)) and Denying Defendants' Motion to Disqualify Counsel. (CD 93; ER 42-81.) The district court denied the Eleventh Amendment immunity defense raised by State Defendants on all three types of claims, the Medicaid Act, NHRA, and ADA. Within ten days from that date, on December 12, 1996, State Defendants filed their notice of appeal, stating that Defendants were appealing the December 2, 1996 Order on Eleventh Amendment immunity grounds pertaining to all claims raised. (CD 93; ER 82-85.)

> FN1. Designations to the record will be as follows: "CD" will refer to the pleading as designated on the district court clerk's docket sheet. "ER" will refer to the pleading as designated in appellants' excerpts of the record.

This court has jurisdiction under the collateral order doctrine of Defendants'/Appellants' appeal from the district court's order denying Defendants' motion to dismiss on the grounds that Plaintiffs' claims are barred by the Eleventh Amendment. *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy,* 506 U.S. 139, 142-45 (1993).[FN2]

> FN2. Denial of a motion to dismiss based upon a claim of absolute immunity is an immediately appealable interlocutory order. *Trevino By and Through Cruz v. Gates,* 23 F.3d 1480, 1481 (9th Cir. 1994),

cert. den., ___ U.S. __, 115 S.Ct. 327.

STATEMENT OF THE CASE

Plaintiffs' complaint seeks to pursue a class action suit on behalf of "all persons who are, have been or will be placed in [Skilled Nursing Facilities/Institutions for Mental Disease] SNF/IMDs because rehabilitative mental health services appropriate to their individual needs are unavailable as a result of funding limitations" (ER 7, First Amended Complaint, p.5.) State Defendants are the Director of the California Department of Health Services, the Director of the California Department of Mental Health, and the Treasurer and Controller of the State of California. All Defendants are sued in their official capacities.

In bringing this suit, Plaintiffs allege that State Defendants failed to comply with the Medicaid Act, NHRA, and ADA, by failing to deinstitutionalize all of California's Institutes for Mental Disease, and providing services to these individuals in community placements. Plaintiffs seek wide-ranging and extraordinarily intrusive injunctive and declaratory relief.

SUMMARY OF ARGUMENT

State defendants are immune from suit under the recent United States Supreme Court decision in *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114 (1996). Since the *Seminole Tribe* decision provides Eleventh Amendment immunity where the legislative enactment was promulgated under a constitutional provision other than the Fourteenth Amendment, Plaintiffs' claims under the Medicaid Act and Nursing Home Reform Act cannot survive. This is because these Acts were promulgated under the Spending Clause. Regarding Plaintiffs' claims under the Americans with Disabilities Act (ADA), the Defendants are immune from suit since under the Fourteenth Amendment Congress lacked authority to enact the ADA. *Ex Parte Young,* 209 U.S. 123 (1908) which is referenced in *Seminole Tribe,* permits a narrow exception to Eleventh Amendment immunity in cases seeking prospective injunctive relief against state officials for constitutional violations. This Court believes, and State Defendants agree, that extending *Ex Parte Young* to suits involving federal statutory violations, as alleged here, was a mistake. Extending *Ex Pane Young* to suits involving alleged violations of federal statutory rights frustrates the very reasons which led to passage of the Eleventh Amendment, without substantially furthering the supremacy of the federal law. The Supreme Court has taken this issue for review and will provide additional guidance during this term.

STANDARD OF REVIEW

The district court's determinations regarding Eleventh Amendment immunity are reviewed de novo. *BV Engineering v. Univ. of Cal., Los Angeles,* 858 F.2d 1394, 1395 (9th Cir. 1988). The court reviews the district court's order on defendants' motion to dismiss de novo. *Gibson v. United States,* 781 F.2d 1334, 1337 (9th Cir. 1986), cert. denied, 479 U.S. 1054 (1987).

ARGUMENT

I.

STATE DEFENDANTS ARE IMMUNE FROM SUIT UNDER THE RECENT *SEMINOLE TRIBE* DECISION

Under the Eleventh Amendment,[FN3] states are immune from suit in federal court. *Hans v. Louisiana,* 134 U.S.

1 (1890). In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114 (1996), the Supreme Court set forth the definitive test for determining a state's immunity from liability under the Eleventh Amendment. Indeed, the Court stated that even where a plaintiff requests only prospective injunctive relief rather than monetary relief, the Eleventh Amendment bars relief. Id. at 1124. The Court could not have made this point more clear:

> FN3. The Eleventh Amendment of the Constitution of the United States provides that "The Judicial power of the United States shall not be construed to extend to any suit in law and equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

But we have often made it clear that the relief sought by plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment. [Citations.] 'It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought.' We think it follows *a fortiori* from this proposition that the type of relief sought is irrelevant to abrogate States' immunity. The Eleventh Amendment does not exist solely in order to 'preven[t] federal court judgments solely that must be paid out of a State's treasury.' [Citations.] Id.

In applying the test, a court must determine "first, whether Congress has 'unequivocally expressed its intent to abrogate the immunity', and second, whether Congress has acted 'pursuant to a valid exercise of power"' in abrogating the immunity. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. at 1123, citing *Green v. Mansour*, 474 U.S. 54, 68, 106 S.Ct. 423, 426 (1985).

The second part of the analysis recognizes that Congress cannot abrogate Eleventh Amendment immunity unless it acts pursuant to the Fourteenth Amendment. *Id*. at 1125-1132.[FN4] This part of the test simply means that Congress cannot abrogate Eleventh Amendment immunity, regardless of its intentions, where it lacks the power to do so. In concluding that Congress only has the power to abrogate the states' Eleventh Amendment immunity in legislation enacted pursuant to the Fourteenth Amendment, the Court expressly overruled its prior holding that Congress could abrogate Eleventh Amendment immunity in legislation enacted under the Commerce Clause. *Id*. at 1128 (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

> FN4. The Ninth Circuit has recognized and applied this two part analysis of Eleventh Amendment immunity. *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991 (9th Cir. 1994).

In this appeal, State Defendants assert only that the Medicaid Act and NHRA were not and could not have been promulgated under Congress's powers under the Fourteenth Amendment. Concerning the ADA, we do not argue that Congress failed to unequivocally express its intent to abrogate Eleventh Amendment immunity under the statutory scheme; but instead, we argue that Congress did not act pursuant to a valid exercise of power since it did not act pursuant to the Fourteenth Amendment.

The Court's stated rationale, *in Seminole Tribe*, is founded upon a simple but historically sound principle:
Even when the Constitution vests in Congress complete law making authority over a particular area, the Eleventh Amendment prevents Congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. Petitioner's suit against the State of Florida must be dismissed for a lack of jurisdiction." *Seminole Tribe*, 116 S.Ct. at 1131-32.

A. *State Defendants Are Immune From Suit Under the Medicaid Act.*

The *Seminole Tribe* decision quickly puts to rest the anticipated argument by Plaintiffs that the State's participation in the Medicaid Program serves to waive its Eleventh Amendment immunity. Indeed, the Court states:
The Eleventh Amendment immunity may not be lifted by Congress unilaterally deciding that it will be replaced by grant of some other authority. Cf. *Atascadero*, 473 U.S., at 246-247, 105 S.Ct., at 3149-3150 ([T]he mere receipt of federal funds cannot establish that a State has consented to suit in federal court")." Id. at 1125.

As to the first prong of the test, it has long been held that Congress in enacting the Medicaid statutory scheme has not "unequivocally expressed its intent to abrogate the immunity". *Amisub Inc. v. Colorado Department of Social Services*, 879 F.2d 789, 793 (10th Cir. 1989); *Gamboa v Rubin*, 80 F.3d 1338, 1349-50 (9th Cir. 1996). Indeed, a State's participation in the Medicaid Program has not constituted a waiver of its Eleventh Amendment immunity. *Yorktown Medical Group, Inc. v. Perales*, 948 F.2d 84, 87-88 (2nd Cir. 1991).

Concerning the second prong, a state's Eleventh Amendment immunity will only be abrogated if the Act in question was promulgated pursuant to the Fourteenth Amendment. It is clear beyond dispute that the Medicaid Act was enacted pursuant to the Spending Clause, U.S. Constitution, Article 1, Section 8, clause 1. *Bennett v. White.*, 865 F.2d 1395, 1404 (3rd Cir. 1989); *Oklahoma v. Schweiker*, 655 F.2d 401, 416-17 (D.C. 1981); *Missouri v. U.S.*, 918 F.Supp. 1320, 1335 (E.D. Mo. 1996); *Robinson v. Block*, 1987 U.S. District LEXIS 11893 (E.D.Pa. 1987). Therefore, plaintiffs' claims against State Defendants for alleged violations of the Medicaid Act, claims one through four, are barred by the Eleventh Amendment.

B. *State Defendants Are Immune From Suit Under the Nursing Home Reform Act.*

A conclusion that the Nursing Home Reform Act was enacted pursuant to Congress' spending powers is supported by analogous and recent precedent. The enactment of the NHRA should be analogized to that of Title VI and Title IX.

Like the NHRA, Title VI was enacted to remedy certain forms of discrimination. Title VI is legislation enacted not under the Fourteenth Amendment, but under Congress' spending powers. *Guardians Association v. Civil Service Commission of New York*, 463 U.S. 582, 598, 103 S.Ct. 3221 (1983).

Similarly, Title IX,[FN5] 42 U.S.C. § 2000d et seq. which was patterned after Title VI, was also enacted under Congress' spending powers. *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006, 1013, n. 14 (5th Cir. 1996) ("[n]othing in Title IX demonstrates an intent to enforce the Fourteenth Amendment"); *Oona v. Santa Rosa City Schools*, 890 F. Supp. 1452, 1465 (N.D. Cal. 1995) ("[t]his court assumes, absent direction to the contrary from the Ninth Circuit or the Supreme Court, that Title IX was likewise enacted pursuant to the Spending Clause"). If Title VI and Title IX are enactments under Congress' spending powers, so too is the NHRA.

FN5. Title IX is codified at 20 U.S.C. § 1681 *et seq*.

C. *Defendants Are Immune From Suit Under the ADA.*

The States' Eleventh Amendment immunity under the ADA requires a more sophisticated analysis than under the other two Acts. This is because in the ADA Congress not only specifically expressed its intent to abrogate Eleventh Amendment immunity, but, unlike in the Medicaid Act or NHRA, also expressed its intended authority for the legislation. According to the ADA, it was passed under Congress' Commerce Clause powers and to enforce the Fourteenth Amendment. 42 U.S.C. § 12101(b)(4).

States are immune from suit for any requirements of the ADA that were based on Congress' powers under the

Commerce Clause. (*Seminole Tribes* at 1131.) Thus, it is only those obligations of the ADA that can be traced to the Fourteenth Amendment for which defendants can be sued in federal court. Plaintiffs have not alleged such obligations under the Fourteenth Amendment.

The incongruence between the requirements of the ADA and those which may be imposed under the Fourteenth Amendment was recently discussed in *Pierce v. King*:

The Fourteenth Amendment has traditionally been understood as protecting individuals from state action that would infringe upon individual liberties. The ADA, however, creates positive rights to entitlements against other individuals and state governments. Although framed in terms of addressing discrimination, the Act's operative remedial provisions demand not equal treatment, but special treatment tailored to the claimed disability. In this respect, the ADA differs radically from traditional anti-discrimination laws, such as Title VII, which seek only a state of affairs where individuals are treated in a neutral manner without regard to race, sex, age, etc. Unlike traditional anti-discrimination laws, the ADA demands entitlement in order to achieve its goals. This the Fourteenth Amendment cannot authorize. 918 F. Supp. 932, 940 (E.D.N.C. 1996).

Most of what Plaintiffs seek in this case are matters not grounded in notions of equal treatment, but instead are affirmative obligations requiring actions for them and them alone. In other words, Plaintiffs argue that the State is responsible for developing resources in the community so that plaintiffs can receive the services there that they are now receiving in NFs.

1. *Deinstitutionalization of the Mentally Ill Is Not a Right Grounded in the Fourteenth Amendment.*

Courts have consistently rejected the argument that deinstitutionalization is a right grounded in the Fourteenth Amendment. *(Society for Good Will to Retarded Children v. Cuomo,* 737 F.2d 1239 (1989)(Post-*Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) courts have held that there is no constitutional right of the mentally ill or mentally retarded to placement in the least restrictive environment.)[FN6]

FN6. *Society for Goodwill to Retarded Children* at 1249, citing *Rennie v. Klein,* 720 F.2d 266, 269, 271 (3d Cir. 1983) (en banc) (plurality and concurring opinions); *Johnson v. Brelje,* 701 F.2d 1201, 1210 (7th Cir. 1983); *Association of Retarded Citizens of North Dakota v. Olson,* 561 F.Supp. 473, 486(D.N.D. 1982), *aff'd on other grounds,* 713 F.2d 1384 (8th Cir. 1983). Cf. *Sanchez v. New Mexico,* 396 U.S. 276, 90 S.Ct. 588, 24 L.Ed.2d 469 (1970), dismissing for want of a substantial federal question *State v. Sanchez,* 80 N.M. 438, 441, 457 P.2d 370 (1969)(appellant's argument that institutionalization of mentally ill persons was unconstitutional because it deprived individuals of personal liberties rejected by New Mexico Supreme Court.)

2. Duffy v. Riverland *Does Not Establish That Congress Acted Pursuant to a Valid Exercise of Power Since the Court Did Not Consider Whether Congress in Passing the ADA Did So Under the Fourteenth Amendment.*

Any reliance by plaintiffs on *Duffy v. Riveland,* 98 F3d. 447 (9th Cir. 1996) to establish that Congress successfully abrogated the Eleventh Amendment in this case would be wholly misplaced. The court in *Duffy* neither mentioned the *Seminole* analysis in considering Eleventh Amendment issues nor addressed the only part of the analysis which is applicable to the issues raised in this case--the source of congressional authority for the enactment of the ADA. The Court merely noted Congress' intent to abrogate the Eleventh Amendment in enacting the ADA.

II.

EX PARTE YOUNG DOES NOT PROVIDE AN EXCEPTION TO DEFENDANTS' ELEVENTH AMENDMENT IMMUNITY.

Ex Pane Young, 209 U.S. 123 (1908), provides no exception to Defendants' Eleventh Amendment immunity and the district court's conclusion to the contrary was erroneous. (ER 52-53.) Under the Eleventh Amendment, "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-663 (1973) (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)). In general, *Ex Pane Young* permits a suit for injunctive relief challenging the constitutionality of a state official's action. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102 (1983) (*Pennhurst II*). Thus, "the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign." *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 687 (1949). There can be no question that this case, although captioned with the names of individual state officials, is a suit seeking wide-ranging reforms on the part of the State Defendants in administering the State's mental health system. Accordingly, the suit is against the State of California and *Ex Pane Young* provides no exception to Eleventh Amendment immunity.

Furthermore, *Ex Pane Young* is inapplicable because this case is based on alleged statutory, and not constitutional, violations. As the Supreme Court has cautioned, *Ex Pane Young* is not to be given "expansive interpretation." *Pennhurst II*, 465 U.S. at 102. Despite this admonition, the Ninth Circuit extended the *Ex Pane Young* exception to suits for injunctive relief challenging the legality of state officials' actions under federal statutes. *Almond Hill School v. U.S. Dept. of Agriculture*, 768 F.2d 1030 (1985). The appropriateness of this extension is doubtful. As recently noted by two Ninth Circuit judges, the Court "took a wrong turn in *Almond Hill* because it represented a "persistent erosion of the Eleventh Amendment by expanding judicial exceptions within this circuit." *Natural Resources Defense Council v. California Department of Transportation*, 96 F.3d 420, 424 (9th Cir. 1996) (O'Scannlain and Kleinfeld concurring).

The extension of the *Ex Pane Young* exception to cases arising under federal legislation was improper and will likely be addressed in a case presently before the Supreme Court. *Coeur d'Alene Tribe of Idaho v. Idaho*, 42 F.3d 1244 (9th Cir. 1994), *cert. granted*, 116 S. Ct. 1415 (1996). The extension was inappropriate because it is in contravention with the very policies behind *Ex Pane Young*:

[T]he scope of any such relief [is to] be constrained by principles of comity and federalism. "Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'

Pennhurst II, 465 U.S. at 104, n.13 (citations omitted). Thus, the scope of the *Ex Pane Young* exception requires balancing the states' sovereign immunity with the rights and powers secured by other parts of the Constitution. "[T]he need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Id*.

Extending *Ex Pane Young* to cases alleging violations of federal statutory law against these State Defendants in their administration of the State of California's provision of mental health services essentially nullifies the constitutional immunity of the States and subjects them to suits in federal court going far beyond the protections contained in the Constitution. Because such an extension violates principles of federalism, the district court's reliance on *Ex Parte Young* was mistaken and must be reversed.

CONCLUSION

The district court's dismissal order must be reversed. The statutes contained in the ADA cannot be considered to have been a valid exercise of congressional power under the Fourteenth Amendment, and the State Defendants are immune from the application of the ADA, Medicaid Act, and NHRA, pursuant to the Eleventh Amendment for which there is no exception under *Ex Pane Young*.

Worth ""Buttercup" HALE, et al., Plaintiffs-Appellees, v. Kimberly BELSHE, et al., Defendants-Appellants. 1997 WL 33555336 (C.A.9) (Appellate Brief)

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