

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ANDREW JAMES SCOTT,

Plaintiff,

v.

STATE OF WISCONSIN DEPARTMENT
OF WORKFORCE DEVELOPMENT,

Defendant.

ORDER

06-C-308-C

Plaintiff Andrew James Scott brought this civil action for monetary relief under several civil rights statutes. He asserts four claims against defendant State of Wisconsin Department of Workforce: (1) creating a hostile work environment because of his sex, in violation of Title VII of the Civil Rights of 1964; (2) failing to accommodate his disability, in violation of Title I of the Americans with Disabilities Act; (3) retaliating against him for opposing discriminatory practices, in violation of both Title VII of the Civil Rights Act and Title V of the ADA; and (4) terminating him because of his age, in violation of the Age Discrimination in Employment Act.

Defendant has moved to dismiss plaintiff's disability and age discrimination claims,

on the ground that it is entitled to sovereign immunity. Plaintiff's opposition to the motion was due on November 8, 2006. When no response was filed, defendant requested a ruling on the motion. Plaintiff then requested an extension of time to respond to the motion, which the magistrate judge granted, extending the deadline to November 29. Although plaintiff filed his list of experts on November 27, 2006, he has neither filed a response to the motion nor asked for another extension. However, the court has received a letter from defendant's counsel, in which he stated, "It is my understanding, based on a December 1, 2006 telephone conversation with plaintiff's counsel, that [he] does not intend to file a response." Accordingly, I conclude that defendant's motion is ripe for determination. (In the future, counsel for plaintiff should notify the court himself if he does not intend to oppose a motion, rather than make both the court and opposing counsel wonder whether a response is forthcoming. Common courtesy should have suggested this course of action, particularly when counsel already delayed determination of the motion by seeking an extension.)t

Sovereign immunity extends to all "arms of the state," which include state agencies such as defendant. Kashani v. Purdue University, 813 F.2d 843, 845 (7th Cir.1987). Under current law, no state agency may be sued for money damages unless the state either consents to be sued or Congress has validly abrogated immunity under § 5 of the Fourteenth Amendment. There is no indication in this case that the state has consented to suit or

otherwise waived its right to assert immunity. With respect to abrogation, the Supreme Court has held explicitly that states retain their sovereign immunity on claims brought under the ADEA and Title I of the ADA. Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001) (Title I of ADA); Kimel v. Florida Board of Regents, 528 U.S. 62 (2001) (ADEA).

The Court has identified two possible exceptions to immunity. First, the Court has held that immunity is abrogated in cases in which the plaintiff alleges facts suggesting a possible violation of the Constitution. United States v. Georgia, 546 U.S. 151 (2006) (no sovereign immunity for ADA claim when alleged conduct also violates Fourteenth Amendment). Plaintiff has not alleged enough facts in his complaint to allow a determination whether his claim could rise to a constitutional violation. However, I conclude that by failing to respond to defendant's motion to dismiss, plaintiff has conceded that his claims do not meet this standard.

Second, the Supreme Court suggested in Garrett, 531 U.S. at 374 n.9, that sovereign immunity may not bar claims for injunctive relief brought under these statutes. This exception does not apply, however, because plaintiff seeks only money damages.

Neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has considered whether states are entitled to immunity for claims brought under Title V of the ADA. The Court's conclusion in Garrett is not necessarily controlling because it is limited

to Title I. And with respect to Title II of the ADA, which prohibits disability discrimination in government “services, programs or activities,” the Court has determined that Congress *has* validly abrogated state sovereign immunity, at least in some circumstances. Tennessee v. Lane, 541 U.S. 509 (2004) (no sovereign immunity in cases implicating right of access to courts).

It is unlikely, however, that the Court’s conclusion with respect to Title V would be any different from its decision on Title I. In determining whether Congress has validly abrogated sovereign immunity, the Supreme Court has stated that the threshold question is whether the legislative record shows a pattern of unconstitutional conduct by the states prior to enactment. Garrett, 531 U.S. at 964-65. Because both Title I and Title V relate to discrimination in employment, the legislative record for both is likely to be similar. In any event, it was plaintiff’s burden to show that immunity was abrogated. Because he failed to do so, I conclude that defendant’s motion to dismiss must be granted.

ORDER

IT IS ORDERED that the motion to dismiss filed by defendant State of Wisconsin Department of Workforce is GRANTED. Plaintiff Andrew James Scott’s claims brought under the Americans with Disabilities Act and the Age Discrimination in Employment Act

are DISMISSED on the ground that defendant enjoys sovereign immunity.

Entered this 22d day of December, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge