

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-3055

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ROBERT J. BLANCIK; RAYMOND BOWMAN, WILLIAM BURKETT;
MARLIN D. BYERS; RICHARD COOK; ROBERT EL DELLEDONNE;
JACK DELCIMMUTO; RICHARD T. FARAH; DONALD E. HOLMES;
JAMES MARKYBY; DONALD C. MILLER; HOWARD MUMAU; DOMONIC
POCETTI; EDWARD E. PRIMACK; ANTHONY RODNICKI; WILLIAM D.
ROWE; DON SHELLHAMMER; PAUL R. SIBIK; JAMES WALKER;
THEODORE W. WALKER; FRANCIS N. AMARANTO; LEROY A. CALDERONE;
RONALD E. CALHOUN; LOUIS ECARAVAGGIO; JOSEPH W. CLARK;
GEORGE L. FLEEGER; RONALD R. FULTON; RICHARD L. GEORGE;
JOHN M. GULYAS; JACK C. HESKETH; ROBERT HUTCHERSON;
ROBERT D. KNABB; BERNARD C. KUMPF; WILLIAM JOHN MORDA;
JAMES E. PATTY; LAURA G. POSKUS; ARTHUR L. RAMER; F.
EUGENE SMELTZER; ROBERT L. STEWART; WESLEY E. SUMAN;
DOUGLAS E. TALMADGE; JACK WILMOT, JR., individually and
and on behalf of all other persons similarly situated,

v.

ALLEGHENY LUDLUM CORPORATION; UNITED STEELWORKERS OF AMERICA;
and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR &
INDUSTRY; HARRIS WOFFORD, Secretary of Labor and Industry;
MAURICE NATES; JOHN KRISIAK; STELLA RAVETTO; R.C. THOMAS;
CHARLES E. SWARTZ, and various JOHN DOES, and or JANE DOE(S),

ROBERT J. BLANCIK, RAYMOND BOWMAN;
JOSEPH W. CLARK; JACK DELCIMMUTO;
RICHARD T. FARAH; RICHARD GEORGE;
JOHN M. GULYAS; JACK C. HESKETH;
DONALD E. HOLMES; ROBERT D. KNABB;
JAMES MARKBY; DONALD C. MILLER;
JAMES E. PATTY; DOMINIC POCETTI;
EDWARD E. PRIMACK; ANTHONY RODNICKI;
WILLIAM ROWE; DON SHELLHAMMER;
F. EUGENE SMELTZER; ROBERT L. STEWART;
DOUGLAS E. TALMADGE and JAMES WALKER,

Appellants.

APPEAL FROM THE ORDER DATED
DECEMBER 30, 1994, OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA AT CIVIL ACTION NO. 90-0931

BRIEF FOR APPELLEES,
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF LABOR &
INDUSTRY; HARRIS WOFFORD, Secretary of Labor & Industry;
MAURICE NATES; JOHN KRISIAK; and STELLA RAVETTO

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STATEMENT OF JURISDICTION

Jurisdiction in the District Court of Appellants' claims under the Age Discrimination in Employment Act was conferred by 29 U.S.C. § 626(c). Jurisdiction of Appellants' constitutional claims under 42 U.S.C. § 1983 was based on 28 U.S.C. §§ 1331 and 1343.

Appellants alleged inter alia that they were subjected to age discrimination in the hiring context and to a denial of equal protection.

On December 30, 1994, the district court entered a final order entering summary judgment against appellants and disposing of all claims. Some of the plaintiffs filed a notice of appeal on January 25, 1994.

Appellate jurisdiction exists pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW
AND STANDARD OF REVIEW

- I. Whether the district court correctly concluded that the eleventh amendment barred the claims against the Commonwealth Appellees when sued as an employment agency?

This issue was raised by the Commonwealth in the Answer to the Complaint and as part of the summary judgment motion, App. 113, 194, and ruled upon by the District Court in its Memorandum Opinion and Order dated June 7, 1994, App. 51-53.

Review is plenary. Skehan v. State System of Higher Education, 815 F.2d 244, 246 (3d Cir. 1986).

- II. Whether the district court correctly concluded that an award of front pay under Section 1983 against the Commonwealth or in an official capacity suit was barred by the Eleventh Amendment?

This issue was raised by the Commonwealth in its Supplement to Motion for Summary Judgment App. 202-203 and ruled upon by the District Court in its Memorandum Opinion and Order dated June 7, 1994, App. 54-58.

Review is plenary. Skehan v. State System of Higher Education, 815 F.2d 244 (3d Cir. 1986).

- III. Whether the district court properly found that the action for equitable relief was moot?

This issue was raised upon by the District Court in its Memorandum Opinion and Order dated June 7, 1994, App. 59-64.

Review is plenary. Northeast Women's Center, Inc. v. McMonagle, 939 F.2d 57, 61 (3d Cir. 1991).

STATEMENT OF THE CASE

A. Nature of the Appeal, the Action and Parties.

Twenty-two (22) former employees of United States Steel (USX) filed this appeal from the entry of summary judgment in favor of the Commonwealth, the Department of Labor and Industry and the current Secretary of the Department, on eleventh amendment and mootness grounds.

1. The Plaintiff's-Appellants

Appellants are some of the forty-one (41) original and opt-in plaintiffs who filed a civil action for damages and equitable relief under the Age Discrimination In Employment Act, 29, U.S.C. § 621, et seq. (the "ADEA"), the federal civil rights act, 42 U.S.C. §§ 1983 and 1985, and the Pennsylvania Human Relations Act (among other statutes, none of which are pertinent to this appeal). (Compl. at ¶ 1) (Appendix "A", 68-69). In their complaint, the plaintiff-appellants characterized themselves as individuals, at least 40 years of age, who were employed by USX at its United States Steel facility in Vandergrift, Pennsylvania. (A70-71). They were union members subject to a collective bargaining agreement and represented by the United States Steelworkers of America. (A70). When the USX plant was sold to Allegheny Ludlum in June 1988, they alleged that they were

involuntarily retired or not employed by Allegheny Ludlum due to "age-motivated" reasons. (A70).

The plaintiffs brought their ADEA claims as an opt-in class action. (A71). The civil rights claims were not brought as or certified as part of a class action. (The plaintiff-appellants are sometimes referred to as the "steelworkers" in this brief.)

2. The Defendants

As defendants, the steelworkers named Allegheny Ludlum Corporation; their union, the United Steelworkers of America; and the Commonwealth of Pennsylvania and the following officials or employees of the Pennsylvania Department of Labor and Industry: Harris Wofford, the Secretary of the Department;¹ John Krisiak, Stella Ravetto and Maurice Nates, employees of the Department (herein, the "Commonwealth" or "Commonwealth Appellees"). (A76-77). (Also named as defendants were "John" or "Jane Doe" defendants. However, no service was effected on either the Doe defendants or Nates.) The Department of Labor and Industry was sued as an employment agency under the ADEA. (See Complaint at ¶ 35); (A76).

3. Description of ADEA Class

As the members of the pertinent Subclass Two described in their complaint (A87-94), the employees alleged that age

¹ For purposes of injunctive relief, Wofford's successor in office, at the time of the court's first 1994 order was Robert S. Barnett; the current Secretary is John J. Butler.

discrimination occurred when they were not selected for employment at Allegheny Ludlum, but were required to meet other hiring criteria, among which was the requirement to report to the Job Service, an office of the Department of Labor and Industry's Office of Employment Security, to take the General Aptitude Test Battery (GATB), on June 28, 1988. (See Complaint at ¶ 104, p. 22) (A89). The steelworkers alleged that the GATB test administered by the Commonwealth was a general abstract test which had no specific relationship to the work (that of a steelworker) in the Vandergrift facility. (See ¶ 110 of the Complaint) (A90).

While the complaints asked for back and front pay, generally from all defendants, the only specific equitable relief sought against the Commonwealth Appellees was a request that the district court "monitor the offices of Defendant Job Services which serve Allegheny Ludlum's Vandergrift, West Leechburg, and Brackenridge plants for a period of at least one year with regard to the treatment of older work force members." (Compl. at pp. 35-36); A102); (see also Suppl. Amended Compl. at pp. 26-27, Prayer for Relief) (A166).

The steelworkers asked for an injunction against Allegheny Ludlum "preliminarily and permanently [enjoining] Defendant Allegheny Ludlum from filling hourly positions at its Vandergrift facility in a manner which discriminates on the basis of the age of the job applicants." (A166). The steelworkers

requested that the court order Allegheny Ludlum to reinstate them.²

The steelworkers also asked for a declaratory judgment to declare all defendants' conduct to be "unlawful and in willful violation of plaintiffs' rights." (Compl. at p. 35; A102).

**C. The Plaintiffs' Pretrial Settlement
between Defendants, Allegheny Ludlum
and the Union.**

All of the plaintiffs entered into a settlement agreement with Allegheny Ludlum and the United Steelworkers. (See Sealed Appendix "SA" 5-30). These parties filed a Stipulation of Dismissal but did not file a copy of the settlement agreement with the Court. (535-536A). The settlement agreement extinguished and waived the plaintiff-appellants' claims related to their employment with Allegheny Ludlum, including those arising from the purchase and operation of the Vandergrift-United States Steel Plant, and any hiring decisions. (SA11;17).

The settlement also released the agents of Allegheny Ludlum. (See Slip. Op. at 13, n.5). Plaintiff-Appellants did not waive the right to pursue "existing claims" and claim damages

² Specifically, the plaintiffs asked that the district court:
(c) Grant Plaintiffs an order requiring defendant Allegheny Ludlum to make them whole by re-employing them in suitable positions commensurate with their qualifications, seniority, and compensation levels, as if their service had been continuous.

See Slip Op. at p. 9 (citing the Plaintiffs' Supplemental Amended Complaint) (A166).

against the Commonwealth parties. (SA11); (SA19).

**D. The Memorandum Opinion and Proposed
Order dated June 3, 1994.**

Thereafter, the Commonwealth parties moved for summary judgment. The district court on June 3, 1994, entered a proposed order which granted the Commonwealth Appellees' motion for summary judgment, entering judgment in their favor and ending all claims that would have required the Commonwealth to pay money to the plaintiffs.

The district court held that "Congress, through the ADEA, has not abrogated sovereign immunity for state-run employment agencies", *id.* at 12, pointing to its inability to infer Congress' intent to abrogate eleventh amendment constitutional immunity absent the unmistakable clarity required by the decisional law, and, also, to Congress' failure to amend the definition of "employment agency" in the ADEA to include states when it amended the ADEA's provisions to include states in its definition of an "employer" subject to suit under the ADEA. (Slip Op. at p. 11).

The district court also rejected the plaintiffs' proposition that it could award them "front pay", as an equitable substitution for "reinstatement," (since the district court could not order the Commonwealth to employ them at Allegheny Ludlum). Concluding that the payment of front pay would be payment from the state's treasury and constitutionally barred by the eleventh amendment, the district court refused to order the Commonwealth to

pay "front pay". See id. at pp. 16-17.

The district court also found that the steelworkers' claims under 42 U.S.C. § 1983 against the Commonwealth and its Department, for either damage, front pay, or equitable relief, were "entirely foreclosed by the eleventh amendment," and that the eleventh amendment also barred the claims for the payment of money by the individual officials or employees in the claims brought against them for conduct taken in their official capacities. See Slip Op. at 14.

To the extent a Section 1983 personal capacity claim existed that would have required the payment of money, the district court entered summary judgment in favor of the Commonwealth Appellees. (Slip Op. at 18).

The district court however reserved ruling on the declaratory and injunctive claims against the Commonwealth Appellees pending resolution of what it perceived to be a threshold jurisdictional and prudential question -- whether the claims for injunctive and declaratory relief were moot. The district court indicated that before it could definitively decide this question, it needed to review the settlement agreement. See Proposed Order of Court dated June 3, 1994, at pp. 1-2 (attached to memorandum opinion).

Based on what the district court knew about the settlement even before it was filed under seal, it raised questions concerning its jurisdiction over the injunctive relief sought by the plaintiffs against the Commonwealth Appellees . . .

[i]f, as the court strongly suspects, the sealed settlement agreement provides all the relief requested and pursued in this case which concerns the hiring of former United States Steel-Vandergrift employees over the age of forty at the Allegheny Ludlum facilities and the Commonwealth Defendants' use of the GATB's at the Job Service in Vandergrift to determine preferences for hiring members of the plaintiff class.

Slip Op. at p. 24 (citation omitted).³

The district court noted without deciding the Commonwealth Appellees' objections to "plaintiffs' recently asserted claims for injunctive and declaratory relief pertaining to the Department's use of the General Aptitude Test Battery, or 'GATB', in general, and not just with regard to the Allegheny Ludlum facilities." Slip. Op. at 24 n.6.

In its June 3 order, in view of its reasoning that the "equitable claims are in likelihood moot", Slip. Op. at 6, the district court ordered the steelworkers to file objections to the proposed order and the Commonwealth parties to file their opposition to the steelworkers' objections. *Id.* at p. 2. Before filing their objections, the steelworkers appealed the June 3 proposed order. The appeal was dismissed for lack of jurisdiction.

The steelworkers then filed their Objections to "the June 3 Proposed Order of Court Dismissing Injunctive and Declaratory

³ The settlement agreement has been offered under seal to this Court with a motion to seal the agreement pending. It was sealed in the proceedings in the district court after the intervention of Allegheny Ludlum raising the confidentiality provisions of the agreement. Therefore, its provisions are not set forth with particularity in this brief.

Relief". The Commonwealth parties filed their reply and brief in opposition. (SA110-126).

E. The Order dated December 30, 1994.

After the case was remanded, the settlement agreement entered into between steelworkers (class member), the union and Allegheny Ludlum, on motion of Allegheny Ludlum, was submitted under seal for the district court's "consideration of its effect upon the remaining issues in this case." (Memorandum Order dated Nov. 1, 1995) (SA4).

The district court entered its order dated December 30, 1994, and denied plaintiffs' objections. The district court stated:

[A]fter consideration of the sealed settlement agreement and joint tortfeasor release, Plaintiffs' Objections to Proposed Order of Court Dismissing Injunctive and Declaratory Relief against the remaining Commonwealth of Pennsylvania defendants, briefs in support of and in opposition to the objections, and upon the entire record in this case, the Court remains of the opinion that the plaintiffs have insufficient personal stake in the outcome of these proceedings against these defendants to warrant any further prudential exercise of this Court's jurisdiction.

(Order dated December 30, 1994).

This appeal followed.

STATEMENT OF THE FACTS

1. Background - Job Service Offices and the GATB Test.

Job Service, an agency of the Commonwealth of Pennsylvania, Department of Labor and Industry, functions as a no-fee employment service and labor exchange with the primary purpose of bringing employers and job seekers together. The system of free State Employment Service offices was initially established by the Commonwealth in 1915. After passage by Congress of the Wagner-Peyser Act, 29 U.S.C. 49 et seq., in 1933, the State Employment Service became part of a national system of employment offices regulated and funded by the federal Department of Labor, and collectively known as the United States Employment Service. See 20 C.F.R. §§ 654.1 et seq.

The GATB was developed under the auspices of the United Employment and Training Administration (ETA). It consists of twelve separately timed subtests which measure a wide range of occupationally relevant cognitive, perceptual, and psychomotor skills - general learning ability, verbal, numerical, spatial, form perception, clerical perception, motor coordination, and finger and manual dexterity. (See Title VI Determination of U.S. Department of Labor, Compl. of Richard Farah; Attachment 5 to Plaintiff's Opposition to Motion for Summary Judgment) (A424).

In the early 1980's a new process from using the GATB in job training referral was introduced called Validity Generalization or VG-GATB. (Id.) Its major features are:

- (i) all 12,000 occupations in the U.S. were grouped into five broad categories called job families;
- (ii) the GATB components were weighed differently for each of the categories;
- (iii) referral to job openings or training opportunities was top-down among those otherwise qualified.

(Id.)

2. The Summary Judgment Record

The summary judgment record established that the following facts were undisputed:

In January, 1988, United States Steel (U.S.S.) placed its Vandergrift plant in an idled status and stopped manufacturing or shipping products from the Plant. Allegheny Ludlum negotiated with U.S.S. to buy the plant and in June, 1988 purchased the plant from U.S.S. (See the Commonwealth's Statement of Undisputed Material Facts, affidavit of Bruce McGillivray, Attachment D) (A 196).

As part of its responsibilities, the New Kensington and Kittanning Job Service offices administer the General Aptitude Test Battery (GATB), for use in referring applicants to companies that ask that the test be administered, including Allegheny Ludlum which requested testing for general laborer positions. (See affidavits

of Terrence Kinney and Ronald Marsh, Attachments B and C); (A196). Allegheny Ludlum had used the test at other facilities before it staffed the former U.S.S. Plant, the staffing that led to this action. (A278).

To staff the Plant initially with an hourly workforce, Allegheny Ludlum decided to hire 55 hourly employees. (196A). Allegheny Ludlum and the United Steelworkers of America entered into negotiations and reached an agreement with regard to the establishment of a bargaining relationship at the Plant which was to apply to the 55 individuals to be hired initially. (196-197A). Allegheny Ludlum agreed to hire its first 55 hourly employees at the Vandergrift plant from a group of more than 125 U.S.S. hourly employees who had worked at the Plant and were members of the USWA. (197A). Pursuant to the Agreement, Allegheny Ludlum agreed to establish a preferential hiring list for ex-Vandergrift employees who were members of the USWA. (97A).

Many, if not most, of the plaintiffs voted to ratify this "manning" agreement between Allegheny Ludlum and the union.

Job Service was provided a list of names by Allegheny Ludlum who were to be tested. (A198). Allegheny Ludlum asked Job Service to take applications for the initial 55 and the others on the preference list. (Excerpt of deposition testimony of T.L. Kinney); (A271-272). Testing took place in June, 1988. (A198-199).

Of the individual plaintiffs who were tested earlier or in 1988, and who were referred or secured employment with Allegheny

Ludlum, the following continue to assert their claims as appellants: Blanciak, Smeltzer, Markby, Farah, and Stewart. Several of the plaintiffs, and, three of the current plaintiff-appellants, did not take the GATB test. These appellants are John Gulyas, Jack C. Hesketh, and Robert D. Knabb. (207-208A). Appellants Blanciak, Gulyas, Hesketh, Knabb, Marsh and Smeltzer were found by the magistrate judge to lack standing, and no appeal has been filed regarding that ruling. (See Report and Recommendation dated October 12, 1993).⁴ (557A).

The summary judgment record also showed that plaintiff after plaintiff testified at their depositions that the Commonwealth did not discriminate against him, that he did not have any complaints against the Commonwealth, or that he did not know or have contact with the individual defendant employees. (Supplemental Appendix, 1-109).

When the steelworkers filed their objections to the district court's June 3 order raising the question of the mootness of their claims, they added to the record by filing excerpted pages of depositions taken during the course of discovery, apparently, for the purpose of showing: (1) that one plaintiff, Farah, one of the appellants herein -- who was hired by Allegheny Ludlum -- was not hired by another steel company, Edgewater Steel Company, in the

⁴ Although not a part of the summary judgment record before the district court, appellants now add in their brief in this appeal, comments and statistics regarding Pennsylvania's ranking among states in the percentage of its older workers. From this, appellants now argue in their "Statement of the Case" that the Commonwealth Appellees are "callous to the needs of older citizens", as well as "cynical." See Br. for Appellants.

past because of his GATB scores, presumably (SA-105); and (2) that an employee of the Department had testified that several employers other than Allegheny Ludlum, at the time of his deposition, had used the GATB test in the past. (SA97-98).

The Commonwealth also submitted as part of the record affidavits that established that no plaintiff was currently registered for employment or referral services with the department's job centers. One plaintiff, who had been registered, had been referred for employment. (SA113-114).

STATEMENT OF RELATED CASES AND PROCEEDINGS

Counsel for Appellees is aware of no other case presently pending or about to be presented to this Court which involves the same or similar issue as that in this appeal.

This case was previously before this Court at No. 94-3363.

This first appeal was from the June 3, 1994 order of court and involved only the eleventh amendment decision. The appeal was dismissed for want of jurisdiction by order dated September 30, 1994.

SUMMARY OF THE ARGUMENT

I. The Eleventh amendment is a jurisdictional bar to suits against a state or state agency regardless of the nature of the relief sought. As part of the constitutional plan, the amendment immunizes the state treasury and the payment of public funds from a federal court order. Congress may abrogate the immunity but its intention to do so may not be inferred. When Congress amended the ADEA to include states within the definition of employers subject to liability, it did not similarly amend the ADEA to bring states within the definition of employment agencies. Appellants' ADEA claims against the Commonwealth as an employment agency were and are constitutionally barred.

II. Appellants' demand that the Commonwealth be ordered to pay front pay to them similarly requires payment of state funds. The eleventh amendment bars that claim even if brought under § 1983.

III. Appellants settled their ADEA claims relating to their failure to be hired by the employer. What remained was a § 1983 claim against the Secretary of the Department of Labor and Industry, in his official capacity, for injunctive or declaratory relief, to stop a hiring criteria for employment by the employer that was resolved by the settlement. The § 1983 claim no longer presented a live case or controversy in which any appellant had the requisite personal stake. No contact or interaction between any

appellant and the Commonwealth has been maintained and no action of the Commonwealth by way of the GATB is or was affecting any appellant. The case was and is moot.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE ELEVENTH AMENDMENT BARRED THE ADEA CLAIMS AGAINST THE COMMONWEALTH APPELLEES WHEN SUED AS AN EMPLOYMENT AGENCY.

The ADEA provides:

It shall be unlawful for an employer to fail or refuse to hire or to discharge an individual or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 623(a)(1). The ADEA also proscribes discrimination by employment agencies and labor organizations. See U.S.C. § 623(b) and (c). The ADEA does not, however, impose liability on a State when sued as an "employment agency."

Section 630 of the ADEA defines "employers" as a "State . . . or an agency of a State." 29 U.S.C. § 630(b). In this case, neither the Commonwealth nor the Department was the employer under the ADEA. The Department was sued as an "employment agency."⁵

⁵ The pertinent provisions of the ADEA are set forth at length in 28 U.S.C. Sec. 630, entitled, "Definitions", which states:

For the purposes of this chapter --

- (a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or

Section 630(c), 29 U.S.C. § 630(c) of the ADEA, defines "employment agency" as "any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person." The term, "person", in the ADEA does not include state or state agencies as part of its definition. See 29 U.S.C. § 630(a). (Nor does it include an agent of a state or state agency.) Subsection (c) defines "employment agency" as a "person", which term, as noted, under the ADEA, 29 U.S.C. § 630(a), does not include a state or state agency.

As the district court noted, "[i]n 1974, Congress explicitly expanded the statutory definition of "employer" in the ADEA to allow states to be sued for age discrimination when they are the alleged employer. See Slip. Op. at p. 12 (citing Radeschi v. Commonwealth of Pennsylvania, Dep't. of Labor and Industry, 846 F.Supp. 416, 420-21 (W.D. Pa. 1993). In this case (as in Radeschi), the Commonwealth was not sued as the steelworkers'

any organized group of persons.

- (b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees... The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.
- (c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

employer but as an employment agency. The district court properly concluded that Congress did not expand the ADEA to encompass a claim against a state when sued as an employment agency and did not abrogate sovereign immunity for state employment agencies. (Id.)

The district court's conclusion is in harmony with the decisional law explaining the reach of the constitutional immunity from suit in federal court conferred by the Eleventh Amendment. For example, although the amendment explicitly bars only diversity suits against a state, it has been interpreted as a broader limitation on the authority of federal courts, prohibiting law suits in federal court under Article III, even if the actions present a federal question.⁶ The Supreme Court held in Hans v. Louisiana, 134 U.S. 1, 16 (1890), that the Eleventh Amendment bars a federal court from hearing a suit against a state by its own citizens. In Hans, the Court stated, "[T]he suability of a state without its consent was a thing unknown to the law." 134 U.S. at 16. The states' immunity from federal court jurisdiction extends to claims for both legal and equitable relief. Pennhurst State School & Hospital v. Halderman, 456 U.S. 89, 101 (1984) (citing Missouri v. Fiske, 290 U.S. 18, 27 (1933)).

Because of the reluctance to tip the delicate balance

⁶ The Commonwealth Appellees alternatively presented as a ground and argument in support of dismissal, the argument that the claim under the ADEA failed to state a claim upon which relief can be granted. The district court did not reach that question, since when "the court dismisses the complaint for lack of subject matter jurisdiction, any accompanying defenses and other pending motions become moot and are not resolved." Radeschi, 846 F.Supp. at 419 (citations omitted).

between the state and the federal government and to thereby expand its own jurisdiction, it is now well established that Congress must unequivocally express its intention to abrogate the eleventh amendment. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 (1984). Emphasizing the unusually high standard of certainty required, the Court has clarified that it will look no further than the four corners of a statute to discern the congressional intent. "Congress may abrogate the States' constitutionally secured immunity . . . only by making its intention unmistakably clear in the language of the statute." Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985). (rejecting reliance upon pre-and post-passage legislative history to define Congress' intent to abrogate immunity). This unusually strict rule of construction is necessary to guard against expansion of federal court jurisdiction by judicial interpretation and to ensure that lower federal courts will not misinterpret the intent of Congress at the expense of the federal system. Id. 473 U.S. at 243:

Because of the requirement of unmistakable clarity on the face of the statute, two additional rules emerge. First, "A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." Id. at 246. Secondly, the mere inclusion of the states among those to whom a statute applies does not suffice to eliminate the state's eleventh amendment immunity. "When Congress chooses to subject the states to federal jurisdiction, it must do

so specifically." Atascadero State Hospital v. Scanlon, 473 U.S. at 246. In Atascadero, the Court rejected a general definitional reference to possible defendants, such as "any recipient of federal aid", which may have included the state did not suffice under Atascadero. Thus, after Atascadero, Congress specifically heeded the Court's requirement of explicit abrogation when it amended the Federal Rehabilitation Act to read, "A state shall not be immune under the Eleventh Amendment . . . from suit in federal court for a violation of (various provisions of the Act)." 42 U.S.C. § 2000d-7.

Applying the strict test set forth above, it is clear that nothing in the language of ADEA exists to provide the basis for the conclusion that Congress eliminated the eleventh amendment immunity for a state when sued as an employment agency. In ruling that the eleventh amendment was not abrogated for state-run employment agencies, the district court therefore correctly relied on three factors: (1) the definitions contained in the plain language of U.S. C. § 630; (2) its conclusions that the statute did not contain Congress' unmistakable intent to abrogate the eleventh amendment, and (3) the more apt conclusion -- that Congress did not intend to do so, in view of the fact that when it amended the ADEA to include a state or any agency of a state within Section 630's definition of an employer subject to ADEA liability -- it did not amend the ADEA or subsection (c)'s definition of "employment agency" to include a state or state agency. See Slip Op. at pp. 11-12 (quoting Radeschi v. Commonwealth of Pennsylvania, Dep't of

Labor and Indus., supra. (holding that the eleventh amendment barred a similar ADEA claim)).⁷

In response, appellants argue that "Congress never intended such a strange and unjustifiable special immunity proposed by the Commonwealth." See Br. for Appellants, at p. 22. They go on to attribute to Congress its "clear . . . intent . . . to impose full liability on state employment agencies." Id. Appellants draw this conclusion from their own understanding that "Congress amended the Act with the clear intention to extend the prohibitions against age discrimination to the states," id., having done so in the "employer" context. Id. Appellants conclude that it would be inconceivable if Congress "intended to exempt from the purview of the Act those state agencies, and only those agencies, which deal

⁷ The Court stated:

To the contrary, Congress' explicit amendment of "employer" in 1974 to include States, coupled with its failure to similarly amend the definition of "employment agency", indicates if anything, a deliberate decision not to abrogate states' immunity in the employment agency context. Therefore, because Congress, through the ADEA, has not abrogated sovereign immunity for state-run employment agencies, the Eleventh Amendment bars this court's consideration of plaintiff's ADEA claims, as well as his state PHRA claims. Pennhurst, supra at 465 U.S. 121.

Slip Op. at p. 12 (citing Radeschi, 846 F.Supp. at 420-21) (emphasis added in original).

with employment services." Id.

That argument, however, only emphasizes the lack of clarity of Congress' intent and lends credence to the district court's rejection of appellants' argument.

Alternatively, Appellants ask that the provisions of Title VII, subjecting state employment agencies to suit in Title VII claims, be considered as evidence of Congress' intent to "impose full liability on state employment agencies," see Br. for Appellants, at p. 22, even though they "have found no informative legislative history to clarify Congressional intent with respect to the Amendments to the ADEA." Id. at p. 25.

The Age Discrimination in Employment Act does not contain the same definitions as Title VII. As noted, the ADEA's Subsection (c) of Section 630, 29 U.S.C. 3630(c), defines an "employment agency" as a person, which pursuant to Subsection (a), 29 U.S.C. § 630(a), does not include a state or state agency. On the other hand, Section 2000-e(a) of Title VII, 42 U.S.C. § 2000e(a), defines "person" to include "governments" and "government agencies." Subsection (c), 42 U.S.C. § 2000e(c), of Title VII defines an employment agency in terms of a person. Consequently, a government agency acting as an employment agency would be subject to suit under Title VII.

What Congress did in its amendment to Title VII and what it failed to do in its amendment of the ADEA clearly does not meet the Atascadero test. The district court's reasoning and conclusion, therefore, similarly applies to appellants' attempt to

compare Title VII and the ADEA. In Title VII, Congress included states within the statutory definition of employment agencies. It did not do so in the ADEA. Title VII simply cannot be substituted for the ADEA to establish congressional intent. Cf. Lorillard v. Pons, 434 U.S. 575 (1975) (rejecting an argument comparing the statutory language of Title VII to the ADEA, and stating "petitioner's reliance on Title VII, therefore is misplaced." (footnote omitted)).

Based on the foregoing, the decision of the district court should be affirmed.⁸

⁸ Appellants urge this Court to reverse the district court by asserting the proposition that state run employment agencies will be free to engage in age discrimination. See Br. for Appellant, at pp. 27-30. However, appellants' proposition that the Commonwealth, when allegedly acting as an "employment agency", is and will be free to act with impunity against older workers flies in the face of the Commonwealth's own employment discrimination statute. Appellants themselves end their argument by noting that section 955(f) of the Pennsylvania Human Relations Act (the "PHRA"), 43 P.S. § 955(f), brings within its prohibition the Commonwealth of Pennsylvania and its agencies, even when acting as an "employment agency." The PHRA claim was also barred from federal jurisdiction by virtue of the eleventh amendment. See Slip. Op. at 12. Three plaintiffs filed complaints through the PHRA administrative process, but they were dismissed as untimely. (237-249A). The PHRA claim was not brought or certified as a class action. No appeal has been taken regarding the PHRA claim.

II. THE DISTRICT COURT CORRECTLY FOUND
THAT THE ELEVENTH AMENDMENT BARRED
THE AWARD OF FRONT PAY UNDER SECTION
1983.

Despite the preceding argument, appellants argue that they can obtain money from the Commonwealth if it is called "front pay." However, it is well established as the district court held that the eleventh amendment bars any claim against either the Commonwealth or the Department and its agencies or offices, regardless of the nature of the relief sought. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100 (1984).

Appellants did not succeed on their Section 1983 personal capacity suits and have not appealed from the order entering summary judgment on that claim. Thus, appellants' request remains one for money against the Commonwealth or a state official in an official capacity suit. However in Will v. Michigan Department of State, 491 U.S. 58 (1989), the Court reaffirmed the prohibition of monetary relief in civil rights actions against a state, its departments or its officials in their official capacity. Edelman v. Jordan, 415 U.S. 651 (1974), Milliken v. Bradley, 433 U.S. 267 (1977), Quern v. Jordan, 440 U.S. 332 (1979), Green v. Monsour, 474 U.S. 64 (1985), and Papasan v. Allain, 478 U.S. 265 (1986), all prohibit the result that plaintiffs want. Consequently, plaintiffs cannot obtain any money from the Commonwealth, the Department or any state official in his or her official capacity.

Contrary to appellants' arguments,⁹ the award of front pay -- which operationally means payment of funds from the state treasury -- is not warranted by the exception to the eleventh amendment bar to a Section 1983 action against the state, its agencies, departments and officials created in Ex parte Young, 209 U.S. 123 (1908). This exception asserts that a suit challenging the constitutionality of a state official's actions in enforcing a state law is not a suit against the state because an unconstitutional law is void and as such provides the official with no immunity from responsibility. Id. 209 U.S. at 159-60. Accordingly, as Edelman v. Jordan illustrates, plaintiffs may obtain prospective injunctive relief against a state official even though such relief might require payment of state funds or otherwise affect state treasuries as a necessary consequence of future compliance with that injunction. Edelman, 415 U.S. at 668-669; Milliken, 433 U.S. at 289-290; Quern, 440 U.S. at 337-338; Green, 474 U.S. at 68-70; and Papasan, 478 U.S. at 278-279. In other words, the money paid is incurred in achieving compliance with the injunction. It is not money paid to an individual to remedy past action.

Appellants fail to acknowledge that under the exception of Ex Parte Young, not all "equitable" remedies are available.

⁹ Appellants argue: "Since [reinstatement] is not available, the equitable remedy of front pay, which is available, may be constitutionally awarded. In this regard it is irrelevant that this equitable relief will have the ancillary effect of requiring the Commonwealth to make expenditures from the state's treasury." See Br. for Appellant at 39.

Only prospective relief may be granted. Edelman, 415 U.S. at 665-666. As Edelman explains, an order requiring disbursement of previously unpaid benefits is prohibited by the Eleventh Amendment because it is indistinguishable from a damages award and thus retrospective in nature. Id. at 667-668.

The Sixth Circuit Court of Appeals followed the same reasoning as the district court did in denying front pay. In Freeman v. Michigan Dep't. of State, 808 F. 2d 1174 (6th Cir. 1987), the Sixth Circuit Court held that an award of front pay is "barred by the Eleventh Amendment . . . since any payment . . . would come from the state treasury." The Court explained that although a front pay award sounds like permissible "prospective" relief, it nevertheless constitutes an award of damages for a past constitutional violation. The award is nevertheless paid directly from the state treasury, rather than from private individuals.

Despite all this, Appellants reason as follows: since the district court could not grant them reinstatement, or employment with Allegheny Ludlum, it was obligated to substitute an award of front pay. See Br. for Appellants at pp. 37-38. To follow appellants' reasoning however leads to only one result: the payment of money from the Commonwealth's treasury for an alleged past act, and not from the personal assets of any individual defendant. See Sample v. Diecks, 897 F.2d 1099 (3d Cir.).

The district court succinctly held that there was no record evidence to support appellants' claim against the individual defendants in their individual capacity for money damages.

Appellants' argument that they can nonetheless secure money ignores not only the eleventh amendment but also their failure to support any Section 1983 claim for damages. No reason exists to disturb the decision of the district court.

**III. THE DISTRICT COURT PROPERLY FOUND
THAT THE ACTION FOR EQUITABLE RELIEF
WAS MOOT.**

Article III, Section 2 of the Constitution, of course, limits the jurisdiction of the federal courts to actual "cases" or "controversies." E.g., SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972). To remain justiciable, a live controversy must not only exist when a case is initially decided, but must not continue to exist at all stages of the litigation. Honig v. Doe, 484 U.S. 305, 329 (1988) (Renquist, C.J. concurring) (collecting cases). Where subsequent developments, however, have mooted the issue originally presented for decision, no justiciable case or controversy exists, and the federal court lacks jurisdiction to decide that issue. E.g., Flast v. Cohen, 392 U.S. 83, 95 (1968).

Appellants' claims amounted to saying if all of the same contingencies, about which they complained, again coincide, they may be subjected to allegedly impermissible actions. An injunction, however, looks to the future. Douglas v. City of Jeanette, 319 U.S. 157 (1943). "[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing present adverse effect." City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983).

To embody the resolution of a live controversy, the judgment of a federal court must have some real-life effect on the

relationship between the parties, and given the absence of any matter of consequence affecting any plaintiff, this case was and is moot. When, as here, "[d]evelopments [occur] during the course of adjudication [and] eliminate a plaintiff's personal stake in the outcome of a suit, then a federal court must dismiss the case as moot." Rosetti v. Shalala, 12 F.3d 1216, 1224 (3d Cir. 1993). Thus, if at any point in the judicial process the judgment sought would be of no real use to the plaintiff, the case is moot. Murphy v. Hunt, 455 U.S. 478, 481-82 (1982) (per curiam) (case moot where plaintiff could no longer obtain relief sought even with a favorable decision). An injunction does not redress past conduct and cannot be issued on the basis of speculation about the future. The result does not change merely because the plaintiff asks for declaratory relief. Rosetti, 12 F.3d at 1225 n.22.

From the entire record of this case, the district court correctly decided that no individual plaintiff, or now appellant, had a live injunctive claim. The claims against the Commonwealth Appellees arose from the "hiring of former United States Steel-Vandergrift employees over the age of forty at the Allegheny Ludlum facilities and the Commonwealth's use of the GATB's at the Job Service in Vandergrift to determine preferences for hiring members of the plaintiff class." (Slip. Op. at 24). The district court correctly described appellants' claims, based on the specific relief sought in their complaints and throughout the course of the proceedings, as centrally focused on: "the allegedly unlawful age discriminatory practices of all defendants with regard to the

hiring of former United States Steel-Vandergrift employees by Allegheny Ludlum and plaintiffs' attempts to remedy those practices through appropriate money damages and equitable relief, pertaining to future hiring by Allegheny Ludlum at that facility, and perhaps, its West Leechburg and Brackenridge plants." (Slip. Op. at 10).

With the settlement, the question of hiring at Allegheny Ludlum was a dead issue. "[W]here the settlement effectively supplies all the relief which plaintiffs had sought, a settlement with some defendants represents a sufficient change of circumstances to render the case against the remaining defendants moot." (Slip. Op. at p. 22, citing S-1 v. Spangler, 832 F.2d 294 (4th Cir. 1987); Rossetti v. Shalala, 12 F.3d 1216, 1233 (3d Cir. 1993)).

Despite this, appellants contended that they could pursue a claim for injunctive relief against the Commonwealth Defendants for the use of the GATB test by any other possible employer, if and when they may register with job service, unrelated to the claim they brought and litigated throughout the course of the pretrial proceedings related to their employment with Allegheny Ludlum.¹⁰

The district court's earlier characterization of this newly fashioned claim was correct. Before entering its final December 30 order, the court stated: "Any claims in the abstract

¹⁰ Although appellants' brief lumps all the appellants' together as if they were all affected by the GATB test, the undisputed facts are that not all plaintiffs took the test. Therefore, those appellants were found to lack standing for any injunctive relief, and there is no indication that this decision needs to be changed or that it is the subject of this appeal.

regarding the possible age-discriminatory effect of the GATB tests as administrated to some workers or in some other employment referral context are simply too amorphous to permit the prudential exercise of the federal judicial power." (Slip. Op. at 24). Since this is and was the case, no error on the part of the district court was committed in dismissing the newly revised and refashioned claim.

To the extent any question remained, the record showed an absence of employment registrations from appellants with Job Service. (See Affidavit of Stephen Frea, attached to the Commonwealth Defendants' Reply to Plaintiff's Objections; affidavit of Terrence L. Kinney) (SA113-114). Applications with the Job Service are active for one year. (See Plaintiff's Response to the Commonwealth's Motion for Summary Judgment, submitting deposition testimony of Commonwealth employee, T.L. Kinney) (A273). The affidavits submitted by the Commonwealth confirmed that there were and are no active registrations of any plaintiff, except one, Richard G. Cook, who was referred to a job opening. (SA113-114). Hence, no question remained. No plaintiff, or appellant, is or was affected by the GATB. The steelworkers no longer had any personal stake in the outcome.¹¹

¹¹ Appellants attempt to use the same analysis as that set forth in cases that were class actions to justify continuing a moot claim. See Br. for Appellant at pp. 43-44 (citing to Rosetti v. Shalala, 12 F.3d 1216 (3d Cir. 1993); at p. 48 (citing to Sosna v. Iowa, 419 U.S. 393 (1975)). However, their Section 1983 claims were not brought as and not certified as class actions. The question of appropriate "class-wide relief" absent a class is an exercise of no moment.

No extension of the foregoing precedential authority is required to hold that, on the speculations offered, each appellant utterly failed to demonstrate the requisite level of concreteness to require judicial intervention. Indeed, nothing was or is affecting any of them at all.

No error was therefore committed by the district court's final order which entered summary judgment and dismissed all claims with prejudice, in view of the fact that the "plaintiff's have [an] insufficient personal stake in the outcome of these proceedings . . . to warrant any further prudential exercise of this Court's jurisdiction." (See Order of Court dated December 30, 1994). Appellants' attempt to use mere speculation and hypothetical theories about any one of their future employment prospects as if dependent on the GATB test did not and does not create a live case or controversy within the meaning of Article III.

For these reasons, the December 30, 1994 order of the district court should be affirmed.

CONCLUSION

For the above stated reasons, the order of the district court should be affirmed.

Respectfully submitted,

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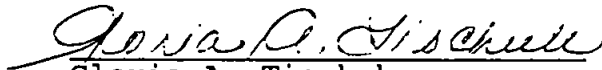
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Date: April 19, 1995

**CERTIFICATE OF ADMISSION
TO THE BAR OF THE THIRD CIRCUIT**

I, Gloria A. Tischuk, Deputy Attorney General for the Commonwealth of Pennsylvania, hereby certify that I have been admitted to the bar of the United States Court of Appeals for the Third Circuit.


Gloria A. Tischuk
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two copies of the foregoing document, namely, Brief for Appellee' Commonwealth of Pennsylvania, Department of Labor & Industry; Harris Wofford, Secretary of Labor & Industry; Maurice Nates; John Krisiak; and Stella Ravetto, upon the persons and in the manner indicated below which service satisfies the requirements of F.R.A.P. 25.

Service by first-class mail, addressed as follows:

James B. Lieber, Esquire
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