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Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2000 FED App. 0118P (6th Cir.)
File Name: 00a0118p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DALVAN M. COGER; JOSEPH K. DAVIS; CAROLYN THORPE FURR; LUCILLE GOLIGHTLY; THOMAS M. HUGHES; JANIE S. KNIGHT; CHARLES E. LONG, JR.; HARRY RICHARD MAHOOD; RAMONA MADSON MAHOOD; ROBERT MARSHALL; BETTY HULL OWEN; JUNE ROSE RICHIE; STEVE SCESA; CHARLES R. SCHROEDER; ROBERT A. SNYDER; BOB J. TUCKER; SHARON L. VAN OTEGHEN,
Plaintiffs-Appellants,

WILLIAM WELCH,
Plaintiff,

UNITED STATES OF AMERICA,
Intervenor,

v.

BOARD OF REGENTS OF THE STATE OF TENNESSEE, a

No. 97-5134

Subdivision of the State of Tennessee; MEMPHIS STATE UNIVERSITY, An Institution Operated by the State Board of Regents; THOMAS G. CARPENTER, Individually and as President of Memphis State University; VICTOR E. FEISAL, Individually and as Vice-President of Academic Affairs at Memphis State University,
Defendants-Appellees.

On Remand from the United States Supreme Court.
No. 89-02374—Julia S. Gibbons, Chief District Judge.

Argued: April 30, 1998

Decided and Filed: April 4, 2000

Before: JONES, MOORE, and COLE, Circuit Judges.

COUNSEL

ARGUED: Donald A. Donati, DONATI LAW FIRM, Memphis, Tennessee, for Appellants. Michael E. Moore, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellees. Seth M. Galanter, U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, APPELLATE SECTION, Washington, D.C., for Intervenor. Jeffrey S. Sutton, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Amicus Curiae. **ON BRIEF:** Donald A. Donati, DONATI LAW FIRM, Memphis, Tennessee, Jeffrey L. Atchley, NORWOOD, WILSON & ATCHLEY, Memphis, Tennessee, for Appellants. Michael E. Moore, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, Sheri H. Lipman, BURCH, PORTER & JOHNSON, Memphis, Tennessee, for Appellees. Seth M. Galanter, U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, APPELLATE SECTION, Washington, D.C., for Intervenor. Douglas A. Hedin, LAW OFFICE OF DOUGLAS A. HEDIN, Minneapolis, Minnesota, Thomas W. Osborne, AMERICAN ASSOCIATION OF RETIRED PERSONS, Washington, D. C., Jeffrey S. Sutton, Jack W. Decker, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Amici Curiae.

OPINION

R. GUY COLE, JR., Circuit Judge. In our prior opinion in this case, *Coger v. Board of Regents*, 154 F.3d 296, 307 (6th Cir. 1998), we concluded that Congress intended to abrogate the states' Eleventh Amendment immunity from suit by its enactment of the 1974 amendments to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq*., and that it had the authority to do so pursuant to Section 5 of the Fourteenth Amendment. The Supreme Court, in a plurality opinion, now has determined that although the ADEA does contain a clear statement of Congress' intent to abrogate the states' immunity, the abrogation exceeded Congress' authority under Section 5 of the Fourteenth Amendment. *See Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 649-50 (2000).

Having carefully considered the present case in light of *Kimel*, we conclude that the faculty members cannot maintain their ADEA suit against the University, a state employer. We therefore **VACATE** our prior judgment and **AFFIRM** the district court's order dismissing the plaintiffs' ADEA action.