

old (Compl. at ¶¶ 3-6), in violation of the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C.A. § 623(a).²

The defendant responded by filing a motion to dismiss, alleging that, as an agency of the Commonwealth of Virginia, it is immune from suit under the Eleventh Amendment.

Although by its terms the Eleventh Amendment applies only to suits against a state by citizens of another state, its protection has been extended to suits by citizens against their own states. *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 121 S.Ct. 955, 962 (2001). Just last year, the Supreme Court held in a suit for money damages, brought under the ADEA against a corrections department, that the ADEA’s purported abrogation of a state’s immunity under the Eleventh Amendment was invalid. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000).

However, certain exceptions to the doctrine of sovereign immunity have been recognized, including a private suit brought against a state official, acting in his official capacity, when the suit seeks “injunctive or declaratory relief to remedy an ongoing

² That section provides that “[i]t shall be unlawful for an employer to . . . discriminate against any individual . . . because of such individual’s age.” 29 U.S.C.A. § 623(a)(1) (West 1999 & Supp. 2000).

violation of law.” *S.C. State Ports Auth. v. Fed. Mar. Comm’n*, 243 F.3d 165, 170 (4th Cir. 2001) (citing *Alden v. Maine*, 527 U.S. 706, 755-57 (1999)).³

Nevertheless, the defendant argues that this exception is inapplicable in the instant suit for two reasons. First, the plaintiff’s complaint names the Virginia Department of Corrections, and not an individual, as the party defendant. *See Fed. Mar. Comm’n*, 243 F.3d at 177. Second, the plaintiff seeks injunctive relief for past discrimination and not for future transgressions. *See DeBauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999).

With respect to the first assertion, where a pro se litigant alleges a cause of action that may be meritorious, this court should afford a reasonable opportunity to determine the correct person against whom the claim is asserted, advise the pro se litigant how to proceed, and direct or permit amendment of the complaint to bring the correct defendant before the court. *See Gordon v. Leeke*, 574 F.2d 1147, 1152-53 (4th Cir. 1978).

³ The availability of such injunctive relief under the ADEA was recognized prior to *Kimel*, see, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 456 (1991); *Equal Employment Opportunity Comm’n v. Pennsylvania*, 768 F.2d 514, 516 (3d Cir. 1985), and has continued to be granted against state officials since *Kimel* was decided. *See State Police for Automatic Ret. Ass’n v. Difava*, No. CIV.A.01-10053-PBS, 2001 WL 360549, at *1-2 (D. Mass. Mar. 28, 2001).

As to the second argument, I find it to be factually without merit. It is clear from the pleadings that the pro se plaintiff seeks injunctive relief from alleged continuing discrimination, not merely redress for past wrong doing.

In sum, the plaintiff has alleged sufficient facts to proceed against a proper state official, acting in his or her official capacity, seeking injunctive relief from future discrimination based upon his age.⁴

For these reasons, it is **ORDERED** that the Motion to Dismiss (Doc. No. 2) is granted and the Virginia Department of Corrections is dismissed as a party. However, the plaintiff is granted leave to file an amended complaint, if filed within thirty days hereof. If the plaintiff does not file such an amended complaint within that time, his action will be dismissed.⁵

ENTER: May 10, 2001

United States District Judge

⁴ The director of the Virginia Department of Corrections is Ronald Angelone, 6900 Atwood Drive, Richmond, VA 23225.

⁵ The plaintiff has recently indicated in a letter to counsel for the defendant that he wishes to withdraw his suit because “[he] cannot defend [himself] against the state of Virginia and the Attorney General [sic] office.” (Letter from Pl. of 4/27/01.) If the plaintiff truly does not wish to proceed with his suit, he need not file an amended complaint.