

July 10, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-50790

JAMES HEATH,

Plaintiff-Appellant,

versus

GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Texas
(W-02-CV-146)

Before KING, Chief Judge, and HIGGINBOTHAM and BARKSDALE, Circuit
Judges.

PER CURIAM:*

On appeal Plaintiff James Heath complains that the district
court erred in dismissing his claims under the ADA and FMLA for
want of jurisdiction because language in *Board of Trustees of the
University of Alabama v. Garrett*¹ suggests that, pursuant to *Ex*

*Pursuant to 5TH CIR. R. 47.5, the court has determined that
this opinion should not be published and is not precedent except
under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

¹ 531 U.S. 356, 374 n.9 (2001).

parte Young,² the Eleventh Amendment does not prohibit him from seeking prospective injunctive relief against Johnson, the assertedly responsible state official. Heath did not contend in response to Johnson's motion to dismiss that he was seeking injunctive relief so neither *Garrett* nor *Ex parte Young* was ever considered by the district court. Because Heath did not present this argument to the district court, we AFFIRM the dismissal and do not address whether *Garrett* and *Ex parte Young* apply in this case.

² 209 U.S. 123 (1908).