Appeal No. 11-15369

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPHINE OKWU,

Appellant,

vs.

CINDY MCKIM; JUDITH SMITH; DAVE SCHAEFER; ANNE STAUSBOLL; PETER H. MIXON; RORY J. COFFEY; DONNA RAMEL LUM; AND DOES 1-10 ,

Respondents.

On Appeal From the United States District Court
for the Eastern District of California
Hon. Garland E. Burrell, Jr.
Case No. 2:10-CV-00653-GEB-KSM

ANSWERING BRIEF OF APPELLEES ANNE STAUSBOLL, PETER H. MIXON, RORY J. COFFEY, AND DONNA RAMEL LUM

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I.

STATEMENT OF JURISDICTION

This is an appeal from final judgment entered January 19, 2011 (ER 249). This Court therefore has jurisdiction pursuant to 28 U.S.C. § 1291. The District Court had federal question subject matter jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343.

II.
ISSUE ON APPEAL

Whether the trial court properly granted Appellees Anne Stausboll, Peter H. Mixon, Rory J. Coffey, and Donna Ramel Lum's motion to dismiss Plaintiff Josephine Okwu's First Amended Complaint, without granting leave to amend, because these defendants cannot be held liable in their individual or official capacities under 42 U.S.C. § 1983, based on an alleged violation of Title I of the Americans with Disabilities Act, or of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, where the alleged equal protection violation is also based on disability discrimination?

III.
SUMMARY OF ARGUMENT

This Court should affirm the District Court's judgment. Plaintiff-Appellant Josephine Okwu is a former employee of the California Department of Transportation ("Caltrans"). She also is a member and beneficiary of the California Public Employees' Retirement System ("CalPERS").

In September 2003, Okwu filed with CalPERS an application for disability retirement benefits, which CalPERS approved in February 2004. But in May 2004, she sought to be restored from disability retirement to active status, and reemployment with Caltrans.

CalPERS followed its regular procedures for evaluating a request for return from disability retirement, prescribed by statute and regulation. After medical examinations and an evidentiary hearing, CalPERS concluded that Okwu was ineligible for return to active status.

Okwu pursued, and continues to pursue, relief in state court from CalPERS's determination. She also filed the instant lawsuit in the U.S. District Court, for the Eastern District of California (Hon. Garland E. Burrell), claiming violation of her federal civil rights under 42 U.S.C. § 1983. She claims that Caltrans and CalPERS, via its respective employees, violated the Americans with Disabilities Act and the Equal Protection Clause of the Fourteenth Amendment in denying her reinstatement from disability retirement.

Knowing the Eleventh Amendment bars her claims against Caltrans and CalPERS directly, Okwu sued several individuals from each agency. As to CalPERS, she sued Anne Stausboll, the CEO; Peter H. Mixon, the General Counsel; Senior Staff Counsel Rory J. Coffey, who represented CalPERS at the administrative hearing; and Donna Ramel Lum, Chief of the Benefit Services

Division, who sent Okwu a letter denying her request for reinstatement from retirement status.[1]

The defendants filed in the District Court two separate Motions to Dismiss under Federal Rule of Civil Procedure 12(b)(6), one each on behalf of the CalPERS and Caltrans defendants. After oral argument and full briefing, the District Court granted both motions.

The District Court correctly decided § 1983 did not provide Okwu with a remedy for enforcing the Americans with Disabilities Act against any named defendant. This Court already has recognized that the ADA includes a "comprehensive remedial scheme," precluding enforcement of its provisions via § 1983. Okwu's efforts to distinguish this Court's precedent is unavailing.

The District Court properly rejected the Equal Protection Clause basis for Okwu's § 1983 claim as well. She cannot proceed as a "class of one." In any event, the Equal Protection Clause provides her with no protection from the allegations in her First Amended Complaint because the Constitution does not require "reasonable accommodation" and alleged disability discrimination is subject to "rational basis" review.

The District Court also correctly held that Okwu could not proceed against Stausboll in her "official" capacity. The Eleventh Amendment bars Okwu's claim because an "official capacity" suit is the same as a suit against the state. The

[1] Collectively, these individuals are referred to as the "CalPERS Defendants," who are filing this brief. The Caltrans individual defendants are separately represented and are filing a separate brief.

narrow exception to the Eleventh Amendment bar that the Supreme Court recognized in Ex Parte Young does not apply.

Finally, the District Court correctly determined that granting leave to amend would be futile. The applicable law bars Okwu's claim such that amendment would not cure the defects in her pleading. In sum, this Court should affirm the judgment.

IV.
STATEMENT OF FACTS

A. OKWU'S EMPLOYMENT APPLICATION FOR DISABILITY RETIREMENT

As alleged in the First Amended Complaint, Josephine Okwu ("Appellant" or "Okwu") is a former employee of the California Department of Transportation ("Caltrans"). (First Am. Complaint ¶¶ 14, 49, ER 77, 84). In 2003, Caltrans disciplined her for unacceptable workplace conduct which, she alleges, may have resulted from her bi-polar disorder, schizoaffective disorder, and psychosis. (First Am. Complaint ¶¶ 16, 49, ER 77, 84).

Okwu agreed to apply for disability retirement benefits through the California Public Employees Retirement System ("CalPERS"). (First Am. Complaint ¶ 17, ER 78). CalPERS approved Okwu's disability retirement application on February 21, 2004. (First Am. Complaint ¶ 20, ER 78).

Just months later, in May 2004, Okwu applied for reinstatement to active employment status. (First Am. Complaint ¶ 20, ER 78). CalPERS denied Okwu's

application for reinstatement, meaning that she remained on disability retirement status. (First Am. Complaint ¶ 21, ER 78).

Okwu again applied for reinstatement in August 2005. (First Am. Complaint ¶ 23, ER 78). After an initial review of medical records suggested that reinstatement was appropriate, CalPERS sent Okwu a letter explaining that "CalPERS can only reinstate an annuitant to active membership in the Retirement System; we cannot order your return to the job." (First Am. Complaint Exhibit E (emphasis added), ER 127) "To complete the reinstatement action, [Caltrans] must also submit a membership document verifying your entry into compensated employment." (Id.)

CalPERS further explained that under the Public Employee Retirement Laws, "retirement allowance is to be discontinued when (1) CalPERS has determined that [a retired annuitant] is no longer substantially incapacitated and (2) the employer has offered the job." (Id. (emphasis in original)).

Caltrans objected to CalPERS's preliminary finding that Okwu was fit to return to work. (First Am. Complaint ¶ 24, ER 79). Upon further review and analysis of Okwu's medical record, CalPERS agreed with Caltrans that Okwu was still psychiatrically disabled and, therefore, should remain on disability retirement.

Okwu appealed that determination and requested an evidentiary hearing as provided by the California Government Code. (First Am. Complaint ¶ 25, ER 79).

An Administrative Law Judge ("ALJ") from the State of California's Office of Administrative Hearings held a hearing in September and November 2008, during which several medical doctors testified regarding Okwu's psychiatric condition. (First Am. Complaint ¶ 27, Exhibit A, ER 79, 96-119).

Based on the evidence adduced at the hearing, the ALJ found that Okwu was not recovered from her disability and could not return safely to work for the State of California. (First Am. Complaint ¶ 62, Exhibit A, ER 87, 96-119). The CalPERS Board of Administration adopted the ALJ's decision without modification on April 22, 2009. (First Am. Complaint Exhibit A, ER 96).

Okwu filed a petition for writ of mandate with the Sacramento County Superior Court, Case No. 34-2009-80000404. (First Am. Complaint ¶ 63, ER 88). The Superior Court denied the Petition on February 25, 2011 and Okwu has appealed to the California Court of Appeal, Third District.[2]

B. THE ALLEGATIONS AGAINST THE CALPERS DEFENDANTS

Okwu's allegations regarding the CalPERS Defendants exclusively concern the handling of her request for reinstatement to "active" (from disability retirement status) in the California public employees' retirement system, rather than reinstatement to her job with Caltrans:

Okwu claims Appellee Anne Stausboll is "the CEO of CalPERS" and is "responsible for implementing a policy within CalPERS of discrimination based on

[2] Appellees respectfully ask this Court to take judicial notice of the files of the Sacramento Superior Court. See Fed. R. Evid. 201(d).

disabilities in that CalPERS refuses to reinstate disabled persons to employment with reasonable accommodations if those disabled persons are otherwise fit to perform their job duties." (First Am. Complaint ¶ 56, ER 85A).

She alleges that Appellee Donna Ramel Lum "sent a letter to Okwu indicating that CalPERS was rescinding its previous reinstatement approval and denying plaintiff's request [for] reinstatement from disability retirement." (First Am. Complaint ¶ 57, ER 85A).

Okwu avers that Peter H. Mixon, Esq., CalPERS General Counsel, "dictated and ratified CalPERS' position on plaintiff's application for reinstatement from disability retirement and advocated the rescinding of her reinstatement from disability retirement." (First Am. Complaint ¶ 59).

Okwu alleges that Rory J. Coffey "represented CalPERS at the administrative hearings . . . advocated [against] plaintiff's reinstatement from disability retirement . . . [and] argued that she was not fit to return to work at Cal Trans." (First Am. Complaint ¶ 60).

C. CALPERS THROUGH ITS EMPLOYEES DETERMINES RETIREMENT BENEFITS FOR DISABLED PUBLIC EMPLOYEES

The California Legislature has enacted a comprehensive statutory scheme, codified in 18 chapters of the California Government Code, dedicated exclusively to the administration of CalPERS. See Cal. Govt. Code §§ 20000-21703. The purpose of California's public employee retirement system "is to effect economy and efficiency in the public service by providing a means whereby employees who

become superannuated or otherwise incapacitated may, without hardship or prejudice, be replaced by more capable employees, and to that end provide a retirement system consisting of retirement compensation and death benefits." Cal. Govt. Code. § 20001. "The legislative purpose of public employee pension programs is well established. They 'serve two objectives: to induce persons to enter and continue in public service, and to provide subsistence for disabled or retired employees and their dependents. . . . Disability pension laws are intended to alleviate the harshness that would accompany the termination of an employee who has become medically unable to perform his duties.'" Haywood v. American River Fire Protection Dist., 67 Cal. App. 4th 1292, 1304 (1998).

Early retirement can be granted due to "disability or incapacity for performance of duty," based on competent medical opinion, and subject to appeal under California's Administrative Procedure Act. See Cal. Govt. Code §§ 20026, 21156. "Disability or incapacity for performance of duty" means: disability of permanent or extended and uncertain duration. . . ." Id. § 20026.

However, state employees may not "double dip," by receiving a pension while remaining employed: "a person who has been retired under this system, for service or for disability, may not be employed in any capacity thereafter by the state . . . ." Id. § 21220(a).

Former employees granted disability retirement may be reinstated as active employees following a similar procedure. Medical evidence that the employee is

no longer disabled is required to establish the employee can be reinstated from disability retirement:

> The board . . . may require any recipient of a disability retirement allowance under the minimum age for voluntary retirement for service applicable to members of his or her class to undergo medical examination, and upon his or her application for reinstatement, shall cause a medical examination to be made of the recipient . . . shall also cause the examination to be made upon application for reinstatement to the position held at retirement or any position in the same class, of a person who was incapacitated for performance of duty in the position at the time of a prior reinstatement to another position. . . . Upon the basis of the examination, the board or the governing body shall determine whether he or she is still incapacitated, physically or mentally, for duty in the state agency, . . . where he or she was employed and in the position held by him or her when retired for disability . . .and for the duties of the position with regard to which he or she has applied for reinstatement from retirement.

Id. § 21192; see also § 21193.

Okwu points to nothing irregular regarding her disability retirement application and adjudication. She does not allege the CalPERS Defendants took any ultra vires action beyond performing their duties at CalPERS, or that they have any discriminatory or personal bias against her.

V.
LEGAL DISCUSSION

A. STANDARD OF REVIEW

1. Appellate Review of Order Granting Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6)

This Court reviews de novo a dismissal under Federal Rule of Civil Procedure 12(b)(6). See Caviness v. Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010). This Court may affirm the judgment based on "any ground supported by the record." Johnson v. Riverside Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008).

2. Fed. R. Civ. P. 12(b)(6) Standards

Rule 12(b)(6) permits the district court to dismiss a complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal sufficiency of the complaint. See North Star Int'l v. Arizona Corporation Comm'n, 720 F.2d 578, 581 (9th Cir. 1983).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter to state a facially plausible claim to relief." Krainski v. State ex rel. Bd. of Regents, 616 F.3d 963, 972 (9th Cir. 2010). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

A plaintiff is required to allege "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). Thus, a defendant's Rule 12(b)(6) motion challenges the court's ability to grant any relief on the plaintiff's claims, even if the plaintiff's allegations are true.

A general allegation of constitutional violations, or simply tracking statutory language, is insufficient to properly raise a claim for relief. See Twombly, 550 U.S. at 555. Further, a complaint will be insufficient and a motion to dismiss will be granted if the facts in the complaint are "not only compatible with, but indeed . . . more likely explained by lawful . . . behavior." Ashcroft v. Iqbal, 566 U.S. __, 129 S. Ct. 1937, 1951 (2009).

While this Court accepts as true well-pleaded, factual allegations, conclusory statements and legal conclusions are not entitled to a presumption of truth. See Iqbal, 556 U.S. at ___, 129 S. Ct. at 1949-50; Twombly, 550 U.S. at 555. “In sum, for a complaint to survive a motion to dismiss, the nonconclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” Moss v. United States Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009).

3. Denial of Leave to Amend

This Court reviews the denial of leave to amend under the abuse of discretion standard of review. See Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1038 (9th Cir. 2002).

B. OKWU FAILS TO STATE A § 1983 CLAIM AGAINST THE CALPERS DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES BASED ON ALLEGED VIOLATION OF THE ADA

Okwu's only claim for relief is asserted under 42 U.S.C. § 1983. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

To state a claim under § 1983, the plaintiff must allege the violation of a right secured by the U.S. Constitution or federal laws, and that the alleged violation was committed by a person acting under color of state law. See Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006).

Okwu's § 1983 claim is based on her allegations that Caltrans and CalPERS "committed an act of disability discrimination prohibited by the" Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA"), and that such discrimination violates her rights under the Equal Protection Clause of the Fourteenth Amendment to the Constitution. (First Am. Complaint ¶¶ 51, 53, ER 84-85). The District Court correctly held Okwu is precluded from seeking § 1983 relief based on the ADA (Order Granting Motions to Dismiss. (ER 239-248).

1. Section 1983 is Not Available as a Separate Remedy to Enforce the ADA Because of the ADA's Comprehensive Remedial Scheme

a. Vinson v. Thomas Forecloses Plaintiff's § 1983 Claim

As the District Court noted,

> An alleged violation of federal law may not be vindicated under § 1983, . . . where: '(1) the statute does not create an enforceable right, privilege, or immunity, or (2) Congress has foreclosed citizen enforcement in the enactment itself, either explicitly, or implicitly by imbuing it with its own comprehensive remedial scheme.'

Vinson v. Thomas, 288 F.3d 1145, 1155 (9th Cir. 2002) (quoting Buckley v. City of Redding, 66 F.3d 188, 190 (9th Cir. 1995)). A "comprehensive remedial scheme for the enforcement of a statutory right creates a presumption that Congress intended to foreclose resort to more general remedial schemes to vindicate that right." Id. at 1155 (quoting Lollar v. Baker, 196 F.3d 603, 609 (5th Cir. 1999) (citing Middlesex Co. Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 20, 69 L. Ed. 2d 435, 101 S. Ct. 2615 (1981)).

This Court in Vinson joined the Fifth, Eighth, and Eleventh circuits in holding that Congress included within the ADA a "comprehensive remedial scheme" and, therefore, a plaintiff can "not maintain a section 1983 action in lieu of – or in addition to – a[n] ADA cause of action if the only alleged deprivation is of the employee's rights created by the . . . ADA." See Id. at 1156 (citing Alsbrook v. City of Maumelle, 184 F.3d 999, 1011 (8th Cir. 1999) (en banc); Lollar, 196 F.3d at 609; Holbrook v. City of Alpharetta, 112 F.3d 1522, 1531 (11th Cir. 1997)).

b. Vinson v. Thomas Applies Equally to Title I and Title II of the ADA

Plaintiff's attempts to distinguish Vinson, because she is seeking § 1983 relief based on Title I of the ADA rather than Title II,[3] are without merit.

First, both Title I and Title II of the ADA import their comprehensive remedial schemes from Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"). See 42 U.S.C. § 12117; compare Walsh v. Nevada Dept. of Human Resources, 471 F.3d 1033, 1038 (9th Cir. 2006) ("Title I of the ADA invokes the same 'powers, remedies and procedures' as those set forth in Title VII."); with Pona v. Cecil Whittaker's, Inc., 155 F.3d 1034, 1038 (8th Cir. 1998) ("while the EEOC plays no role in the enforcement of Title II of the ADA, Congress has provided that title with detailed means of enforcement that it imported from Title VII of the Civil Rights Act of 1964 . . . ."); Holbrook, 112 F.3d at 1529 ("Title II thus incorporates by reference the substantive, detailed regulations prohibiting discrimination against disabled individuals contained in Title I."). Because Title I and II of the ADA contain remedial schemes based on Title VII's remedial scheme, Vinson's analysis is fully applicable to Title I.

The Eleventh Circuit in Holbrook treated a Title I claim on the same footing as a Title II claim in holding that § 1983 is inapplicable. There, the plaintiff sued the City of Alpharetta and individuals under both Title I and Title II, as well as

[3] Title I of the ADA, beginning at 42 U.S.C. § 12111, addresses employment discrimination, while Title II, beginning at 42 U.S.C. § 12131, addresses programs and services provided by public entities.

§ 1983. See 112 F.3d at 1525. Without distinguishing between the two titles, the court held the plaintiff "may not bring a cause of action under 42 U.S.C. § 1983 solely for alleged violations of the ADA and the Rehabilitation Act." Id. at 1531.

Second, this Court has held that the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), prohibiting employment discrimination on the basis of age, includes a comprehensive remedial scheme that forecloses § 1983 relief as well. See Ahlmeyer v. Nev. Sys. of Higher Educ., 555 F.3d 1051, 1058 (9th Cir. 2009) ("The comprehensive remedial scheme of the ADEA demonstrates that Congress intended the ADEA to serve as the exclusive means for pursuing claims of age discrimination in employment."). "Because the ADEA provides a comprehensive remedial scheme, it should be read as precluding § 1983 actions in the area of age discrimination in employment." Id.

The ADEA and Title I of the ADA are similar not only because both statutes address employment discrimination and both include comprehensive remedial schemes, but also because the Eleventh Amendment bars enforcement of both laws. See id. at 1060 (recognizing Eleventh Amendment applies to ADEA); Board of Trs. v. Garrett, 531 U.S. 356, 360 (2001) (Eleventh Amendment bars suits against states under Title I of ADA). Plaintiff's argument that Vinson does not apply because the Eleventh Amendment bars relief under Title I, but not Title II, see AOB p.46, therefore is without merit.

Contrary to Okwu's argument throughout her brief, e.g., AOB p. 42, her (erroneous) claim that she is left without a federal remedy does not make any legal difference. This Court already has held that argument does not militate in favor of permitting § 1983 relief. See Ahlmeyer, 555 F.3d at 1060 ("The argument that a plaintiff should not be left remediless with respect to state actors has been squarely rejected by the Supreme Court . . . .").

Moreover, state courts have concurrent jurisdiction over ADA claims. See Hapgood v. City of Warren, 127 F.3d 490, 494 (6th Cir. 1997); Krouse v. American Sterilizer Co., 872 F. Supp. 203, 205 (W.D. Pa. 1994) ("state courts have concurrent jurisdiction over ADA cases"). This Court in Ahlmeyer noted the ADEA similarly grants to state courts concurrent jurisdiction. 555 F.3d at 1060. Therefore, Ahlmeyer's argument she was without a remedy was overstated; at most she was without a federal court forum. Okwu's argument is similarly wrong. Section 1983 relief is not Okwu's only avenue of redress.[4]

Finally, this Court in Ahlmeyer noted that § 1983 relief under the Equal Protection Clause would not help the plaintiff in an age discrimination case because the Equal Protection Clause provides for "rational basis" review of age discrimination claims. 555 F.3d at 1059 n.8 (the plaintiff would have "little to gain

[4] In addition to pursuing an ADA claim in state court, Okwu also potentially had remedies available to her under California's Fair Employment and Housing Act, which prohibits discrimination based on disability and requires reasonable accommodation. See Cal. Govt. Code §§ 12940(a), (m), (n). She also is pursuing remedies in state court via her writ of administrative mandamus and appeal. See supra, n.1. Thus, Okwu is wrong to argue she had "no choice" but to pursue a § 1983 claim.

by circumventing the ADEA, which affords more protection in the area of age discrimination than does the federal Constitution."). As discussed below, the Equal Protection Clause applies the same, rational basis standard to claims of disability discrimination. See infra p. 24-25. Therefore, this Court noted, "[b]ecause the ADEA provides broader protection than the Constitution, a plaintiff has 'nothing substantive to gain' by also asserting a § 1983 claim." Ahlmeyer, 555 F.3d at 1058. The same analysis applies to the ADA.

c. Plaintiff's Remaining Authorities Are Inapposite and Unpersuasive

Plaintiff's citation to Nick Daum, Comment, Section 1983, Statutes, and Sovereign Immunity, 112 Yale L.J 353 (2002), does not help her. See AOB p.47. Mr. Daum argues "the Alsbrook court's reasoning appears simply incorrect." Id. But this Court in Vinson expressly followed the Eight Circuit's en banc decision in Alsbrook: "a plaintiff cannot bring an action under 42 U.S.C. § 1983 against a State official in her individual capacity to vindicate rights created by Title II of the ADA or section 504 of the Rehabilitation Act. Vinson's claim against Thomas in her individual capacity under 42 U.S.C. § 1983 fails." Vinson, 288 F.3d at 1156. Therefore, with all due respect to Mr. Daum, his Comment is not well taken in this Circuit.

Plaintiff's other authorities are similarly distinguishable. Harris v. City of New York, AOB p.46, decided simply that the plaintiff filed a complaint within the statute of limitations applying to the ADA and the Rehabilitation Act "(and

perhaps to Section 1983 as well)." 186 F.3d 243, 251 (2d Cir. 1999). This opinion does not address whether Title I of the ADA is enforceable under § 1983.

Weixel v. Board of Education of the City of New York, (AOB pp. 46-47) reversed a district court's dismissal of a pro se complaint, holding that because "plaintiffs have stated causes of action under Section 504/ADA and the IDEA, the district court erred in dismissing their claims for damages under Section 1983." 287 F.3d 138, 151 (2d Cir. 2002). The Second Circuit again did not address whether § 1983 is an appropriate remedy in a Title I ADA case.

Neither Second Circuit opinion offers any analysis or conclusion contrary to the Ninth Circuit's holding in Vinson. Both cases found that the plaintiffs had viable substantive claims under statutes other than § 1983. But neither opinion addressed whether § 1983 was preempted by a comprehensive remedial scheme and neither case was filed against a state official or addressed Eleventh Amendment immunity. See Best Life Assur. Co. v. Comm'r., 281 F.3d 828, 834 (9th Cir. 2002) ("these statements were not necessary to the decision and thus have no binding or precedential impact" (internal quotation omitted)).

2. Even if § 1983 Relief Were Available to Okwu for an Alleged Violation of the ADA, There Is No Individual Liability Under § 1983 for Alleged Violations Based on Title I of the ADA

"Section 1983 does not confer rights, but instead allows individuals to enforce rights contained in the United States Constitution and defined by federal

law." Vinson, 288 F.3d at 1155. Therefore, § 1983 does not expand who may be held liable under the ADA.

Okwu seeks to hold individuals personally liable under § 1983 for an alleged violation of Title I of the ADA. She cannot do so because only employers can be liable under Title I of the ADA; there is no personal liability for managers, supervisors, or co-workers. See Walsh, supra, 471 F.3d at 1037-1038 (finding it "'inconceivable' that Congress intended to allow individual employees to be sued" under the ADA).

CalPERS's employees named herein are not even her co-workers, much less her employer. Because Okwu could not sue the CalPERS Defendants under Title I of the ADA itself, she cannot do so via § 1983. See Holbrook, 112 F.3d at 1531 ("a plaintiff may not maintain a section 1983 action in lieu of–or in addition to–a Rehabilitation Act or ADA cause of action if the only alleged deprivation is of the employee's rights created by the Rehabilitation Act and the ADA."). Because the ADA does not extend liability to non-employers or individuals employed by the same employer, § 1983 does not confer liability either. See also Alsbrook, 184 F.3d at 1012 ("Alsbrook is precluded from bringing a section 1983 suit against the commissioners in their individual capacities for alleged violations of Title II of the ADA when he could not do so directly under Title II itself."); id. at 1005 & n.8.

3. The ADA Does Not Apply to Disability Retirement Benefit Determinations

Again, § 1983 does not create substantive rights, but rather provides only a remedy for violations of federal law. Section 1983 relief is also unavailable when Congress has "explicitly . . . foreclosed citizen enforcement." Vinson, 288 F.3d at 1155.

Congress has explicitly barred lawsuits under the ADA for disability benefits determinations. The ADA provides: "Nothing in this chapter alters the standards for determining eligibility for benefits under State worker's compensation laws or under State and Federal disability benefit programs." 42 U.S.C. § 12201(e) (emphasis added).

CalPERS disability retirement is a "disability benefit program" because it is "intended to alleviate the harshness that would accompany the termination of an employee who has become medically unable to perform [her] duties.'" Haywood, 67 Cal. App. 4th at 1304. Plaintiff challenges the administration of the California Public Employee Retirement Law, which is a matter of state, not federal, law. As such, § 1983 does not apply to enforcement of state statutes.

Moreover, Title I of the ADA does not prohibit "a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law." 42 U.S.C. § 12201(c).

Contrary to Okwu's argument, see AOB 65-66, she is suing the CalPERS Defendants precisely because CalPERS made a determination regarding Plaintiff's eligibility for a disability benefit program, with which she did not agree (see First Am. Complaint ¶¶ 26-30, 56-60, ER 79, 85A-87). CalPERS's actions that Okwu challenges here relate to its administration of the disability retirement benefits for which CalPERS is responsible under state law. Title I of the ADA does not cover CalPERS's activities. Therefore, Okwu cannot use § 1983 to create liability under the ADA where none exists.

C. OKWU FAILS TO STATE A CLAIM FOR VIOLATION OF THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Okwu alleges in her First Amended Complaint:

> Defendants . . . refuse to permit this reasonable accommodation and have instead taken steps to deem her permanently disabled . . . . These acts violated plaintiff's civil rights in that they deprived her of her rights under the Equal Protection Clause of the 14th Amendment and the ADA, in that they denied her the right to reasonable accommodations under the ADA, and discriminated against her on the basis of her disability, in violation of the ADA and the Equal Protection Clause.

First Am. Complaint ¶ 53, ER 84-85.

The District Court correctly concluded that Okwu failed to state a viable claim under the Equal Protection Clause and, therefore, her § 1983 claim was barred.

1. The Equal Protection Clause Does Not Mandate Reasonable Accommodations for Individuals with Disabilities

Okwu's § 1983 claim based on the Equal Protection Clause fails because she cannot establish the CalPERS Defendants violated that provision, potentially entitling her to the § 1983 remedy. The Supreme Court definitively stated in Board of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 367-368 (2001):

> States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational. They could quite hard headedly–and perhaps hardheartedly–hold to job-qualification requirements which do not make allowance for the disabled. If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.

Id. (emphasis added). Therefore, "unwillingness on the part of state officials to make the sort of accommodations for the disabled required by the ADA" does not support a claim under the Fourteenth Amendment. Id. at 370. Plaintiff's claims that the CalPERS Defendants should be held liable for violating the U.S. Constitution's Equal Protection Clause are directly contrary to the Supreme Court's holding in Garrett.

To the extent Plaintiff argues that she may bring an Equal Protection Clause claim based on Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985),

"the burden is upon the challenging party to negative "'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" Garrett, 531 U.S. at 367 (citations omitted). Thus, because "'the disabled do not constitute a suspect class' for equal protection purposes, a governmental policy that purposefully treats the disabled differently from the non-disabled need only be 'rationally related to legitimate legislative goals' to pass constitutional muster." Lee v. City of Los Angeles, 250 F.3d 668, 687 (9th Cir. 2001) (citation omitted).

Okwu does not claim the disabled are treated differently from the non-disabled. She claims only she is disabled and should have been treated differently. In any event, the state's Public Employee Retirement Law evinces a rational basis for requiring applicants to establish medical reasons for reinstatement to active status after having previously been found medically unable to perform their duties.

As stated, California's public employee retirement system's purpose "is to effect economy and efficiency in the public service by providing a means whereby employees who become superannuated or otherwise incapacitated may, without hardship or prejudice, be replaced by more capable employees, and to that end provide a retirement system consisting of retirement compensation and death benefits." Cal. Govt. Code § 20001. CalPERS's administration also ensures state employees do not receive retirement benefits while simultaneously remaining employed. Cal. Govt. Code § 21220(a).

Plaintiff made no effort in her First Amended Complaint to defeat the "rational basis" review that applies to claims of disparate treatment based on disability under the Equal Protection Clause, nor can she. As such, her claim based on the Equal Protection Clause is barred.

2. The Equal Protection Clause Does Not Apply to Okwu's Claim Because She Alleges a "Class of One."

As stated, Okwu does not claim she was treated adversely because of her membership in a protected group, as compared with others outside that group. Rather, she claims that she was unfairly denied reinstatement from disability retirement status. She does not claim that members of another, identifiable class were treated more favorably, contrary to the Equal Protection Clause. Naturally, she cannot do so, because only the disabled are involved in disability retirement determinations.

The District Court recognized that Okwu in essence is claiming CalPERS' employees arbitrarily or irrationally denied her reinstatement from disability retirement status (ER 245). As such, she is alleging a "class-of-one" equal protection violation. As the District Court held, the Supreme Court foreclosed such a claim in Engquist v. Or. Dept. of Agric., 553 U.S. 591, 605 (2008) ("we have never found the Equal Protection Clause implicated in the specific circumstance where, as here, government employers are alleged to have made an individualized, subjective personnel decision in a seemingly arbitrary or irrational manner.").

Even if an Equal Protection Clause challenge were available to Okwu, her claim is subject to rational basis review, as discussed above. She does not and cannot claim CalPERS's standards for disability retirement are irrational. Therefore, because Okwu cannot plausibly allege a violation of the Constitution, she cannot rely on § 1983.

D. QUALIFIED IMMUNITY BARS PLAINTIFF'S § 1983 CLAIM ASSERTED AGAINST DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES

Even if Plaintiff had a cognizable claim under § 1983, "State officials are entitled to qualified immunity from suits for damages 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Krainski v. Nev. ex rel. Bd. of Regents of the Nev. Sys. of Higher Ed., 616 F.3d 963, 968 (9th Cir. 2010) (citation omitted).

"Determining whether officials are owed qualified immunity involves two inquiries: (1) whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right; and (2) if so, whether the right was clearly established in light of the specific context of the case." Id. "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. (citing Hope v. Pelzer, 536 U.S. 730, 739 (2002)). The inquiry presents a question of law for the court. See Dunn v. Castro, 621 F.3d 1196, 1199 (9th Cir. 2010).

Okwu argues that qualified immunity does not apply "because a reasonable official should have been well aware of the ample statutory and appellate case law showing a duty to permit reasonable accommodations under the ADA." (AOB p. 62). Okwu's argument is misplaced for two reasons.

First, as stated, none of the CalPERS Defendants (or CalPERS itself) were Okwu's employer. Only the employer may be held liable under Title I of the ADA. See Walsh, 471 F.3d at 1037-1038. The CalPERS Defendants have no reason to believe the ADA somehow required them to act any differently than they did. Okwu has cited no authority at all governing the administration of disability retirement benefits under the ADA, let alone clearly established authority. She does not explain what "reasonable accommodation" would mean in the context of reinstatement from disability retirement status, either.

Second, Okwu cannot simply allege that a defendant "knows" that a right exists–such as to "due process" or "reasonable accommodation"–and claim summarily that it was violated. Even when a plaintiff alleges a violation of a clearly established right, it "cannot be so general as to allow [her] to 'convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.'" Watkins v. City of Oakland, 145 F.3d 1087, 1092 (9th Cir. 1998) (quoting Anderson v. Creighton, 483 U.S. 635, 639 (1987)).

Rather, "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." Dunn, 621 F.3d at 1199 (quoting Wilson v. Layne, 526 U.S. 603, 615 (1999)); Calabretta v. Floyd, 189 F.3d 808, 812 (9th Cir. 1999) ("The right the official is alleged to have violated must have been 'clearly established' in an appropriately particularized sense.")).

In Dunn, the trial court found that an inmate had stated a claim under § 1983 against prison officials who denied him family visits, on the grounds that a parent has a clearly established "fundamental interest in maintaining. . . a relationship with his child." 621 F.3d at 1200. This Court held the District Court "erred in defining the established constitutional right so broadly." Id. ("'The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'") (quoting Anderson v. Creighton, 483 U.S. 635, 639-40 (1987)). Because "Supreme Court and Ninth Circuit precedent clearly established that prisoners do not enjoy an absolute right to receive visits while incarcerated, even from family members," the prison officials did not have reasonable notice that denying particular visitation rights would be unconstitutional. Id. at 1201.

Here, Okwu does not have an "absolute" right to accommodation under the ADA, even if it applied to the CalPERS Defendants. Okwu must establish she is a "qualified individual," in that she can perform her essential job functions with or

without reasonable accommodation. See Dark v. Curry County, 451 F.3d 1078, 1089 (9th Cir. 2006). If a disabled person cannot perform a job's "essential functions" (even with a reasonable accommodation), then the ADA's employment protections do not apply. See Cripe v. City of San Jose, 261 F.3d 877, 884 (9th Cir. 2001).

The employer has no duty to remove a job's essential functions as a form of accommodation. See Dark, 451 F.3d at 1089. Moreover, the employer need not accommodate where the employee poses a "direct threat" to himself or others. 42 U.S.C. § 12113(b).

As this Court has explained, the ADA:

> in no way provides employees with absolute protection from adverse employment actions based on disability-related conduct. Under the ADA a plaintiff must still establish that she is 'an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires' . . . Even if a plaintiff were to establish that she's qualified, under the ADA the defendant would still be entitled to raise a 'business necessity' or 'direct threat' defense against the discrimination claim Defendant may also raise the defense that the proposed reasonable accommodation poses an undue burden.

Gambini v. Total Renal Care, Inc., 486 F.3d 1087, 1090 (9th Cir. 2007).

The CalPERS Defendants' role was simply to administer an established, statutory procedure, containing significant due process protections, by which Okwu would be able to apply for disability retirement and reinstatement therefrom.

The ALJ – again, not a defendant here or CalPERS employee for that matter – considered several psychiatrists' testimony and concluded that Okwu "remains substantially incapacitated from the performance of the usual and customary duties of [her prior] position, and similar ones, and will continue so for the foreseeable future." (First Am. Complaint, Exhibit A, pp. 21-22, ER 117-118.) The ALJ, a disinterested, presumably reasonable, official did not find that Plaintiff had any right to return to work with the accommodations she requested, let alone a "clearly established" right.

Okwu offers no authority or explanation of how the CalPERS Defendants received "fair warning" that their conduct was unlawful. See Dunn, 621 F.3d at 1200. Thus, even if Okwu were entitled to some reasonable accommodation by her employer for her bi-polar disorder, schizoaffective disorder, and psychosis, as Okwu claims (First Am. Complaint ¶ 49, ER 84), the contours of that accommodation are not "clearly established" in the "specific context" of this case.

In sum, although the District Court did not reach the issue of qualified immunity, this Court should affirm the judgment on this ground. See Dunn, 621 F.3d at 1199 (Supreme Court has "repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation."(citation and internal quotation omitted)).

E. OKWU FAILS TO STATE A CLAIM AGAINST CALPERS'S CEO STAUSBOLL IN HER OFFICIAL CAPACITY

Okwu sues only CalPERS CEO Anne Stausboll in her "official" capacity in addition to her individual capacity. Even if § 1983 supported a claim under the ADA, which it does not, "[t]he Eleventh Amendment bars suits against the State or its agencies for all types of relief, absent unequivocal consent by the state . . . Eleventh Amendment immunity also shields state officials from official capacity suits." See Krainski, 616 F.3d at 967(citing Central Reserve Life of North America Ins. Co. v. Struve, 852 F.2d 1158, 1160-61 (9th Cir. 1988)).

Okwu attempts to avoid the Eleventh Amendment by attempting to invoke the exception the Supreme Court recognized in Ex parte Young, 209 U.S. 123 (1908). However, that case provides her with no relief.

1. Ex Parte Young Does Not Apply Because Okwu's Claim Against Stausboll Is Not Limited to Prospective, Injunctive Relief

The Ex parte Young action is a "narrow exception" to the Eleventh Amendment bar. Krainski, 616 F.3d at 967-68. It may exist "where the relief sought is prospective in nature and is based on an ongoing violation of the plaintiff's federal constitutional or statutory rights." Id. (emphasis in original).

A suit against a state officer is barred "unless it falls within the exception [the Supreme] Court has recognized for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities." Idaho v. Coeur D'Alene Tribe of Idaho, 521 U.S. 261, 269 (1997). Accordingly, a plaintiff may

sue a state official in her official capacity under Ex parte Young to enforce the ADA but only for prospective injunctive relief. See Miranda B. v. Kitzhaber, 328 F.3d 1181, 1189 (9th Cir. 2003) (en banc) .

"In determining whether the doctrine of Ex parte Young avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" Verizon Md., Inc. v. PSC, 535 U.S. 635, 645 (2002) (internal quotation and citation omitted; emphasis added).

Okwu is not suing Stausboll for prospective injunctive relief. Although a conclusory request for an injunction appears in the First Amended Complaint's prayer, there is no hint as to what sort of injunction could be sought against Defendant Stausboll for an "ongoing violation of federal law." Okwu principally seeks hundreds of thousands of dollars in money damages. (See First. Am. Complaint ¶¶ 68, 73, 74, ER 89-91). The First Amended Complaint contains a prayer for money damages against "all" defendants. (See id., Prayer, p. 21, ER 92). The only arguable request for specific injunctive relief is asserted against Caltrans, not Stausboll or CalPERS (see First Am. Complaint ¶ 76, ER 91).

The Supreme Court's decision in Edelman v. Jordan, 415 U.S. 651, 664 (1974) ("the relief awarded in Ex parte Young was prospective only"), "and its progeny clearly prevent the federal courts from achieving through the artful use of injunctive relief the identical result obtained by a retroactive award of money

damages." Friendship Villa-Clinton, Inc. v. Buck, 512 F. Supp. 720, 728 (D. Md. 1981). To that end, Plaintiff "cannot by artful pleading transform the failure to provide a remedy for a completed, past wrong into the continuing violation of the 'right' to that remedy." Nelson v. Univ. of Tex., 491 F. Supp. 2d 672, 679 (N.D. Tex. 2007) ("wrongful termination" lawsuit cannot be a "continuing violation of federal law," merely because the state does not reinstate the fired employee).

2. Because Stausboll's Conduct Could Not Have Violated the ADA, Ex Parte Young Does Not Apply to Okwu

Finally, as discussed, the ADA does not address Stausboll's conduct. Neither she nor CalPERS are Okwu's employer, as required by Title I of the ADA. As such, CalPERS's alleged conduct here does not implicate federal law at all. Therefore, the requirement of an "ongoing violation" of federal law remains unmet as well.

As Okwu alleged, she pursued her right to a hearing before an ALJ (First Am. Complaint ¶¶ 25-29, ER 79), before the board of CalPERS itself (Id. ¶ 30, ER 79), and has now challenged the Board's decision in Superior Court by way of administrative mandamus. (Id. ¶ 63, ER 88). Plaintiff has a "prompt and effective remedy" to challenge CalPERS's benefits determinations "in a state forum," and is not entitled to rely on Ex parte Young for that reason. Coeur D'Alene, 521 U.S. at 274.

"Even if there is a prompt and effective remedy in a state forum, a second instance in which Young may serve an important interest is when the case calls for

the interpretation of federal law." Coeur D'Alene, 521 U.S. at 274. As discussed above, CalPERS's determination regarding Plaintiff's disability retirement is not regulated by the ADA and is the subject of state, not federal law.

CalPERS did precisely nothing to Okwu that violates the ADA. CalPERS did not engage in any conduct against Okwu related to her employment status. CalPERS did not fail to rehire her or reinstate her to work. CalPERS applied California law to ensure Okwu did not "double dip" by collecting disability retirement benefits as well as a state salary for productive work. To regain active status, Okwu had to leave the disability retirement rolls.

CalPERS followed its procedures for doing so, and provided Okwu with due process to seek reinstatement from her disability retirement status. After a hearing involving testimony from several medical experts, the ALJ, not even a CalPERS employee, simply concluded that Ms. Okwu is totally disabled from working:

> Appellant remains substantially incapacitated from the performance of the usual and customary duties of this position, and similar ones, and will continue so for the foreseeable future.

(First Am. Complaint Exh. E, pp. 21-22, ER 50-51). In so holding, the ALJ simply applied California law to the facts adduced at Okwu's hearing. See, e.g., Cal. Govt Code § 20026 (defining "disability"); Mansperger v. Pub. Employees' Ret. Sys., 6 Cal.App.3d 873, 876 (1970) (defining "substantially incapacitated").[5]

[5] Throughout her papers, Okwu recites the words "reasonable accommodation," but CalPERS did not deny her reasonable accommodation. Moreover, in finding that Okwu was "substantially incapacitated" under state law,

In sum, Okwu seeks to remedy an alleged past wrong – denial of reinstatement to active service and denial of reinstatement to her former job. She challenges a state law determination regarding her fitness to leave the disability retirement rolls under state standards. The Constitution does not require "reasonable accommodation" or grant any extra protection to individuals with disabilities over and above what is guaranteed to all. Therefore, Ex Parte Young, designed to enjoin future violations of the Constitution and federal law, does not apply. This Court should affirm the District Court's dismissal.

F. THE DISTRICT COURT CORRECTLY DENIED OKWU LEAVE TO AMEND HER COMPLAINT

Leave to amend is not appropriate when "no allegation of other facts consistent with the complaint could possibly cure the deficiency." Montz v. Pilgrim Films & TV, Inc., 606 F.3d 1153, 1159 (9th Cir. 2010) (citing Miller v. Yokohama Tire Corp., 358 F.3d 616, 622-23 (9th Cir. 2004). See also Lipton, 284 F.3d at 1039 (leave to amend properly denied when amendments would be futile).

The District Court examined the allegations and concluded that, as a matter of law, Okwu cannot enforce the ADA via § 1983 against the CalPERS Defendants. In Ahlmeyer, the Court held that the district court properly denied leave to amend because he could not obtain relief under § 1983 based on a violation of the ADEA. 555 F.3d at 1061 ("the district court did not abuse its

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it is plain that Ms. Okwu could not do her job at all, regardless of accommodation. As such, she would not be a "qualified individual" under the ADA and, therefore, would not be entitled to accommodation in any event.

discretion by dismissing Ahlmeyer's motion to amend her complaint as futile."). The same result should obtain here. As in Ahlmeyer, the District Court properly exercised its discretion to deny leave to amend.

VI.
CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment of the District Court.

VII.
STATEMENT OF RELATED CASES

Appellees are not aware of any related cases.

Dated: August 1, 2011

Respectfully submitted,

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VIII.
CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 8090 words as measured by the word processing program used to prepare the brief.

Dated: August 1, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 1, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/D. Gregory Valenza
D. Gregory Valenza

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