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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSEPHINE OKWU,	)	
	)	2:10-cv-0653-GEB-KJM
Plaintiff,	)	
	)	
v.	)	<u>ORDER GRANTING MOTIONS TO</u>
	)	<u>DISMISS</u>
CINDY MCKIM; JUDITH SMITH; DAVE	)	
SCHAEFER; ANNE STAUSBOLL; PETER	)	
H. MIXON; RORY J. COFFEY; DONNA	)	
RAMEL LUM; and DOES 1-10,	)	
	)	
Defendants.	)	
_____	)	

Defendants Cindy McKim, Judith Smith, and Dave Schaefer (collectively, "Cal Trans Defendants") move for dismissal of Plaintiff's First Amended Complaint ("FAC") under Federal Rules of Civil Procedure ("Rule") 12(b)(1) and 12(b)(6). Dismissal is sought under Rule 12(b)(1) for lack of subject matter jurisdiction, and under Rule 12(b)(6) for failure to state a claim.

Defendants Anne Stausboll, Peter H. Mixon, Rory J. Coffey, and Donna Ramel Lum (collectively, "CalPERS Defendants") also move for dismissal of Plaintiff's FAC under Rule 12(b)(6) for failure to state a claim.

Each defendants sued in his or her individual capacity also argues that qualified immunity shields him or her from liability for the allegations in Plaintiff's claims. However, in light of the ruling

1 below, it is unnecessary to address each Defendant's qualified immunity  
2 arguments.

3 Plaintiff states in her FAC that she alleges a single claim  
4 "for violation of the Federal Civil Rights Act", 42 U.S.C. § 1983 ("§  
5 1983"). (FAC 10:12-13.) Plaintiff alleges "[t]he federal rights at issue  
6 [in her § 1983 claims] are (a) Equal Protection Clause of the 14th  
7 Amendment and (b) the [Americans with Disabilities Act ("ADA").]" Id. ¶  
8 45. Plaintiff alleges Defendants "violated [her] civil rights . . .  
9 under the Equal Protection Clause of the 14th Amendment and the ADA .  
10 . . [by] deni[ng] her the right to reasonable accommodations as required  
11 under the ADA, and discrimin[ing] against her on the basis of her  
12 disability, in violation of the ADA and the Equal Protection Clause."  
13 Id. ¶¶ 57-60. Since all of Plaintiff's claims are plead under § 1983,  
14 and no claim is alleged directly under the ADA, Plaintiff's claims are  
15 analyzed under § 1983.

### 16 I. Legal Standard

17 A Rule 12(b)(6) dismissal motion tests the legal sufficiency  
18 of the claims alleged in a complaint. Novarro v. Block, 250 F.3d 729,  
19 732 (9th Cir. 2001). Dismissal under Rule 12(b)(6) is appropriate only  
20 where the complaint either 1) lacks a cognizable legal theory, or 2)  
21 fails to allege "sufficient facts . . . under a cognizable legal  
22 theory." Balistreri v. Pacific Police Dept., 901 F.2d 696, 699 (9th Cir.  
23 1988). To avoid dismissal, a plaintiff must allege "enough facts to  
24 state a claim to relief that is plausible on its face." Bell Atlantic  
25 Corp. v. Twombly, 550 U.S. 544, 547 (2007).

26 In deciding a Rule 12(b)(6) motion, the material allegations  
27 of the complaint are accepted as true and all reasonable inferences are  
28 drawn in favor of the Plaintiffs. See al-Kidd v. Ashcroft, 580 F.3d 949,

1 956 (9th Cir. 2009). However, conclusory statements and legal  
2 conclusions are not entitled to a presumption of truth. See Ashcroft v.  
3 Iqbal, --- U.S. ----, 129 S. Ct. 1937, 1949-50 (2009); Twombly, 550 U.S.  
4 at 555. "In sum, for a complaint to survive a motion to dismiss, the  
5 nonconclusory 'factual content,' and reasonable inferences from that  
6 content, must be plausibly suggestive of a claim entitling the plaintiff  
7 to relief." Moss v. United States Secret Serv., 572 F.3d 962, 969 (9th  
8 Cir. 2009).

## 9 **II. Request for Judicial Notice**

10 The Cal Trans Defendants' motion includes a request that  
11 judicial notice be taken of two documents: "The Board of Administration  
12 for the California Public Employees Retirement System ("Board") Decision  
13 dated January 29, 2009, attached as Exhibit A to [these defendants']  
14 Request For Judicial Notice;" and "[t]he Settlement Agreement between  
15 the parties which was adopted by the California State Personnel Board  
16 ['SPB'] as its decision . . . [and] is attached as Exhibit B to [these  
17 defendants'] Request For Judicial Notice." (Cal Trans Def.'s Req. for  
18 Judicial Notice in Supp. of Mot. to Dismiss Compl. ("RJN") Exs. A-B.)  
19 Plaintiff does not oppose this request.

20 "As a general rule, a district court may not consider any  
21 material beyond the pleadings in ruling on a Rule 12(b)(6) motion." Lee  
22 v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001) (internal  
23 quotation marks omitted). However, since the Board's Decision dated  
24 January 29, 2009, is attached to Plaintiff's FAC as Exhibit A, and the  
25 Board Decision discusses the Settlement Agreement of which judicial  
26 notice is sought, both documents are considered in the decision on the  
27 motion under the "'incorporation by reference' doctrine." Knieval v.  
28 ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005). This doctrine applies "to

1 situations in which the plaintiff's claim depends on the contents of a  
2 document, the defendant attaches the document to its motion to dismiss,  
3 and the parties do not dispute the authenticity of the document, even  
4 though the plaintiff does not explicitly allege the contents of that  
5 document in the complaint." Id.

### 6 **III. Factual Allegations in FAC**

7 Plaintiff alleges in her complaint that she "suffers from  
8 several mental disorders, including bi-polar disorder, Schizoaffective  
9 disorder, and Psychosis." (FAC ¶ 13.) Plaintiff further alleges on  
10 February 18, 2003, she was dismissed from her job with the California  
11 Department of Transportation ("Cal Trans"). Id. ¶ 14. Plaintiff appealed  
12 the dismissal to the SPB, and also filed a discrimination action with  
13 the SPB. Id. ¶¶ 15-16. Thereafter, Plaintiff and Cal Trans entered into  
14 a signed settlement agreement, which the SPB adopted. (RJN Ex. B.) The  
15 Settlement Agreement "state[s] in part that if [Plaintiff] was not to be  
16 fit for duty, she would apply for disability retirement ["DR"] with the  
17 California Public Employees Retirement System ("CalPERS")." (FAC ¶ 17.)

18 Plaintiff applied for disability retirement on September 3,  
19 2003, and CalPERS approved Plaintiff's application on February 21, 2004.  
20 Id. ¶¶ 18,19. Subsequently, on May 18, 2004, Plaintiff filed an  
21 application for reinstatement to the job position she held before she  
22 was granted disability retirement. Id. ¶ 20.

23 On April 12, 2005, CalPERS sent Plaintiff and Cal Trans a  
24 letter stating it intended to grant Plaintiff's application for  
25 reinstatement. Id. ¶ 22. Cal Trans objected, and Plaintiff's application  
26 was subsequently denied in April 2005, because Plaintiff "was deemed  
27 disabled again due to her bi-polar disorder, Schizoaffective disorder,  
28

1 and psychosis[.]” Id. ¶ 21. Plaintiff filed a second application for  
2 release from disability retirement on August 24, 2005. Id. ¶ 23.

3 A hearing was held on Plaintiff’s “request for reinstatement  
4 from disability” before an Administrative Law Judge (“ALJ”) on September  
5 18 and November 24-25, 2008 Id. ¶ 27. At the hearing Rory J. Coffey  
6 represented CalPERS and Judith Smith represented Cal Trans. Id. ¶ 28.  
7 The ALJ issued a proposed decision on January 29, 2009 in which he  
8 denied Plaintiff’s application, and CalPERS adopted the ALJ’s decision  
9 on April 22, 2009. Id. ¶¶ 29-30, Ex. A.

10 Plaintiff sues Cindy McKim, the director of Cal Trans, and  
11 Anne Stausboll, the CEO of CalPERS, in their official capacities for  
12 injunctive relief, and in their individual capacities for damages. Id.  
13 ¶¶ 4-5, 8-9. Plaintiff also sues Judith Smith, Senior Legal Analyst at  
14 Cal Trans, Dave Schaefer, the Return to Work Coordinator within Cal  
15 Trans, Peter H. Mixon, General Counsel at CalPERS, Rory J. Coffey,  
16 Senior Staff Counsel at CalPERS, and Donna Ramel Lum, Chief of Benefit  
17 Services at CalPERS, in their individual capacities for damages. Id. ¶¶  
18 6-7, 10-12.

#### 19 **IV. Discussion**

20 Each Defendant argues Plaintiff’s FAC should be dismissed  
21 since the damages and other relief Plaintiff seeks under § 1983 are not  
22 actionable, Plaintiff cannot state a § 1983 claim based on alleged  
23 violations of the ADA, and Plaintiff has not stated a viable equal  
24 protection claim. (Points and Authorities in Supp. Cal Trans Mot. (“Mot.  
25 Cal Trans”) 8:24-26; CalPERS Mot. to Dismiss (“Mot. CalPERS”) 6:25-9:4.)

26 “Section 1983 does not alone create substantive rights;  
27 rather, [it] merely provides a mechanism for enforcing individual rights  
28 secured elsewhere, i.e., rights independently ‘secured by the

1 Constitution and laws' of the United States." Johnson v. City of  
2 Detroit, 446 F.3d 614, 618 (6th Cir. 2006) (internal quotation marks  
3 omitted). "To state a claim under § 1983, a plaintiff must allege two  
4 essential elements: (1) that a right secured by the Constitution or laws  
5 of the United States was violated, and (2) that the alleged violation  
6 was committed by a person acting under the color of State law." Long v.  
7 County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006). "A plaintiff  
8 will not be permitted to bring a section 1983 action if (1) the statute  
9 does not create an enforceable right, privilege, or immunity, or (2)  
10 Congress has foreclosed citizen enforcement in the enactment itself,  
11 either explicitly, or implicitly by imbuing it with its own  
12 comprehensive remedial scheme." Buckley v. City of Redding, 66 F.3d 188,  
13 190 (9th Cir. 1995).

14 **§ 1983 Claim- Violation of Equal Protection Clause of the 14th Amendment**

15           The Cal Trans Defendants argue Plaintiff's § 1983 claim for  
16 violation of the Equal Protection Clause fails for lack of a class-based  
17 differential treatment allegation. (Mot. Cal Trans 14: 4-6.) The CalPERS  
18 Defendants argue that the Fourteenth Amendment does not require  
19 reasonable accommodation for employees with disabilities. (Mot. CalPERS  
20 7:9-10.)

21           Plaintiff counters the FAC alleges the Defendants committed  
22 disability-based discrimination, which is a violation of the Fourteenth  
23 Amendment. (Opp'n Cal Trans 11:4-5; Opp'n CalPERS 11:3-4; see FAC ¶¶ 47-  
24 62.) Plaintiff alleges in the FAC that "[t]he defendants' conduct  
25 constitutes a federal violation because the state actors are denying  
26 plaintiff's right to employment without equal protection of law, in that  
27 the defendants are wrongfully refusing to allow her employment to be  
28 reinstated with reasonable accommodations under the A.D.A., all in

1 violation of the 14th Amendment's Equal Protection Clause of the U.S.  
2 Constitution." (FAC ¶ 64.)

3 The Supreme Court has concluded that "the class-of-one theory  
4 of equal protection has no application in the public employment  
5 context[.]" Engquist v. Oregon Dept. of Agr., 553 U.S. 591, 607 (2008).

6 Thus, the class-of-one theory of equal  
7 protection-which presupposes that like individuals should  
8 be treated alike, and that to treat them differently is  
9 to classify them in a way that must survive at least  
10 rationality review-is simply a poor fit in the public  
11 employment context. To treat employees differently is not  
12 to classify them in a way that raises equal protection  
13 concerns. Rather, it is simply to exercise the broad  
14 discretion that typically characterizes the employer-  
15 employee relationship. A challenge that one has been  
16 treated individually in this context, instead of like  
17 everyone else, is a challenge to the underlying nature of  
18 the government action.

19 Of course, that is not to say that the Equal  
20 Protection Clause, like other constitutional provisions,  
21 does not apply to public employers. Indeed, our cases  
22 make clear that the Equal Protection Clause is implicated  
23 when the government makes class-based decisions in the  
24 employment context, treating distinct groups of  
25 individuals categorically differently.

26 Id. at 605. "[T]he Equal Protection Clause [is not] implicated . . .  
27 where . . . government employers are alleged to have made an  
28 individualized, subjective personnel decision in a seemingly arbitrary  
or irrational manner." Id.

Plaintiff alleges in her FAC that Defendants "denied her the  
right to reasonable accommodations as required under the ADA, and  
discriminated against her on the basis of her disability, in violation  
of the ADA and the Equal Protections Clause." (FAC ¶ 53.) Plaintiff's  
class-of-one personnel decision discrimination allegation is not a  
cognizable theory of liability under the Equal Protection Clause.

In addition, "States are not required by the Fourteenth  
Amendment to make special accommodations for the disabled, so long as  
their actions toward such individuals are rational." Bd. of Trustees of

1 University of Alabama v. Garrett, 531 U.S. 356, 367 (2001). "If special  
2 accommodations for the disabled are to be required, they have to come  
3 from positive law and not through the Equal Protection Clause." Id. at  
4 368. The CalPERS Defendants argue "[t]he state's Public Employee  
5 Retirement Law has a rational basis for requiring pension applicants to  
6 establish medical reasons for early retirement and for reinstatement to  
7 active duty after having previously been found medically unable to  
8 perform their duties." (CalPERS Reply 6:27-28.) Plaintiff's request for  
9 the special accommodation of reinstatement is being litigated in a state  
10 court action in which Plaintiff is challenging the adverse decision on  
11 her reinstatement request. Plaintiff has not shown that the Equal  
12 Protection Clause is implicated in any claim. This claim is dismissed  
13 without leave to amend since an amendment "could not possibly cure the  
14 deficiency" in this claim. DeSoto v. Yellow Freight Sys., Inc., 957 F.2d  
15 655, 658 (9th Cir. 1992).

16 **§ 1983 Claim- Violation of the ADA**

17 Both the CalPERS and the Cal Trans Defendants argue the ADA is  
18 not enforceable under § 1983, citing as support for their argument the  
19 Ninth Circuit's holding in Vinson v. Thomas, 288 F.3d 1145, 1156 (2002).  
20 The Ninth Circuit held "that a plaintiff cannot bring an action under 42  
21 U.S.C. § 1983 against a State official in her individual capacity to  
22 vindicate rights created by Title II of the ADA[.]" Id. Plaintiff  
23 responds that Vinson was decided under Title II of the ADA, and her  
24 claim alleges a violation under Title I. (Opp'n Cal Trans 8:27-28; Opp'n  
25 CalPERS 8:25-26.)

26 In Vinson, the Ninth Circuit stated:"the comprehensive  
27 remedial scheme of Title II of the ADA barred a section 1983 action  
28 against defendants in their individual capacities predicated upon a

1 Title II violation." 288 F.3d at 1155 (citing Alsbrook v. City of  
2 Maumelle, 184 F.3d 999, 1011 (8th Cir. 1999)). In Alsbrook, the Eighth  
3 Circuit reasoned "that the comprehensive enforcement mechanisms provided  
4 under . . . the ADA suggest Congress did not intend violations of [the  
5 ADA] to be also cognizable under § 1983." Alsbrook, 184 F.3d at 1011.  
6 This is because "Congress has provided [Title II] with detailed means of  
7 enforcement that it imported from Title VII [of the Civil Rights Act of  
8 1964.]" Id. (internal quotation marks omitted). "Title I of the ADA  
9 invokes the same 'powers, remedies and procedures' as those set forth in  
10 Title VII." Walsh v. Nevada Dept. of Human Resources, 471 F.3d 1033,  
11 1038 (9th Cir. 2006); 42 U.S.C. §§ 2000e-5, 12117. Since both Title I  
12 and Title II of the ADA provide a comprehensive remedial scheme  
13 patterned after Title VII, the Ninth Circuit's reasoning in Vinson  
14 applies with equal force to both Title I and Title II of the ADA.  
15 Therefore, Plaintiff's individual capacity § 1983 claims, through which  
16 she seeks to enforce Title I of the ADA is not actionable in light the  
17 comprehensive remedial scheme of Title I of the ADA.

18 Nor can Plaintiff bring a § 1983 claim against the individual  
19 Defendants in their official capacities to vindicate rights created by  
20 Title I of the ADA. Cherry v. City College of San Francisco, No. C  
21 04-04981 WHA, 2006 WL 6602454, at \*12 (N.D. Cal. Jan. 12, 2006)  
22 (extending the holding in Vinson and holding "that the  
23 official/individual capacity distinction does not alter the preclusive  
24 effect of Title II [of the ADA]"). "Section 1983 is not a vehicle to  
25 vindicate statutory rights secured by the ADA; rather, plaintiff must  
26 sue under the ADA directly." Hill v. Baca, No. CV 08-03834 CAS (AJW),  
27 2010 WL 1727655, at \*6 (C.D. Cal. April 26, 2010). This is because §  
28

1 1983 cannot be used to enforce rights created by a statutory scheme that  
2 already includes comprehensive remedial measures.

3 For the stated reasons, Plaintiff's § 1983 claims against  
4 Defendants in their individual and official capacities based on a  
5 violation of Title I of the ADA are dismissed with prejudice because an  
6 amendment "could not possibly cure the deficiency" in this claim.  
7 DeSoto, 957 F.2d at 658.

8 **V. Conclusion**

9 Therefore, each Defendant's dismissal motion is GRANTED and  
10 all of Plaintiff's claims are dismissed with prejudice. Judgment shall  
11 be entered in favor of Defendants.

12 Dated: January 19, 2011

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GARLAND E. BURRELL, JR.  
United States District Judge