UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

----oo0oo----

JEANNE KITCHEN,

Plaintiff,

v.

LODI UNIFIED SCHOOL DISTRICT,

Defendant.

CIV. NO. 2:14-01436 WBS EFB

MEMORANDUM AND ORDER RE: MOTION TO DISMISS AND MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

----oo0oo----

Plaintiff Jeanne Kitchen brought this action against defendant Lodi Unified School District alleging disability-based discrimination, retaliation, and interference in violation of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act. Plaintiff seeks, among other relief, reimbursement for health care premiums she paid as a result of her allegedly wrongful exclusion from the school district's Early Retirement Health Benefits program. Defendant moves to dismiss several of these claims.

I. Factual and Procedural History

Plaintiff worked as a school teacher for the defendant, Lodi Unified School District, from 1991 to 2012. (Compl. ¶¶ 13-15.) In September 2009, plaintiff was diagnosed with bipolar disorder, and around the same time, she required surgery for a back disability. (Id. ¶ 14.) Between September 2009 and the summer of 2012, plaintiff missed work due to her disabilities. (Id.) She allegedly worked most of the 2010-2011 school year, and worked in the fall semester for the 2011-2012 school year. She did not work during the spring semester of 2011-2012 due to disability. (Id.)

By that time, plaintiff qualified for early retirement from the school district. (Id. ¶ 15.) During the summer of 2012, plaintiff decided to exercise her option to retire, and she submitted a letter of retirement on August 22, 2012. (Id.) Her effective date of retirement was September 30, 2012. (Id.)

Through its Early Retirement Health Benefits program, defendant ordinarily pays for retirees' health coverage premiums. (Id. ¶ 16.) Plaintiff alleges that defendant excluded her from the program based on the fact that she took unpaid days off prior to retirement. (Id.) She alleges that, but for that time off, she would have qualified for the Early Retirement Health Benefits program. (Id.)

Plaintiff brought this action under the ADA and Rehabilitation Act seeking reimbursement of premiums paid as a result of her exclusion from the Early Retirement Health Benefits program, interest on that amount, and injunctive relief ordering defendant to pay future premiums. (Compl. at 8.) She asserts

five causes of action: (1) disability-based discrimination in violation of Title I of the ADA, 42 U.S.C. §§ 12112, et seq.; (2) disability-based discrimination in violation of Title II of the ADA, 42 U.S.C. §§ 12131, et seq.; (3) disability-based discrimination in violation of the Rehabilitation Act, 29 U.S.C. §§ 794, et seq.; (4) retaliation and interference in violation of Title V of the ADA, 42 U.S.C. § 12203; and (5) retaliation in violation of the Rehabilitation Act, 29 U.S.C. §§ 704, et seq. (Compl. ¶¶ 25-45.)

II. Defendant's Motion to Dismiss

Defendant moves to dismiss plaintiff's first and fourth claims pursuant to Federal Rule of Civil Procedure 12(b)(1) on the basis of Eleventh Amendment immunity and plaintiff's second and fifth claims pursuant to Rule 12(b)(6) for failure to state a claim on which relief can be granted.

On a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). To survive a motion to dismiss, a plaintiff must plead "only enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). This "plausibility standard," however, "asks for more than a sheer possibility that a defendant has acted unlawfully," and where a complaint pleads facts that are "merely consistent with a defendant's liability," it "stops short of the line between

possibility and plausibility." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557).

A. The Eleventh Amendment Precludes Plaintiff's First and Fourth Claims

The Eleventh Amendment bars any suit against a state or state agency absent a valid waiver or abrogation of its sovereign immunity. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996); Hans v. Louisiana, 134 U.S. 1, 10 (1890) (holding that the Amendment bars suits against a state by citizens of that same state as well as suits brought by citizens of another state). This immunity applies regardless of whether a state or state agency is sued for damages or injunctive relief, Alabama v. Pugh, 438 U.S. 781, 782 (1978), and regardless of whether the plaintiff's claim arises under federal or state law, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 121, (1984).

The Ninth Circuit has held that "Eleventh Amendment immunity does not implicate a federal court's subject matter jurisdiction in an ordinary sense," and thus, should be treated as an affirmative defense for which "the public entity . . . bear[s] the burden of proving the facts that establish its immunity under the Eleventh Amendment." ITSI T.V. Prods., Inc. v. Agric. Ass'ns, 3 F.3d 1289, 1291-92 (9th Cir. 1993) ("Eleventh Amendment immunity, whatever its jurisdictional attributes, should be treated as an affirmative defense."); see also Hill v. Blind Indus. and Serv. of Md., 179 F.3d 754, 760 (9th Cir. 1999) (concluding that Eleventh Amendment immunity is not a true jurisdictional bar because it can be waived or forfeited by the state).

In Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001), the Supreme Court held that the Eleventh Amendment shields states from employment claims under Title I of the ADA. Id. at 360 (striking down Congress's purported abrogation of Eleventh Amendment immunity as exceeding its authority under Section 5 of the Fourteenth Amendment). The Ninth Circuit has extended Garrett's holding to Title V claims that are premised on alleged violations of Title I. See Demshki v. Monteith, 255 F.3d 986, 988 (9th Cir. 2001) ("[T]he Court's holding necessarily applies to claims brought under Title V of the ADA, at least where . . . the claims are predicated on alleged violations of Title I.").

California school districts, including the defendant, are considered agents of the state and may assert Eleventh Amendment immunity. Belanger v. Madera Unified Sch. Dist., 963 F.2d 248, 253-55 (9th Cir. 1992) (holding that California's scheme of centralized state control of and funding for public school districts makes them immune from suit under the Eleventh Amendment because the school district "is an agent of the state that performs state governmental functions and . . . a judgment would be satisfied out of state funds"). Plaintiff makes no argument to the contrary. Accordingly, the Eleventh Amendment squarely precludes plaintiff's first claim for relief under Title I of the ADA and fourth claim for relief under Title V of the ADA.

B. Plaintiff Fails to State a Cognizable Claim for Relief under Title II of the ADA

Individuals may not bring claims related to their

employment under Title II of the ADA. Zimmerman v. Oregon Dep't of Justice, 170 F.3d 1169, 1178 (9th Cir. 1999) ("[W]hen viewed as a whole, the text, context and structure of the ADA show unambiguously that Congress did not intend for Title II to apply to employment."). Title II pertains to "Public Services," id. at 1175, whereas employment claims are reserved for Title I, id. at 1172 ("Title I applies specifically to employment.").

This holding would appear to bar plaintiff's attempt to sue her former employer under Title II. But plaintiff argues that her Title II claim is proper because it arises, not out of her employment with defendant, but out of her exclusion from defendant's Early Retirement Health Benefits Program, which should be considered one of the "services, programs, or activities" covered by Title II. (Pl.'s Opp'n at 8 (Docket No. 10).)

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. In Zimmerman, the Ninth Circuit interpreted the phrase "services, programs, or activities" as applying "only to 'outputs' of a public agency, not to 'inputs' such as employment." Zimmerman, 170 F.3d at 1174 (citing Decker v. Univ. of Houston, 970 F. Supp. 575, 580 (S.D. Tex. 1997)). In defining the scope of a public agency's "outputs," the court drew a line between services that an agency makes "generally available" to the public and the "inputs" required to provide those services:

> Consider, for example, how a Parks Department would answer the question, "What are the services, programs, and activities of the Parks Department?" It might answer, "We operate a swimming pool; we lead nature walks; we maintain playgrounds." It would not answer, "We buy lawnmowers and hire people to operate them." The latter is a means to deliver the services, programs, and activities of the hypothetical Parks Department, but it is not itself a service, program, or activity of the Parks Department.

Id. at 1174.

The Ninth Circuit did not directly consider whether a retirement health benefits program falls on the input or output side of this line. However, it is clear that such a program is not generally available to the public. An individual becomes eligible for retirement health benefits as a direct result of his or her employment relationship with the school district. (See Compl. ¶ 30 ("As a former school teacher with more than 20 years of service, Plaintiff was qualified to participate in the Defendant's Early Retirement Health Benefits program . . . .").) Presumably, a school district's primary service is education, and it engages in the provision of retirement benefits only "as a means to deliver [] services, programs, and activities" relating to education. See Zimmerman, 170 F.3d at 1174.

Moreover, at least one other circuit has concluded that retirement benefits relate to an individual's employment with a public agency, not the "services, programs, or activities" of that agency. See Mary Jo C. v. N.Y. State & Local Ret. Sys., Civ. No. 09-5635 SJF ARL, 2011 WL 1748572, at *10-12 (E.D.N.Y. May 5, 2011) (holding that Title II does not apply to a plaintiff's claim for denial of disability retirement benefits because such a claim "clearly relate[s] to her employment with

that entity, as opposed to the programs and services the Library offers to the public at large") aff'd in relevant part in Mary Jo C. v. N.Y. State & Local Ret. Sys., 707 F.3d 144, 168-72 (2d Cir. 2013).

Because plaintiff's claim arises from her employment with defendant, she cannot bring it under Title II of the ADA. Zimmerman, 170 F.3d at 1178. Accordingly, the court must grant defendant's motion to dismiss plaintiff's second claim.

C. Plaintiff Fails to State a Claim for Retaliation in Violation of the Rehabilitation Act[1]

The Ninth Circuit has held that a retaliation claim brought under the Rehabilitation Act "requires a plaintiff to show: '(1) involvement in a protected activity, (2) an adverse employment action and (3) a causal link between the two.'" Coons v. Sec'y of U.S. Dep't of Treasury, 383 F.3d 879, 887 (9th Cir. 2004) (quoting Brown v. City of Tucson, 336 F.3d 1181, 1187 (9th Cir. 2003)). Defendant argues that plaintiff fails to allege facts establishing involvement in a protected activity or a causal link. (Def.'s Mem. at 7-8 (Docket No. 7-1).)

With regard to the first required showing, a request

[1] The Rehabilitation Act contains no anti-retaliation provision of its own. Instead, it expressly incorporates the ADA's anti-retaliation provision, 42 U.S.C. § 12203. McCoy v. Dep't of Army, 789 F. Supp. 2d 1221, 1234 (E.D. Cal. 2011) (Karlton, J.). Accordingly, the court draws in part from the case law and requirements of that section, which provides that "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a).

for accommodation of a disability can constitute involvement in a protected activity. See Coons, 383 F.3d at 887 ("Coons was engaged in a protected activity when he requested that the IRS make reasonable accommodations for his alleged disability."). However, to state a retaliation claim premised on a request for accommodation, a plaintiff must "allege[] facts which demonstrate that the defendants were aware of plaintiff's attempts to seek such accommodation." Weixel v. Bd. of Educ. of City of New York, 287 F.3d 138, 149 (2d Cir. 2002); see also Alex G. ex rel. Dr. Steven G. v. Bd. of Trs. of Davis Joint Unified Sch. Dist., 387 F. Supp. 2d 1119, 1128 (E.D. Cal. 2005) (Levi, J.) (requiring plaintiffs to show "the defendants knew [plaintiffs] were involved in the protected activity").

Plaintiff alleges she was denied eligibility based on "the time off she required as a reasonable accommodation for her disability." (Compl. ¶ 44.) However, the complaint is silent as to whether plaintiff actually made a request for time off as an accommodation for her disability or otherwise alerted the defendant of the need to accommodate her. Because she fails to allege such a request, plaintiff falls short of showing that she engaged in an activity protected by the Rehabilitation Act.

Plaintiff's Complaint also fails to allege "a causal link" between her involvement in a protected activity and the defendant's adverse employment action against her. See Coons, 383 F.3d at 887. Plaintiff alleges "there is evidence that Defendant LUSD took affirmative and intentional steps to ensure that Plaintiff Kitchen would be excluded from the program," (Compl. ¶ 17), and she points to this statement in support of a

causal link, (see Pl.'s Opp'n at 10, 13). But a fair reading of this statement does not contain an allegation that defendant's "affirmative and intentional steps" were taken because of plaintiff's request for an accommodation or any other alleged protected activity. Nor does it point to any circumstantial evidence of causation, such as her employer's knowledge of her disability. See Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987) ("Causation sufficient to establish the third element of the prima facie case may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision" (citing Miller v. Fairchild Indus., Inc., 797 F.2d 727, 731 (9th Cir. 1986)).

Accordingly, because plaintiff fails to allege the first and third elements of a prima facie retaliation claim, the court must grant defendant's motion to dismiss.

III. Plaintiff's Motion for Leave to File First Amended Complaint

Plaintiff seeks leave to file a First Amended Complaint ("FAC") pursuant Federal Rule of Civil Procedure 15(a) to address the issues discussed above and add two additional defendants--Superintendent Catherine Nichols-Washer and Director of Personnel Neil Young--as state officials sued in their official capacity. (See Pl's Mem. in Support of Mot. for Leave to File FAC at 1-2.)

A party may amend its complaint under Rule 15(a) "once as a matter of course at any time before a responsive pleading is served . . . or 21 days after service of a motion under Rule 12(b) . . ." Fed. R. Civ. P. 15(a). Thereafter, a party may

amend only "with the opposing party's written consent or the court's leave." Id. "[T]he court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2); see also Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989) ("We have stressed Rule 15's policy of favoring amendments, and we have applied this policy with liberality."). But "leave need not be granted where the amendment of the complaint would cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue delay." Ascon Properties, 866 F.2d at 1160.

Defendant opposes plaintiff's request on the basis of futility. (Def.'s Opp'n to Pl.'s Mot. for Leave to File FAC at 3-7.) "[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988).

As explained above, plaintiff's first, second, and fourth claims against defendant are barred as a matter of law, and the court can envision no set of facts that will allow plaintiff to allege that defendant violated those respective statutes. Accordingly, any proposed amendment to those claims as against defendant would be futile.

However, the court cannot conclude that no set of facts would entitle plaintiff to relief under her fifth claim, retaliation in violation of the Rehabilitation Act. (Compl. ¶ 42-45.) Defendant appears to argue that this claim would be barred by the Eleventh Amendment. (Def.'s Opp'n to Pl.'s Mot. for Leave to File FAC at 3-7.) However, "Congress may exercise

its spending power to condition the grant of federal funds upon the states' agreement to waive Eleventh Amendment immunity." Douglas v. Cal. Dep't of Youth Auth., 271 F.3d 812, 820, amended, 271 F.3d 910 (9th Cir. 2001) (citing Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999)). The Ninth Circuit has held that "the clear waiver language of the Rehabilitation Act conditions the receipt of federal funds under the Rehabilitation Act upon a state's agreement to forgo the Eleventh Amendment defense" and "by accepting federal Rehabilitation Act funds, California has waived its sovereign immunity under the Rehabilitation Act." Id. at 820. Thus, the Eleventh Amendment does not necessarily bar plaintiff from amending her fifth claim to correct its current deficiencies and state a cognizable claim for relief.

Similarly, the court cannot conclude that no set of facts would allow plaintiff to state a valid claim against the additional defendants she proposes. Plaintiff may sue state officials for prospective injunctive relief under Ex parte Young, 209 U.S. 123 (1908). See Garrett, 531 U.S. at 374 n.9 ("Those standards [of Title I of the ADA] can be enforced by . . . private individuals in actions for injunctive relief under Ex parte Young."). She should have a chance to bring those claims.

The court cautions, however, that to the extent that plaintiff may seek to sue state officials in their official capacity for relief properly characterized as retrospective, her claims may be barred again by the Eleventh Amendment. See Papasan v. Allain, 478 U.S. 265, 276 (1986) ("Relief that in essence serves to compensate a party injured in the past by an

action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant."); see also Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645 (2002) ("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." (quotation marks and citation omitted)); Edelman v. Jordan, 415 U.S. 651, 666 (1974) ("We do not read Ex parte Young or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer . . . so long as the relief may be labeled 'equitable' in nature.").

IT IS THEREFORE ORDERED that defendant Lodi Unified School District's motion to dismiss be, and the same hereby is, GRANTED;

Plaintiff has twenty days from the date this Order is signed to file an amended complaint, if she can do so consistent with this Order.

Dated: November 4, 2014

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE