

1 **I. BACKGROUND**

2 In his Complaint, Plaintiff RODNEY E. AKINS alleges that on May 25, 2010, he
3 attempted to effect service of process for nine defendants in a case in San Diego Superior
4 Court via the mail center at the Mesa College Campus, but was deterred from doing so by
5 Defendant PENNY HEDGEOTH, a District employee. According to the Complaint,
6 Defendant HEDGEOTH called the campus police, and Defendant MATTHEW TORRES,
7 a campus police officer, subsequently stopped Plaintiff and, along with another officer,
8 Defendant JOHN DOE 3, detained Plaintiff using force, resulting in an alleged injury to his
9 rotator cuff.

10 **II. DISCUSSION**

11 Defendants move to dismiss the Complaint on the grounds that: 1) service of process
12 was defective as to all Defendants; 2) the District and District Parties are immune from suit
13 under the Eleventh Amendment as to Counts 1-3 and 5-14, as well as Count 4 to the extent
14 it is based on 42 U.S.C. § 1983; and 3) Plaintiff has failed to state a claim upon which relief
15 can be granted, both as to the Complaint in its entirety and to the fourth cause of action for
16 racial discrimination under Title VI.

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18 **A. Service of Process**

19 Defendants move to dismiss the Complaint in part for insufficient service of process.
20 See Fed.R.Civ.P. 12(b)(5). “Once service is challenged, plaintiffs bear the burden of
21 establishing that service was valid under Rule 4.” Brockmeyer v. May, 383 F.3d 798, 801
22 (9th Cir. 2004). While “Rule 4 is a flexible rule that should be liberally construed so long as
23 a party receives sufficient notice of the complaint,” United Food & Commercial Workers
24 Union v. Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984), there must still be “substantial
25 compliance” with Rule 4; otherwise, “neither actual notice nor simply naming the defendant
26 in the complaint will provide personal jurisdiction.” Direct Mail Specialists, Inc. v. Eclat
27 Computerized Technologies, Inc., 840 F.2d 685, 688 (9th Cir. 1988) (quoting Benny v. Pipes,
28 799 F.2d 489, 492 (9th Cir.1986), cert. denied, --- U.S. ----, 108 S.Ct. 198, 98 L.Ed.2d 149

1 (1987)).

2 Under Rule 4, an individual defendant may be served by:

3 (1) following state law for serving a summons in an action brought in courts
4 of general jurisdiction in the state where the district court is located or where
service is made; or

5 (2) doing any of the following:

6 (A) delivering a copy of the summons and of the complaint to the
individual personally;

7 (B) leaving a copy of each at the individual's dwelling or usual place
of abode with someone of suitable age and discretion who resides there; or

8 (C) delivering a copy of each to an agent authorized by appointment
or by law to receive service of process.

9 Fed.R.Civ.P. 4(b). With regard to serving the District, Rule 4 states that:

10 A state, a municipal corporation, or any other state-created governmental
organization that is subject to suit must be served by:

11 (A) delivering a copy of the summons and of the complaint to its chief
executive officer; or

12 (B) serving a copy of each in the manner prescribed by that state's law
for serving a summons or like process on such a defendant.

13 Id. at 4(j)(2). Under California law, service of process may be effected by: personal
14 delivery, Code Civ. Proc. § 415.10; leaving a copy at the person's home or office and
15 thereafter mailing a copy, id. at § 415.20; mailing a copy along with two copies of the notice
16 and acknowledgment of summons and a return envelope to sender, id. at § 415.30; or
17 publication, id. at § 415.50.

18 It is undisputed that in this case, Plaintiff served Defendants by sending them the FAC
19 and a copy of the summons via certified mail, which is not authorized under federal or state
20 law. Therefore, the Court finds that Plaintiff's service of process was insufficient.

21 However, as a pro se plaintiff proceeding in forma pauperis, Plaintiff is entitled to have
22 the U.S. Marshals serve his papers. Therefore, the Court quashes service and grants
23 Plaintiff's ex parte application for appointment of a process server as detailed below. Plaintiff
24 shall have ninety (90) days from the date of this order in which to serve defendants.

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1 **B. Sovereign Immunity**

2 1. The District

3 Under the Eleventh Amendment, “[t]he Judicial power of the United States shall not
4 be construed to extend to any suit in law or equity, commenced or prosecuted against one
5 of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign
6 State.” The Eleventh Amendment “confirms” the “presupposition” of state sovereign
7 immunity, such that no state may be sued by an individual without its consent, unless
8 Congress has unequivocally and constitutionally abrogated that immunity in a statute. See
9 Kimel v. Florida Bd. of Regents, 528 U.S. 62, 72-73, 120 S. Ct. 631, 640, 145 L. Ed. 2d 522
10 (2000). The Ninth Circuit has held that community college districts are state entities
11 protected by sovereign immunity under the Eleventh Amendment. See Mitchell v. Los
12 Angeles Cmty. Coll. Dist., 861 F.2d 198, 201-02 (9th Cir. 1988); Cerrato v. San Francisco
13 Cmty. Coll. Dist., 26 F.3d 968, 972 (9th Cir. 1994).

14 Plaintiff has alleged the following causes of action: (1) intentional infliction of
15 emotional distress; (2) denial of public accommodation in violation of 42 U.S.C. § 1983; (3)
16 age discrimination in violation of California Government Code 11135(a); (4) racial
17 discrimination in violation of Title VI of the 1964 Civil Rights Act as implemented by 42
18 U.S.C. § 1983; (5) abuse of process; (6) deprivation of due process and equal protection in
19 violation of Article 1 § 7 of the California Constitution; (7) conspiracy to interfere with
20 Plaintiff’s civil rights in violation of California Government Code 11135(a); (8) unlawful
21 retaliation in violation of 42 U.S.C. § 1983; (9) unlawful detainment in violation of Article 1
22 § 13 of the California Constitution; (10) negligence; (11) interference with Plaintiff’s exercise
23 and enjoyment of his constitution rights in violation of California Civil Code § 52.1(b); (12)
24 retaliation in violation of California Government Code 11135(a); (13) personal injury; and (14)
25 denial of public accommodation in violation of California Government Code 11135(a).

26 It is well-established that Congress has not abrogated sovereign immunity for section
27 1983 claims. See Braunstein v. Arizona Dept. of Transp., 683 F.3d 1177, 1188 (9th Cir.
28 2012). The Eleventh Amendment also bars Plaintiff’s state law claims, since allowing a

1 federal court to adjudicate state law claims as against the state itself “conflicts directly with
2 the principles of federalism that underlie the Eleventh Amendment.” Pennhurst State Sch.
3 & Hosp. v. Halderman, 465 U.S. 89, 106, 104 S. Ct. 900, 911, 79 L. Ed. 2d 67 (1984); see
4 also Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 973 (9th Cir. 2004). However, Congress
5 *has* abrogated sovereign immunity as to Title VI claims for damages. See 42 U.S.C. §
6 2000d-7(a). Thus, Plaintiff’s fourth cause of action for racial discrimination in violation of
7 Title VI may be allowed against the District, but all of his other claims against the District
8 must be dismissed as barred by sovereign immunity. The Court therefore **DENIES**
9 Defendants’ motion to dismiss the fourth cause of action, but **GRANTS** the motion as to the
10 District for the remainder of the claims.

11 12 2. Individual Defendants

13 As to the individual defendants, the Eleventh Amendment extends sovereign immunity
14 to state officials sued in their official capacity. See Romano v. Bible, 169 F.3d 1182, 1185
15 (9th Cir. 1999). Even where state officials are sued in their personal capacities, the Eleventh
16 Amendment bars such suits “when ‘the state is the real, substantial party in interest.’”
17 Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101, 104 S. Ct. 900, 908-09, 79
18 L. Ed. 2d 67 (1984) (quoting Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464,
19 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945)). However, the Supreme Court has recognized a
20 significant exception to the immunity of state officials, namely that “a suit challenging the
21 constitutionality of a state official’s action is not one against the State,” id. at 102, since “an
22 official who acts unconstitutionally is ‘stripped of his official or representative character.’” Id.
23 at 104 (citing Ex parte Young, 209 U.S. 123 (1908)). Here, Plaintiff sues the individual
24 defendants in their official and individual capacities. The defendants are entitled to
25 sovereign immunity in their official capacity just as is the District. Thus, the claims against
26 the individual defendants in their official capacity, except the Title VI claim, are dismissed.

27 28 **C. Failure to State a Claim Upon Which Relief Can Be Granted**

1 Finally, Defendants have moved to dismiss Plaintiff's Complaint on the grounds that
2 it fails to state a claim for which relief can be granted. Fed. R. Civ. Pro. 12(b)(6). However,
3 because the Court grants Plaintiff's motion for leave to file a second amended complaint
4 (see below), it **DENIES** without prejudice the motion to dismiss under 12(b)(6) as moot.

5 6 **D. Plaintiff's Application to Appoint Process Server**

7 Plaintiff has also made an *ex parte* application for appointment of a process server
8 pursuant to 28 U.S.C. § 1915 (ECF No. 11). Under Rule 4, a court must order that service
9 be made by a United States marshal or deputy marshal or by a person specially appointed
10 by the court if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. §1915.
11 See Fed.R.Civ.P. 4(c)(3). Because the Court granted Plaintiff's motion to proceed in forma
12 pauperis (ECF No. 3), the Court now **GRANTS** Plaintiff's *ex parte* application as required by
13 Rule 4 and hereby **ORDERS** that the United States Marshal shall serve a summons and a
14 copy of the Complaint upon Defendants as directed by Plaintiff on U.S. Marshal Form 285,
15 with all costs of service to be advanced by the United States.

16 17 **E. Plaintiff's Motion to File Second Amended Complaint**

18 Leave to amend a complaint should be freely given when justice so requires. Fed.
19 R. Civ. P. 15(a)(2). "Liberality in granting a plaintiff leave to amend is subject to the
20 qualification that the amendment not cause undue prejudice to the defendant, is not sought
21 in bad faith, and is not futile." Bowles v. Reade, 198 F.3d 752, 758 (9th Cir. 1999). Because
22 this suit is still in its early stages, there is no prejudice to Defendants, and there is nothing
23 to suggest bad faith by Plaintiff. While Defendants claim amendment would be futile
24 because Plaintiff's proposed second amended complaint is "substantially similar" to the
25 present complaint, that alone is insufficient to override the "extreme liberality" with which
26 Rule 15's policy of favoring amendments should be applied. See DCD Programs, Ltd. v.
27 Leighton, 833 F.2d 183, 186 (9th Cir. 1987). Therefore, the Court **GRANTS** Plaintiff's motion
28 to file a second amended complaint.


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II. CONCLUSION

For the reasons above, the Court **GRANTS in part and DENIES in part** Defendants' motion to dismiss, **GRANTS** Plaintiff's *ex parte* application to appoint a process server, and **GRANTS** Plaintiff's motion for leave to file a second amended complaint. Plaintiff's second amended complaint must be filed within 21 days of the date of this order. The claims in the present complaint against the District and the individual defendants in their official capacity except the Title VI claim, are dismissed with prejudice and shall not be re-alleged in the Second Amended Complaint. The Court further **ORDERS** that the United States Marshal shall serve a summons and a copy of the Second Amended Complaint upon Defendants as directed by Plaintiff on U.S. Marshal Form 285, with all costs of service to be advanced by the United States. Plaintiff shall have ninety (90) days from the filing of the Second Amended Complaint in which to serve defendants.

IT IS SO ORDERED.

DATED: January 2, 2013


BARRY TED MOSKOWITZ, Chief Judge
United States District Court