

1 KAREN K. PEABODY (SBN 187702)
2 JONATHAN D. MILLER (SBN 220848)
3 NYE, PEABODY, STIRLING, HALE & MILLER, LLP
4 33 West Mission St., Ste. 201
5 Santa Barbara, CA 93101
6 (805) 963-2345 / (805) 563-5385 (fax)
7 jonathan@nps-law.com
8 karen@nps-law.com
9 Attorneys for DEFENDANTS

10
11
12 **UNITED STATES DISTRICT COURT**
13
14 **CENTRAL DISTRICT OF CALIFORNIA**
15

16 ALEXANDER STERN, an individual,
17 Plaintiff,

18 v.

19 THE REGENTS OF THE
20 UNIVERSITY OF CALIFORNIA et
21 al.,
22 Defendants.

Case No. CV11-08418PSG(MRWX)

**DEFENDANTS' REPLY TO
PLAINTIFFS' OPPOSITION TO
DEFENDANT'S NOTICE OF
MOTION AND MOTION TO
DISMISS PURSUANT TO
RULES 12(b)(1) AND 12(b)(6)
AND MOTION TO STRIKE
PURSUANT TO RULE 12(f);
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION**

Date: December 19, 2011
Time: 1:30 p.m.
Ctrm: 880
The Hon. Philip S. Gutierrez

23
24 **I. INTRODUCTION**

25 Much of Plaintiff's opposition to Defendant's moving papers is spent re-
26 alleging facts from the complaint. Plaintiff does little to respond to the
27 weight of substantive authority provided by Defendants and the few

1 arguments plaintiff does try to make are not supported by appropriate legal
2 authority. As such, Defendant’s motion must be granted.

3
4 **II. PLAINTIFF’S FAILURE TO RESPOND TO DEFENDANTS’**
5 **MEET AND CONFER LETTER WAIVED ANY**
6 **OBJECTION TO WHETHER A PROPER MEET AND**
7 **CONFER EFFORT TOOK PLACE**

8 Plaintiff cannot avoid a motion to dismiss by failing to respond to a meet
9 and confer letter. This lawsuit was filed on filed on October 12, 2011. (See
10 Miller Decl. ¶ 1.) Though no proofs of service were filed by Plaintiff before
11 this motion was filed, it appeared at least one of the individual Defendants
12 may have been served as early as October 13, 2011. (*Id.*)¹

13 On October 28, 2011, Defendants wrote to Plaintiff regarding service.
14 Defendants offered to accept service for any remaining defendants and
15 asked for a thirty (30) extension to file a response so the parties could
16 evaluate the issues. (Miller Decl. ¶ 2.) On October 31, 2011, Plaintiff
17 responded indicating he would not provide the extension. (Miller Decl. ¶
18 3.) On November 1, 2011, Defendants responded with their grounds for this
19 motion and requested a further meet and confer effort. (Miller Decl. ¶ 4.)
20 Defendants again asked for an extension of time to do so. Plaintiff never
21 responded. (*Id.*) Plaintiff cannot avoid a motion to dismiss simply by
22 refusing to engage in the meet and confer process. Plaintiff’s refusal to
23 meet and confer in good faith narrowed Defendants’ options on how to

24
25 ¹ The method of service was apparently accomplished by Plaintiff’s counsel
26 walking into a crowded lecture room full of students during the middle of a
27 class, throwing the complaint on the Professor’s desk, and stating loudly
28 “you have been served.”

1 proceed and necessitated the instant motion. Plaintiff, through his conduct,
2 has waived any right to contend to the contrary.

3 **III. PLAINTIFF’S FIRST, SECOND, THIRD AND FIFTH**
4 **CAUSES OF ACTION ARE BARRED BY THE ELEVENTH**
5 **AMENDMENT**

6 The Eleventh Amendment Immunity applies to the employees of The
7 Regents in federal court actions. *Regents of California v. Doe*, 519, U.S. at
8 429, 117 S.Ct. 900; *Vaughn v. Regents of University of California*, 504
9 F.Supp. at 1354. Eleventh Amendment Immunity bars Plaintiff’s First
10 Cause of Action for violation of Plaintiff’s rights under the Equal Protection
11 Clause of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983 against
12 each of the individual Defendants. Although, under the *Ex Parte Young*
13 exception, a plaintiff may sue state officials in federal court for prospective
14 injunctive relief based upon a cognizable violation of federal law, as
15 discussed in the moving papers, Plaintiff has failed to allege facts sufficient
16 to support a claim for injunctive relief against any of the individual
17 Defendants.

18 Plaintiff argues the Eleventh Amendment Immunity should not apply
19 under Title I of the ADA but fails to provide any authority to support this
20 argument. Under Title I of the ADA individual defendants are not subject to
21 personal liability. *Walsh v. Nevada Dept. of Human Resources*, 471 F.3d at
22 1037-1038. The only exception is a suit against state officials seeking
23 prospective injunctive and declaratory relief. *Garrett*, 531 U.S. at 360, 374,
24 121 S.Ct. 95, *Walsh*, 471 F.3d at 1036. Plaintiff argues it has “properly pled
25 a request for injunctive relief” but has failed to point to the court where this
26 has been sufficiently pled in the complaint. In fact, plaintiff’s second cause
27

1 of action consists of only three paragraphs of allegations none of which
2 allege facts sufficient to support a claim for injunctive or declaratory relief.

3 Plaintiff also argues the Eleventh Amendment immunity does not
4 apply to Title II of the ADA but fails to explain how the circumstances in
5 this case gets plaintiff around the immunity. The United States Supreme
6 Court in *United States v. Georgia*, 546 U.S. 151 126 S.Ct. 877, 163 L.Ed.2d
7 650 (2006) held that Title II of the ADA validly abrogates state sovereign
8 immunity insofar as it creates a private cause of action for damages against
9 the States for conduct that actually violates the Fourteenth Amendment. In
10 other words a plaintiff must plead conduct that violates the Fourteenth
11 Amendment in order for the Eleventh Amendment immunity not to apply.
12 As explained in the moving papers, Plaintiff cannot establish a violation of
13 the Fourteenth Amendment because the disabled are not a suspect class
14 under the Fourteenth Amendment. Plaintiff's moving papers do not even
15 address this argument or provide any authority to the contrary.

16 Plaintiff argues the Eleventh Amendment immunity is not applicable
17 to the third and fifth causes of action. The Eleventh Amendment immunity
18 is indeed applicable to these causes of action. To find otherwise goes
19 against the purpose of the Eleventh Amendment. The court in *Penhurst*
20 *State School & Hospital v. Halderman*, 465 U.S. 89, 121,104 S.Ct. 900, 79
21 L.Ed.2d 67 (1984 explained: Our reluctance to infer that a State's immunity
22 from suit in the federal courts has been negated stems from recognition of
23 the vital role of the doctrine of sovereign immunity in our federal system. A
24 State's constitutional interest in immunity encompasses not merely whether
25 it may be sued, but where it may be sued. As Justice MARSHALL well has
26 noted, "[b]ecause of the problems of federalism inherent in making one
27 sovereign appear against its will in the courts of the other, a restriction upon

1 the exercise of the federal judicial power has long been considered to be
2 appropriate in a case such as this.” *Employees v. Missouri Public Health &*
3 *Welfare Dep’t*, 411 U.S. 279, 294, 93 S.Ct. 1614, 1622-1623, 36 L.Ed.2d
4 251 (1973). Accordingly, in deciding this case we must be guided by “[t]he
5 principles of federalism that inform Eleventh Amendment doctrine.” *Hutto*
6 *v. Finney*, 437 U.S. 678, 691, 98 S.Ct. 2565, 2573-2574, 57 L.Ed.2d 522
7 (1978).

8 (Id. at 99).

9 Plaintiff has failed to provide any authority that rids Defendants of
10 the Eleventh Amendment immunity in cases where a Plaintiff pleads causes
11 of action for violations of FEHA and the Unruh Act.

12 For the reasons set forth above and the reasons set forth in the moving
13 papers, Plaintiff’s First, Second, Third, and Fifth Causes of Action are
14 barred by the Eleventh Amendment Immunity as a matter of law and
15 Defendants respectfully requests the Court dismiss these cause of action
16 under Rule 12(b)(1) and 12(b)(6).

17 **IV. PLAINTIFF’S FIRST CAUSE OF ACTION IS BARRED BY**
18 **QUALIFIED IMMUNITY**

19 Plaintiff’s sole argument against the application of qualified immunity is
20 “each of the Defendants has treated Plaintiff differently than the non-
21 disabled thereby violating settled interpretations of the Fourteenth
22 Amendment’s Equal Protection Clause.” (See Plaintiff’s Opposition, page
23 23, lines 13-16).

24 Defendants’ moving papers explain that where a plaintiff is not a
25 member of a suspect class, courts require only that there be a rational
26 relationship between the differential treatment of similarly situated
27

1 individuals and a legitimate government interest. *Board of Trustees of Univ.*
2 *of Alabama v. Garrett*, 531 U.S. 356, 366-368; 121 S.Ct. 955, 148 L.Ed.2d
3 866 (2001). The moving papers explained a rational basis existed for
4 Defendants' policy because students whose own disabilities require
5 academic accommodations may be less able, due to their disabilities, to
6 perform the essential functions of the positions – which is to provide
7 accommodations services to disabled students. Plaintiff's opposition does
8 not even address this analysis. His only argument is that he was treated
9 differently. This is not sufficient to plead this cause of action.

10 **V. PLAINTIFF'S SECOND AND FOURTH CAUSES OF**
11 **ACTION ARE BARRED BECAUSE INDIVIDUALS ARE**
12 **NOT SUBJECT TO PERSONAL LIABILITY UNDER THE**
13 **ADA OR REHABILITATION ACT**

14 Plaintiff argues Defendants have not provided any authority that
15 precludes claims under Section 504 of the Rehabilitation Act against
16 individuals. This is not accurate. Defendants cited to *Hiller v. Brown*, 177
17 F. 3d 542, 546 (page 19 of the motion). The Court in *Hiller* held
18 individuals cannot be held personally liable under the Rehabilitation Act.
19 The court explained, "Indeed, numerous courts, including this one, have
20 held that supervisors, sued in their individual capacities, are not included
21 within the statutory definition of "employer" under Title VII and its sister
22 civil rights statutes, and accordingly cannot be held personally liable for
23 discrimination." *Id.* at 546.

24 As to the ADA, Plaintiff concedes allegations under Title I of the
25 ADA cannot be brought against individuals but argues individuals can be
26 sued under Title II. Plaintiff does not cite to any authority for this
27 argument. Both the ADA and the Rehabilitation Act cover employment

1 related claims and claims of discrimination in the provision of programs and
2 services. Because there is no significant difference in the analysis of the
3 rights and obligations created by the ADA and the Rehabilitation Act,
4 courts apply the same analysis to claims brought under both statutes. *Zukle*
5 *v. Regents of the University of California*, 166 F.3d 1041, 1045 n. 11 (9th
6 Cir.1999); *Vinson v. Thomas*, 288 F.3d 1145, 1152 (9th Cir. 2002).

7

8 **VI. PLAINTIFF DID NOT OPPOSE DEFENDANT’S MOTION**
9 **AS TO PUNITIVE DAMAGES**

10 Plaintiff did not oppose Defendant’s motion as to his claim for punitive
11 damages. For this reason and for the reasons set forth in detail in
12 Defendant’s motion Plaintiff’s prayer requesting punitive damages should
13 be stricken.

14

15 **VII. CONCLUSION**

16 Based on the foregoing and the arguments set forth in the moving papers,
17 Defendants respectfully request that this Court grant their motion to dismiss
18 and motion to strike.

19

20 DATED: December 5, 2011 NYE, PEABODY, STIRLING, HALE & MILLER, LLP

21

22 By: 
Jonathan D. Miller
23 Attorneys for Defendants

24

25

26

27

28

PROOF OF SERVICE

RE: STERN VS REGENTS OF THE UNIVERSITY OF CA, ET AL CASE # CV11-08418PSG (MRWX)

I am employed in the County of Santa Barbara, State of California. I am over the age of eighteen years and not a party to this action. My business address is 33 West Mission, Suite 201, Santa Barbara, California 93101.

On the date stated below, I served the following documents:

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO RULES 12(b)(1) AND 12(b)(6) AND MOTION TO STRIKE PURSUANT TO RULE 12(f); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

on the interested parties in this action, by placing true copies thereof enclosed in sealed envelopes addressed as follows:

Andrew R Stern, Esq 31659 Sea Level Dr. Malibu, Ca 90265	Attorney for Plaintiff, ALEXANDER STERN
--	---

[By Express Service Carrier] I provided such envelope(s) to a driver employed by California Overnight, an express service carrier, on December 5, 2011, with delivery fees paid or provided for, for next business morning deliveries.

[By Mail] I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at Santa Barbara, California on December 5, 2011.

[By Personal Service] I caused such envelope(s) to be delivered by hand to the office(s) of the addressee(s) on December 5, 2011.

[By Fax Service] I caused such document(s) to be sent via facsimile transmission on December 5, 2011.

[By Electronic Service] I caused such document(s) to be sent electronically on December 5, 2011 in accordance with the Court's electronic filing ("ECF") rules, pursuant to which registered ECF users receive service copies by e-mail delivery. A courtesy copy will follow as stated above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: December 5, 2011



Brenda Rosales