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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARLEEN AVILA,

Plaintiff,

v.

CITY OF VISALIA, et al.,

Defendants.

1:09-cv-00847 OWW SMS

MEMORANDUM DECISION AND
ORDER GRANTING UNOPPOSED
MOTION TO DISMISS (DOC. 25),
STRIKING FIRST AMENDED
COMPLAINT (DOC. 27) AND
GRANTING PLAINTIFF LEAVE TO
RE-FILE FIRST AMENDED
COMPLAINT

On or about May 11, 2007, Plaintiff was arrested for driving under the influence of an alcohol or drug. Plaintiff's May 11, 2009 Complaint against the City of Visalia and three of its police officers alleges that Defendants "erroneously determined" that she had been driving her automobile under the influence" and "failed to consider information then and there provided to them that plaintiff was not under the influence of alcohol or a drug, but was rather suffering from the debilitating effect of her disability." Doc. 1 at ¶8. Elsewhere in the complaint, Plaintiff explains that she suffers from Parkinson's Disease. *Id.* at ¶12. During the course of Defendants' efforts to arrest

1 Plaintiff, Plaintiff alleges that she was "physically and
2 verbally assault[ed] repeatedly," *id.* at ¶9, and was physically
3 restrained and "removed" to a hospital against her will and over
4 her objection, *id.* at ¶10.

5 Plaintiff's initial complaint alleges: (1) a cause of action
6 under 42 U.S.C. § 1983 ("Section 1983") based upon a violation of
7 her Fourth Amendment rights; (2) discrimination under the
8 Americans with Disabilities Act ("ADA"); (3) retaliation; (4)
9 false arrest and imprisonment; and (5) and intentional infliction
10 of emotional distress. Doc. 1.

11
12 On June 14, 2010, Defendants moved to dismiss the Section
13 1983 and state causes of action. As to the Section 1983 claim,
14 Defendants argue that the Complaint "fails to allege any facts
15 that would lead one to conclude any Defendant did anything
16 wrong." Doc. 25-1 at 3. In addition, Defendants argued that
17 because the Complaint "is silent as to any policy or
18 custom...that would [support] Plaintiff's claim that she has been
19 harmed by the City[,] Plaintiff [] failed to plead *Monell*
20 liability against the City...." *Id.* at 4-5. Defendants also
21 argue that the Complaint fails to adequately plead causes of
22 action for false imprisonment and intentional infliction of
23 emotional distress. *Id.* at 5-6

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26 On July 20, 2010, Plaintiff filed a statement of non-
27 opposition along with a proposed first amended complaint. Docs.
28

1 27 & 28. Federal Rule of Civil Procedure 15 was recently amended
2 to provide:

3 A party may amend its pleading once as a matter of
4 course within:

5 (A) 21 days after serving it; or

6 (B) if the pleading is one to which a responsive
7 pleading is required, 21 days after service of a
8 responsive pleading or 21 days after service of a
9 motion under Rule 12(b), (e), or (f), whichever is
10 earlier.

11 "In all other cases, a party may amend its pleading only with the
12 opposing party's written consent or the court's leave. The court
13 should freely give leave when justice so requires." Fed. R. Civ.
14 Pro. 15(a)(2).

15 By order of the Supreme Court dated March 26, 2009, the
16 amendments took effect December 1, 2009 and should "govern in all
17 proceedings thereafter commenced and, insofar as just and
18 practicable, all proceedings then pending." Order, 2009 U.S.
19 Order 17 (Mar. 26, 2009) (emphasis added). This proceeding, which
20 was filed on May 11, 2009, was pending as of December 1, 2009.
21 There is no apparent basis for a finding that application of the
22 new Rule 15 to a motion filed after December 1, 2009 would be
23 unjust or impracticable. Accordingly, Plaintiff was required to
24 file her amended complaint within 21 days after service of
25 Defendants' June 14, 2010 motion to dismiss. Plaintiff did not
26 lodge her proposed amended complaint until July 20, 2010, more
27 than 30 days after Defendants' motion.
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Plaintiff has neither filed a stipulation indicating the opposing party's consent to amendment nor has she filed a motion for leave to amend. It is therefore improper to allow the first amended complaint to automatically moot Defendants' motion to dismiss. The First Amended Complaint, Doc. 27, is STRICKEN. However, given Plaintiffs' non-opposition to Defendants' motion to dismiss, that motion is GRANTED WITH LEAVE TO AMEND. Plaintiff may re-file her proposed first amended complaint.

SO ORDERED
Dated: August 5, 2010

/s/ Oliver W. Wanger
Oliver W. Wanger
United States District Court