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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

STEVEN FREDERICK BECK, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 CITY OF PORTLAND, OREGON, and )  
 KELLI SHEFFER, individually )  
 and in her official capacity, )  
 )  
 Defendants. )

No. CV-10-434-HU

OPINION & ORDER

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/ / /  
/ / /

1 - OPINION & ORDER

1 Jeff S. Pitzer  
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3 101 S.W. Main Street, Suite 805  
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5 Attorney for Defendant Kelli Sheffer

6 HUBEL, Magistrate Judge:

7 Plaintiff Steven Beck brings this 42 U.S.C. § 1983 action  
8 against the City of Portland and Kelli Sheffer, a City of Portland  
9 police officer. Sheffer moves to dismiss the claims against her.  
10 All parties have consented to entry of final judgment by a  
11 Magistrate Judge in accordance with Federal Rule of Civil Procedure  
12 73 and 28 U.S.C. § 636(c)). I grant the motion.

#### 13 BACKGROUND

14 Plaintiff and Sheffer reside in the same neighborhood in  
15 Hillsboro. In June 2007, plaintiff "made contact with Lieutenant  
16 Kelli Sheffer" while she was off duty, with the intent of "bringing  
17 legitimate concerns" to her attention. First Am. Compl. at ¶ 10.

18 Apparently, at some other later date, plaintiff was driving on  
19 SE Reedville Creek Drive, in Hillsboro, when he noted Sheffer, out  
20 of uniform, walking on the sidewalk. Id. at ¶ 11. Sheffer stepped  
21 off the curb, stopped plaintiff's vehicle from proceeding by  
22 walking in front of it, and directed plaintiff to pull his vehicle  
23 over. Id. Plaintiff stopped his vehicle because he knew that  
24 Sheffer was a Portland police officer. Id.

25 During "this exchange," plaintiff heard Sheffer state that she  
26 had previously "run" Beck's license plate. Id. at ¶ 12. Sheffer  
27 then directed plaintiff not to drive his vehicle through the public  
28 street, meaning SE Reedville Creek Drive, near her residence. Id.  
She also accused plaintiff of following two Hispanic young men and

1 harassing them in an incident that took place in the latter part of  
2 2007. Id. at ¶ 13.

3 In July 2008, plaintiff called the City and ultimately spoke  
4 with the Independent Police Review (IPR) division on July 8, 2008.  
5 Id. at ¶ 14. After receiving a letter from IPR Director Mary-Beth  
6 Baptista, plaintiff requested formal mediation of his dispute with  
7 Sheffer, including Sheffer's investigating Beck's license plate,  
8 her stop of his vehicle, and her direction for plaintiff to stay  
9 out of the neighborhood. Id. at ¶ 15.

10 On August 27, 2008, plaintiff received a letter from Dan  
11 Malin, the auditor of the law enforcement data system (LEDS) which  
12 confirmed that, for unknown reasons, Sheffer ran plaintiff's  
13 license number. Id. at ¶ 16. The letter requested that the  
14 Portland Police Bureau provide LEDS with the reason why Sheffer had  
15 requested the information. Id.

16 Plaintiff further alleges that when Sheffer ran his license  
17 plate information, it was not part of any assigned duty. Id. at ¶  
18 18. Additionally, according to plaintiff, the Portland Police  
19 Bureau's own policy and procedure materials, specifically Section  
20 310.70, make clear that LEDS is not for public disclosure and  
21 should not be accessed for personal reasons. Id. at ¶ 17.  
22 Plaintiff alleges that Sheffer illegally ran his personal  
23 information for her own personal reasons, in violation of Oregon  
24 Administrative Rules 257-015-0060(1) and 257-010-0025(3). Id. at  
25 ¶ 19.

26 On July 31, 2008, plaintiff's neighbor called him to say that  
27 a Hillsboro police officer was in plaintiff's driveway. Id. at ¶  
28 20. The police officer asked the neighbor to confirm that the

1 residence belonged to plaintiff, which the neighbor did. Id.  
2 Plaintiff arrived home to discover a business card on his back  
3 door, with a request that he call Officer Scott Hanley. Id.

4 Plaintiff learned from speaking with Hanley on the phone that  
5 Sheffer, after learning that plaintiff had filed a complaint and  
6 requested mediation regarding plaintiff's disputes with Sheffer,  
7 reported that plaintiff was involved in a possible stalking  
8 situation. Id. at ¶ 21. Sheffer had also reported other alleged  
9 facts regarding plaintiff: purported acts of inappropriate conduct  
10 by plaintiff, including that a female minor named "Carissa" had  
11 expressed that plaintiff made her feel uncomfortable and was  
12 stalking her, and a report of another incident where plaintiff  
13 allegedly inappropriately approached a minor. Id. Sheffer also  
14 had reported to the Hillsboro police that "the situation" with  
15 plaintiff had been brought up "several times" in neighborhood  
16 association meetings. Id.

17 Since learning of the foregoing, plaintiff has been extremely  
18 emotionally distraught and no longer feels welcome in his own  
19 neighborhood. Id. at ¶ 22. He fears that Sheffer's actions have  
20 caused him irreparable harm by encouraging his neighbors and their  
21 children to shun him as a potential predator in the community. Id.  
22 at ¶ 23. He "has had several experiences that lead him to believe  
23 that his image in the community has been tarnished since Sheffer  
24 began her campaign . . . suggesting that he is a potential  
25 predator." Id.

26 Plaintiff has sought the assistance of his physician due to  
27 the emotional and psychological harm he suffered because of  
28 Sheffer's actions. Id. at ¶ 24. He has been diagnosed with a

1 shingles-related disorder stemming from the stress. Id. He has  
2 developed asthmatic-type symptoms and conditions for which he is  
3 being treated. Id.

#### 4 STANDARDS

5 On a motion to dismiss, the court must review the sufficiency  
6 of the complaint. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).  
7 All allegations of material fact are taken as true and construed in  
8 the light most favorable to the nonmoving party. American Family  
9 Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114, 1120  
10 (9th Cir. 2002). However, the court need not accept conclusory  
11 allegations as truthful. Holden v Hagopian, 978 F.2d 1115, 1121  
12 (9th Cir. 1992).

13 A motion to dismiss under Rule 12(b)(6) will be granted if  
14 plaintiff alleges the "grounds" of his "entitlement to relief" with  
15 nothing "more than labels and conclusions, and a formulaic  
16 recitation of the elements of a cause of action[.]" Bell Atlantic  
17 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation  
18 omitted). "Factual allegations must be enough to raise a right to  
19 relief above the speculative level, . . . on the assumption that  
20 all the allegations in the complaint are true (even if doubtful in  
21 fact)[.]" Id. (citations and footnote omitted).

22 To survive a motion to dismiss, the complaint "must contain  
23 sufficient factual matter, accepted as true, to state a claim to  
24 relief that is plausible on its face[.]" meaning "when the  
25 plaintiff pleads factual content that allows the court to draw the  
26 reasonable inference that the defendant is liable for the  
27 misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949  
28 (2009) (internal quotation omitted). Additionally, "only a

1 complaint that states a plausible claim for relief survives a  
2 motion to dismiss." Id. at 1950. The complaint must contain  
3 "well-pleaded facts" which "permit the court to infer more than the  
4 mere possibility of misconduct." Id.

5 DISCUSSION

6 Based on the facts recited above, plaintiff brings three  
7 claims: (1) a section 1983 claim against Sheffer; (2) a section  
8 1983 claim against the City; and (3) an intentional infliction of  
9 emotional distress (IIED) claim. Sheffer moves to dismiss both of  
10 the claims against her.

11 I. Section 1983 Claim

12 Plaintiff captions this claim against Sheffer as a violation  
13 of his constitutional right to liberty. He alleges:

14 Defendant Kelli Sheffer's actions, as described herein,  
15 in unlawfully detaining Plaintiff for the duration of the  
16 unsanctioned traffic stop, and by further engaging in a  
17 pattern of harassment against Plaintiff while acting  
18 under color of city authority as a police officer,  
19 deprived Plaintiff of his liberty interest and privileges  
20 or immunities protected under the Constitution in  
21 violation of 42 U.S.C. § 1983.

22 First Am. Compl. at ¶ 27.

23 In support of the motion to dismiss this claim, Sheffer argues  
24 that the claim has no merit because Sheffer did not act under color  
25 of state law and none of the allegations support a claim of  
26 deprivation of a federal or constitutional statutory right.  
27 Alternatively, Sheffer argues that she is entitled to qualified  
28 immunity.

29 In response, plaintiff affirmatively states that he does not  
30 base his section 1983 claim on the independent acts of Sheffer's  
31 license plate LEDES search or on her report(s) to the Hillsboro  
32

1 police. Pltf's Resp. at pp. 7-8. Thus, the actions relevant to  
2 the section 1983 claim are those that occurred when Sheffer stopped  
3 plaintiff's car.

4 In opposing the motion, plaintiff argues that Sheffer  
5 unconstitutionally seized him in violation of the Fourth Amendment.  
6 To prevail, plaintiff must show that he was deprived of a federal  
7 constitutional or statutory right, by a person acting under color  
8 of state law. E.g., Mangum v. Action Collection Serv., Inc., 575  
9 F.3d 935, 941 (9th Cir. 2009) (to state 42 U.S.C. § 1983 claim,  
10 plaintiff was required to show that (1) action complained of  
11 occurred under color of law, and (2) action resulted in a  
12 deprivation of constitutional right or federal statutory right).

13 A. Color of State Law

14 "[A] defendant in a § 1983 suit acts under color of state law  
15 when he abuses the position given to him by the State. . . . Thus,  
16 generally, a public employee acts under color of state law while  
17 acting in his official capacity or while exercising his  
18 responsibilities pursuant to state law." West v. Atkins, 487 U.S.  
19 42, 50 (1988) (citation omitted).

20 It is clear in the instant case that Sheffer was not acting in  
21 her official capacity as a Portland police officer or while  
22 actually exercising her responsibilities pursuant to state law.  
23 However, a police officer may nonetheless act under color of law  
24 when he or she "purport[s] or pretend[s] to act in the performance  
25 of his . . . official duties." McDade v. West, 223 F.3d 1135, 1140  
26 (9th Cir. 2000).

27 Several Ninth Circuit cases have considered the question of  
28 whether an off-duty police officer has "purported" or "pretended"

1 to act in the performance of his or her official duties such that  
2 the officer's actions are considered to have been under color of  
3 state law. In Huffman v. County of Los Angeles, 147 F.3d 1054,  
4 1058 (9th Cir. 1998), an off-duty sheriff's deputy shot and killed  
5 plaintiffs' decedent during a barroom brawl. The deputy was not in  
6 uniform and was carrying his personal, off-duty revolver. 147 F.3d  
7 at 1058. However, his revolver was loaded with department-issued  
8 ammunition and the deputy carried his official identification. Id.  
9 When he met the plaintiffs' decedent, whom he did not previously  
10 know, in the bar, the deputy did not identify himself as a  
11 sheriff's deputy, but instead said he owned an air conditioning  
12 company. Id.

13 At some point, a conversation between the deputy and the  
14 plaintiffs' decedent became heated and aggressive, and the deputy  
15 left the bar. The plaintiffs' decedent tackled the deputy to the  
16 ground. The deputy never identified himself as a police officer  
17 and did not issue any commands. He did, however, fire his gun into  
18 plaintiffs' decedent's chest, killing him.

19 On appeal from a jury verdict in favor of the plaintiffs (the  
20 victim's parents), the Ninth Circuit explained that "under color of  
21 law" means "under pretense of law." Id. at 1058. The court said:

22 A police officer's actions are under pretense of law only  
23 if they are in some way related to the performance of his  
24 official duties. . . . By contrast, an officer who is  
25 pursuing his own goals and is not in any way subject to  
26 control by his public employer . . . does not act under  
27 color of law unless he purports or pretends to do so, .  
28 . . . Officers who engage in confrontations for personal  
reasons unrelated to law enforcement, and do not purport  
or pretend to be officers, do not act under color of law.

27 Id. (internal quotations, brackets, and citations omitted; emphasis  
28 added).

1           In Huffman, the Ninth Circuit noted that the deputy was not on  
2 duty and was not wearing his uniform. Although the weapon he  
3 carried was loaded with ammunition supplied by the sheriff's  
4 department, the weapon was his own. Id. He never identified  
5 himself as a police officer and never issued any commands to the  
6 plaintiffs' decedent. As a result, the court concluded that he had  
7 not acted under color of state law. The deputy clearly did not act  
8 pursuant to his official duties and the facts did not support that  
9 he did purported or pretended to act as a police officer. Id.

10           In Van Ort v. Stanewich, 92 F.3d 831 (9th Cir. 1996), a  
11 sheriff's deputy, Stanewich, returned to the Van Orts' residence to  
12 rob it after having earlier performed, while on duty, a search for  
13 illegal drugs. The search revealed no contraband and no charges  
14 were filed, but during the search, the officers learned of a safe  
15 containing cash, jewelry, and coins.

16           When Stanewich was off-duty, he returned to the Van Orts' home  
17 and entered it, either forcibly or possibly after being recognized  
18 by Donald Van Ort. It was undisputed that he did not display his  
19 badge and he denied being a police officer.

20           Stanewich attacked and tortured the Van Orts. But, Donald Van  
21 Ort's girlfriend escaped and called 911. The responding police  
22 officer entered the home, ordered the intruder to freeze, and shot  
23 him when he failed to comply. Upon unmasking the intruder, the  
24 officer recognized Stanewich and exclaimed "Mike!" Stanewich  
25 responded, "[y]es, it's me, I'm wrong." He then died.

26           The Van Orts brought suit, including a section 1983 and other  
27 claims. In addressing the color of state law issue, the court  
28 easily concluded that Stanewich was pursuing his own goals and was

1 not in any way subject to control by his public employer. Id. at  
2 838. Although the plaintiffs did not contest this point, they  
3 argued that Stanewich used his status and privileges as a law  
4 enforcement officer to gain entry to their home and to commit his  
5 crime and thus, he acted under color of state law. Id. at 838.  
6 The plaintiffs contended that because Stanewich carried handcuffs  
7 and a gun and was perceived by Donald Van Ort to be acting as a  
8 police officer and allowed to enter the home due to that  
9 perception, Stanewich's acts were under color of state law. Id. at  
10 839.

11 The court recognized that if Stanewich had purported to or  
12 pretended to act under color of law, even if his goals were private  
13 and outside the scope of authority, he was acting under color of  
14 state law. Id. The court further noted that Stanewich could have  
15 been acting under color of state law if the Van Orts had been  
16 injured during a meeting "related to the provision of services  
17 pursuant to Stanewich's County employment," and if Stanewich had  
18 used his "'government position to exert influence and physical  
19 control' over the Van Orts, particularly if they were 'in awe of  
20 government officials.'" Id. (quoting Dang Vang v. Vang Xiong X.  
21 Toyed, 944 F.2d 476, 480 (9th Cir. 1991)) (brackets omitted).

22 The court struggled with an unclear factual record, but  
23 ultimately concluded that regardless of which version of the facts  
24 it accepted, Stanewich had not acted under color of state law. The  
25 court rejected the plaintiffs' argument that Donald Van Ort's  
26 recognition of Stanewich as a police officer rendered Stanewich's  
27 actions under color of state law:

28 Merely because Donald recognized Stanewich, however,

1 would not make the attack under color of law. For  
2 instance, in Barna v. City of Perth Amboy, 42 F.3d 809  
3 (3d Cir. 1994), a police officer attacked an individual,  
4 who was his relation by marriage and, of course,  
5 therefore knew the officer personally. The officer used  
6 his service revolver and police-issued nightstick, id. at  
813, yet the court held there was no action under color  
of state law. Merely because a police officer is  
recognized as an individual employed as a police officer  
does not alone transform private acts into acts under  
color of state law.

7 Id. at 839.

8 The court pointed out that Donald Van Ort opened the door  
9 without knowing who was there. At trial Donald Van Ort testified  
10 that he then recognized Stanewich, who quickly put on a mask and  
11 pointed a revolver at him. Id. But, the court explained,  
12 Stanewich did not use his authority to gain entry to the home or to  
13 induce Donald Van Ort to open his front door. Rather, Stanewich,  
14 while wearing his mask, used his gun and physical force to enter  
15 the house. Id. Donald Van Ort's cry of "it's a robbery" showed  
16 that Donald Van Ort was not under any illusion concerning  
17 Stanewich's intentions. Id.

18 According to the court, the most Donald Van Ort could contend  
19 was that his recognition of Stanewich caused him to hesitate and  
20 open the door a little further to find out what Stanewich wanted.  
21 Id. Based on this, the court stated, Donald Van Ort could argue  
22 that Stanewich exerted physical control using his official status,  
23 as was done in Vang. Id. The court stated that unlike in Vang,  
24 the circumstances in the case before it showed "conjectural,  
25 momentary, and de minimis physical control." Id. The court  
26 continued:

27 The evidence shows that Donald would have opened the door  
28 regardless of whether Stanewich was a police officer, and  
Stanewich did not rely on Donald's recognition to gain

1 entry; his gun and brute physical violence proved quite  
2 sufficient. Moreover, Stanewich did not purport to act  
3 under state law. Quite to the contrary, Stanewich, in a  
4 matter of moments, made it clear that his actions were  
5 illicit. In short, Stanewich exerted no meaningful,  
6 physical control over Donald on the basis of his status  
7 as a law enforcement officer. Thus, Stanewich's acts  
8 were not under color of law.

9 Id. at 839-40.

10 Finally, in Traver v. Meshriy, 627 F.2d 934 (9th Cir. 1980),  
11 the plaintiff was a customer in a bank who experienced problems  
12 making a withdrawal. The exasperated plaintiff believed he had  
13 overextended his coffee break from work and announced to bank staff  
14 that he would be back in five minutes to get his money. He left  
15 his documents in the bank. As he was heading for the exit, the  
16 bank teller employee called out to Timothy Gibson, an off-duty San  
17 Francisco police officer working as a teller at the bank, "stop  
18 that man," or "stop that guy." Id. at 937. Gibson, whose primary  
19 responsibility was bank security, pulled his police identification  
20 from his wallet and proceeded to the bank exit, intercepting the  
21 plaintiff. Id.

22 Gibson identified himself as a police officer and motioned the  
23 plaintiff to a platform in the branch and instructed him to sit  
24 down. The plaintiff complied, but at several points inquired about  
25 what was going on and protested the detainment. Gibson left his  
26 handgun at his teller's station, retrieved it, and then Gibson  
27 returned to the plaintiff's location, holding the gun. Although  
28 the parties disputed exactly how the gun was held, it was agreed  
that it was not aimed or cocked. After a few minutes, Gibson  
stationed himself, this time with his gun, near the bank exit where  
he had first intercepted plaintiff.

1           The bank employee then finished checking the plaintiff's  
2 accounts and approved the transaction, giving the plaintiff the  
3 \$1,000 he sought to withdraw. The plaintiff was held for  
4 approximately fifteen to twenty minutes.

5           The first issue addressed by the Ninth Circuit was whether  
6 Gibson acted under color of state law. Gibson's testimony was that  
7 he responded to the employee's call to stop the plaintiff as a  
8 police officer rather than as a bank teller. Other testimony  
9 established that using off-duty police officers as "security  
10 tellers" at the bank was part of a police department "secondary  
11 hiring" program, and that the police department selected the  
12 officers for the program. Id. Additionally, Gibson flashed his  
13 police identification at the plaintiff and introduced himself as a  
14 police officer before instructing the plaintiff to sit down on the  
15 platform. Id. The court concluded that the facts compelled the  
16 conclusion that Gibson was acting under color of state law.

17           These cases, Huffman, Van Ort, and Traver, collectively point  
18 to several types of factors relevant to the query of when an off-  
19 duty police officer purports or pretends to act pursuant to  
20 official authority. First are the indicia of authority such as  
21 wearing a uniform, displaying badge, brandishing a weapon,  
22 identifying oneself as an officer, issuing commands, or intervening  
23 in a dispute. Other considerations may include the officer's role  
24 at the time, such as the fact that Gibson was actually hired to  
25 perform security under a formal arrangement with the police  
26 department. Finally, as explained in Van Ort, while mere  
27 recognition as a police officer does not turn private acts into  
28 acts under color of state law, there are situations where an

1 officer may exert such "meaningful, physical control" over another  
2 "on the basis of his status as a law enforcement officer" that the  
3 officer's actions may amount to official conduct under color of  
4 state law.

5 Sheffer argues that walking down the sidewalk in her  
6 neighborhood, outside the jurisdiction where she is employed, off-  
7 duty, and out-of-uniform, and stepping into the street in front of  
8 a neighbor's car with no allegation that she flashed a badge or  
9 identified herself as a police officer in any way, and then  
10 motioning for her neighbor to stop, are not actions taken under  
11 color of state law. Furthermore, Sheffer argues that, under Van  
12 Ort, simply because plaintiff knew Sheffer to be a Portland police  
13 officer does not transform her actions into actions taken under  
14 color of state law.

15 Plaintiff argues that Sheffer acted under pretense of state  
16 employment by asserting her state-authorized ability to stop moving  
17 vehicles as well as to run license plate searches. Pltf's Mem. at  
18 p. 6. Plaintiff argues that it was precisely because Sheffer was  
19 "cloaked" in the authority of the state that she had the audacity  
20 to walk into a public street and stand in front of a moving vehicle  
21 and direct plaintiff to pull over.

22 Although the issue is close, I agree with defendant. As  
23 defendant notes, she was off-duty, out of uniform, and not in her  
24 jurisdiction. She did not flash a badge. She did not have a  
25 weapon. She did not issue an oral command to stop. She did not  
26 identify herself in any way as a police officer. Additionally, her  
27 actions were made in the context of what appears to have been a  
28 personal dispute between plaintiff and Sheffer. And while

1 plaintiff may have known that Sheffer was a police officer, that  
2 alone does not cloak Sheffer's actions with official authority. If  
3 that were the test, a police officer's every action would be  
4 subject to a federal constitutional claim by any family member,  
5 neighbor, friend, etc. based only on the status of being in law  
6 enforcement. The caselaw does not support such a standard.

7 The alleged facts which cause a concern regarding Sheffer's  
8 possible pretense of authority are the allegations in paragraphs 11  
9 and 12 of the First Amended Complaint in which plaintiff asserts  
10 that Sheffer walked in front of his car, directed him to pull over,  
11 told him during their exchange that she had previously run his  
12 license plate, and directed him not to drive through the public  
13 street. First Am. Compl. At ¶¶ 11, 12. Some of these facts  
14 (walking in front of the car and directing plaintiff to pull over)  
15 raise the question of whether Sheffer exerted "meaningful, physical  
16 control" over plaintiff "on the basis" of her "status as a law  
17 enforcement" officer. Previously running plaintiff's license  
18 plate, because it is expected to be performed only by law  
19 enforcement personnel, could suggest that Sheffer was purporting to  
20 act officially.

21 Nonetheless, when all the circumstances of the encounter are  
22 considered, these facts fall short of establishing that Sheffer  
23 acted under color of state law because they do not imbue her with  
24 the required authority given all of the other relevant facts and  
25 the lack of any indicia of official conduct. Given the time,  
26 place, manner, and context of the encounter, the collective facts  
27 do not show that Sheffer invoked her police authority in stopping  
28 plaintiff. Thus, I grant defendant's motion. Given my

1 disposition, I do not consider defendant's qualified immunity  
2 argument. However, because the question is close, I give plaintiff  
3 leave to replead the section 1983 claim against Sheffer.

#### 4 II. IIED Claim

5 Sheffer moves to dismiss the IIED claim because the alleged  
6 conduct was not "extraordinarily outside the bounds of socially  
7 tolerable behavior."

8 To sustain an IIED claim, plaintiff must show that defendant  
9 intended to inflict severe emotional distress, that defendant's  
10 acts were the cause of plaintiff's severe emotional distress, and  
11 that defendant's acts constituted an extraordinary transgression of  
12 the bounds of socially tolerable conduct. McGanty v. Staudenraus,  
13 321 Or. 532, 563, 901 P.2d 841, 849 (1995); see also Babick v.  
14 Oregon Arena Corp., 333 Or. 401, 411, 40 P.3d 1059, 1063 (2002) (to  
15 state an IIED claim under Oregon law, plaintiff must prove, inter  
16 alia, that defendants' actions "constituted an extraordinary  
17 transgression of the bounds of socially tolerable conduct.")  
18 (internal quotation omitted).

19 Conduct that is merely "rude, boorish, tyrannical, churlish,  
20 and mean" does not support an IIED claim. Patton v. J.C. Penney  
21 Co., 301 Or. 117, 124, 719 P.2d 854, 858 (1986). "[T]he tort does  
22 not provide recovery for the kind of temporary annoyance or injured  
23 feelings that can result from friction and rudeness among people in  
24 day-to-day life even when the intentional conduct causing  
25 plaintiff's distress otherwise qualifies for liability." Hall v.  
26 The May Dep't Stores Co., 292 Or. 131, 135, 637 P.2d 126, 129  
27 (1981); see also Watte v. Maeyens, 112 Or. App. 234, 237, 828 P.2d  
28 479, 480-81 (1992) (no claim where employer threw a tantrum,

1 screaming and yelling at his employees, accused them of being liars  
2 and saboteurs, then fired them all); Madani v. Kendall Ford, Inc.,  
3 312 Or. 198, 205-06, 818 P.2d 930, 934 (1991) (no claim where  
4 employee terminated for refusing to pull down pants).

5 In a 2008 case, the Oregon Court of Appeals explained the  
6 following parameters of the tort:

7 A trial court plays a gatekeeper role in evaluating  
8 the viability of an IIED claim by assessing the allegedly  
9 tortious conduct to determine whether it goes beyond the  
10 farthest reaches of socially tolerable behavior and  
11 creates a jury question on liability. . . .

12 \* \* \*

13 The classification of conduct as "extreme and outrageous"  
14 depends on both the character and degree of the conduct.  
15 As explained in the Restatement at § 46 comment d:

16 "Liability has been found only where the conduct  
17 has been so outrageous in character, and so extreme  
18 in degree, as to go beyond all possible bounds of  
19 decency, and to be regarded as atrocious, and  
20 utterly intolerable in a civilized community."

21 Whether conduct is an extraordinary transgression is  
22 a fact-specific inquiry, to be considered on a  
23 case-by-case basis, based on the totality of the  
24 circumstances. We consider whether the offensiveness of  
25 the conduct exceeds any reasonable limit of social  
26 toleration, which is a judgment of social standards  
27 rather than of specific occurrences.

28 House v. Hicks, 218 Or. App. 348, 358-60, 179 P.3d 730, 737-39  
(2008) (internal quotations and citations omitted).

Sheffer argues that the act of stepping in front of a  
neighbor's car and motioning for it to stop cannot be characterized  
as "atrocious" or "utterly intolerable in a civilized community."  
She contends that in its worst light, it might be rude, or even  
mean or "tyrannical," but it does not go "beyond the farthest  
reaches of socially tolerable behavior." Deft's Mem. at p. 10.

Sheffer also relies on a 2008 decision by Judge Ashmanskas in

1 which he held that the defendant police officers' alleged conduct  
2 in chasing a female bicyclist during the night without properly  
3 identifying themselves and pulling her from her house by her hair  
4 was not sufficiently outrageous to support the bicyclist's IIED  
5 claim. Child v. City of Portland, 547 F. Supp. 2d 1161, 1167-68  
6 (D. Or. 2008). Sheffer argues that if the conduct of those  
7 officers did not meet the standard for an IIED claim, then her  
8 conduct also does not meet the standard.

9 Plaintiff notes that the IIED claim is based on Sheffer's  
10 cumulative conduct taken as a whole, beginning with the stop and  
11 including the LEDS search and her statements regarding plaintiff's  
12 purportedly inappropriate interactions with various individuals  
13 around the neighborhood, described as a "possible stalking  
14 situation." Plaintiff cites to Oregon cases which have allowed an  
15 IIED claim based on false statements where the "defamation  
16 allegedly was to serve an ulterior purpose or to take advantage of  
17 an unusually vulnerable individual." Checkley v. Boyd, 170 Or.  
18 App. 721, 727, 14 P.3d 81, 86 (2000); see also Kraemer v. Harding,  
19 159 Or. App. 90, 111, 976 P.2d 1160, 1173-74 (1999) (directed  
20 verdict properly denied where defendants accused plaintiff of  
21 sexually molesting schoolchildren, but lacked reasonable grounds to  
22 believe the charges and instead were trying to force plaintiff's  
23 reassignment from their child's bus route); Dalby v. Sisters of  
24 Providence, 125 Or. App. 149, 154, 865 P.2d 391 (1993) (reversing  
25 dismissal of IIED claim where plaintiff alleged the defendant  
26 falsely accused the plaintiff of theft and encouraged a police  
27 investigation and arrest in retaliation for the employee's report  
28 that the defendant failed to comply with legal requirements in

1 keeping drug inventory records).

2        Additionally, citing House, plaintiff contends that the  
3 outrageousness of Sheffer's behavior must be examined in the  
4 context of the "special relationship" that exists between a police  
5 officer and a citizen. House, 218 Or. App. at 360, 179 P.3d at 737  
6 (most important contextual factor guiding court's classification of  
7 conduct as extreme and outrageous is whether a special relationship  
8 exists between a plaintiff and a defendant).

9        While I generally agree with plaintiff's analysis of Oregon  
10 law, I grant the motion to dismiss the IIED claim. First, as  
11 defendant notes, the First Amended Complaint fails to allege that  
12 any of Sheffer's statements about plaintiff were false. Thus, the  
13 cases cited by plaintiff are not on point.

14        Second, the facts alleged here do not rise to the level of  
15 "outrageousness" required to sustain an IIED claim in Oregon. In  
16 addition to the Watte and Madani cases cited above, Oregon courts  
17 have found no IIED claim when a sheriff allegedly mocked plaintiff  
18 as mentally ill, accused him of larceny, threatened to imprison him  
19 without reason, ridiculed his complaints about neighbors, and  
20 caused plaintiff apprehension by unduly delaying him in front of  
21 the sheriff's office, Pakos v. Clark, 253 Or. 113, 132, 453 P.2d  
22 682, 691 (1969), or when an employer allegedly publicly reprimanded  
23 the employee without reason, had him placed under surveillance, and  
24 publicly ridiculed his elimination habits. Snyder v. Sunshine  
25 Dairy, 87 Or. App. 215, 217, 742 P.2d 57, 58 (1987). I agree with  
26 defendant that the cases establish a very high bar and that the  
27 alleged facts do not rise to the level required.

28        Finally, while House notes that a "government officer-citizen"

1 relationship may be a "special" relationship, none of the cases it  
2 cites involve a police officer. Even if a police officer-citizen  
3 relationship is "special" such that a police officer has a  
4 "'greater obligation to refrain from subjecting the victim to  
5 abuse, fright, or shock than would be true in arm's-length  
6 encounters among strangers[,]'" id. (quoting McGanty, 321 Or. at  
7 547-48, 901 P.2d 841), the problem here is that I have already  
8 determined that the facts alleged in the First Amended Complaint do  
9 not establish that Sheffer was acting under color of state law and  
10 thus, I do not analyze the relationship between Sheffer and  
11 plaintiff as one between a police officer and a citizen. I further  
12 note that plaintiff himself alleges that Sheffer ran his license  
13 plate for her personal reasons and not part of any assigned duty,  
14 underscoring the personal nature of the relationship. First Am.  
15 Compl. at ¶¶ 18, 19.

16 CONCLUSION

17 Defendant Sheffer's motion to dismiss (#21) is granted. The  
18 section 1983 claim is dismissed without prejudice. The IIED claims  
19 is dismissed with prejudice. Plaintiff is given leave to file an  
20 amended complaint as to the section 1983 claim, within ten (10)  
21 days of the date of this Opinion and Order.

22 IT IS SO ORDERED,

23  
24 Dated this 5th day of November, 2010.

25  
26 /s/ Dennis J. Hubel

27 \_\_\_\_\_  
28 Dennis James Hubel  
United States Magistrate Judge