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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KIMBERLY BARSAMIAN,

Plaintiff,

v.

CITY OF KINGSBURG, MARTIN SOLIS,
individually and in his official
capacity as a Police Officer for
the City of Kingsburg Police
Department, and DOES 1 through
100, inclusive,

Defendants.

1:07-CV-00316 OWW-GSA

MEMORANDUM DECISION AND
ORDER RE DEFENDANT CITY OF
KINGSBURG'S MOTION FOR
SUMMARY ADJUDICATION AND
PLAINTIFF'S MOTION FOR
SUMMARY ADJUDICATION

I. INTRODUCTION

Before the court is Defendant City of Kingsburg's motion for summary adjudication and Plaintiff Kimberly Barsamian's cross-motion for summary adjudication, on different issues.

An on-duty police officer for the City of Kingsburg ("City"), Defendant Martin Solis ("Solis" or "Officer Solis") was dispatched to the residence of Plaintiff Kimberly Barsamian ("Plaintiff") in response to her mother's request. At the residence, among other things, Officer Solis evaluated whether Plaintiff, a twenty-six year old female, was under the influence of narcotics. He determined that Plaintiff was not under the influence. Officer Solis remained on the premises, received oral sex from Plaintiff, ejaculated and left the scene. Based on this encounter, Plaintiff

1 filed a state court action asserting various claims. The action
2 was removed to federal court and, subsequently, the City and
3 Plaintiff filed the instant motions.

4 The following background facts are taken from the parties'
5 submissions in connection with the motions and other documents on
6 file in this case.

7 II. BACKGROUND

8 From April 1999 to October 2000, Solis worked as a reserve
9 officer for the City, a municipal entity. Thereafter Solis served
10 as a full-time police officer for the City from October 2000 to
11 June 9, 2005, when the City terminated his employment. (Doc. 98 at
12 2.) The disputed sexual incident with Plaintiff occurred on June
13 5, 2005. Prior to that date, Officer Solis had encountered
14 Plaintiff before. Back in 2003, Solis observed Plaintiff and
15 placed her under a California Welfare & Institution Code 5150
16 (unable to care for her own safety or the safety of others). (Doc.
17 95 at 2.)¹ There is no evidence that Officer Solis and Plaintiff
18 had a dating or personal relationship after that time, or at any
19 point prior to June 5, 2005.

20 At approximately 12:51 p.m. on June 5, 2005, Officer Solis was
21 dispatched to a family disturbance call at Plaintiff's residence
22 located at 2200 Sierra Street in Kingsburg, California. (Doc. 95 at
23 3.) This family disturbance call originated from Plaintiff's
24

25 ¹ The City does not dispute that this prior encounter
26 occurred, only its relevance. This prior encounter is, at minimum,
27 relevant to provide some background and context. See *Pelayo v. City*
28 *of Downey*, 570 F. Supp. 2d 1183, 1189 n.52 (C.D. Cal. 2008)
(considering evidence that was "relevant at a minimum to provide
context and background").

1 mother, Carol Barsamian, who had contacted the Kingsburg police
2 department and asked the dispatcher to send an officer to her home.
3 (Doc. 98 at 2.) The dispatcher revealed to Officer Solis that
4 Plaintiff's mother had called the Kingsburg Police Department
5 because she, Mrs. Barsamian, wanted to speak to an officer
6 regarding her daughter, Plaintiff Kimberly Barsamian, who Mrs.
7 Barsamian suspected was under the influence of narcotics, had not
8 slept for five days and had tried to jump out of a moving vehicle
9 that morning. (Doc. 95 at 3; Solis Dep. 80:11-25; 81:15-18.)

10 Officer Solis radioed that he arrived on the scene at 1:03
11 p.m. (Doc. 95 at 3.) On the scene, Officer Solis apparently met
12 Mrs. Barsamian at the doorway of the residence. Mrs. Barsamian
13 told Officer Solis that she wanted Plaintiff evaluated to determine
14 if Plaintiff was under the influence of narcotics. (*Id.* at 4.)
15 Officer Solis spoke with Plaintiff outside on the front porch.
16 Plaintiff asked Officer Solis if he was going to arrest her and he
17 stated "No." (*Id.*) Officer Solis did not state, at any time while
18 at the Barsamian residence, that he was going to arrest Plaintiff.
19 (Doc. 98 at 21.) As they spoke, Plaintiff sat on a bench in the
20 front the residence. Plaintiff believed that while she was sitting
21 on the bench, she could not leave Officer Solis's presence. (Pl.
22 Dep. 151:6-13.)

23 Plaintiff revealed to Officer Solis that she was voluntarily
24 entering a drug rehab center in Florida and that she had ingested
25 some narcotics a few days prior. (Doc. 95 at 4.) According to
26 Plaintiff, she also mentioned that she was scared about a situation
27 she got herself into with an ex-boyfriend who was into "witchcraft"
28 and feared that she had been "brainwashed into it." (Pl. Dep.

1 145:25-146:1.) Plaintiff testified at her deposition that Officer
2 Solis talked about problems he was having with his wife and told
3 Plaintiff she was lucky because when she "went to Florida all [her]
4 problems would just go away, and [she] could start a new life
5 there." (Pl. Dep. 146:7-8.) He further stated, according to
6 Plaintiff, that Plaintiff "didn't have to worry," and "he was
7 holding a - a manilla folder saying this would just go away - this
8 case would just go away." (Pl. Dep. 146:13-15.)

9 According to Officer Solis, based on his experience as a
10 police officer and visual observations, he determined that
11 Plaintiff was not under the influence of any substance on June 5,
12 2005. (Doc. 95 at 4.) Previously, while serving as a full-time
13 officer with the City, Solis had completed a POST (Peace Officer
14 Standards & Training) sponsored program at Fresno City College and
15 received certification that he completed a course on "Drug
16 Influence - H&S 11550." (Doc. 98 at 14.) Officer Solis was
17 certified as qualified to determine whether a person was under the
18 influence of narcotics. (*Id.*)

19 Plaintiff ultimately got up from the bench of her own volition
20 without having to ask for permission. (Doc. 98 at 22.) Plaintiff
21 went back into her residence, Officer Solis followed, and inside the
22 residence he continued to counsel her regarding her narcotics
23 addiction. (Doc. 98 at 22; Doc. 95 at 4.) Inside the residence,
24 Plaintiff offered and provided Officer Solis with something to
25 drink, and they talked while sitting at the kitchen table. (Doc. 98
26 at 23.) Plaintiff testified at her deposition that, at the kitchen
27 table, "I told him about my brother's wedding, how I ruined his
28 wedding, all the methadone and meds I was taking. And I started

1 crying." (Pl. Dep. 160:18-20.) At some point during their
2 conversation, Plaintiff told Officer Solis that she was going to
3 drug rehab with the hope that she could overcome her low self-esteem
4 and depression. (Doc. 95 at 4.) While Plaintiff and Officer Solis
5 were at the kitchen table, Plaintiff's parents left the residence.
6 (Doc. 98 at 23.) Before she left, Mrs. Barsamian (Plaintiff's
7 mother) provided Officer Solis with a videotape regarding mental
8 illness and told him that it was about how to deal with people with
9 bi-polar disorder. (Doc. 95 at 4.) After the parents left, Officer
10 Solis and Plaintiff talked a bit more, and as Solis was preparing
11 to leave, a hug and kiss occurred between Solis and Plaintiff. As
12 Plaintiff testified at her deposition:

13 Q. Did you continue to talk to Mr. Solis after your
14 parents left?

15 A. Briefly, yeah. But he stood up and he said, 'While
16 your parents are gone, and I don't want them to
17 disrespect me, so I'd better be leaving now.' And I said,
18 you know, 'I won't disrespect you,' and I gave him a hug,
19 and he started kissing me.

20 Q. Why did you give Mr. Solis a hug?

21 A. Just I'm a friendly person. I used to be.

22 (Pl. Dep. 164:7-15.) According to Officer Solis, Plaintiff kissed
23 him, not the other way around. (Doc. 95 at 5.) After the kiss, it
24 is undisputed that Plaintiff and Officer Solis ended up in
25 Plaintiff's bedroom together. The parties dispute, however, how
26 that occurred.

27 According to Plaintiff, after the kiss, she expected Solis to
28 leave the house (Pl. Dep. 170:11-13) and she immediately went to her
bedroom (Pl. Dep. 168:22-169:3). She did not invite Solis to her
bedroom; she just walked off by herself and he followed her there.

(Pl. Dep. 168:1-10.)

1 According to Officer Solis, after the kiss, Plaintiff stated
2 that she wanted to talk some more. (Solis Dep. 105:7-8.) As Officer
3 Solis testified at his deposition:

4 Q. And at that point you went to leave and she told you
5 stay, she wanted to talk to you some more; correct?

6 A. Yes.

7 Q. Did you leave at that point?

8 A. No.

9 Q. Why not?

10 A. Because I wanted to see what else she had to say.

11 Q. Why did you want to see what else she had to say?

12 A. I was just interested to find out what she had to
13 say?

14 Q. When you say you were interested, were you interested
15 from your perspective as an officer with the Kingsburg
16 Police Department?

17 A. Yes.

18 Q. As part of your investigation that you were
19 conducting; correct?

20 A. Yes.

21 (Solis Dep. 105:19-21; 105:25-106:13.) According to Solis, they
22 continued to talk for about a minute in the living room where she
23 asked him questions about his marriage and his family. (Solis Dep.
24 106:14-21.) He indicated he would rather not answer, told her he
25 was leaving, and he walked towards the door at which time "she told
26 me she needed to show me something and grabbed me and led me through
27 the hallway." (Solis Dep. 107:23-25.) According to Solis, he went
28 with her because he wanted to see what Plaintiff was going to show
him - Plaintiff led him into her bedroom. (Solis Dep. 108:6-11;
109:2-6.)

In the bedroom, it is undisputed that Plaintiff played some
music from her computer to break up the silence. (Doc. 98 at 26.)
The parties offer different accounts of what next occurred.

According to Plaintiff, once she noticed Officer Solis had come
into her bedroom, she "showed him music on my computer, tried to

1 show him, and he was uninterested in it. And he sat on my bed, and
2 he motioned for me to come over to him." (Pl. Dep. 171:16-18.) He
3 also exposed his penis. (Pl. Dep. 179:4-9.) While sitting at the
4 foot of her bed, Officer Solis grabbed Plaintiff by her waist area
5 and pulled her towards him. (Pl. Dep. 180:12-25; 181:3-5.) While
6 Officer Solis pulled her towards him, Plaintiff testified that she
7 was scared and did not know what was going on. (Pl. Dep. 181:6-11.)
8 He started kissing her, and she did not return the kisses. (Pl. Dep.
9 182:1-7.) She "was just kind of frozen." (Pl. Dep. 182:16.) In her
10 words, he "kept pushing my head down, and he kept using more and
11 more force pushing my head down, and I finally asked him what - what
12 did - did he want, and he told me a blow job. And I just did it.
13 And I remember him leaving just afterward." (Pl. Dep. 183:2-6.)
14 Plaintiff remained off the bed the entire time.

15 On Solis's recollection, after being led to her bedroom
16 Plaintiff "told me that she was showing me her music" (Solis Dep.
17 109:13-14) and then, while standing at the foot of her bed, "she
18 kissed me and put her hand on my crotch" (Solis Dep. 109:16-20).
19 At that time, Officer Solis did not attempt to leave - he "didn't
20 do anything." (Solis Dep. 110:7-9.) To Officer Solis, Plaintiff
21 seemed rational, calm and coherent. (Solis Dep. 110:12-14.) Then
22 she made a comment like "I know what you'd like, you'd like a blow
23 job." (Solis Dep. 110:16-17.) He did not answer her. (Solis Dep.
24 110:20-21.) She pushed him on his chest and onto her bed. (Solis
25 Dep. 110:23-111:1; 111:25-112:10.) Officer Solis did not take any
26 action to avoid being pushed onto her bed, and the push onto her bed
27 was not against his will. (Solis Dep. 113:12-17.) Plaintiff then
28 unzipped Officer Solis's pants and performed oral sex on him. (Solis

1 Dep. 113:21-25.) He did not make any comment during that time.
2 (Solis Dep. 114:1-5.)

3 It is undisputed that after receiving oral sex for
4 approximately one minute, Officer Solis ejaculated on Plaintiff's
5 hair and then left the residence. (Doc. 95 at 6.) Plaintiff said
6 "bye" before he left. (Pl. Dep. 185:15.) Officer Solis went to his
7 patrol car and notified dispatch that he was clearing the call at
8 2:16 p.m. (Doc. 95 at 6.) He requested a case number regarding the
9 investigation from the dispatcher. (*Id.*) Officer Solis spent
10 approximately one hour and thirteen minutes on the scene. (*Id.*)

11 After allegations of wrongful conduct by Officer Solis became
12 known, the Kingsburg Police Department initiated an Internal Affairs
13 Investigation. (Doc. 95 at 7.) The Kingsburg Police Department
14 retained Investigator T.J. Law to conduct the investigation (Doc.
15 95 at 7), and he concluded that "[o]n June 5, 2005 at approximately
16 1251 hours Officer Solis, while on duty, in full uniform, while
17 counseling a narcotic addicted, bi-polar, manic depressant, took
18 advantage of this woman's mental health and addiction" (Kapetan
19 Decl. Ex E at 4). Mr. Law also indicated that "both parties'
20 statements reflect that the act was consensual, not forced or
21 coerced." (*Id.*) Solis is no longer employed by the Kingsburg Police
22 Department.

23 Following her sexual encounter with Officer Solis, Plaintiff
24 filed a complaint in California state court alleging various causes
25 of action against Officer Solis and the City. Plaintiff's second
26 amended complaint, which was also filed in state court, asserts
27 claims against Officer Solis and the City for: (1) negligence; (2)
28 sexual assault; (3) negligent infliction of emotional distress; (4)

1 battery; (5) liability under 42 U.S.C. § 1983 based on a violation
2 of the Fourth Amendment, which is made applicable to the states
3 through the Fourteenth Amendment; (6) liability under California
4 Civil Code § 52.1(b) for a violation of Article I, § 13 of the
5 California Constitution; and (7) intentional infliction of emotional
6 distress. Subsequently, Plaintiff's state court action was removed
7 to federal court, and Plaintiff has not since amended her second
8 amended complaint. The City and Plaintiff both filed motions for
9 summary adjudication.

10 III. SUMMARY ADJUDICATION STANDARD

11 A motion for summary adjudication, sometimes referred to as a
12 motion for partial summary judgment, is governed by the same
13 standard as a typical motion for summary judgment. *California v.*
14 *Campbell*, 138 F.3d 772, 780-81 (9th Cir. 1998); *Costa v. Nat'l*
15 *Action Fin. Servs.*, No. CIV S-05-2084 FCD/KJM, 2007 WL 4526510, at
16 *2 (E.D. Cal. Dec. 19, 2007). Summary judgment is appropriate when
17 "the pleadings, the discovery and disclosure materials on file, and
18 any affidavits show that there is no genuine issue as to any
19 material fact and that the movant is entitled to judgment as a
20 matter of law." Fed. R. Civ. P. 56(c). A party moving for summary
21 judgment "always bears the initial responsibility of informing the
22 district court of the basis for its motion, and identifying those
23 portions of the pleadings, depositions, answers to interrogatories,
24 and admissions on file, together with the affidavits, if any, which
25 it believes demonstrate the absence of a genuine issue of material
26 fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal
27 quotation marks omitted).

28 Where the movant will have the burden of proof on an issue at

1 trial, it must "affirmatively demonstrate that no reasonable trier
2 of fact could find other than for the moving party." *Soremekun v.*
3 *Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); see also
4 *So. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir.
5 2003) (noting that a party moving for summary judgment on claim as
6 to which it will have the burden at trial "must establish beyond
7 controversy every essential element" of the claim) (internal
8 quotation marks omitted). With respect to an issue as to which the
9 non-moving party will have the burden of proof, the movant "can
10 prevail merely by pointing out that there is an absence of evidence
11 to support the nonmoving party's case." *Soremekun*, 509 F.3d at 984.

12 When a motion for summary judgment is properly made and
13 supported, the non-movant cannot defeat the motion by resting upon
14 the allegations or denials of its own pleading, rather the
15 "non-moving party must set forth, by affidavit or as otherwise
16 provided in Rule 56, 'specific facts showing that there is a genuine
17 issue for trial.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477
18 U.S. 242, 250 (1986)). "Conclusory, speculative testimony in
19 affidavits and moving papers is insufficient to raise genuine issues
20 of fact and defeat summary judgment." *Id.*

21 "[S]ummary judgment will not lie if [a] dispute about a
22 material fact is 'genuine,' that is, if the evidence is such that
23 a reasonable jury could return a verdict for the nonmoving party."
24 *Anderson*, 477 U.S. at 248. In ruling on a motion for summary
25 judgment, the district court does not make credibility
26 determinations; rather, the "evidence of the non-movant is to be
27 believed, and all justifiable inferences are to be drawn in his
28 favor." *Id.* at 255.

1 IV. DISCUSSION AND ANALYSIS

2 A. The City's Motion For Summary Adjudication

3 The City's motion for summary adjudication is brought against
4 Plaintiff's negligence claim (Plaintiff's first cause of action),
5 Plaintiff's § 1983 claim (Plaintiff's fifth cause of action), and
6 Plaintiff's claim under California Civil Code § 52.1(b) for a
7 violation of Article I, § 13 of the California Constitution
8 (Plaintiff's sixth cause of action).

9 1. Negligence

10 Plaintiff's negligence claim is asserted against the City and
11 against Officer Solis. In its motion for summary adjudication, the
12 City argues that to the extent Plaintiff is asserting a negligence
13 claim against the City for its own negligent acts (as opposed to any
14 alleged negligent acts of its former employee, Officer Solis), such
15 a claim fails because there is no evidence to support a contention
16 that the City negligently failed to supervise or train Officer
17 Solis. In opposition to the motion, Plaintiff states that she is
18 not asserting a direct negligence claim against the City; rather
19 Plaintiff is asserting that the City is vicariously liable for
20 Officer Solis's acts committed within the course and scope of his
21 employment. Therefore, as Plaintiff concedes, the City's "request
22 for summary adjudication should be granted only to the extent that
23 it seeks a determination that Defendant City of Kingsburg did not
24 commit any direct negligent acts." (Doc. 96 at 2.) Absent evidence
25 and in light of this concession, to the extent Plaintiff's first
26 cause of action for negligence asserts a claim against the City for
27 direct negligence, summary adjudication on that claim is GRANTED in
28 favor of the City and against the Plaintiff.

1 2. 42 U.S.C. § 1983

2 Plaintiff's claim under § 1983 is asserted against Officer
3 Solis in his individual and official capacities and also separately
4 against the City. Plaintiff's § 1983 claim is premised on an
5 alleged underlying violation of the Fourth Amendment as made
6 applicable to the states through the Fourteenth Amendment. The City
7 moves for summary adjudication on the ground that Plaintiff's § 1983
8 claim fails for lack of evidentiary support in that Plaintiff cannot
9 establish that the alleged constitutional violation was the product
10 of a policy or custom of the City, or, more specifically, that it
11 was the product of a policy or custom of inadequate training or
12 supervision. In opposition to the motion, Plaintiff conceded that
13 she "will not seek to assert liability against Defendant City of
14 Kingsburg for violation of 42 U.S.C. § 1983. Therefore, Plaintiff
15 does not oppose Defendant City of Kingsburg's summary adjudication
16 to the extent that it applies to Defendant City of Kingsburg."
17 (Doc. 96 at 2.) There is no vicarious liability for a public entity
18 under the civil rights law without *Monell*-type evidence. See *Monell*
19 *v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91, 694 (1978); see also
20 *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). Absent evidence
21 and in light of this concession, the City's motion for summary
22 adjudication on Plaintiff's § 1983 claim asserted against the City
23 is GRANTED in favor of the City and against the Plaintiff.

24 Plaintiff's concession that she will not seek to assert
25 liability against the City for a violation of § 1983 also warrants
26 summary adjudication as to Plaintiff's § 1983 official-capacity
27 claim against Officer Solis. Official-capacity suits "generally
28 represent only another way of pleading an action against an entity

1 of which an officer is an agent." *Monell*, 436 U.S. at 690 n.55.
2 After *Monell*, the United States Supreme Court stated that an
3 "official-capacity suit is, in all respects other than name, to be
4 treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S.
5 159, 166 (1985). "In an official-capacity suit, the government
6 entity is the real party in interest and the plaintiff must show
7 that the entity's policy or custom played a part in the federal law
8 violation." *Vance v. County of Santa Clara*, 928 F. Supp. 993, 996
9 (N.D. Cal. 1996). Accordingly, the official-capacity claim here and
10 the claim against the City are one and the same; if Plaintiff
11 concedes that she does not have an independent § 1983 claim against
12 the City, this concession necessarily applies to both the § 1983
13 claim alleged against the City and the § 1983 official-capacity
14 claim alleged against Officer Solis, as the latter is a "suit
15 against the entity," *Graham*, 473 U.S. at 166, as well. These claims
16 are "redundant." See *Megargee v. Wittman*, 550 F. Supp. 2d 1190,
17 1206 (E.D. Cal. 2008). After pointing this out to Plaintiff during
18 oral argument on the instant motions, Plaintiff voiced no objection
19 to granting summary adjudication on her § 1983 claim asserted
20 against Officer Solis in his official capacity. Summary
21 adjudication is also GRANTED against Plaintiff on this claim.²

22 3. California Civil Code § 52.1

23 Among other things, § 52.1 of the California Civil Code
24 provides an individual with a statutory mechanism by which to seek
25 relief, in a civil case, for a constitutional violation. Section
26

27 ² This leaves Plaintiff with a federal claim under § 1983
28 against Officer Solis in his individual capacity.

1 52.1 (b) provides:

2 Any individual whose exercise or enjoyment of rights
3 secured by the Constitution or laws of the United States,
4 or of rights secured by the Constitution or laws of this
5 state, has been interfered with, or attempted to be
6 interfered with as described in subdivision (a), may
7 institute and prosecute in his or her own name and on his
8 or her own behalf a civil action for damages, including,
9 but not limited to, damages under Section 52, injunctive
10 relief, and other appropriate equitable relief to protect
11 the peaceable exercise or enjoyment of the right or
12 rights secured.

13 This section refers to interference or attempted interference "as
14 described in subdivision (a)," i.e., in § 52.1(a). In pertinent
15 part, § 52.1(a) provides:

16 If a person or persons, whether or not acting under color
17 of law, *interferes by threats, intimidation, or coercion,*
18 *or attempts to interfere by threats, intimidation, or*
19 *coercion, with the exercise or enjoyment by any*
20 *individual or individuals of rights secured by the*
21 *Constitution or laws of the United States, or of the*
22 *rights secured by the Constitution or laws of this state,*
23 *the Attorney General, or any district attorney or city*
24 *attorney may bring a civil action*

25 (Emphasis added.) "The word 'interferes' as used in [§ 52.1] means
26 'violates.'" *Austin B. v. Escondido Union Sch. Dist.*, 149 Cal. App.
27 4th 860, 883 (2007).

28 Consistent with the language of the statute, and California
case law makes clear, to sustain a claim under § 52.1(b) based on
an alleged constitutional violation (as Plaintiff attempts to do in
this case), it must be demonstrated that the violation occurred and
that the violation was accompanied by threats, intimidation or
coercion within the meaning of the statute. See *Venegas v. County*
of Los Angeles, 32 Cal. 4th 820, 843 (2004) ("[T]he language of
section 52.1 provides remedies for certain misconduct that
interferes with federal or state laws, *if* accompanied by threats,
intimidation, or coercion") (emphasis added) (internal

1 quotation marks omitted); *Jones v. Kmart Corp.*, 17 Cal. 4th 329, 334
2 (1998) ("[S]ection 52.1 does require an attempted or completed act
3 of interference with a legal right, accompanied by a form of
4 coercion.") (emphasis added); *O'Toole v. Superior Court*, 140 Cal.
5 App. 4th 488, 502 (2006) (noting that, under § 52.1, "a defendant
6 is liable if he or she interfered with the plaintiff's
7 constitutional rights by the requisite threats, intimidation, or
8 coercion."). Technically, whether a constitutional violation
9 occurred and whether that violation was accompanied by any threats,
10 intimidation or coercion are separate analytical inquiries (albeit
11 with intertwining facts). See, e.g., *O'Toole*, 140 Cal. App. 4th at
12 502-03; *City & County of San Francisco v. Ballard*, 136 Cal. App. 4th
13 381, 408 (2006).

14 Plaintiff's claim under § 52.1(b) asserts a violation of
15 Article I, § 13 of the California Constitution, which states:

16 The right of the people to be secure in their persons,
17 houses, papers, and effects against unreasonable seizures
18 and searches may not be violated; and a warrant may not
19 issue except on probable cause, supported by oath or
affirmation, particularly describing the place to be
searched and the persons and things to be seized.

20 Here, whether Officer Solis subjected Plaintiff to any threats,
21 intimidation or coercion is not an issue on which the City moves for
22 summary adjudication. Rather, the City moves for summary
23 adjudication on the ground that Officer Solis did not violate
24 Plaintiff's rights under the California Constitution because,
25 according to the City, he did not "seize" her at the Barsamian
26 residence.

27 Both the "Fourth Amendment to the United States Constitution
28 and article I, section 13 of the California Constitution proscribe

1 seizures of persons, even brief investigative detentions, that are
2 unreasonable." *People v. Britton*, 91 Cal. App. 4th 1112, 1118 (2001)
3 (emphasis removed). California's constitutional ban on unreasonable
4 searches and seizures is "similar" to the Fourth Amendment's
5 prohibition on unreasonable searches and seizures. *People v. Celis*,
6 33 Cal. 4th 667, 673 (2004). The "United States Constitution
7 defines the minimum protection provided under Article 1, § 13 of the
8 California Constitution." *Craft v. County of San Bernardino*, 468
9 F. Supp. 2d 1172, 1180 (C.D. Cal. 2006). Thus, it is appropriate
10 to consider Fourth Amendment jurisprudence in analyzing a claim that
11 is based on a purported violation of California's similar
12 constitutional provision. See, e.g., *Wood v. Emmerson*, 155 Cal.
13 App. 4th 1506, 1514, 1526 (2007).

14 In *Celis*, the California Supreme Court noted that "[a] seizure
15 occurs whenever a police officer 'by means of physical force or show
16 of authority' restrains the liberty of a person to walk away.'" 33
17 Cal. 4th at 673 (citing *People v. Souza*, 9 Cal. 4th 224, 229 (1994),
18 quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). The court
19 continued: "[W]hen police engage in conduct that would communicate
20 to a reasonable person that he [or she] was not at liberty to ignore
21 the police presence and go about his [or her] business, there has
22 been a seizure." *Celis*, 33 Cal. 4th at 673 (internal quotation marks
23 omitted).

24 As more recently explained by the California Supreme Court in
25 *People v. Zamudio*, a seizure of an individual occurs only when the
26 "officer, by means of physical force or show of authority,
27 terminates or restrains" an individual's "freedom of movement"
28 "through means intentionally applied" by the officer. 43 Cal. 4th

1 327, 341 (2008) (quoting *Brendlin v. California*, __ U.S. __, 127
2 S.Ct. 2400, 2405 (2007)). The dispositive inquiry is whether, "in
3 view of all of the circumstances surrounding the incident, a
4 reasonable person would have believed that he [or she] was not free
5 to leave." *Zamudio*, 43 Cal. 4th at 341 (alteration in original)
6 (internal quotation marks omitted). When, as here, an individual
7 "has no desire to leave for reasons unrelated to the police
8 presence, the coercive effect of the encounter can be measured
9 better by asking whether a reasonable person would feel free to
10 decline the officers' requests or otherwise terminate the
11 encounter." *Id.* (internal quotation marks omitted). "The test is
12 objective, not subjective; it looks to the intent of the police as
13 objectively manifested to the person confronted." *Id.* (internal
14 quotation marks omitted). Thus, an "officer's uncommunicated state
15 of mind and the individual citizen's subjective belief are
16 irrelevant." *Id.* (internal quotation marks omitted).

17 In the context of its motion, the City does not argue that
18 Plaintiff consented to any conduct that would otherwise constitute
19 a seizure of her person. Nor does the City argue that, if any
20 seizure occurred, it was reasonable under Article I, § 13 of the
21 California Constitution. Rather, the City argues that Officer
22 Solis, by his conduct, did not effectuate a seizure of Plaintiff.
23 Accordingly, as to the City's motion, Plaintiff's consent *vel non*
24 and the reasonableness of any seizure of Plaintiff's person should
25 not be within the scope of this order.

26 In its initial brief, the City argues that "[t]he words and
27 actions of Martin Solis on June 5, 2005, could not have conveyed to
28 Ms. Barsamian, or any reasonable person, that she was arrested or

1 detained by Mr. Solis. Her actions on June 5, 2005, . . . were the
2 actions of a person who was free to move about her residence as she
3 chose to do." (Doc. 89 at 23.) In response to the City's motion,
4 Plaintiff argues that the City has ignored Plaintiff's version of
5 the events, as "[c]learly" she was seized by Officer Solis when he,
6 while in her bedroom, grabbed Plaintiff and forced her head
7 downward. (Doc. 96 at 5.) In its reply brief, the City argues that,
8 even if Officer Solis grabbed Plaintiff and forced her head downward
9 toward his crotch, his use of physical force did not constitute a
10 seizure. (Doc. 102 at 2.) The City's argument is unpersuasive.

11 A seizure can be effectuated "by means of physical force or
12 show of authority." *Zamudio*, 43 Cal. 4th at 341. There need not be
13 both physical force and a show of authority. *Acevedo v. Canterbury*,
14 457 F.3d 721, 724-25 (7th Cir. 2006). "[T]he use of physical means
15 to restrain a person's movement," such as by grabbing them, "is the
16 most obvious form of seizure." *United States v. Sokolow*, 831 F.2d
17 1413, 1416 (9th Cir. 1987), rev'd on other grounds, 490 U.S. 1
18 (1989).

19 Examples of circumstances that might indicate a seizure,
20 even where the person did not attempt to leave, would be
21 the threatening presence of several officers, the display
22 of a weapon by an officer, *some physical touching of the*
person of the citizen, or the use of language or tone of
voice indicating compliance with the officer's request
might be compelled.

23 *United States v. Anders*, 663 F.2d 934, 939 (9th Cir. 1981) (emphasis
24 added) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554
25 (1980); see also *Slusher v. Carson*, 540 F.3d 449, 454 (6th Cir.
26 2008) (concluding, in a § 1983 case, that the plaintiff's "liberty
27 was restrained when Deputy Carson grabbed her right hand as she
28 certainly was not at liberty to ignore the police presence and go

1 about her business") (internal quotation marks omitted). Even if
2 brief, an officer's application of physical force upon a person can
3 be regarded as a seizure. See *United States v. Brignoni Ponce*, 422
4 U.S. 873, 878 (1975) ("The Fourth Amendment applies to all seizures
5 of the person, including seizures that involve only a brief
6 detention short of traditional arrest."); *Acevedo*, 457 F.3d at 724
7 ("The fact that the restraint on the individual's freedom of
8 movement is brief makes no difference.").

9 The City argues that Officer Solis's conduct in grabbing
10 Plaintiff and forcing her head downward did not reflect that he
11 intended to "limit, restrict, or take away her liberty to walk away
12 from the situation." Rather, his conduct was merely done in the
13 course of a "sexual act between two adults." (Doc. 102 at 2.) This
14 is nonsense. The question is whether, in light of the all of
15 surrounding circumstances, a reasonable person would not feel free
16 to leave or terminate the encounter.

17 If Officer Solis intentionally grabbed Plaintiff and, in a
18 suggestive manner, pushed Plaintiff's head downward, a jury could
19 find that Officer Solis seized Plaintiff. Viewing all the
20 surrounding facts in a light most favorable to Plaintiff, and
21 crediting her version of the events, a reasonable trier of fact
22 could conclude that not only would Plaintiff's (and a reasonable
23 person's) movement be restrained when Officer Solis actually grabbed
24 her and pushed her downward, but such conduct would also communicate
25 to reasonable person that she was not free to leave or terminate the
26 encounter. The City's motion for summary adjudication on the issue
27 of whether a seizure occurred is DENIED.

1 B. Plaintiff's Motion For Summary Adjudication

2 Plaintiff moves for summary adjudication on the issue of
3 whether Solis was acting within the scope of his public employment
4 when he received oral sex from Plaintiff.³ "Generally, the issue of
5 scope of employment is a question of fact, but becomes a question
6 of law when the facts are undisputed and no conflicting inferences
7 are possible." *Billings v. United States*, 57 F.3d 797, 801 (9th
8 Cir. 1995) (citing *Perez v. Van Groningen & Sons, Inc.*, 41 Cal. 3d
9 962, 968 (1986)); see also *Mary M. v. City of Los Angeles*, 54 Cal.
10 3d 202, 213 (1991).

11 1. California Case Law On Respondeat Superior

12 Under the state law rule of respondeat superior, an employer
13 is vicariously liable "for the torts of its employees committed
14 within the scope of the employment." *Lisa M. v. Henry Mayo Newhall*
15 *Mem'l Hosp.*, 12 Cal. 4th 291, 296 (1995); see also *Mary M.*, 54 Cal.
16 3d at 208. Under California law, "an employee's willful, malicious,
17 and even criminal torts may fall within the scope of his or her
18 employment for purposes of respondeat superior, even though the
19 employer has not authorized the employee to commit crimes or
20 intentional torts." *Lisa M.*, 12 Cal. 4th at 296-97. *Mary M.* is
21 currently the seminal California case on whether an officer's on-
22 duty sexual misconduct falls within the scope of employment, and
23 both parties discuss *Mary M.* at length.⁴

24 In *Mary M.*, around 2:30 a.m., an on-duty uniformed police

25
26 ³ Plaintiff does not move for summary adjudication on whether
Officer Solis committed any underlying torts.

27
28 ⁴ The City also cites to *K.G. v. County of Riverside*, 106
Cal. App. 4th 1375 (2003) for *K.G.'s* discussion on the *Mary M.*
case.

1 officer, Sergeant Leigh Schroyer, activated the red lights on his
2 patrol car and stopped plaintiff, Mary M., for erratic driving. 54
3 Cal. 3d at 207, 221. He asked plaintiff to perform a field
4 sobriety test; she did not perform well and began to cry. *Id.* at
5 207. After she pleaded with the officer not to take her to jail,
6 the officer ordered plaintiff to get in his patrol car. *Id.* The
7 officer drove plaintiff to her home and entered her house. *Id.* The
8 officer said he expected "payment" for driving her home instead of
9 taking her to jail. *Id.* She tried to get away, but the officer
10 grabbed her hair and threw her on the couch. *Id.* When she
11 screamed, the officer covered her mouth and threatened to take her
12 to jail. *Id.* Plaintiff stopped struggling, the officer then raped
13 her and left. *Id.*

14 In analyzing whether the public entity that employed the
15 officer could be liable for the officer's rape of plaintiff under
16 the doctrine of respondeat superior, the California Supreme Court
17 first determined whether the doctrine should be invoked in light of
18 the three policy objectives which the doctrine serves. *Id.* at 214.
19 As the court explained, the "three reasons for applying the doctrine
20 of respondeat superior" are: "(1) to prevent recurrence of the
21 tortious conduct; (2) to give greater assurance of compensation for
22 the victim; and (3) to ensure that the victim's losses will be
23 equitably borne by those who benefit from the enterprise that gave
24 rise to the injury." *Id.* at 209.

25 After concluding that the three policy reasons behind the
26 doctrine of respondeat superior would be advanced by imposing
27 vicarious liability for the officer's conduct, the court then
28 considered whether the doctrine of respondeat superior *could* be (as

1 opposed to *should* be) invoked on the facts of the case.⁵ As to this
2 issue, tortious conduct falls within the scope of employment when
3 the risk of such conduct "may fairly be regarded as typical of or
4 broadly incidental to the enterprise undertaken by the employer."
5 *Id.* at 217 (internal quotation marks omitted). To determine whether
6 the officer's tortious conduct fell within the scope of his
7 employment, the *Mary M.* court considered: (i) the nexus between the
8 officer's tortious conduct and his work; and (ii) the general
9 foreseeability of that type of tortious conduct in the enterprise
10 of law enforcement.

11 The "typical of or broadly incidental to" inquiry deals with
12 whether there is a sufficient "nexus" or "link" between the tortious
13 conduct and the employee's work to invoke the rule of respondeat
14 superior:

15 The nexus required for respondeat superior liability—that
16 the tort be engendered by or arise from the work—is to be
17 distinguished from 'but for' causation. That the
18 employment brought tortfeasor and victim together in time

18 ⁵ In its later *Lisa M.* decision, the California Supreme Court
19 reversed these inquiries. There, the court first determined
20 whether the doctrine of respondeat superior *could* be invoked on the
21 facts of the case. *Lisa M.*, 12 Cal. 4th at 299-304. Next the
22 court analyzed whether it would be appropriate, in light of the
23 three policy objectives, to apply the doctrine of respondeat
24 superior. *Id.* at 304. The court stated that the three policy
25 objectives can be looked to "for additional guidance as to whether
26 the doctrine *should* be applied" and concluded that the first two
27 policy objectives provided "no firm direction" in the case. *Id.*
28 The third policy objective, the court indicated, is just another
way of asking whether the employee's work duties and the tortious
conduct are "too attenuated" to support the imposition of vicarious
liability. *Id.* at 305. In *Lisa M.*, a consideration of the three
policy objectives did not "alter" the court's conclusion as to
whether the tortious conduct at issue fell within the scope of
employment. *Id.*

1 and place is not enough. We have used varied language to
2 describe the nature of the required additional link
3 (which, in theory, is the same for intentional and
4 negligent torts): the incident leading to injury must be
5 an outgrowth of the employment; the risk of tortious
6 injury must be inherent in the working environment or
7 *typical of or broadly incidental to the enterprise [the*
8 *employer] has undertaken*

9 *Lisa M.*, 12 Cal. 4th at 298 (alteration in original) (citations,
10 internal quotation marks, and footnote omitted). The requisite
11 nexus between the tortious conduct and the employee's work is
12 effectively broken if the employee "substantially deviate[s] from
13 his duties for personal purposes." *Mary M.*, 54 Cal. 3d at 218
14 (internal quotation marks omitted). That the ultimate act was
15 unauthorized by the employer does not automatically break the nexus.
16 "The proper inquiry is not whether the wrongful act itself was
17 authorized but whether it was committed in the course of a series
18 of acts of the agent which were authorized by the principal." *Id.*
19 at 219 (internal quotation marks omitted).

20 In *Mary M.* the court determined that although the ultimate act
21 - rape - was obviously unauthorized, it did not fall outside the
22 scope of employment. *Id.* at 214 ("Sergeant Schroyer's conduct was
23 not so divorced from his work that, as a matter of law, it was
24 outside the scope of employment."). The court explained:

25 Here, Sergeant Schroyer was acting within the scope of
26 his employment when he detained plaintiff for erratic
27 driving, when he ordered her to get out of her car and to
28 perform a field sobriety test, and when he ordered her to
get in his police car. Then, misusing his authority as a
law enforcement officer, he drove her to her home, where
he raped her. When plaintiff attempted to resist Sergeant
Schroyer's criminal conduct, he continued to assert his
authority by threatening to take her to jail. Viewing the
transaction as a whole, it cannot be said that, as a
matter of law, Sergeant Schroyer was acting outside the

1 scope of his employment when he raped plaintiff.

2 *Id.* at 219. As is apparent from this passage, the court found the
3 requisite nexus between the tortious conduct and the officer's work
4 in that: (1) he initially detained plaintiff by using his authority
5 as a police officer conducting an investigation; and (2) he
6 continued to detain her and effectuated his rape of plaintiff by
7 misusing his authority as a police officer. The court re-emphasized
8 these facts in a later part of the opinion:

9 In this case, plaintiff presented evidence that would
10 support the conclusion that the rape arose from *misuse of*
11 *official authority*. Sergeant Schroyer detained plaintiff
12 when he was on duty, in uniform, and armed. He
13 accomplished the detention by activating the red lights
14 on his patrol car. *Taking advantage of his authority and*
15 *control as a law enforcement officer*, he ordered
16 plaintiff into his car and transported her to her home,
17 where he threw her on a couch. When plaintiff screamed,
18 *Sergeant Schroyer again resorted to his authority and*
19 *control as a police officer* by threatening to take her to
20 jail. Based on these facts, the jury could reasonably
21 conclude that Sergeant Schroyer was acting in the course
22 of his employment when he sexually assaulted plaintiff.

23 *Id.* at 221 (emphasis added).

24 Apart from assessing the nexus between the rape and the
25 officer's work, the *Mary M.* court also analyzed the foreseeability
26 of that type of tortious conduct in the enterprise of law
27 enforcement.

28 [S]ociety has granted police officers great power and
control over criminal suspects. Officers may detain such
persons at gunpoint, place them in handcuffs, remove them
from their residences, order them into police cars and,
in some circumstances, may even use deadly force. The law
permits police officers to ensure their own safety by
frisking persons they have detained, thereby subjecting
detainees to a form of nonconsensual touching ordinarily
deemed highly offensive in our society. In view of the
considerable power and authority that police officers
possess, it is neither startling nor unexpected that on

1 occasion an officer will misuse that authority by
2 engaging in assaultive conduct. The precise circumstances
3 of the assault need not be anticipated, so long as the
4 risk is one that is reasonably foreseeable. Sexual
5 assaults by police officers are fortunately uncommon;
6 nevertheless, the risk of such tortious conduct is
7 broadly incidental to the enterprise of law enforcement
8

9 *Id.* at 217-28 (citation omitted). As the California Supreme Court
10 later explained, "a police officer's assault may be foreseeable from
11 the scope of his unique authority over detainees." *Lisa M.*, 12 Cal.
12 4th at 304.

13 In *Mary M.*, in light of the officer's use of authority to
14 initially detain plaintiff, his misuse of authority in continuing
15 to detain her and effectuating his rape of plaintiff, and the
16 foreseeability of assaultive conduct in the enterprise of law
17 enforcement, the court ultimately held:

18 [W]hen, as in this case, a police officer on duty misuses
19 his official authority by raping a woman whom he has
20 detained, the public entity that employs him can be held
21 vicariously liable. This does not mean that, as a matter
22 of law, the public employer is vicariously liable
23 whenever an on-duty officer commits a sexual assault.
24 Rather, this is a question of fact for the jury.⁶

25 ⁶ A few years after *Mary M.*, in *Lisa M.*, the California
26 Supreme Court articulated two general approaches to respondeat
27 superior liability (both of which were reflected in *Mary M.*) Under
28 the first approach, touched upon above, the court analyzed whether
there was a sufficient "nexus" or "link" between the tortious
conduct and the employee's work for the rule of respondeat superior
to apply. *Lisa M.*, 12 Cal. 4th at 298, 300-01. Second, the court
also analyzed "whether the tortious conduct was, in a general way,
foreseeable from the employee's duties." *Id.* at 299. "The question
is not one of statistical frequency, but of a relationship between
the nature of the work involved and the type of tort committed. The
employment must be such as predictably to create the risk employees
will commit intentional torts of the type for which liability is
sought." *Id.* at 302.

1 54 Cal. 3d at 221.

2 2. California Civil Jury Instructions On Respondeat Superior
3 Subsequent to *Mary M.*, the Judicial Council of California
4 approved of Civil Jury Instructions dealing with vicarious liability
5 and the scope of employment issue (which neither party discusses).
6 CACI 3270, entitled "Scope of Employment," reads as follows:

7 [Name of Plaintiff] must prove that [name of agent] was
8 acting within the scope of [his/her]
9 [employment/authorization] when [name of plaintiff] was
10 harmed.

11 Conduct is within the scope of [employment/authorization]
12 if:

13 (a) It is reasonably related to the kinds of tasks that
14 the [employee/agent] was employed to perform; or

15 (b) It is reasonably foreseeable in light of the
16 employer's business or the [agent's/employee's job]
17 responsibilities.

18 In the "Directions for Use" section of CACI 3720, it states "[f]or
19 an instruction on the scope of employment in cases involving on-duty
20 peace officers, see CACI No. 3721." In turn, CACI 3721, entitled
21 "Scope of Employment - Peace Officer's Misuse of Authority," reads
22 as follows:

23 [Name of plaintiff] must prove that [name of agent] was
24 acting within the scope of [his/her]
25 [employment/authorization] when [name of plaintiff] was
26 harmed.

27 The conduct of a peace officer is within the scope of
28 [his/her] employment as a peace officer if all of the
following are true:

(a) The conduct occurs while the peace officer is on duty
as a peace officer;

(b) The conduct occurs while the peace officer is
exercising [his/her] authority as a peace officer; and

1 (c) The conduct results from the use of [his/her]
2 authority as a peace officer.

3 3. Application Of California Law

4 Plaintiff, as the moving party who has the burden of proof on
5 the scope of employment issue, *Delfino v. Agilent Technologies,*
6 *Inc.*, 145 Cal. App. 4th 790, 812 (2006), must "affirmatively
7 demonstrate that no reasonable trier of fact could find other than
8 for" her on this issue, *Soremekun*, 509 F.3d at 984. That is, she
9 must demonstrate, "beyond controversy," that Officer Solis was
10 acting within the scope of his employment at the time of the
11 disputed sexual conduct. *So. Cal. Gas Co.*, 336 F.3d at 888 (internal
12 quotation marks omitted).

13 As mentioned, "[g]enerally, the issue of scope of employment
14 is a question of fact, but becomes a question of law when the facts
15 are undisputed and no conflicting inferences are possible."
16 *Billings*, 57 F.3d at 801; see also *Mary M.*, 54 Cal. 3d at 213. The
17 parties offer widely divergent stories on how Officer Solis ended
18 up in Plaintiff's bedroom and how the sexual act came about.
19 Viewing the evidence in a light most favorable to the City, it
20 cannot be concluded, as a matter of law, that Officer Solis was
21 acting within the scope of his employment under a *Mary M.* and CACI
22 3721 analysis.

23 Plaintiff admitted in her deposition that, after her parents
24 left, Officer Solis got up from the kitchen table and was getting
25 ready to leave. He indicated that he did not want to be
26 disrespectful. Plaintiff stated to him, "I won't disrespect you,"
27 and she hugged him (as she concedes). Subsequently, according to
28

1 Solis, he was walking to the door and was going to leave the
2 residence but Plaintiff, after she had already hugged him and kissed
3 him, grabbed him and led him into her bedroom where she kissed him
4 further, grabbed his crotch, pushed him on her bed and unzipped his
5 pants. On his version of the events, he, unlike the officer in *Mary*
6 *M.*, did not physically transport or escort Plaintiff to the scene
7 of the incident, did not further control her there (in the bedroom),
8 did not make any threats to arrest Plaintiff or take her to jail,
9 and did nothing to physically force Plaintiff to give him oral sex;
10 rather he received a sexual act without compulsion on his part.

11 Given the evidence it cannot be concluded, as a matter of law,
12 that Officer Solis misused official authority in obtaining, or to
13 obtain, oral sex. Stated in the words of CACI 3721, it cannot be
14 concluded, as a matter of law, that Officer Solis was exercising (or
15 misusing) his authority as a police officer at the time the sexual
16 act occurred or that the sexual act was a result of his use (or
17 misuse) of authority. There are, of course, facts that cut both
18 ways, but whether a trier of fact ultimately believes that the
19 sexual act occurred while Plaintiff was subject to Officer Solis's
20 use (or misuse) of authority is for the trier of fact to decide.

21 Both at oral argument and in her briefing, Plaintiff argued
22 that the following passage from Mr. Law's investigation report
23 compels the conclusion that Officer Solis was acting within the
24 scope of his employment:

25 //

26 //

27 //

1 Officer Solis, while on duty, in full uniform, while
2 counseling a narcotic addicted, bi-polar, manic
3 depressant, took advantage of this woman's mental health
4 and addiction.

5 (Kapetan Decl. Ex E at 4.) Conspicuously absent from this passage,
6 however, is any mention that Solis actually used or misused his
7 authority as an officer to take advantage of Plaintiff or to obtain
8 oral sex. Cf. *Mary M.*, 54 Cal. 3d at 221 ("Taking advantage of his
9 authority and control as a law enforcement officer, he ordered
10 plaintiff into his car and transported her to her home, where he
11 threw her on a couch.") (emphasis added). Although this passage
12 states that Officer Solis was on duty at the time (which is true),
13 this passage does not state that Officer Solis was acting within the
14 scope of his employment while on duty.

15 In terms of foreseeability, while "a police officer's assault
16 may be foreseeable from the scope of his unique authority over
17 detainees," *Lisa M.*, 12 Cal. 4th at 304 (emphasis added), whether
18 Officer Solis used assaultive conduct in obtaining oral sex, whether
19 Plaintiff was his "detainee" in the bedroom, and whether Officer
20 Solis was actually using or misusing his "authority" at the time,
21 are fact-bound issues over which there is a genuine dispute.

22 Plaintiff essentially argues that it would be incongruous to
23 conclude that although a rape of a detainee falls within the scope
24 of an officer's employment, *Mary M.*, a less violent form of sexual
25 conduct (oral sex with Plaintiff) does not. (Doc. 105 at 5.) At
26 no point in *Mary M.* did the court indicate that the less serious a
27 sexual tort is, the more likely it will be that it falls within the
28 scope of an officer's employment irrespective of such considerations

1 as the officer's use or misuse of authority. Moreover, Plaintiff's
2 argument ignores *Mary M.'s* admonition that not every "sexual
3 assault" committed by an on-duty officer falls within the scope of
4 employment:

5 [W]e hold that when, as in this case, a police officer on
6 duty misuses his official authority by raping a woman
7 whom he has detained, the public entity that employs him
8 can be held vicariously liable. *This does not mean that,
as a matter of law, the public employer is vicariously
liable whenever an on-duty officer commits a sexual
assault. Rather, this is a question of fact for the jury.*

9 54 Cal. 3d at 221 (emphasis added). Here, it is a "question of fact
10 for the jury" whether Officer Solis's conduct fell within the scope
11 of his employment.

12 For the foregoing reasons, Plaintiff's motion for summary
13 adjudication is DENIED.

14 V. CONCLUSION

15 For the reasons stated above:

16 1. Summary adjudication is GRANTED in favor of the City and
17 against Plaintiff on her negligence claim to the extent it seeks to
18 impose liability on the City for its own direct negligent acts;

19 2. Summary adjudication is GRANTED in favor of the City and
20 against Plaintiff on her § 1983 claim asserted against the City and
21 Officer Solis in his official capacity;

22 3. The City's motion for summary adjudication on the issue
23 of whether a seizure of Plaintiff occurred is DENIED; and

24 4. Plaintiff's motion for summary adjudication on the issue
25 of whether Officer Solis acted within the scope of his employment
26 when he received oral sex is DENIED.

1 In light of the ruling, Plaintiff's objection (Doc. 104) to the
2 City's Additional Uncontroverted Material Facts Nos. 52, 53, and 54,
3 as well as to the Declaration of T.J. Law, is denied as moot.
4

5 IT IS SO ORDERED.

6 **Dated: January 28, 2009**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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