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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAWN McCULLOUGH,

CASE NO. 1:10-cv-2295-AWI-MJS

Plaintiffs,

FINDINGS AND RECOMMENDATIONS,
FINDING PLAINTIFF STATES A
COGNIZABLE CLAIM AND
RECOMMENDING DISMISSAL OF CERTAIN
CLAIMS AND DEFENDANTS

v.

FRESNO POLICE DEPARTMENT,

(ECF No. 7)

Defendant.

OBJECTIONS DUE WITHIN THIRTY DAYS

_____ /

Plaintiff Dawn McCullough ("Plaintiff"), proceeding in forma pauperis, initiated this action by filing a pro se Complaint on December 20, 2010. (ECF No. 1.) The Court screened Plaintiff's initial Complaint on March 25, 2011, and dismissed it with leave to amend. (ECF No. 6.) Plaintiff filed a First Amended Complaint on May 2, 2011. (ECF No. 7.) Plaintiff's First Amended Complaint is now before the Court for screening.

I. SCREENING REQUIREMENT

The in forma pauperis statute provides that "the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim upon

1 which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii). A complaint must contain “a
2 short and plain statement of the claim showing that the pleader is entitled to relief”
3 Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but “[t]hreadbare
4 recitals of the elements of a cause of action, supported by mere conclusory statements,
5 do not suffice,” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atlantic Corp.
6 v. Twombly, 550 U.S. 544, 555 (2007)), and courts “are not required to indulge
7 unwarranted inferences,” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009)
8 (internal quotation marks and citation omitted). While factual allegations are accepted as
9 true, legal conclusion are not. Iqbal, 129 S. Ct. at 1949.

11 **II. FACTUAL ALLEGATIONS**

12 Plaintiff names the following individuals as Defendants: 1) Kevin Yambupah (ID:
13 P1555), 2) Maribel Ramirez (ID: D3038), 3) Miguel Archan (ID: P1444), 4) Eddie Barrious
14 (ID: S5107), 5) Chris Cooper (ID: P827), 6) Gregory Taylor (ID: P991), 7) Alex Robles (ID:
15 S142), 8) Josh Bowling (ID: P1188), 9) Robert Chavez (ID: P1348), 10) See Xiong (ID:
16 D3061), 11) Tami Worden (ID: D3081), 12) Mayiyen Yang (ID: D3024), 13) Kaylie
17 Rodriguez (ID: D3080), 14) Jodi Garland (ID: D3076), 15) Lorrie Emerson (ID: D3023), 16)
18 Aisha Jones (ID: P1311), 17) Angie Landin (ID: D3037). Plaintiff alleges that as a result
19 of Defendants’ violations of her rights under the First, Fourth, and Fourteenth Amendments
20 she was injured, and subjected to pain, suffering, and emotional distress.

21 Plaintiff alleges as follows:

22 On December 9, 2008, at 11:15 p.m, Plaintiff was involved in an argument with her
23 brother, David Webster. (Am. Compl. at 3.) Plaintiff then went to take a bath. (Id.)
24 Defendant Yambupah kicked the bathroom door open. (Id.) Plaintiff told Defendant
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1 Yambupah that she was naked, and would get out of the bath, put on clothes, and then talk
2 to him. (Id.) Defendant Yambupah refused to let her do this, and instead took Plaintiff's
3 left arm and pulled her out of the bath. (Id.) Plaintiff fell on the floor. (Id.) Defendant
4 Yambupah pulled Plaintiff into the living room in front of the open front door. (Id.) At this
5 point, Plaintiff was handcuffed. (Id.) Plaintiff continued to ask for clothes. (Id.)
6 Defendants M. Ramirez and Archan were also inside the apartment. (ECF No. 7-1.)
7 Defendants Borrows, Cooper, Taylor, Robles, Yang, Jones, K. Rodriguez, Garland, Landin,
8 Bowling, Chavez, Xiong, Worden, and Emerson were standing outside. (Id.) Plaintiff was
9 never arrested or given a court date. (Am. Compl. at 4.) She never had charges filed
10 against her. (Id. at 4.)
11

12 Plaintiff asks for \$2.7 million for pain and suffering, as well as for mental distress.
13

14 **III. ANALYSIS**

15 **A. Introduction**

16 As Plaintiff was previously informed in the Court's original screening order (ECF No.
17 6 at 4), the Court will construe her claims as though brought pursuant to 42 U.S.C. § 1983.
18

19 Section 1983 "provides a cause of action for the 'deprivation of any rights, privileges,
20 or immunities secured by the Constitution and laws' of the United States." Wilder v.
21 Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983). Section 1983
22 is not itself a source of substantive rights, but merely provides a method for vindicating
23 federal rights conferred elsewhere. Graham v. Connor, 490 U.S. 386, 393-94 (1989). To
24 state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right
25 secured by the Constitution or laws of the United States was violated, and (2) that the
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1 alleged violation was committed by a person acting under the color of state law. See West
2 v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d 1243, 1245 (9th
3 Cir. 1987).

4 Plaintiff alleges violations of her rights under the First, Fourth, and Fourteenth
5 Amendments.
6

7 **B. First Amendment Claim**

8 The First Amendment states that “Congress shall make no law respecting an
9 establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom
10 of speech, or of the press; or the right of the people peaceably to assemble, and to petition
11 the Government for a redress of grievances.” U.S. CONST. amend. I. The First
12 Amendment protects the freedom of religion, free speech, the press, the right to assemble,
13 and to petition the Government for redress of grievances. Id.
14

15 Although Plaintiff alleges violation of First Amendment rights, she does not allege
16 any facts suggesting she was denied any right or freedom protected by that Amendment.
17 Plaintiff has not asserted a claim under the First Amendment. Nothing in the facts she
18 presents implicates a First Amendment right. No useful purpose would be served by giving
19 Plaintiff an opportunity to amend this claim. The Court recommends dismissal of it.
20

21 **B. Fourteenth Amendment Claim**

22 Plaintiff alleges that her rights under the Fourteenth Amendment were violated,
23 apparently intending to allege violation of the the Due Process Clause of the Fourteenth
24 Amendment.
25

26 The Ninth Circuit has found that
27

1 [t]o establish a violation of substantive due process ..., a plaintiff is ordinarily
2 required to prove that a challenged government action was clearly arbitrary
3 and unreasonable, having no substantial relation to the public health, safety,
4 morals, or general welfare. Where a particular amendment provides an
5 explicit textual source of constitutional protection against a particular sort of
6 government behavior, that Amendment, not the more generalized notion of
7 substantive due process, must be the guide for analyzing a plaintiff's claims.

8 Patel v. Penman, 103 F.3d 868, 874 (9th Cir. 1996) (citations, internal quotations, and
9 brackets omitted) overruled on other grounds by Unitherm Food Systems, Inc.v. Swift
10 Eckrich, Inc., 546 U.S. 394 (2006); County of Sacramento v. Lewis, 523 U.S. 833, 842
11 (1998).

12 In this case, the Court concludes that the Fourth Amendment “provides [the] explicit
13 textual source of constitutional protection....” Patel, 103 F.3d at 874. Therefore, the Fourth
14 Amendment rather than the Due Process Clause of the Fourteenth Amendment governs
15 Plaintiff's constitutional claims.

16 **C. Fourth Amendment Claim**

17 The gravamen of Plaintiff's claims bring them within the ambit of the Fourth
18 Amendment protection against excessive force and intrusion into one's right to bodily
19 integrity.

20 The Fourth Amendment protects an individual's right to be free from unreasonable
21 searches and seizures. U.S. Const. amend. IV. Encompassed within the term
22 “unreasonable seizure” is the right to be free from excessive force and protection from
23 “unreasonable intrusions on one's bodily integrity.” Fontana v. Haskin, 262 F.3d 871,
24 878-79 (9th Cir. 2001). To state a Fourth Amendment claim, a plaintiff must show that the
25 amount of force used was unreasonable or that the manner in which the arrest was
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1 effectuated was an unlawful intrusion into her bodily integrity. Gregory v. County of Maui,
2 523 F.3d 1103, 1106 (9th Cir. 2008); Fontana, 262 F.3d at 879. Determining the
3 “reasonableness” of a particular action “requires a careful balancing of the nature and
4 quality of the intrusion on the individual’s Fourth Amendment interests against the
5 countervailing governmental interests at stake.” Id. (internal quotation marks omitted).
6 To determine the reasonableness of the use of force, the Court first must evaluate “the
7 type and amount of force inflicted.” Miller v. Clark County, 340 F.3d 959, 964 (9th Cir.
8 2003). The Court must then consider the importance of the government interests at stake
9 by evaluating: (1) the severity of the crime at issue, (2) whether the suspect posed an
10 immediate threat to the safety of the officers or others, and (3) whether the suspect was
11 actively resisting arrest. See Graham v. Connor, 490 U.S. 386, 396 (1989). Finally, the
12 Court must balance the gravity of the intrusion on the individual against the government’s
13 need for that intrusion. Headwaters Forest Defense v. County of Humboldt, 240 F.3d
14 1185, 1199 (9th Cir. 2000) (judgment vacated and case remanded for further consideration
15 in light of Saucier v. Katz, 533 U.S. 194 (2001), by County of Humboldt v. Headwaters
16 Forest Defense, 534 U.S. 801 (2001)) (judgment reaffirmed after remand by Headwaters
17 Forest Defense v. County of Humboldt, 276 F.3d 1125, 1127 (9th Cir. 2002)).

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21 In this case, taking Plaintiff’s allegations as true, as the Court must at this stage of
22 the proceeding, Defendant Yambupah pulled her naked from a bathtub and dragged her
23 into the living room where he handcuffed her. Defendants M. Ramirez and Archan were
24 inside the apartment at the time of the incident. At this point there is nothing before the
25 Court to suggest that Plaintiff had precipitated the action by threatening or causing harm
26 to herself, the officers or anyone else or by resisting arrest. There is nothing to suggest
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1 it was necessary to “drag” her from the bathroom to the living room or to suggest a valid
2 reason for not covering her naked body before taking her to the living room. Plaintiff
3 alleges she was never arrested or charged. On these facts, the degree of force used to
4 subdue Plaintiff could be construed as more than reasonably necessary under the
5 circumstances.

6
7 Accordingly, it appears that Plaintiff has stated a claim for a violation of her Fourth
8 Amendment right to be free from excessive force and for violation of her right to bodily
9 integrity against Defendant Yambupah. She has failed to state a Fourth Amendment claim
10 against anyone else. Reportedly, Defendants M. Ramirez and Archan were present, but
11 Plaintiff still, after having been given leave to amend, does not allege that they took or
12 failed to take any action which violated her rights. The Court will recommend that
13 Defendants M. Ramirez and Archan be dismissed from this action.

14
15 **D. Section 1983 Linkage Requirement**

16 Plaintiff also alleges claims against Defendants Borrows, Cooper, Taylor, Robles,
17 Yang, Jones, K. Rodriguez, Garland, Landin, Bowling, Chavez, Xiong, Worden, Barrious,
18 and Emerson. However, Plaintiff has failed to link any of these Defendants to any action
19 resulting in an injury to Plaintiff.

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21 Under section 1983, Plaintiff must demonstrate that each defendant personally
22 participated in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir.
23 2002). This requires the presentation of factual allegations sufficient to state a plausible
24 claim for relief. Iqbal, 129 S. Ct. at 1949-50; Moss v. U.S. Secret Service, 572 F.3d 962,
25 969 (9th Cir. 2009). The mere possibility of misconduct falls short of meeting this
26 plausibility standard. Id.

1 The statute clearly requires that there be an actual connection or link between the
2 actions of the defendants and the deprivation alleged to have been suffered by the plaintiff.
3 See Monell v. Department of Social Services, 436 U.S. 658 (1978). Government officials
4 may not be held liable for the actions of their subordinates under a theory of respondeat
5 superior. Iqbal, 129 S. Ct. at 1948. Since a government official cannot be held liable
6 under a theory of vicarious liability in section 1983 actions, Plaintiff must plead sufficient
7 facts showing that the official has violated the Constitution through his own individual
8 actions. Id. at 1948. In other words, to state a claim for relief under section 1983, Plaintiff
9 must link each named defendant with some affirmative act or omission that demonstrates
10 a violation.
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12 Nowhere in the body of the Complaint does Plaintiff attribute any substantive action
13 or wrong to Defendants Borrows, Cooper, Taylor, Robles, Yang, Jones, K. Rodriguez,
14 Garland, Landin, Bowling, Chavez, Xiong, Worden, Barrious, or Emerson. Plaintiff only
15 alleges that they were outside of the apartment when she was dragged into the living room
16 without clothes.
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18 For the reasons stated above, the Court will recommend dismissal of these
19 Defendants, further leave to amend appearing futile.
20

21 **IV. CONCLUSION AND RECOMMENDATION**

22 Plaintiff stated a cognizable claim against Defendant Yambupah for violation of her
23 Fourth Amendment right to be free from excessive force and for violation of her right to
24 bodily integrity, but failed to state any other cognizable claim. Plaintiff has failed to state
25 a claim under the First and Fourteenth Amendments and against Defendants M. Ramirez,
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1 Archan, Borrows, Cooper, Taylor, Robles, Yang, Jones, K. Rodriguez, Garland, Landin,
2 Bowling, Chavez, Xiong, Worden, Barrious, or Emerson.

3 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 4 1. Plaintiff's claims against Defendants M. Ramirez, Archan, Borrows, Cooper,
5 Taylor, Robles, Yang, Jones, K. Rodriguez, Garland, Landin, Bowling,
6 Chavez, Xiong, Worden, Barrious, and Emerson be dismissed with prejudice;
7
- 8 2. Plaintiff's First Amendment claim be dismissed with prejudice;
- 9 3. Plaintiff's Fourteenth Amendment claim be dismissed with prejudice; and
- 10 4. Plaintiff be given leave to proceed on her Fourth Amendment claim against
11 Defendant Yambupah.

12 These Findings and Recommendations are submitted to the United States District
13 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1).

14 Within thirty days after being served with these findings and recommendations, any party
15 may file written objections with the Court and serve a copy on all parties. Such a document
16 should be captioned "Objections to Magistrate Judge's Findings and Recommendations."
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18 Any reply to the objections shall be served and filed within ten days after service of the
19 objections. The parties are advised that failure to file objections within the specified time
20 may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153
21 (9th Cir. 1991).
22

23
24 IT IS SO ORDERED.

25
26 Dated: April 9, 2012

Isl. Michael J. Song
UNITED STATES MAGISTRATE JUDGE