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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

EARLENE SMITH,

Plaintiff,

v.

STATE OF CALIFORNIA [CALIFORNIA
DEPARTMENT OF CORRECTIONS AND
REHABILITATION],

Defendant.

Case No. 1:17-cv-01058-LJO-SAB

AMENDED FINDINGS AND
RECOMMENDATIONS RECOMMENDING
GRANTING DEFENDANT CALIFORNIA
DEPARTMENT OF CORRECTIONS AND
REHABILITATION’S MOTION TO
DISMISS

(ECF No. 7)

OBJECTIONS DUE WITHIN FOURTEEN
DAYS

On August 8, 2017, Plaintiff Earlene Smith (“Plaintiff”) filed this civil rights action pursuant to 42 U.S.C. § 1983 against the California Department of Corrections and Rehabilitation (“CDCR”) and numerous unidentified individuals. (ECF No. 1.) Currently before the Court is Defendant CDCR’s motion to dismiss, filed September 29, 2017, which was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. (ECF No. 8.) Plaintiff has not filed an opposition to the motion to dismiss.

A findings and recommendations was filed on October 24, 2017, recommending granting Defendant CDCR’s motion to dismiss. (ECF No. 12.) On November 7, 2017, Defendant CDCR filed a request for clarification of the findings and recommendations. Accordingly, the Court issues this amended findings and recommendations.

1 I.

2 COMPLAINT ALLEGATIONS

3 In mid-June 2016, Plaintiff, who is African-American, was hired as a psychiatric
4 technician at the Central California Women’s Facility in Chowchilla.¹ (Compl. ¶¶ 14, 15, ECF
5 No. 1.) On June 30, 2016, Plaintiff misplaced her identification card and searched her person,
6 belongings, and those areas that she had visited to no avail. (Compl. ¶ 16.) Plaintiff reported her
7 identification card as missing. (Compl. ¶ 16.) Plaintiff was told to search again for her
8 identification card and was observed searching by an unidentified individual (“Doe 1”) who was
9 supervising the search. (Compl. ¶ 17.)

10 When Plaintiff was unable to find her identification card, Doe 1 instructed a second
11 unidentified individual (“Doe 2”) to take Plaintiff into the bathroom and search Plaintiff’s
12 person. (Compl. ¶ 18.) Doe 2 lead Plaintiff into the bathroom and conducted a search which
13 required Plaintiff to display her naked breasts, show her undergarments, and lift her wig.
14 (Compl. ¶ 19.) Plaintiff objected to the invasiveness of the search. (Compl. ¶ 19.) After she left
15 the bathroom, Plaintiff heard Doe 2 say to correctional officers something to the effect of “she
16 showed it all.” (Compl. ¶ 20.)

17 That same day or the following day, Plaintiff, who was distraught and crying, reported
18 the search to a third unidentified individual (“Doe 3”). (Compl. ¶ 21.) Around June 30, 2016,
19 Does 1 and 2 were aware that Plaintiff had reported the search to Doe 3. (Compl. ¶ 21.)

20 On July 1, 2016, Plaintiff submitted a formal EEO complaint regarding the search.
21 (Compl. ¶ 22.) Does 1, 2, and 3 were aware that Plaintiff submitted the EEO complaint around
22 July 1, 2016. (Compl. ¶ 23.)

23 On July 7, 2016, Plaintiff was written up for allegedly inadequately responding to an
24 emergency although Plaintiff contends that she conducted herself pursuant to the minimal
25 training that she had been provided. (Compl. ¶ 24.) At least one other psychiatric technician

26 _____
27 ¹ The Court notes that Plaintiff’s complaint states that the incidents alleged in the complaint occurred in the City and
28 County of San Francisco (Compl. ¶ 4), which would make venue proper in the Northern District of California. See
28 U.S.C. § 1391(b). However, the Court takes judicial notice that Chowchilla is located in Madera County which
is in the Eastern District of California making venue appropriate in this Court.

1 failed to respond according to protocol but was not written up. (Compl. ¶ 24.)

2 Prior to July 15, 2016, based upon their investigation, EEO determined that Plaintiff's
3 complaint was supervisory in nature and would not be investigated. (Compl. ¶ 25.) The
4 complaint was forwarded to management for review and appropriate action. (Compl. ¶ 25.)
5 Plaintiff was never informed that any action was taken to address her complaint. (Compl. ¶ 26.)

6 Other correctional officers told inmates that Plaintiff wore a wig and the manner in which
7 her hair appeared underneath which would only have been known by Doe 2. (Compl. ¶ 27.)
8 Plaintiff was taunted by inmates who called her bald headed. (Compl. ¶ 27.) The inmates used
9 this knowledge to taunt, intimidate and harass Plaintiff. (Compl. ¶ 27.)

10 After Plaintiff complained to her supervisors, Does 1, 2, 3, and other correctional officers
11 and staff refused to give the necessary level of assistance to Plaintiff which caused her job duties
12 to become more difficult and fundamentally altered the conditions of her employment. (Compl. ¶
13 28.)

14 From August 2016 through September 2016, Does 1, 2, 3, and other unidentified
15 individuals retaliated against Plaintiff by filing multiple reports of misconduct against her for
16 trivial matters related to medication management which were either wholly fabricated or were
17 technical violations for which other employees were not written up or reported. (Compl. ¶ 29.)

18 In September 2016, an unidentified individual ("Doe 8") blamed Plaintiff for some
19 Tylenol 3 tablets that were missing. (Compl. ¶ 30.) Plaintiff denied taking the medication.
20 (Compl. ¶ 30.) Plaintiff alleges that this allegation was made in retaliation for Plaintiff's
21 complaint regarding the unlawful search of her person. (Compl. ¶ 30.)

22 In September 2016, another unidentified individual ("Doe 9") wrote Plaintiff up for an
23 open food port in retaliation for her report. (Compl. ¶ 31.) Despite widespread practice of
24 managing the food port in the manner that resulted in Plaintiff's write-up, no other employees in
25 Plaintiff's position were written up for the same conduct. (Compl. ¶ 31.)

26 On September 11, 2016, a sergeant ("Doe 10") yelled at Plaintiff in front of other
27 employees regarding the protocol for a particular inmate's blood sugar management. (Compl. ¶
28 32.) No other employees were treated with this level of hostility which changed the conditions

1 of Plaintiff's working environment. (Compl. ¶ 32.)

2 On October 30, 2016, Plaintiff was written up by an unidentified individual ("Doe 11").
3 (Compl. ¶ 33.)

4 In November 2016, Plaintiff received notice that she would be interviewed regarding the
5 misconduct that she had complained of. (Compl. ¶ 34.)

6 On December 3, 2016, Plaintiff filed an EEO report regarding the October 30, 2016
7 write-up. (Compl. ¶ 35.)

8 Plaintiff brings this action against the CDCR, and unidentified defendants for
9 unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments; and
10 state law claims of race discrimination and retaliation in violation of California Government
11 Code section 12940, assault, battery, negligence, and negligent infliction of emotional distress
12 seeking monetary damages. (Comp. pp. 6-12.)

13 II.

14 LEGAL STANDARD

15 A. Rule 12(b)(6)

16 Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss on
17 the grounds that a complaint "fail[s] to state a claim upon which relief can be granted." A
18 complaint must contain "a short and plain statement of the claim showing that the pleader is
19 entitled to relief." Fed. R. Civ. P. 8(a)(2). "[T]he pleading standard Rule 8 announces does not
20 require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-
21 unlawfully harmed-me accusation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell
22 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). In assessing the sufficiency of a
23 complaint, all well-pleaded factual allegations must be accepted as true. Iqbal, 556 U.S. at 678-
24 79. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere
25 conclusory statements, do not suffice." Id. at 678.

26 In deciding whether a complaint states a claim, the Ninth Circuit has found that two
27 principles apply. First, to be entitled to the presumption of truth the allegations in the complaint
28 "may not simply recite the elements of a cause of action, but must contain sufficient allegations

1 of underlying facts to give fair notice and to enable the opposing party to defend itself
2 effectively.” Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011). Second, so that it is not unfair
3 to require the defendant to be subjected to the expenses associated with discovery and continued
4 litigation, the factual allegations of the complaint, which are taken as true, must plausibly
5 suggest an entitlement to relief. Starr, 652 F.3d at 1216.

6 **B. Motion to Strike**

7 A defendant may move to dismiss various portions of the complaint as redundant,
8 immaterial, or contrary to law pursuant to Rule 12(f) of the Federal Rules of Civil Procedure.
9 Rule 12(f) provides that “the court may strike from a pleading . . . any redundant, immaterial,
10 impertinent, or scandalous matter.” Motions to strike pursuant to Rule 12(f) are generally
11 regarded with disfavor and the remedy is to be used only “when necessary to discourage parties
12 from raising allegations completely unrelated to the relevant claims and when the interests of
13 justice so require.” Sapiro v. Encompass Ins., 221 F.R.D. 513, 517 (N.D. Cal. 2004).

14 **III.**

15 **DISCUSSION**

16 Defendant CDCR moves to dismiss the complaint against CDCR on the grounds that
17 CDCR is immune from suit in federal court pursuant to the Eleventh Amendment; the first cause
18 of action fails to state a claim against CDCR; the second cause of action fails to state a prima
19 facie case for race discrimination in violation of the Fair Employment and Housing Act
20 (“FEHA”); Plaintiff has failed to plead a statutory basis for the state claims of assault, battery,
21 negligence, and negligent infliction of emotional distress; CDCR is immune from liability under
22 California Government Code section 815; and Plaintiff’s claim for punitive damages is improper
23 as to CDCR and should be stricken.

24 **A. CDCR is Entitled to Immunity from Suit Under the Eleventh Amendment**

25 Defendant CDCR argues that it has immunity from suit pursuant to the Eleventh
26 Amendment and has not consented to being sued in federal court. Therefore, Defendant CDCR
27 argues that the section 1983 claim and all state law claims in this action should be dismissed
28 against CDCR.

1 “The Eleventh Amendment of the United States Constitution prohibits federal courts
2 from hearing suits brought by private citizens against state governments, without the state’s
3 consent.” Nat. Res. Def. Council v. California Dep’t of Transp., 96 F.3d 420, 421 (9th Cir.
4 1996); see also Sofamor Danek Grp., Inc. v. Brown, 124 F.3d 1179, 1183 (9th Cir. 1997). This
5 immunity under the Eleventh Amendment extends to state agencies and to state officers acting
6 on behalf of the state. Nat. Res. Def. Council, 96 F.3d at 421; Aholelei v. Dept. of Public Safety,
7 488 F.3d 1144, 1147 (9th Cir. 2007); Flint v. Dennison, 488 F.3d 816, 824–25 (9th Cir. 2007).
8 The general rule is that federal court jurisdiction will not be found against a state official when
9 the state is the real party in interest. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89,
10 101-02 (1984).

11 The principle of sovereign immunity is a constitutional limitation on the federal judicial
12 power established in Article III of the United States Constitution and a state may not be sued in
13 federal court without its consent. Pennhurst State Sch., 465 U.S. at 98-99. The state’s sovereign
14 immunity can be waived, but the Supreme Court has held that the State’s consent must be
15 unequivocally expressed. Id. at 99. Therefore, “an unconsenting State is immune from suits
16 brought in federal courts by her own citizens as well as by citizens of another state.” Id. at 100.

17 1. Section 1983 Claims

18 Pursuant to the Eleventh Amendment, state agencies and officials are generally immune
19 from liability under 42 U.S.C. § 1983. Will v. Michigan Dep’t of State Police, 491 U.S. 58, 66
20 (1989) (section 1983 does not permit suits against a state unless the state has waived its
21 immunity); Flint, 488 F.3d at 825 (state officials sued in their official capacities are not
22 “persons” within the meaning of section 1983 and are generally entitled to Eleventh Amendment
23 immunity). The CDCR is a state agency entitled to Eleventh Amendment Immunity. Brown v.
24 California Dep’t of Corr., 554 F.3d 747, 752 (9th Cir. 2009); Taylor v. List, 880 F.2d 1040, 1045
25 (9th Cir. 1989); Allison v. California Adult Auth., 419 F.2d 822, 822 (9th Cir. 1969). However,
26 the Eleventh Amendment does not bar suit against state officials sued in their individual
27 capacities for acts taken during the course of their official duties. Hafer v. Melo, 502 U.S. 21, 30
28 (1991); Stilwell v. City of Williams, 831 F.3d 1234, 1245–46 (9th Cir. 2016).

1 In this instance, Plaintiff is seeking monetary damages alleging violations of the Fourth
2 and Fourteenth Amendment. The Court finds that Defendant CDCR is entitled to Eleventh
3 Amendment immunity for the section 1983 claims brought in this action and recommends that
4 the motion to dismiss be granted as to CDCR for the first cause of action.

5 2. State Law Claims

6 Defendant argues that the State has not waived its Eleventh Amendment immunity as to
7 the FEHA claims brought in the complaint. The Ninth Circuit has held that the State of
8 California has not waived sovereign immunity to FEHA actions in federal court. Freeman v.
9 Oakland Unified Sch. Dist., 179 F.3d 846, 847 (9th Cir. 1999); Steshenko v. Gayrard, 44
10 F.Supp.3d 941, 950 (N.D. Cal. 2014). The FEHA claims must therefore be dismissed as to
11 CDCR.

12 Defendant also argues that the state law assault, battery, negligence, and negligent
13 infliction of emotional distress claims must be dismissed because such claims must be based on
14 statute and must be plead with particularity. Section 815 of the California Government Code
15 provides that “[e]xcept as otherwise provided by statute: (a) A public entity is not liable for an
16 injury, whether such injury arises out of an act or omission of the public entity or a public
17 employee or any other person.” Therefore, “public entity liability is statutory in nature.”
18 Peterson v. San Francisco Cmty. Coll. Dist., 36 Cal.3d 799, 809 (1984). In construing section
19 815, California courts find “that public entities are liable in tort only to the extent declared by
20 statute and that such liability where it exists is subject to certain statutory immunities and
21 defenses.” Williams v. State of California, 62 Cal.App.3d 960, 966 (1976); see also Gonzales v.
22 State of California, 29 Cal.App.3d 585, 590 (1972) (the general rule is that “a public entity,
23 which includes the State, is not liable for an injury whether it arises out of an act or omission of
24 the public entity, a public employee or any other person, except as provided by statute”).
25 Plaintiff’s complaint is devoid of any allegations that statutory exceptions apply to allow CDCR
26 to be sued in federal court for the state law claims brought in this action.

27 Accordingly, the Court recommends that Defendant’s motion to dismiss the state law
28 claims against CDCR be granted.

1 **B. Race Discrimination in Violation of FEHA**

2 Defendant also argues that Plaintiff’s second cause of action for race discrimination in
3 violation of the FEHA must be dismissed because Plaintiff has failed to alleged sufficient facts to
4 state a cause of action.²

5 As relevant here, California law makes it an unlawful employment practice for an
6 employer to “to refuse to hire or employ the person or to refuse to select the person for a training
7 program leading to employment, or to bar or to discharge the person from employment or from a
8 training program leading to employment, or to discriminate against the person in compensation
9 or in terms, conditions, or privileges of employment” because of their race. Cal. Gov. Code §
10 12940(a). To state a claim of race discrimination under the FEHA, a plaintiff must allege that
11 “her employer took one or more adverse employment actions against the plaintiff because of the
12 plaintiff’s race.” Pinder v. Employment Dev. Dep’t, 227 F.Supp.3d 1123, 1136 (E.D. Cal.
13 2017). A prima facie case of race discrimination requires the plaintiff to show that (1) she was a
14 member of a protected class; (2) she was performing competently in the position she held; (3)
15 she suffered an adverse employment action, such as termination, demotion, or denial of an
16 available job; and (4) some other circumstances that suggest a discriminatory motive. Lawler v.
17 Montblanc N. Am., LLC, 704 F.3d 1235, 1242 (9th Cir. 2013); Zeinali v. Raytheon Co., 636
18 F.3d 544, 552 (9th Cir. 2011); Guz v. Bechtel Nat. Inc., 24 Cal.4th 317, 352 (2000).

19 Plaintiff alleges that during the term of her employment, she was subjected to
20 discrimination based upon race or ethnicity due “to personnel decision-making based upon race
21 and ethnicity which negatively affected African-American employees, including giving
22 preference in tasks, scheduling and activities, to non-African-American employees.” (Compl. ¶
23 43.) However, the complaint alleges that Plaintiff was subjected to an illegal search and after
24 reporting the incident she was subjected to harassment by inmates and written up for incidents in
25 retaliation for making the report. There are no factual allegations that Plaintiff was subjected to
26 any personnel decision making based on her race or treated differently than other non-African-

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28 ² As this Court is issuing findings and recommendations which the district judge could decline to adopt the
additional arguments in the complaint shall be addressed.

1 American employees or that any other individual was given “preference in tasks, scheduling and
2 activities.”

3 Further, while Plaintiff alleges that she is African-American, the complaint contains no
4 factual allegations that the incidents alleged in the complaint were because of her race. In the
5 context of a claim alleging violation of the Equal Protection Clause, the Ninth Circuit has stated
6 that the fact that the plaintiff is of a different race than the defendants does not standing alone
7 mean the defendants discriminated on the basis of race. Thornton v. City of St. Helens, 425 F.3d
8 1158, 1167 (9th Cir. 2005); Bingham v. City of Manhattan Beach, 341 F.3d 939, 948 (9th Cir.
9 2003), overruled on other grounds as recognized by Benson v. City of San Jose, 583 F. App’x
10 604 (9th Cir. 2014). The Court finds that the complaint is devoid of any factual allegations that
11 would lead to the reasonable inference that adverse action was taken against Plaintiff due to her
12 race. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009).
13 The Court recommends that Defendant’s motion to dismiss the the second cause of action for
14 race discrimination in violation of California Government Code section 12940 be granted.

15 C. Punitive Damages

16 Defendant CDCR moves to strike the punitive damage claim against CDCR from the
17 complaint on the ground that punitive damages are not available against public entities under
18 California law.

19 The purpose of a motion to strike under Rule 12(f) “is to avoid the expenditure of time
20 and money that must arise from litigating spurious issues by dispensing with those issues prior to
21 trial.” Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 973 (9th Cir. 2010) (citations
22 omitted). Immaterial matter “has no essential or important relationship to the claims for relief or
23 defenses being pleaded”; and “impertinent matter consists of statements that do not pertain, and
24 are not necessary, to the issues in question.” Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th
25 Cir. 1993), rev’d on other grounds, 510 U.S. 517 (1994).

26 A claim for damages does not meet the five categories that are covered by Rule 12(f).
27 Whittlestone, Inc., 618 F.3d at 974. Therefore, the Ninth Circuit has held that a motion to strike
28 is the improper method to address Plaintiff’s claim for damages. Walker v. McCoud Cmty.

1 Servs. Dist., No. 2:16-61 WBS CMK, 2016 WL 951635, at *2 (E.D. Cal. Mar. 14, 2016). Here,
2 Defendant is challenging the sufficiency of the pleadings without any argument that the claim is
3 redundant, immaterial, impertinent, or scandalous. A motion addressing damages that are
4 precluded as a matter of law is properly raised as a motion to dismiss or a motion for summary
5 judgment. Whittlestone, Inc., 618 F.3d at 974. “[W]here a motion is in substance a Rule
6 12(b)(6) motion, but is incorrectly denominated as a Rule 12(f) motion, a court may convert the
7 improperly designated Rule 12(f) motion into a Rule 12(b)(6) motion.” Consumer Sols. REO,
8 LLC v. Hillery, 658 F.Supp.2d 1002, 1021 (N.D. Cal. 2009); Kelley v. Corr. Corp. of Am., 750
9 F. Supp. 2d 1132, 1146 (E.D. Cal. 2010) (citation omitted). Accordingly, the Court shall address
10 Defendant’s motion as if it were brought as a motion to dismiss pursuant to Rule 12(b)(6).

11 Plaintiff seeks damages for her section 1983 cause of action alleging that the defendants
12 acted in reckless and callous disregard for his rights, and the acts were willful, oppressive,
13 fraudulent, and malicious. (Compl. ¶ 41.) As a matter of law, a public entity cannot be sued for
14 punitive damages under section 1983. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271
15 (1981); Neveu v. City of Fresno, 392 F.Supp.2d 1159, 1183 (E.D. Cal. 2005). Plaintiff cannot
16 seek punitive damages against CDCR for her federal claims proceeding in this action.

17 Plaintiff also seeks punitive damages for her state law causes of action under California
18 Civil Code section 3294. (Compl. ¶¶ 45, 65.) Pursuant to California Government Code section
19 818, “a public entity is not liable for damages awarded under Section 3294 of the Civil Code or
20 other damages imposed primarily for the sake of example and by way of punishing the
21 defendant.” As a public entity CDCR cannot be held liable for punitive damages under
22 California law. United Nat. Maint., Inc. v. San Diego Convention Ctr., Inc., 766 F.3d 1002,
23 1012 (9th Cir. 2014); State Pers. Bd. v. Fair Employment & Hous. Com., 39 Cal. 3d 422, 434
24 (1985).

25 Accordingly, the Court recommends that CDCR’s motion to dismiss the punitive
26 damages claims against CDCR be granted.

27 ///
28 ///

1 amend as Defendant CDCR is entitled to Eleventh Amendment immunity;

2 b. Plaintiff's second cause of action for racial discrimination in violation of the
3 FEHA be DISMISSED for failure to state a claim;

4 c. Plaintiff's state law claims; third, fourth, fifth, and sixth causes of action; against
5 CDCR be DISMISSED with leave to amend; and

6 d. Plaintiff's request for punitive damages against CDCR be DISMISSED without
7 leave to amend.

8 This findings and recommendations is submitted to the district judge assigned to this
9 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within fourteen
10 (14) days of service of this recommendation, any party may file written objections to this
11 findings and recommendations with the Court and serve a copy on all parties. Such a document
12 should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The
13 district judge will review the magistrate judge's findings and recommendations pursuant to 28
14 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified
15 time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th
16 Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

17 IT IS SO ORDERED.

18 Dated: November 8, 2017

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21 UNITED STATES MAGISTRATE JUDGE