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3 **UNITED STATES DISTRICT COURT**
4 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
5

6 **EARLENE SMITH,**

7 **Plaintiff,**

8 **v.**

9 **OFFICE GINA MENDOZA; SERGEANT**
10 **JOSE LOPEZ; and DOES 3-50,**

11 **Defendants.**

1:17-cv-01058-LJO-SAB

**ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS THAT
DEFENDANTS' MOTION TO DISMISS
BE GRANTED**

(Docs. 24, 28)

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13 On May 11, 2018, the Magistrate Judge issued Findings and Recommendations ("F&Rs") that
14 Defendants' motion to dismiss be granted and that Plaintiff's Second, Fifth, Sixth, and Seventh Causes
15 of Action be dismissed with prejudice. These F&Rs were served on all parties appearing in the action
16 and contained notice that any objections were to be filed within fourteen (14) days after service of the
17 order. Plaintiff did not file any objections.

18 Plaintiff filed her original complaint in August 2017, which purported to state claims against the
19 California Department of Corrections and Rehabilitation ("CDCR") and DOES 1 through 50. The
20 complaint alleged a claim under 42 U.S.C. § 1983 for unlawful detention and search in violation of the
21 Fourth and Fourteenth Amendments; discrimination on the basis of race and sex in violation of
22 California Government Code § 12940; retaliation in violation of California Government Code §12940;
23 and state law claims for assault, battery, negligence, and negligent infliction of emotional distress
24 ("NEID").
25

1 Upon CDCR's motion to dismiss, the Court dismissed with prejudice Plaintiff's Section 1983
2 claims against CDCR, finding it was immune from suit under the Eleventh Amendment. On the same
3 ground, the Court also dismissed with prejudice the Fair Employment and Housing Act ("FEHA")
4 claims under § 12940 against the CDCR. As it pertained to the state law claims for assault, battery,
5 negligence, and negligent infliction of emotional distress, those claims were dismissed with leave to
6 amend.

7 Plaintiff filed a First Amended Complaint ("FAC") naming Officer Gina Mendoza and Sergeant
8 Jose Lopez and DOES 3 through 50 as defendants, stating claims against these defendants for unlawful
9 and unreasonable search under the Fourth and Fourteenth Amendments pursuant to Section 1983;
10 claims of sex and race-based discrimination and for retaliation under FEHA; and state law claims for
11 assault, battery, negligence, and negligent infliction of emotional distress. (Doc. 20). CDCR was not
12 named as a Defendant in the FAC. Defendants Mendoza and Lopez filed a motion to dismissed (Doc.
13 24), arguing the FEHA claims and the state law claims for negligence and negligent infliction of
14 emotional distress ("NEID") are not viable. The Magistrate Judge recommended dismissal with
15 prejudice of Plaintiff's FEHA claims, negligence, and NEID claims against Mendoza and Lopez. The
16 Magistrate Judge also recommended dismissal of any claims made against Lopez and Mendoza in their
17 official capacities.

18 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted a de
19 novo review of the case. Having carefully reviewed the entire file, the Court concludes the Magistrate
20 Judges' F&Rs are supported by the record and proper analysis. The F&Rs are adopted in full.

21 Accordingly, IT IS HEREBY ORDERED that:

- 22 1. Defendants' motion to dismiss is GRANTED;
- 23 2. Plaintiff's Second and Seventh causes of action under FEHA, California Government
24 Code § 12940, are dismissed with prejudice;
- 25 3. Plaintiff's Fifth and Sixth causes of action for negligence and negligent infliction of

1 emotional distress are dismissed with prejudice;

2 4. To the extent the FAC states a claim against Lopez or Mendez in their official
3 capacities, those claims are dismissed with prejudice;

4 5. This case proceeds on Plaintiff's remaining three claims against Defendants Mendoza
5 and Lopez: (1) unlawful detention and search under the Fourth and Fourteenth
6 Amendments (42 U.S.C. § 1983); (2) assault; and (3) battery; and

7 6. The parties shall proceed to a Scheduling Conference pursuant to Federal Rule of Civil
8 Procedure 16, currently set for July 17, 2018, before the Magistrate Judge (*see* Doc. 19).

9
10 IT IS SO ORDERED.

11 Dated: June 11, 2018

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE