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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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SCOTT JOHNSTON,
Plaintiff,
v.
CITY OF RED BLUFF, et al.,
Defendants.

NO. S-09-1353-FCD-CMK-PS
MEMORANDUM AND ORDER

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This matter is before the court on review of the findings and recommendations ("F&R") of the magistrate judge,¹ filed February 8, 2011, addressing defendants City of Red Bluff, Martin Nichols, Tessa Pritchard, Mark Barthel, and Richard Crabtree's (collectively "defendants") motion to dismiss plaintiff Scott Johnston's ("plaintiff") first amended complaint

¹ This matter was referred to a United States magistrate judge pursuant to 28 U.S.C. section 636(b)(1)(B) and Eastern District Local Rule 302.

1 ("FAC"). The FAC alleges the following claims: 1) age
2 discrimination in violation of the Age Discrimination in
3 Employment Act ("ADEA"); 2) denial of procedural due process; 3)
4 civil conspiracy, fraud, and wrongful termination; and 4)
5 negligence. Defendants filed objections to the magistrate
6 judge's findings and recommendations.² The court adopts the
7 magistrate judge's findings and recommendations with respect to
8 the ADEA, procedural due process, and civil conspiracy, fraud,
9 and wrongful termination claims. However, for the reasons set
10 forth below, the court does not adopt in full the findings and
11 recommendations with respect to plaintiff's negligence claim.

12 **BACKGROUND**

13 The court adopts the factual and procedural background set
14 forth by the magistrate judge in his findings and
15 recommendations. (See F&R, filed Feb. 8, 2011 [Docket # 49], at
16 2-3.)

18 ² In their objections, defendants challenge the
19 Magistrate Judge's conclusions regarding plaintiff's Claim 3
20 (conspiracy/fraud/wrongful termination) and Claim 4
21 (negligence). As to Claim 3, defendants argue (as they did in
22 their motion to dismiss) that a claim for conspiracy cannot lie
23 where the individual defendants are legally incapable of
24 committing the underlying tort. In this case, defendants
25 contend that the only tort underlying plaintiff's Claim 3 is
26 alleged wrongful termination due to age discrimination.
27 According to defendants, the individuals cannot be held liable
28 for this tort because, under ADEA, only employers are liable.
While defendants are correct that the individual defendants
cannot be held liable under ADEA, it is still possible that they
conspired to commit another underlying tort alleged in the
complaint - violation of due process (alleged in Claim 2).
Because it is possible that plaintiff can state a claim, the
Magistrate Judge's finding that plaintiff should be permitted to
amend this claim is sound.

1 **STANDARD**

2 When timely objections to findings by a magistrate judge
3 are filed, the district court must conduct a *de novo*
4 determination of the findings and recommendations as to issues
5 of law. 28 U.S.C. § 636(b)(1). The district court may adopt,
6 reject, or modify in part or in full the findings and
7 recommendations. 28 U.S.C. § 636(b)(1)(C). For the reasons set
8 forth below, the court adopts the magistrate’s findings and
9 recommendations in part and declines to adopt in part.

10 **ANALYSIS**

11 Plaintiff’s fourth claim for relief alleges negligence.³
12 (FAC, filed June 18, 2010 [Docket # 34], ¶¶ 87-93.)
13 Specifically, plaintiff alleges that the “[h]iring, promotion
14 and contracting practices of [d]efendant [City of] Red Bluff
15 resulted in unqualified persons being given positions of
16 authority” and that these persons “contributed to, or caused the
17 [p]laintiff’s termination.” (*Id.* ¶ 92.) Defendants’ argue
18 “that no liability exists on behalf of a governmental entity or
19 its employees in the absence of a specific statute providing for
20 such liability,” relying on California Government Code §§ 815
21 and 815.2. (Defs.’ Mot. to Dismiss [“MTD”], filed July 6, 2010
22 [Docket # 35], at 14.)

23 California Government Code § 815(a) provides that “[u]nless
24 otherwise provided by statute: . . . [a] public entity is not
25 liable for an injury, whether such injury arises out of an act

26 _____
27 ³ Except as set forth *infra*, the court adopts the
28 magistrate judge’s analysis and conclusions regarding
plaintiff’s negligence claim.

1 or omission of the public entity or a public employee"
2 Cal. Gov. Code § 815(a). Thus, the City of Red Bluff may not be
3 held directly liable for its hiring, promotion and contracting
4 practices unless plaintiff can show that a statute imposes a
5 duty upon the City of Red Bluff to the contrary or that the City
6 of Red Bluff is vicariously liable for the acts of its
7 employees.⁴ Plaintiff does not point to any specific statute
8 that serves as a basis for liability of the City of Red Bluff
9 nor does he allege that the City of Red Bluff is liable for
10 negligence through the actions of its employees. As such,
11 defendants' motion to dismiss plaintiff's negligence claim as to
12 the City of Red Bluff is GRANTED with leave to amend.

13 As to plaintiff's negligence claims against individual
14 defendants Martin Nichols, Tessa Pritchard, Mark Barthel, and
15 Richard Crabtree, defendants' reliance on California Government
16 Code sections 815 and 815.2 is without merit. These statutes
17 only provide immunity to a public entity, not to individual
18 public employees.⁵ Because defendants failed to point to any
19 relevant statute granting immunity to the individual,
20 defendants' motion to dismiss plaintiff's negligence claim as to
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22 ⁴ A public entity may be liable under a theory of
23 respondeat superior. See id. § 815.2(a). However, in absence
24 of a statute directing otherwise, a public entity cannot be held
25 liable for an employee's act or omission where the employee
26 himself is immune. Id. § 815.2(b). Plaintiff's first amended
27 complaint alleges only direct liability on behalf of the City of
28 Red Bluff. Nothing in this order prevents plaintiff from
amending his complaint to allege that the City of Red Bluff is
liable for negligence via respondeat superior.

⁵ Although defendants' failed to show that the
individual defendants are immune, nothing in this order prevents
defendants from doing so at a later time.

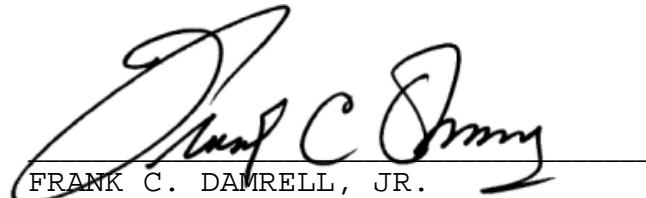
1 the individual defendants is DENIED.

2 **CONCLUSION**

3 For the foregoing reasons, the court adopts the magistrate
4 judge's findings and recommendations as to plaintiff's ADEA, due
5 process, and civil conspiracy, fraud, and wrongful termination
6 claims. The court declines to adopt the magistrate judge's
7 findings and recommendations as to plaintiff's negligence claim.
8 Defendants' motion to dismiss is GRANTED with leave to amend as
9 to defendant City of Red Bluff and DENIED as to defendants
10 Martin Nichols, Tessa Pritchard, Mark Barthel, and Richard
11 Crabtree. Plaintiff is granted fifteen (15) days from the date
12 of this order to file a second amended complaint in accordance
13 with this order. Defendants are granted thirty (30) days from
14 the date of service of plaintiff's second amended complaint to
15 file a response thereto.

16 IT IS SO ORDERED.

17 DATED: March 31, 2011

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FRANK C. DAMRELL, JR.
19 UNITED STATES DISTRICT JUDGE
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