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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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ROBERT L. JEWETT,
Plaintiff,

NO. CIV. 2:10-556 WBS KJN

v.

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS AND MOTION
TO STRIKE

CITY OF SACRAMENTO FIRE
DEPARTMENT; B. COOK; R.
COPLIN; J. ARROYO; and DOES 1
through 20, inclusive,

Defendants.

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Plaintiff Robert L. Jewett brought this action against
defendants City of Sacramento Fire Department ("Fire
Department"), B. Cook, R. Coplen, and J. Arroyo for alleged
violations of his constitutional rights pursuant to 28 U.S.C. §
1983 and state tort law. Presently before the court are the Fire
Department's motion to dismiss plaintiff's First Amended
Complaint ("FAC") pursuant to Federal Rule of Civil Procedure

1 12(b)(6) and motion to strike portions of plaintiff's FAC
2 pursuant to Rule 12(f).

3 I. Factual and Procedural Background

4 In the early morning hours of February 24, 2009, the
5 City of Sacramento allegedly received a 9-1-1 call from an
6 individual who believed that plaintiff had ingested drugs or
7 alcohol and was suffering from an overdose. (FAC ¶ 7(C).)
8 Plaintiff alleges that he was not under the influence of drugs or
9 alcohol at the time. (Id. ¶ 7(A).) Defendants Cook, Copeln, and
10 Arroyo, employees of the City of Sacramento Fire Department,
11 responded to the call. (Id.)

12 Upon arrival, Cook, Copeln, and Arroyo allegedly rushed
13 into plaintiff's home without his permission while "numerous
14 unknown witnesses stood around watching." (Id. ¶ 7(B).) The FAC
15 alleges that Cook, Copeln, and Arroyo told plaintiff that he had
16 "a doctor's appointment" and that they were going to take him
17 there. (Id.) Cook, Copeln, and Arroyo then allegedly tackled
18 plaintiff to the ground, involuntarily removed him from his home,
19 and bound him to a stretcher. (Id.) Plaintiff was subsequently
20 transported to Sutter General Hospital in Sacramento, California,
21 where he was examined and tested for drugs. (Id.) Plaintiff
22 allegedly was released from the hospital a few hours later.
23 (Id.)

24 Plaintiff subsequently filed this action in Sacramento
25 County Superior Court on December 29, 2009. (Docket No. 2.) The
26 case was removed to this court on March 8, 2010. (Id.)
27 Plaintiff's FAC alleges a claim for violations of his First,
28 Fourth, Fifth, Fourteenth, and Eighth Amendment rights pursuant

1 to 28 U.S.C. § 1983, as well as state law claims for negligence,
2 assault, battery, false imprisonment, defamation, libel, slander,
3 intentional infliction of emotional distress, and negligent
4 infliction of emotional distress. The Fire Department now moves
5 to dismiss those claims in the FAC alleged against it.

6 II. Discussion

7 A. Motion to Dismiss

8 On a motion to dismiss, the court must accept the
9 allegations in the complaint as true and draw all reasonable
10 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
11 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
12 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
13 (1972). To survive a motion to dismiss, a plaintiff needs to
14 plead "only enough facts to state a claim to relief that is
15 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S.
16 544, 570 (2007). This "plausibility standard," however, "asks
17 for more than a sheer possibility that a defendant has acted
18 unlawfully," and where a complaint pleads facts that are "merely
19 consistent with" a defendant's liability, it "stops short of the
20 line between possibility and plausibility." Ashcroft v. Iqbal,
21 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 556-
22 57).

23 1. § 1983 Claim

24 In relevant part, § 1983 provides,

25 Every person who, under color of any statute, ordinance,
26 regulation, custom, or usage, of any State . . . ,
27 subjects, or causes to be subjected, any citizen of the
28 United States . . . to the deprivation of any rights,
privileges, or immunities secured by the Constitution and
laws, shall be liable to the party injured in an action
at law, suit in equity or other proper proceeding for

1 redress

2 While § 1983 is not itself a source of substantive rights, it
3 provides a cause of action against any person who, under color of
4 state law, deprives an individual of federal constitutional
5 rights or limited federal statutory rights. 42 U.S.C. § 1983;
6 Graham v. Connor, 490 U.S. 386, 393-94 (1989).

7 Because the Fire Department is a municipal department
8 within the City of Sacramento it is not a "person" subject who
9 can be sued pursuant to § 1983. While a state is not considered
10 a "person" subject to § 1983 liability, Will v. Mich. Dept. of
11 State Police, 491 U.S. 58, 69-71 (1989), local government units,
12 such as counties or municipalities are. Monell v. New York City
13 Dept. of Social Services, 436 U.S. 658, 690-91 (1978); Will, 491
14 U.S. at 69-71.

15 However, municipal departments and sub-units of local
16 governments, such as police and fire departments, generally are
17 not considered "persons" for the purpose of § 1983 liability.
18 See United States v. Kama, 394 F.3d 1236, 1239 (9th Cir. 2005)
19 (Ferguson, J., concurring) (finding municipal police departments
20 and bureaus are generally not considered "persons" within the
21 meaning of § 1983); Vance v. County of Santa Clara, 928 F. Supp.
22 993, 995-96 (N.D. Cal. 1996) (holding that the naming of a
23 municipal department as a defendant "is not an appropriate means
24 of pleading a § 1983 action against a municipality"); Wade v.
25 Fresno Police Dept., No. Civ. 09-0588 AWI DLB, 2010 WL 2353525,
26 at *4 (E.D. Cal. June 9, 2010) (holding a police department is
27 not a "person" under § 1983); Morris v. State Bar of Cal., No.
28 Civ. 09-0026 LJO GSA, 2010 WL 966423, at *5-*6 (E.D. Cal. Mar.

1 11, 2010) (holding that a fire department is a municipal
2 department and therefore not a "person" under § 1983). The Fire
3 Department's motion to dismiss plaintiff's § 1983 claim will
4 accordingly be granted.

5 2. State Law Claims

6 The Fire Department argues that it is immune from
7 plaintiff's negligence, defamation, libel, slander, intentional
8 infliction of emotional distress, and negligent infliction of
9 emotional distress claims. Under California law, a public entity
10 is not liable for a claim brought against it unless liability is
11 provided for by statute or required by the federal or state
12 constitution. Cal. Gov. Code § 815; Cochran v. Herzog Engraving
13 Co., 155 Cal. App. 3d 405, 409 (1984); Williams v. Horvath, 16
14 Cal. 3d 834, 838 (1976). California Government Code section 815
15 specifically provides that liability for a public entity must be
16 provided by statute. Cal. Gov. Code § 815(a) ("Except as
17 otherwise provided by statute: (a) A public entity is not liable
18 for an injury, whether such injury arises out of an act or
19 omission of the public entity or a public employee or any other
20 person.") "It is not interpreted to mean that public entities
21 are liable in tort only when the Legislature has enacted a
22 statute imposing liability which on its face is applicable to
23 public bodies. Rather, a liability is deemed 'provided by
24 statute' if a statute defines the tort in general terms." Levine
25 v. City of Los Angeles, 68 Cal .App. 3d 481, 487 (1977).

26 California Government Code section 815.2 provides that
27 "[a] public entity is liable for injury proximately caused by an
28 act or omission of an employee of the public entity within the

1 scope of his employment if the act or omission would, apart from
2 this section, have given rise to a cause of action against that
3 employee" Cal. Gov. Code § 815.2. Public employees are
4 liable for injuries caused by their acts or omissions to the same
5 extent as private individuals. Cal. Gov. Code § 820. Section
6 815.2 "expressly makes the doctrine of respondeat superior
7 applicable to public employers." Hoff v. Vacaville Unified Sch.
8 Dist., 19 Cal. 4th 925, 932 (1998). "A public entity, as the
9 employer, is generally liable for the torts of an employee
10 committed within the scope of employment if the employee is
11 liable." Thomas v. City of Richmond, 9 Cal. 4th 1154, 1157
12 (1995) (internal citations omitted).

13 The state law claims against the Fire Department are
14 based upon the conduct of its employees alleged to have been
15 acting within the scope of their employment. (See FAC ¶ 7(A).)
16 The Fire Department does not contend that its employees are
17 themselves immune from liability for plaintiff's causes of
18 action. Accordingly, plaintiff's claims against the Fire
19 Department have a statutory basis and are proper. Since the Fire
20 Department does not challenge the sufficiency of the state law
21 claims against it, the court must deny the Fire Department's
22 motion to dismiss these claims.

23 B. Motion to Strike

24 The Fire Department moves to strike the portions of the
25 FAC which refer to Fire Department Chief Ray Jones as a defendant
26 because he is not listed as a defendant in the caption of the FAC
27 and the court did not provide plaintiff leave to add new
28 defendants to this action. Pursuant to Federal Rule of Civil

1 Procedure 12(f), a court "may strike from a pleading an
2 insufficient defense or any redundant, immaterial, impertinent,
3 or scandalous matter." Under Federal Rule of Civil Procedure
4 10(a) "[t]he title of the complaint must name all the parties" in
5 a given action. While plaintiff could have chosen to add Ray
6 Jones as a party to the FAC because the court granted plaintiff
7 leave to amend his original complaint, plaintiff has not named
8 Ray Jones as a party in the caption or served him with the FAC.
9 (Docket No. 11.) Accordingly, Ray Jones is not currently a party
10 to this action and should not be referred to as such in the FAC.
11 See Fed. R. Civ. P. 10(a). The court will therefore order that
12 the FAC be stricken of any references to Ray Jones as a defendant
13 in this action.

14 C. Sanctions

15 In its May 20, 2010 Order granting plaintiff leave to
16 amend his original complaint, the court gave plaintiff twenty
17 days from the date of its Order to file the FAC. (Docket No.
18 11.) Despite this clear mandate, plaintiff filed his FAC on June
19 15, 2010, five days after the court's deadline. Additionally,
20 under Local Rule 230(c), a party must file an opposition, if any,
21 to the granting of a motion fourteen days before the motion's
22 noticed hearing date. Plaintiff late-filed his Opposition only
23 ten days before the hearing scheduled on this motion. The
24 failure of plaintiff's counsel to comply with the deadlines of
25 the court has inconvenienced opposing counsel by limiting the
26 amount of time available to formulate responses to plaintiff's
27 filings in a timely manner.

28 Although the Fire Department urges the court to strike

1 plaintiff's FAC and Opposition, the court will not impose such a
2 harsh punishment in the interests of justice. Local Rule 110
3 authorizes the court to impose sanctions for "[f]ailure of
4 counsel or of a party to comply with these Rules or with any
5 order of the Court" Accordingly, the court will sanction
6 plaintiff's counsel, Mary C. Polansky-Gravatt, \$100.00 payable to
7 the Clerk of the Court within ten days of the date of this Order,
8 unless she shows good cause for her failure to comply with this
9 court's Order and the Local Rules.


10 IT IS THEREFORE ORDERED that the Fire Department's
11 motion to dismiss be, and the same hereby is, GRANTED with
12 respect to plaintiff's § 1983 claim and DENIED in all other
13 respects.

14 IT IS FURTHER ORDERED that the Fire Department's motion
15 to strike the First Amended Complaint's references to Roy Jones
16 as a defendant be, and the same hereby is, GRANTED.

17 AND IT IS FURTHER ORDERED that within ten days of the
18 date of this Order Mary C. Polansky-Gravatt shall either (1) pay
19 sanctions in the amount of \$100.00 to the Clerk of the Court or
20 (2) submit a statement of good cause explaining her failure to
21 comply with the court's May 20, 2010 Order and the Local Rules.

22 Plaintiff has twenty days from the date of this Order
23 to file an amended complaint, if he can do so consistent with
24 this Order.

25 DATED: August 12, 2010

26 
27 WILLIAM B. SHUBB
28 UNITED STATES DISTRICT JUDGE