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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

LEAH COOK,	)	Case No. 2:10-CV-03091 JAM-CMK
	)	
Plaintiff,	)	
	)	
v.	)	<u>ORDER GRANTING</u>
	)	<u>UNION PACIFIC'S MOTION FOR</u>
	)	<u>JUDGMENT ON THE PLEADINGS</u>
UNION PACIFIC RAILROAD COMPANY;	)	
CUSA ES, LLC; CUSA CSS LLC; and	)	
DOES 1-50,	)	
	)	
Defendants.	)	

This matter comes before the Court on Defendant Union Pacific Railroad Company's ("Union Pacific") Motion for Judgment on the Pleadings (Doc. #8). Union Pacific seeks dismissal of all claims asserted against it in the Complaint ("Complaint", Doc. #1) filed by Plaintiff Leah Cook ("Plaintiff"). Plaintiff opposes the motion<sup>1</sup> in its "Opposition [sic.] to Defendan't [sic.], Union Pacific Railroad Company's Demurrer (Doc. #11).<sup>2</sup>

<sup>1</sup> This motion was determined to be suitable for decision without oral argument. E.D. Cal. L. R. 230(g). The hearing was scheduled for March 23, 2011.

<sup>2</sup> The Court notes that this is a federal case, not a state court case. The motion before the Court is a judgment on the pleadings, not a demurrer.

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I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is a former employee of Defendant CUSA CSS, LCC ("Coach"). Plaintiff began working for Coach on or about August 2008. She was employed as a Crew Transport driver. Specifically, she transported Union Pacific employees by van from their various working sites. Plaintiff alleges that she was harassed, battered, and assaulted based primarily on her physical appearance by Union Pacific and Coach employees.

Plaintiff alleges six causes of action: 1) Severe and pervasive harassment based on sex in violation of California Government Code § 12900, et seq. ("FEHA"); 2) Intentional infliction of emotional distress; 3) Constructive termination in violation of public policy; 4) Assault and battery; 5) Negligent retention and supervision; and 6) Negligent infliction of emotional distress. Coach removed the action to this Court based upon 28 U.S.C. § 1332.

II. OPINION

A. Legal Standard

1. Motion for Judgment on the Pleadings

The principal difference between a Rule 12(b) motion to dismiss and a Rule 12(c) judgment on the pleadings is the time of filing. A motion for judgment on the pleadings occurs "[a]fter the pleadings are closed - but early enough not to delay trial." Fed.R.Civ.P. 12(c). "Because the motions are functionally identical, the same standard of review applicable to a Rule 12(b) motion applies to its Rule 12(c) analog." Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1192 (9th Cir. 1989).

1 A party may move to dismiss an action for failure to state a  
2 claim upon which relief can be granted pursuant to Federal Rules of  
3 Civil Procedure 12(b)(6). In considering a motion to dismiss, the  
4 court must accept the allegations in the complaint as true and draw  
5 all reasonable inferences in favor of the plaintiff. Scheuer v.  
6 Rhodes, 416 U.S. 232, 236 (1975), overruled on other grounds by  
7 Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319,  
8 322 (1972). Assertions that are mere "legal conclusions," however,  
9 are not entitled to the assumption of truth. Ashcroft v. Iqbal,  
10 129 S. Ct. 1937, 1950 (2009), citing Bell Atlantic Corp. v.  
11 Twombly, 550 U.S. 544, 555 (2007). To survive a motion to dismiss,  
12 a plaintiff needs to plead "enough facts to state a claim to relief  
13 that is plausible on its face." Twombly, 550 U.S. at 570.  
14 Dismissal is appropriate where the plaintiff fails to state a claim  
15 supportable by a cognizable legal theory. Balistreri v. Pacifica  
16 Police Department, 901 F.2d 696, 699 (9th Cir. 1990).

17 While Rule 12(c) of the Federal Rules of Civil Procedure does  
18 not expressly provide for partial judgment on the pleadings,  
19 neither does it bar them; it is common to apply Rule 12(c) to  
20 individual causes of action. See Moran v. Peralta Community College  
21 District, 825 F.Supp. 891, 893 (N.D.Cal. 1993). "Courts have  
22 discretion to grant leave to amend in conjunction with 12(c)  
23 motions, and may dismiss causes of action rather than grant  
24 judgment." Id. When a court finds the pleadings deficient, it  
25 must then decide whether to grant leave to amend. In general, leave  
26 to amend is only denied if it is clear that amendment would be  
27 futile and "that the deficiencies of the complaint could not be  
28 cured by amendment." Broughton v. Cutter Laboratories, 622 F.2d

1 458, 460 (9th Cir. 1980) (per curium).

2 B. Claims for Relief

3 1. Claim 1: FEHA

4 Union Pacific argues that Plaintiff fails to state a FEHA  
5 sexual harassment claim because Union Pacific is not Plaintiff's  
6 employer and Plaintiff does not allege Union Pacific negligently  
7 responded to the alleged harassment by non-supervisory employees.  
8 In the Opposition, Plaintiff concedes Union Pacific's FEHA  
9 argument. Accordingly, Union Pacific's motion for judgment on the  
10 pleadings for the FEHA claim (Claim 1) is GRANTED WITH PREJUDICE.

11 2. Intentional Infliction of Emotional Distress

12 Union Pacific argues that Plaintiff cannot state an  
13 intentional infliction of emotional distress ("IIED") claim because  
14 the allegedly unlawful conduct was, as a matter of law, outside the  
15 scope of employment. Plaintiff counters that Union Pacific is  
16 negligent for retaining employees who harassed, assaulted, and  
17 battered her and, as such, it is liable for the harm that flowed  
18 from that breach of duty.

19 An employer is liable for the willful and malicious torts of  
20 its employees committed in the scope of employment. John R. v.  
21 Oakland Unified School District, 48 Cal.3d 438, 447 (Cal. 1989).  
22 To hold an employer liable for an employee's tort of IIED,  
23 Plaintiff must prove that she is a victim of sexual harassment,  
24 that the harasser is an employee of Union Pacific, and that the  
25 harasser was acting within the scope of his employment. See Fisher  
26 v. San Pedro Peninsula Hospital, 214 Cal.App.3d 590, 618 (Cal. App.  
27 Ct. 2d 1989). If properly pled, sexual harassment will constitute  
28 the outrageous behavior element of a cause of action for IIED. Id.

1           The issue is whether Union Pacific employees acted within the  
2 scope of their employment. Union Pacific relies on Farmers  
3 Insurance Group v. County of Santa Clara, 11 Cal. 4th 992, 1007  
4 (Cal. 1995). In Farmers, the California Supreme Court discusses  
5 the general principles of the respondeat superior doctrine in  
6 actions by third persons against the employer for the torts of the  
7 employee. See Id. at 1003. The California Supreme Court held that  
8 despite the fact that sexually harassing acts were committed  
9 "during . . . work hours at the [place of employment]," the  
10 "inappropriate touchings were motivated for strictly personal  
11 reasons unrelated to . . . the performance of any other duty  
12 [related to the harasser's job]." Id. at 1007. Furthermore, the  
13 Court added that the "misconduct was not reasonably necessary to  
14 [the harasser's] comfort, convenience, health, and welfare while at  
15 work. Nor was it precipitated by a work-related dispute over the  
16 performance of his duties or those of his victims." Id.  
17 Therefore, the sexual misconduct was held to be outside the scope  
18 of employment and the employer was not liable to a third party for  
19 the actions of its employee. Id. at 1009.

20           Plaintiff alleges that various Union Pacific employees rubbed  
21 their legs against hers, sent her personal texts, described the  
22 ways [they] wanted to have sex with her, forcibly pressed her  
23 against a van and kissed her, and smelled her hair. This is,  
24 essentially, the same type of conduct the California Supreme Court  
25 determined was outside the scope of employment in Farmers. See Id.  
26 at 998 (employee admitted conduct such as touching one female's  
27 thighs, slapping another's buttocks, telling the females he wanted  
28 to "eat pussy" and "butt fuck" them, and telling one female he was

1 supervising that she would have to "give him head" to complete her  
2 training).

3 Because those torts were personal in nature, "mere presence at  
4 the place of employment and attendance to occupational duties prior  
5 or subsequent to the offense will not give rise to a cause of  
6 action against the employer under the doctrine of respondeat  
7 superior." Id. at 1005 (internal citations omitted).

8 Ordinarily, the scope of employment presents a question of  
9 fact, but it becomes a question of law when the facts are  
10 undisputed and no conflicting inferences are possible. Id. at  
11 1019. Because the facts are undisputed and no conflicting  
12 inferences are possible, the Court finds, as a matter of law, that  
13 the Union Pacific employees acted outside the scope of employment.  
14 Accordingly, Union Pacific's motion for judgment on the pleadings  
15 for Plaintiff's IIED claim (Claim 2) is GRANTED WITH PREJUDICE.

16 3. Constructive Termination in Violation of Public  
17 Policy

18 Union Pacific argues that it cannot be liable to Plaintiff for  
19 wrongful termination as a matter of law because Plaintiff cannot  
20 state a valid FEHA claim, Union Pacific was not Plaintiff's  
21 employer, and Plaintiff does not allege Union Pacific was aware she  
22 was being subjected to intolerable working conditions. Plaintiff  
23 concedes the constructive termination claim in the Opposition.  
24 Therefore, Union Pacific's motion for judgment on the pleadings for  
25 Plaintiff's constructive termination in violation of public policy  
26 claim (Claim 3) is GRANTED WITH PREJUDICE.

27 4. Assault and Battery

28 Union Pacific argues that Plaintiff does not state a viable

1 assault and battery claim because the alleged wrongful acts were  
2 outside the scope of employment and the claim is barred by the  
3 statute of limitations. In Plaintiff's Opposition, she makes a  
4 passing reference to section 213 of the Second Restatement of  
5 Agency, presumably to argue that Union Pacific should be liable for  
6 assault and battery under an agency theory. While Plaintiff  
7 concedes that some of the alleged incidents took place outside the  
8 statute of limitations, Plaintiff alleges there were additional  
9 incidents that took place during the statute of limitations that  
10 were not identified in the Complaint.

11 Under the doctrine of respondeat superior, an employer is  
12 vicariously liable for the torts of its employees that are  
13 committed within the scope of employment. Lisa M. v. Henry Mayo  
14 Newhall Memorial Hospital, 12 Cal.4th 291, 296 (Cal. 1995). Under  
15 the agency theory, "[a]n employer is liable for an assault and  
16 battery committed by an employee where the employment in some way  
17 involves the risk of force used against third persons, the act is  
18 connected with the employment, and the act is not motivated by  
19 independent personal malice." Witkin, Summary of Cal. Law (10th  
20 ed. 2005) Agency and Employment, § 186, p. 237.

21 As discussed supra, the Union Pacific employees' alleged  
22 actions occurred outside the scope of employment. Thus, Plaintiff  
23 fails to state a claim against Union Pacific for assault and  
24 battery.

25 Additionally, even if Plaintiff had properly stated a claim,  
26 the only allegation against Union Pacific that could be considered  
27 assault and battery occurred in August 2008, which is clearly  
28 outside the applicable two year statute of limitations. See Cal.

1 Code of Civ. Pro. § 335.1. Accordingly, Union Pacific's motion for  
2 judgment on the pleadings for the assault and battery claim (Claim  
3 4) is GRANTED WITH PREJUDICE.

4 5. Negligent Retention and Supervision

5 Union Pacific argues that Plaintiff does not adequately allege  
6 that Union Pacific was aware that the alleged harassers had the  
7 propensity to act unlawfully without further supervision.

8 Plaintiff counters that she pled she was harassed, assaulted, and  
9 battered by employees of Union Pacific during her employment, Union  
10 Pacific knew or should have known of this conduct, and it failed to  
11 take steps necessary to address it and/or prevent it.

12 "When the harasser is a nonsupervisory employee, employer  
13 liability turns on a showing of negligence (that is, the employer  
14 knew or should have known of the harassment and failed to take  
15 appropriate corrective action)." Roby v. McKesson Corp., 47  
16 Cal.4th 686, 707 (Cal. 2009).

17 Plaintiff makes only one reference to a Union Pacific  
18 supervisor being aware of any harassment against Plaintiff by a  
19 nonsupervisory employee and that incident did not have to do with  
20 sexual harassment, but instead related to driver safety. The fact  
21 that a Union Pacific supervisor allegedly overheard a conversation  
22 about an incident relating to driver safety did nothing to put  
23 Union Pacific on notice that Plaintiff was being subjected to  
24 sexual harassment. Plaintiff must allege facts to show that Union  
25 Pacific was aware of sexual harassment and that it failed to take  
26 steps necessary to address it or prevent it. Accordingly, the  
27 claim for negligent supervision and retention (Claim 5) is  
28 DISMISSED WITH LEAVE TO AMEND.

1           6.    Negligent Infliction of Emotional Distress

2           Defendant argues that Plaintiff's negligent infliction of  
3 emotional distress ("NIED") claim fails because a negligence claim  
4 cannot be based on intentional conduct, the alleged tortuous  
5 conduct was outside the scope of employment, the claim is  
6 duplicative of Plaintiff's negligent retention or supervision  
7 claim, and Plaintiff does not allege that any Union Pacific  
8 employee threatened her with physical injury. Plaintiff argues  
9 that she properly pled that Union Pacific was negligent in  
10 retaining its employees who harassed, assaulted, and battered  
11 Plaintiff and, accordingly, Union Pacific is liable for the harm  
12 that flowed from that breach of duty.

13           "[T]here is no independent tort of negligent infliction of  
14 emotional distress. The tort is negligence, a cause of action in  
15 which a duty to plaintiff is an essential element." Potter v.  
16 Firestone Tire & Rubber Co., 6 Cal.4th 965, 984 (Cal. 1993)  
17 (internal citations omitted). Since Plaintiff's NIED claim is  
18 based on the contention that Union Pacific was negligent in  
19 retaining its employees who harassed, assaulted, and battered  
20 Plaintiff, the NIED cause of action is duplicative of the fifth  
21 cause of action and fails as a matter of law. See T.B. ex rel.  
22 G.B. v. Chico Unified School District, No. 2:07-cv-926-GEB-CMK,  
23 2008 WL 3835731, \*5 (E.D.Cal. Aug. 14, 2008) (dismissing NIED claim  
24 as a separate cause of action because it is duplicative of the  
25 negligence claim, but allowing plaintiff to plead emotional  
26 distress damages due to defendants' negligence). Accordingly,  
27 Union Pacific's motion for judgment on the pleadings for the NIED  
28 claim (Claim 6) is GRANTED WITH PREJUDICE. Plaintiff will be

1 allowed to seek recovery of emotional distress damages under her  
2 fifth cause of action if the claim is properly pled in the amended  
3 complaint.

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5 III. ORDER

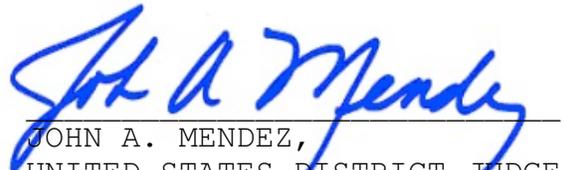
6 For the reasons set forth above,

7 Union Pacific's Motion for Judgment on the Pleadings for the  
8 FEHA Claim (Claim 1), the IIED claim (Claim 2), the constructive  
9 termination claim (Claim 3), the assault and battery claim (Claim  
10 4), and the NIED claim (Claim 6) is GRANTED WITH PREJUDICE.

11 The negligent retention and supervision claim (Claim 5) is  
12 DISMISSED WITH LEAVE TO AMEND. Plaintiff shall file her First  
13 Amended Complaint within twenty (20) days of the date of this  
14 Order.

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16 IT IS SO ORDERED.

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18 Dated: May 13, 2011

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20 \_\_\_\_\_  
21 JOHN A. MENDEZ,  
22 UNITED STATES DISTRICT JUDGE  
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