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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CD ALSTON,

Plaintiff,

No. CIV S-11-2078 JAM GGH PS

vs.

PAUL TASSONE, et al.,

Defendants.

ORDER

\_\_\_\_\_ /

Plaintiff, proceeding in this action pro se, has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by E.D. Cal. L.R. 302(c)(21), pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff has submitted an affidavit making the showing required by 28 U.S.C. § 1915(a)(1). Accordingly, the request to proceed in forma pauperis will be granted.

The determination that plaintiffs may proceed in forma pauperis does not complete the required inquiry. Pursuant to 28 U.S.C. § 1915(e)(2), the court is directed to dismiss the case at any time if it determines the allegation of poverty is untrue, or if the action is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against an immune defendant.

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1 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
2 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28  
3 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
4 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
5 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
6 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
7 Cir. 1989); Franklin, 745 F.2d at 1227.

8 A complaint must contain more than a “formulaic recitation of the elements of a  
9 cause of action;” it must contain factual allegations sufficient to “raise a right to relief above the  
10 speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).  
11 “The pleading must contain something more...than...a statement of facts that merely creates a  
12 suspicion [of] a legally cognizable right of action.” Id., quoting 5 C. Wright & A. Miller, Federal  
13 Practice and Procedure 1216, pp. 235-235 (3d ed. 2004). “[A] complaint must contain sufficient  
14 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft  
15 v. Iqbal, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570, 127  
16 S.Ct. 1955). “A claim has facial plausibility when the plaintiff pleads factual content that allows  
17 the court to draw the reasonable inference that the defendant is liable for the misconduct  
18 alleged.” Id.

19 Pro se pleadings are liberally construed. See Haines v. Kerner, 404 U.S. 519,  
20 520-21, 92 S. Ct. 594, 595-96 (1972); Balistreri v. Pacifica Police Dep’t., 901 F.2d 696, 699 (9th  
21 Cir. 1988). Unless it is clear that no amendment can cure the defects of a complaint, a pro se  
22 plaintiff proceeding in forma pauperis is entitled to notice and an opportunity to amend before  
23 dismissal. See Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987); Franklin, 745 F.2d at 1230.

24 In this case, plaintiff alleges that two Sacramento County Deputy Sheriffs, Paul  
25 Tassone and Bruce Smith, approached her with their guns drawn while she was sitting in her car  
26 parked in front of a gym. The officers demanded that she exit her vehicle and ignored her

1 requests for them to explain what she had done wrong. They then handcuffed plaintiff and  
2 searched her vehicle and personal property. Thereafter, plaintiff was detained in the back of their  
3 patrol car and released after 30 minutes without an explanation. Plaintiff further alleges that the  
4 officers completed a false event log, falsely accusing plaintiff of trying to place something behind  
5 her back as the officers approached, refusing to identify herself, and being confrontational,  
6 yelling, violent, and uncooperative.

7           Subsequently, plaintiff filed suit against the two deputy sheriffs, Tassone and  
8 Smith, Jeana Zwolinski (the sergeant in charge of Tassone and Smith), Scott Jones (the  
9 Sacramento County Sheriff), Matt Morgan (a lieutenant for Sacramento County Sheriff  
10 Department Bureau of Professional Standards), Sacramento County Sheriff Department Bureau  
11 of Professional Standards, Sacramento County Sheriff Department, and the County of  
12 Sacramento.<sup>1</sup> The complaint for damages primarily alleges liability for constitutional violations  
13 under 42 U.S.C. § 1983 and for related state law tort claims. Plaintiff claims that the Sacramento  
14 County Sheriff Department’s policies, customs, and practices, such as their failure to provide  
15 adequate training and lack of supervision, gave rise to the deprivation of her constitutional rights.

16           For the limited purposes of screening, plaintiff’s complaint states colorable claims  
17 for relief against defendants Tassone, Smith, Sacramento County Sheriff Department, and the  
18 County of Sacramento. For the reasons stated below, however, the court finds that plaintiff fails  
19 to state a cognizable claim against defendants Zwolinski, Jones, Morgan, and Sacramento County  
20 Sheriff Department Bureau of Professional Standards.

21           The Civil Rights Act provides as follows:

22           Every person who, under color of [state law] . . . subjects, or causes  
23           to be subjected, any citizen of the United States . . . to the

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24           <sup>1</sup> Plaintiff has named the individual, non-entity defendants in both their individual and  
25 official capacities. “[A]n official-capacity suit is, in all respects other than name, to be treated as  
26 a suit against the entity.” Kentucky v. Graham, 473 U.S. 159, 166 (1985). Accordingly, all  
further references to the individual, non-entity defendants relate to the individual capacity claims.

1 deprivation of any rights, privileges, or immunities secured by the  
2 Constitution . . . shall be liable to the party injured in an action at  
law, suit in equity, or other proper proceeding for redress.

3 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the  
4 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See  
5 *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362  
6 (1976). “A person ‘subjects’ another to the deprivation of a constitutional right, within the  
7 meaning of § 1983, if he does an affirmative act, participates in another’s affirmative acts or  
8 omits to perform an act which he is legally required to do that causes the deprivation of which  
9 complaint is made.” *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

10 Supervisory personnel are generally not liable under § 1983 for the actions of their  
11 employees under a theory of respondeat superior and, therefore, when a named defendant holds a  
12 supervisory position, the causal link between him and the claimed constitutional violation must  
13 be specifically alleged. See *Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir. 1979); *Mosher v.*  
14 *Saalfeld*, 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442 U.S. 941 (1979). Vague and  
15 conclusory allegations concerning the involvement of official personnel in civil rights violations  
16 are not sufficient. See *Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982). Here,  
17 plaintiff’s claims against Scott Jones are frivolous because she has not shown that Jones had any  
18 involvement with her detention and search. Jones appears to have been named in plaintiff’s  
19 complaint solely due to his position as Sacramento County Sheriff. Furthermore, plaintiff fails to  
20 allege any causal link between defendant Zwolinski and the alleged violation of plaintiff’s  
21 constitutional rights. Plaintiff claims that Zwolinski, as supervisor of Tassone and Smith, later  
22 stated that she was proud of her officers and that she believes that they had done everything by  
23 the book. However, plaintiff does not articulate how these expressions of confidence in her  
24 officers’ compliance with protocol, made after the fact, caused the alleged unreasonable search  
25 and detention. Plaintiff does not allege, for example, that Zwolinski was on the scene or that she  
26 had ordered plaintiff’s detention.

1 Plaintiff's claims against the Sacramento County Sheriff Department Bureau of  
2 Professional Standards and one of its lieutenants, Morgan, should also be dismissed. Plaintiff  
3 had reported the incident to Morgan and is greatly dissatisfied that Morgan refused to investigate  
4 it and instead forwarded plaintiff's complaint to another division. That dissatisfaction, however,  
5 does not a constitutional claim make. Plaintiff has made no showing that these defendants  
6 caused her detention and search.

7 Additionally, the complaint fails to state claims for violation of the Fourteenth  
8 Amendment under 42 U.S.C. § 1983. To the extent plaintiff attempts to state a violation of the  
9 Due Process Clause of the Fourteenth Amendment related to the detention and search, that claim  
10 is improper. All constitutional claims, including excessive force claims, resulting from an arrest,  
11 investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth  
12 Amendment rather than under a substantive due process approach. Graham v. O'Connor, 490  
13 U.S. 386, 395 (1989). Plaintiff also fails to allege any facts in support of a violation of the Equal  
14 Protection Clause of the Fourteenth Amendment. "To state a § 1983 claim for violation of the  
15 Equal Protection Clause, a plaintiff must show that he was treated in a manner inconsistent with  
16 others similarly situated, and that the defendants acted with an intent or purpose to discriminate  
17 against the plaintiff based upon membership in a protected class." Thornton v. City of St.  
18 Helens, 425 F.3d 1158, 1166-67 (9th Cir. 2005). Here, plaintiff alleges no facts demonstrating  
19 intentional discrimination or differential treatment of others similarly situated. Plaintiff may  
20 state such a claim by, for example, alleging that these officers specifically targeted persons of her  
21 race for searches while people of other races were not stopped. Such allegations, however, may  
22 only be made upon a good faith basis.

23 Plaintiff's claim for illegal search and seizure under 42 U.S.C. § 2000 is improper,  
24 because that statute does not exist. Moreover, it appears to be duplicative of plaintiff's other  
25 claims for violation of the Fourth Amendment pursuant to 42 U.S.C. § 1983. Furthermore,  
26 plaintiff's conspiracy claim is also improperly brought under 42 U.S.C. § 2000. A claim for

1 conspiracy to violate constitutional rights must be stated under 42 U.S.C. §§ 1983 and 1985.

2           With respect to plaintiff's state law tort claims, plaintiff improperly attempts to  
3 state a claim for negligence under 42 U.S.C. § 1983. A negligence claim instead arises under  
4 California state law. Under California law, "to prevail in an action based upon a defendant's  
5 alleged negligence, a plaintiff must demonstrate that the defendant owed the plaintiff a legal  
6 duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of  
7 his or her injuries." Ambriz v. Kelegian, 146 Cal. App. 4th 1519, 1530-31 (2007). To state a  
8 proper claim for negligence, plaintiff must plead facts in support of each element, i.e. what duty  
9 the defendants owed plaintiff, how the defendants breached that duty, and how that breach  
10 resulted in the harm plaintiff allegedly suffered.

11           The complaint also fails to state a claim for intentional infliction of emotional  
12 distress. "The tort of intentional infliction of emotional distress is comprised of three elements:  
13 (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless  
14 disregard of the probability of causing, emotional distress; (2) the plaintiff suffered severe or  
15 extreme emotional distress; and (3) the plaintiff's injuries were actually and proximately caused  
16 by the defendant's outrageous conduct." Cochran v. Cochran, 65 Cal. App. 4th 488, 494 (1998).  
17 "In order to meet the first requirement of the tort, the alleged conduct...must be so extreme as to  
18 exceed all bounds of that usually tolerated in a civilized community." Id. Here, the complaint  
19 essentially alleges that defendants breached their duty of care to plaintiff, and reads more like a  
20 negligence claim. To state a cognizable claim for intentional infliction of emotional distress,  
21 plaintiff must set forth the elements outlined above along with specific facts in support of each  
22 element.

23           In light of the above, the court concludes that defendants Zwolinski, Jones,  
24 Morgan, and Sacramento County Sheriff Department Bureau of Professional Standards should be  
25 dismissed from the action. The court also finds that the first cause of action (negligence under 42  
26 U.S.C. § 1983), third cause of action (violation of the Fourteenth Amendment Due Process and

1 Equal Protection rights), fourth cause of action (duty to investigate/reckless or intentional failure  
2 to investigate), seventh cause of action (illegal search and seizure under 42 U.S.C. § 2000), tenth  
3 cause of action (conspiracy under 42 U.S.C. § 2000), and eleventh cause of action (intentional  
4 infliction of emotional distress) should be dismissed.

5           However, plaintiff will be given 28 days from the date of service of this order to  
6 amend her complaint to cure any deficiencies outlined above. Plaintiff is not required to file an  
7 amended complaint, but failure to do so will result in a recommendation that the above-  
8 mentioned defendants and causes of action be dismissed with prejudice. Upon filing an amended  
9 complaint or expiration of the time allowed therefor, the court will make further orders for  
10 service of process upon some or all of the defendants.

11           If plaintiff chooses to amend, plaintiff must set forth the jurisdictional grounds  
12 upon which the court's jurisdiction depends. Fed. R. Civ. P. 8(a). Further, plaintiff must  
13 demonstrate how the conduct complained of has resulted in a deprivation of plaintiff's federal  
14 rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980).

15           In addition, plaintiff is informed that the court cannot refer to a prior pleading in  
16 order to make plaintiff's amended complaint complete. E.D. Cal. L.R. 220 requires that an  
17 amended complaint be complete in itself without reference to any prior pleading. This is  
18 because, as a general rule, an amended complaint supersedes the original complaint. See Loux v.  
19 Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original  
20 pleading no longer serves any function in the case. Therefore, in an amended complaint, as in an  
21 original complaint, each claim and the involvement of each defendant must be sufficiently  
22 alleged.

23           Furthermore, plaintiff alleges that she has exhausted government tort claim  
24 procedures with respect to the state law tort claims prior to bringing this action. Plaintiff is  
25 advised to attach copies of any such written claims as an exhibit to any amended complaint.

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1 In accordance with the above, IT IS HEREBY ORDERED that:

2 1. Plaintiff's request to proceed in forma pauperis (dkt. no. 3) is granted.

3 2. Plaintiff's claims against defendants Zwolinski, Jones, Morgan, and  
4 Sacramento County Sheriff Department Bureau of Professional Standards are dismissed with  
5 leave to amend. Additionally, the first cause of action (negligence under 42 U.S.C. § 1983), third  
6 cause of action (violation of the Fourteenth Amendment Due Process and Equal Protection  
7 rights), fourth cause of action (duty to investigate/reckless or intentional failure to investigate),  
8 seventh cause of action (illegal search and seizure under 42 U.S.C. § 2000), tenth cause of action  
9 (conspiracy under 42 U.S.C. § 2000), and eleventh cause of action (intentional infliction of  
10 emotional distress) are dismissed with leave to amend.

11 3. Plaintiff is granted 28 days from the date of service of this order to amend her  
12 complaint to cure the deficiencies outlined in this order. Plaintiff is not required to file an  
13 amended complaint, but failure to do so will result in a recommendation that the above-  
14 mentioned defendants and causes of action be dismissed with prejudice.

15 4. If plaintiff elects to amend, any amended complaint shall bear the docket  
16 number assigned to this case, shall be labeled "First Amended Complaint," and shall not exceed  
17 twenty (20) pages. Plaintiff must file an original and two copies of any amended complaint.

18 5. Upon filing an amended complaint or expiration of the time allowed therefor,  
19 the court will make further orders for service of process upon some or all of the defendants.

20 DATED: October 31, 2011

21  
22 /s/ Gregory G. Hollows  
23 UNITED STATES MAGISTRATE JUDGE

24 GGH/wvr  
25 alston.2078.ifp-lta.wpd