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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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10 M.S., by and through her
11 Guardian ad Litem, David
12 Sisco; DAVID SISCO; and
13 KATHLEEN WILDER,

14 Plaintiffs,

15 v.

16 WEED UNION ELEMENTARY SCHOOL
17 DISTRICT, LEEANNA RIZZO,
18 ALISA CUMMINGS, COUNTY OF
19 SISKIYOU, and DEPUTY SHERIFF
20 CARL HOUTMAN,

21 Defendants.

No. 2:13-cv-01211 JAM-DAD

**ORDER GRANTING COUNTY
DEFENDANTS' MOTION TO DISMISS IN
PART AND DENYING IN PART**

22 This matter is before the Court on Defendants County of
23 Siskiyou ("County") and Deputy Sheriff Carl Houtman's ("Deputy
24 Houtman") (collectively "County Defendants") Motion to Dismiss
25 Plaintiffs' complaint (Doc. #15). Plaintiffs M.S., David Sisco
26 ("Sisco"), and Kathleen Wilder ("Wilder") (collectively
27 "Plaintiffs") oppose the motion (Doc. #22) and Defendant replied
28 (Doc. #24).¹ For the reasons set forth below, County Defendants'

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for October 23, 2013.

1 Motion to Dismiss is GRANTED in part and DENIED in part

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3 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

4 Plaintiffs originally filed this action on June 18, 2013,
5 against County Defendants, Weed Union Elementary School District
6 ("the District"), Leeanna Rizzo ("Rizzo"), and Alisa Cummings
7 ("Principal") (collectively "Defendants"). In the complaint,
8 Plaintiffs' allege seven causes of action: (1) violation of civil
9 rights pursuant to 42 U.S.C. § 1983 as to all Defendants;
10 (2) child abuse as to Rizzo; (3) intentional infliction of
11 emotional distress as to Rizzo; (4) battery as to Rizzo;
12 (5) vicarious liability as to the District; (6) negligence as to
13 Rizzo, Principal, and the District; and (7) negligence as to
14 County Defendants. Compl ¶¶ 23-57. On August 16, 2013, the
15 Court dismissed the District without prejudice pursuant to
16 Plaintiffs' request (Doc. #14).

17 Plaintiffs allege that M.S., a minor, was battered and
18 abused while a student at a school owned and operated by the
19 District. Id. ¶ 3. Plaintiffs Sisco and Wilder are M.S.'s
20 natural parents. Id. Plaintiffs allege that beginning in or
21 about November 2012, M.S. was harassed by a classmate and by
22 Rizzo, M.S.'s teacher. Id. ¶¶ 12-13. Plaintiffs reported the
23 incidents to the Principal and the Weed Police Department. Id. ¶
24 14. In addition, Plaintiffs allege that the Principal knew that
25 M.S. was molested by a classmate but never reported it to the law
26 enforcement authorities. Id. ¶¶ 18-19.

27 On or about February 13, 2013, Deputy Houtman allegedly
28 appeared in uniform at Plaintiffs' home and attempted to dissuade

1 Plaintiffs from testifying or making further complaints against
2 the Principal. Id. at 20. Plaintiffs allegedly declined Deputy
3 Houtman's demand and the Sheriff's Department began a campaign of
4 harassment against Plaintiffs. Id.

6 II. OPINION

7 A. Legal Standard

8 A party may move to dismiss an action for failure to state
9 a claim upon which relief can be granted pursuant to Federal
10 Rule of Civil Procedure 12(b)(6). To survive a motion to
11 dismiss a plaintiff must plead "enough facts to state a claim to
12 relief that is plausible on its face." Bell Atlantic Corp. v.
13 Twombly, 556 U.S. 662, 570 (2007). In considering a motion to
14 dismiss, a district court must accept all the allegations in the
15 complaint as true and draw all reasonable inferences in favor of
16 the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974),
17 overruled on other grounds by Davis v. Scherer, 468 U.S. 183
18 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). "First, to be
19 entitled to the presumption of truth, allegations in a complaint
20 or counterclaim may not simply recite the elements of a cause of
21 action, but must sufficiently allege underlying facts to give
22 fair notice and enable the opposing party to defend itself
23 effectively." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir.
24 2011), cert. denied, 132 S. Ct. 2101, 182 L. Ed. 2d 882 (U.S.
25 2012). "Second, the factual allegations that are taken as true
26 must plausibly suggest an entitlement to relief, such that it is
27 not unfair to require the opposing party to be subjected to the
28 expense of discovery and continued litigation." Id. Assertions

1 that are mere "legal conclusions" are therefore not entitled to
2 the presumption of truth. Ashcroft v. Iqbal, 556 U.S. 662, 678
3 (2009) (citing Twombly, 550 U.S. at 555). Dismissal is
4 appropriate when a plaintiff fails to state a claim supportable
5 by a cognizable legal theory. Balistreri v. Pacifica Police
6 Department, 901 F.2d 696, 699 (9th Cir. 1990).

7 Upon granting a motion to dismiss for failure to state a
8 claim, a court has discretion to allow leave to amend the
9 complaint pursuant to Federal Rule of Civil Procedure 15(a).
10 "Dismissal with prejudice and without leave to amend is not
11 appropriate unless it is clear . . . that the complaint could
12 not be saved by amendment." Eminence Capital, L.L.C. v. Aspeon,
13 Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

14 B. Discussion

15 County Defendants move to dismiss all claims against them:
16 the first claim, a Civil Rights claim under 42 U.S.C. § 1983,
17 and the seventh claim, a negligence claim under state law.²

18 1. First Claim for Violation of 42 U.S.C. § 1983

19 County Defendants move to dismiss Plaintiffs' first claim
20 for violation of 42 U.S.C. § 1983 because they have failed to
21 allege sufficient facts to establish the requisite elements of a
22 claim under Monell v. Department of Social Services, 436 U.S.
23 658, 690-91 (1978) and because Plaintiffs have failed to alleged
24 a constitutional violation. Plaintiffs concede that the
25 complaint does not properly allege county liability under Monell

26 ² County Defendants also mention that the second, third, fourth,
27 fifth, and sixth claims should be dismissed against them.
28 However, these claims are not alleged against them. See Compl.
¶¶ 32-50.

1 and therefore should be dismissed with leave to amend.

2 Accordingly, the Court dismisses Plaintiffs' first claim against
3 the County for violation of § 1983 with leave to amend.

4 Plaintiffs also argue that Deputy Houtman's actions in
5 dissuading Plaintiffs from reporting or cooperating in a
6 criminal case gives rise to a § 1983 claim against Deputy
7 Houtman. Specifically, Plaintiffs argue that Deputy Houtman
8 violated the First and Fourteenth Amendment by attempting to
9 dissuade Plaintiffs from testifying against Rizzo or the
10 Principal. Plaintiffs' precise claim is unclear, but it appears
11 to be a retaliation claim and a right of access to courts claim.
12 Opp. at 5-7. In addition, Plaintiffs state that their Fourth
13 Amendment claim and the due process claim under the Fourteenth
14 Amendment should be stricken. Opp. at 7.

15 a. Right of Access Claim

16 For a § 1983 claim, Plaintiffs must allege facts to show "a
17 deprivation of a right, privilege or immunity secured by the
18 Constitution or federal law, by one acting under color of state
19 law." Delew v. Wagner, 143 F.3d 1219, 1222 (9th Cir. 1998).
20 The right of individuals to pursue legal redress for claims is
21 protected by the First and Fourteenth Amendments. Harrell v.
22 Cook, 169 F.3d 428, 432 (7th Cir. 1999) (quoting Vasquez v.
23 Hernandez, 60 F.3d 325, 328 (7th Cir. 1995)); see also Delew,
24 143 F.3d at 1222 (9th Cir. 1998) (noting "right of access to the
25 courts is a fundamental right protected by the Constitution").
26 In the Ninth Circuit, to state a right to access claim, a
27 plaintiff must allege that "defendants' cover-up violated their
28 right of access to the courts by rendering 'any available state

1 court remedy ineffective.'" Delew, 143 F.3d at 1223 (quoting
2 Swekel v. City of River Rouge, 119 F.3d 1259, 1264 (6th Cir.
3 1997)).

4 County Defendants argue that Plaintiffs have not alleged
5 any facts to show that Deputy Houtman took any actions to
6 interfere and stop them from pursuing the prosecution with the
7 Weed Police Department. In their complaint, Plaintiffs allege
8 that Deputy Houtman tried to dissuade Sisco, Wilder, and/or M.S.
9 "from testifying against or making any further complaints to the
10 Weed police about PRINCIPAL, telling SISCO it would be in
11 plaintiffs' best interests to back off of the reports already
12 made concerning the foregoing alleged events." Compl. ¶ 20.
13 Plaintiffs allegedly declined, and therefore, "the COUNTY, via
14 its Sheriff's Department began a campaign of harassment against
15 plaintiffs." Id. However, there are no allegations that Deputy
16 Houtman has rendered Plaintiffs' judicial remedies inadequate or
17 ineffective. Therefore, Plaintiffs have not properly alleged a
18 right of access claim.

19 b. Retaliation Claim

20 Plaintiffs argue that a § 1983 claim "will lie for
21 retaliation based on the exercise of constitutionally or
22 statutorily protected rights when the government or its
23 officials take negative action against an individual because of
24 his or her exercise of rights guaranteed by the Constitution or
25 federal laws." Opp. at 6. In support of their argument,
26 Plaintiffs rely on several out-of-circuit cases. Nevertheless,
27 the Ninth Circuit has held that a free speech retaliation claim
28 is cognizable under § 1983. See e.g., Soranno's Gasco, Inc. v.

1 Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989) ("The right of
2 access to the courts is subsumed under the first amendment right
3 to petition the government for redress of grievances.
4 []Deliberate retaliation by state actors against an individual's
5 exercise of this right is actionable under section 1983.")
6 (internal citations omitted). Plaintiffs may demonstrate a
7 First Amendment retaliation claim by showing that "(1) [they]
8 engaged in constitutionally protected activity; (2) as a result,
9 [they] were subjected to adverse action by the defendant that
10 would chill a person of ordinary firmness from continuing to
11 engage in the protected activity; and (3) there was a
12 substantial causal relationship between the constitutionally
13 protected activity and the adverse action." Blair v. Bethel
14 School Dist., 608 F.3d 540, 543 (9th Cir. 2010) (citing Pinard
15 v. Clatskanie School Dist. 6J, 467 F.3d 755, 770 (9th Cir.
16 2006)); see also Wardany v. City of San Jacinto, 5:09-CV-00299,
17 2011 WL 2119370 (C.D. Cal. May 27, 2011) (applying Blair to a
18 right to petition retaliation claim) aff'd, 509 F. App'x 650
19 (9th Cir. 2013)

20 In this case, County Defendants argue that the verbal
21 statements by Deputy Houtman and unrelated actions by other
22 officers, not tied to Deputy Houtman, are insufficient to
23 establish a claim for retaliation. Reply at 4. As mentioned
24 above, Plaintiffs allege that Deputy Houtman threatened them.
25 However, verbal threats, alone, are insufficient to state a
26 violation of a constitutional right under § 1983. Oltarzewski
27 v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987). Plaintiffs also
28 claim in their Tort Claim Letter to the County, attached to the

1 complaint, that several unnamed deputies followed and watched
2 them, but Plaintiffs fail to allege any facts to connect these
3 actions to Deputy Houtman. Claim Letter to County of Siskiyou,
4 Ex. 1, Doc. #1-1, at 2. Without allegations that Deputy Houtman
5 personally participated in the alleged deprivation of First
6 Amendment rights, Plaintiffs cannot state a claim. See Jones v.
7 Williams, 297 F.3d 930, 934 (9th Cir. 2002) (“In order for a
8 person acting under color of state law to be liable under § 1983
9 there must be a showing of personal participation in the alleged
10 rights deprivation.”)

11 Accordingly, the Court finds that Plaintiffs have failed to
12 state a § 1983 claim against Deputy Houtman. Because Plaintiffs
13 may be able to allege sufficient facts to state a right of
14 access claim or a retaliation claim, the Court grants Plaintiffs
15 leave to amend.

16 2. Negligence Claim

17 County Defendants argue that Plaintiffs’ seventh claim for
18 negligence should be dismissed because they failed to comply
19 with the Tort Claims Act (“TCA”). Mot. 4-5. Plaintiffs contend
20 that the Tort Claim Notice was timely filed. Opp. at 5. As an
21 initial matter, Defendants do not argue that Plaintiffs’ Tort
22 Notice was untimely; they argue that Plaintiffs’ claim was for
23 an intentional tort not for negligence. See Reply at 2.

24 State tort law claims are subject to the claim presentation
25 requirements of the TCA. Karim-Panahi v. Los Angeles Police
26 Dep’t, 839 F.2d 621, 627 (9th Cir. 1988) A submitted “claim
27 need not contain the detail and specificity required of a
28 pleading, but need only fairly describe what the entity is

1 alleged to have done." Stockett v. Ass'n of California Water
2 Agencies Joint Powers Ins. Auth., 34 Cal. 4th 441, 446 (2004).
3 If a plaintiff "relies on more than one theory of recovery
4 against the [public entity], each cause of action must have been
5 reflected in a timely claim. In addition, the factual
6 circumstances set forth in the written claim must correspond
7 with the facts alleged in the complaint." Dixon v. City of
8 Livermore, 127 Cal.App.4th 32, 40 (2005); see Stockett, 34 Cal.
9 4th at 447; Nelson v. State of California, 139 Cal.App.3d 72, 79
10 (1982). "[A] complaint is vulnerable to a demurrer if it
11 alleges a factual basis for recovery which is not fairly
12 reflected in the written claim." Stockett, 34 Cal. 4th at 447.
13 In other words, it is permissible to plead additional theories
14 where the "additional theories [are] based on the same factual
15 foundation as those in the claim, and the claim provide[s]
16 sufficient information to allow the public agency to conduct an
17 investigation into the merits of the claim." Dixon, 127
18 Cal.App.4th at 42.

19 In Plaintiffs' claim letter, they state, "The deputies'
20 intentional actions have caused the Siscos to fear for their
21 safety and have caused the [sic] suffer severe emotional
22 distress, fright, anxiety, and physical distress." Claim Letter
23 to County of Siskiyou, Ex. 1, Doc. #1-1, at 2. Although
24 Plaintiffs only refer to intentional actions, Plaintiffs'
25 negligence claim is based on the same factual foundation as the
26 intentional acts. Therefore, the Court finds that Plaintiffs'
27 failure to specifically identify their causes of action in their
28 claim letter is not fatal to their negligence state law claim

1 against Deputy Houtman in this lawsuit.

2 County Defendants also argue that Plaintiffs' claim letter
3 contains no claim of wrongful action by the County. Because
4 there are no facts describing wrongful actions by the County,
5 the Court dismisses Plaintiffs' claim for direct liability
6 against the County. Moreover, County Defendants argue that
7 under California Government Code section 820.8 ("Section 820.8"),
8 "there is no respondeat superior liability of the County of
9 Siskiyou." Mot. at 2. However, Section 820.8 provides that
10 except as otherwise provided by statute, "a public employee is
11 not liable for an injury caused by the act or omission of
12 another person." Cal. Gov't Code § 820.8 (emphasis added).
13 Therefore, Section 820.8 does not apply to public entities.
14 Contrastingly, under California Government Code section 815.2, a
15 public entity may be found vicariously liable for employees'
16 tortious acts. Cal. Gov't Code § 815.2(a) (providing in
17 relevant part that "[a] public entity is liable for injury
18 proximately caused by an act or omission of an employee of the
19 public entity within the scope of employment"). Therefore, the
20 County may be sued in tort based on a respondeat superior theory
21 of vicarious liability.

22 Accordingly, the Court denies County Defendants' motion to
23 dismiss Plaintiffs' negligence claim against Deputy Houtman and
24 against the County under a respondeat superior theory of
25 liability. The Court grants County Defendants' motion to
26 dismiss Plaintiffs' negligence against the County for direct
27 liability. Because Plaintiffs' negligence claim against the
28 County for direct liability was not properly noticed, granting

1 Plaintiff leave to amend would be futile.

2 3. Punitive Damages

3 County Defendants argue that Plaintiffs are barred from
4 seeking punitive against them. Based on Plaintiffs' prayer for
5 relief, Plaintiffs only seek punitive damages against the County
6 pursuant to their first claim for violation of § 1983. See
7 Compl. at p. 19. Under § 1983, municipalities are immune from
8 punitive damages. City of Newport v. Fact Concerts, Inc., 453
9 U.S. 247, 271 (1981). Accordingly, the Court dismisses
10 Plaintiffs' punitive damages claim and does not grant leave to
11 amend because this claim is legally foreclosed.

12 4. Supplemental Claims

13 Finally, County Defendants argue that if Plaintiffs' first
14 claim for violation of § 1983 fails, the Court should decline
15 supplemental jurisdiction. Although the Court has dismissed
16 Plaintiffs' first claim against County Defendants, it granted
17 Plaintiffs leave to amend. Accordingly, the Court need not
18 decide whether to decline supplemental jurisdiction at this
19 time.

20
21 III. ORDER

22 For the foregoing reasons, County Defendants' Motion to
23 Dismiss is GRANTED in part and DENIED in part. County
24 Defendants' Motion to Dismiss Plaintiffs' seventh claim for
25 negligence against Deputy Houtman and the County for vicarious
26 liability is DENIED. The Court GRANTS WITH PREJUDICE County
27 Defendants' Motion to Dismiss:

28 (1) Plaintiffs' seventh claim for negligence against the

1 County based on direct liability,

2 (2) Plaintiffs' claim for punitive damages against the
3 County under § 1983.

4 The Court DISMISSES WITH LEAVE TO AMEND:

5 (1) Plaintiffs' first claim for violation § 1983 against
6 County Defendants.

7 Plaintiffs' Amended Complaint must be filed within twenty
8 (20) days from the date of this Order. County Defendants shall
9 file their responsive pleading within twenty (20) days after the
10 Amended Complaint is filed. If Plaintiffs elect not to file an
11 Amended Complaint, the case will proceed without Plaintiffs'
12 first claim against County Defendants.

13 IT IS SO ORDERED.

14 Dated: November 26, 2013



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

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