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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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DANIEL McTIMMONDS,  
  
                                Plaintiff,  
  
                                v.  
  
ALCOHOL & DRUG TESTING  
SERVICES, LLC, and DOES 1  
through 20 Inclusive,  
  
                                Defendants.

CIV. NO. 2:14-2124 WBS KJN  
  
MEMORANDUM AND ORDER RE: MOTION  
TO DISMISS

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Plaintiff brought this diversity action against defendant Alcohol and Drug Testing Services, LLC ("ADTS") to recover for emotional distress he suffered as a result of defendant's alleged tortious acts during a random alcohol drug screening procedure. Defendant now moves to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.

I. Factual and Procedural Background

1           The Union Pacific Railroad ("Union Pacific") contracts  
2 with defendant to conduct drug testing of Union Pacific  
3 employees. (Compl. ¶ 6.) Plaintiff is an employee at Union  
4 Pacific, and on July 17, 2013, he presented himself for a  
5 routine, random drug and alcohol screening procedure required by  
6 the United States Department of Transportation. (Id.); see  
7 Federal Railroad Safety Act, 49 U.S.C. § 20140 (mandating that  
8 the Secretary of Transportation promulgate regulations  
9 establishing preemployment, reasonable suspicion, random and  
10 post-accident drug testing programs for railroad employees); 49  
11 C.F.R. pt. 40 (Department of Transportation regulations pursuant  
12 to § 20140).

13           Plaintiff alleges that when he entered the site, an  
14 ADTS technician shouted his last name and instructed plaintiff to  
15 take a seat and sign an Alcohol Test form. The technician  
16 administered a breathalyzer test to check plaintiff's blood  
17 alcohol content ("BAC"). When the result appeared, indicating a  
18 BAC of .05%, plaintiff alleges the technician "very loudly and  
19 publicly" asked plaintiff, "Have you been drinking this morning?"  
20 (Id. ¶¶ 8, 13.) "[N]o fewer than six other people" were present,  
21 all within a six-foot radius or "earshot" of plaintiff. (Id.)  
22 Plaintiff, allegedly shocked and humiliated, replied that he had  
23 not been drinking. (Id. ¶ 9.) The technician, waiving the  
24 breathalyzer back and forth, responded, "Well, this says you have  
25 been!" (Id. ¶ 10.) Plaintiff asked the technician to lower her  
26 voice because the information was private and many of plaintiff's  
27 co-workers were nearby. (Id. ¶ 11.) Waiving her hands in the  
28 air, the technician stated in a loud voice, "I have been asking

1 Buck (a UPRR employee) for a private room for the last two years-  
2 -Redding and Dunsmuir [sic] and I never got it!" (Id. ¶ 14.)

3 The technician then questioned whether the machine was working  
4 properly and made a call on her cell phone. (Id. ¶¶ 14-16.)

5 When the call ended, plaintiff told the technician,  
6 "This isn't right," and stated he was going to call his  
7 supervisor. (Id. ¶¶ 15-16.) He picked up his testing form and  
8 proceeded toward the door. (Id.) According to plaintiff, the  
9 technician confronted him, saying, "You can't take that!" (Id. ¶  
10 17.) The technician attempted to physically wrest the form out  
11 of plaintiff's hands while plaintiff simultaneously pulled away  
12 and said, "Don't touch me!" (Id.) Plaintiff walked around the  
13 technician as she continued to instruct plaintiff to stay at the  
14 site. Before plaintiff could manage to leave, he was stopped by  
15 a supervisor who had allegedly overheard the conversation with  
16 the technician from his office adjacent to the testing site.  
17 (Id. ¶ 19.)

18 Soon after, plaintiff's direct supervisor arrived.  
19 (Id. ¶ 20.) During this time, the technician was talking on her  
20 cell phone to an unknown party, allegedly "sharing information  
21 about the testing procedure involving [p]laintiff and clearly  
22 disclosing information regarding [p]laintiff's response and  
23 objections to the testing procedures and conditions." (Id.)

24 Plaintiff's direct supervisor recommended the  
25 technician re-test plaintiff's BAC. (Id. ¶ 21.) The technician  
26 repeated the breathalyzer inside an office with the door open  
27 while "plaintiff's co-workers were entering and exiting the  
28 building." (Id. ¶ 22.) The test was once again positive for

1 alcohol. (Id. ¶ 24.) Plaintiff then performed a confirmation  
2 test, and was next instructed by the technician to produce a  
3 sample for a urinalysis. (Id. ¶ 26.) After roughly one-and-a-  
4 half hours, plaintiff produced a specimen. (Id.) During the  
5 one-and-a-half hour window, plaintiff overheard the technician  
6 ask someone on her cell phone, "Am I going to get fired for  
7 this?" (Id. ¶ 27.) Plaintiff's allegations end there, without  
8 any reference to discipline or adverse employment actions that  
9 resulted from his positive breathalyzers or the result of his  
10 urinalysis.

11 Plaintiff brings four state law tort claims to recover  
12 for emotional distress he allegedly suffered as a result of the  
13 technician's conduct and the public nature of the testing  
14 environment: (1) invasion of privacy; (2) intentional infliction  
15 of emotional distress; (3) negligence; and (4) negligent  
16 infliction of emotional distress. Defendant now moves to dismiss  
17 under Rule 12(b)(6), arguing the Department of Transportation  
18 safety regulations preempt plaintiff's claims, and, in any case,  
19 plaintiff's Complaint does not contain sufficient allegations to  
20 support his claims.

## 21 II. Analysis

22 On a Rule 12(b)(6) motion to dismiss, the court must  
23 accept the allegations in the complaint as true and draw all  
24 reasonable inferences in favor of the plaintiff. See Scheuer v.  
25 Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by  
26 Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S.  
27 319, 322 (1972). To survive a motion to dismiss, a plaintiff  
28 must plead "only enough facts to state a claim to relief that is

1 plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S.  
2 544, 570 (2007). This “plausibility standard,” however, “asks  
3 for more than a sheer possibility that a defendant has acted  
4 unlawfully,” and where a plaintiff pleads facts that are “merely  
5 consistent with a defendant’s liability,” it “stops short of the  
6 line between possibility and plausibility.” Ashcroft v. Iqbal,  
7 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557).

8 A. Invasion of Privacy

9 Plaintiff did not specify in his Complaint which of the  
10 privacy torts he asserts against defendant, but his allegations  
11 employ the elements of a public disclosure of private facts  
12 claim, (see Compl. ¶¶ 29-34), and at oral argument plaintiff’s  
13 counsel confirmed unequivocally that this is plaintiff’s claim.  
14 The elements of this claim are: “(1) public disclosure (2) of a  
15 private fact (3) which would be offensive and objectionable to  
16 the reasonable person and (4) which is not of legitimate public  
17 concern.” Shulman v. Grp. W Prods., Inc., 18 Cal. 4th 200, 214  
18 (1998). Plaintiff alleges the ADTS technician publicly disclosed  
19 the results of [his] breathalyzer test to approximately six  
20 others who were present at the testing site and that his positive  
21 result was extremely private in nature and not a matter of public  
22 concern. (Compl. ¶¶ 28-32.) As a result, plaintiff alleges he  
23 “suffered mental anguish, humiliation, discomfort, worry,  
24 anxiety, annoyance, and severe emotional distress.” (Id. ¶ 33.)

25 Plaintiff has made no attempt to identify a privacy  
26 interest in his positive breathalyzer results such that they  
27 would constitute “private facts.” See Moreno v. Hanford  
28 Sentinel, Inc., 172 Cal. App. 4th 1125, 1130 (5th Dist. 2009)

1 (recognizing that one must have a reasonable expectation of  
2 privacy in a fact for it to be private). Even if plaintiff could  
3 assert he had a privacy interest in his test results, that  
4 interest would be outweighed by the FRA's stated purpose for its  
5 comprehensive drug and alcohol testing regulations, "to prevent  
6 accidents and casualties in railroad operations that result from  
7 impairment of employees by alcohol or drugs." 49 C.F.R. §  
8 219.1(a); see Smith v. Fresno Irrigation Dist., 72 Cal. App. 4th  
9 147, 162 (holding that the plaintiff's privacy interest in the  
10 drugs he ingested was outweighed by the district's legitimate and  
11 substantial safety-related reasons for randomly drug testing its  
12 construction and maintenance workers). Plaintiff thus fails to  
13 allege an essential element of a public disclosure claim of  
14 private facts claim.

15           Additionally, plaintiff has not adequately alleged a  
16 public disclosure. "[E]xcept in cases involving physical  
17 intrusion, the [public disclosure] tort must be accompanied by  
18 publicity in the sense of communication to the public in general  
19 or to a large number of persons as distinguished from one  
20 individual or a few." Schwartz v. Thiele, 242 Cal. App. 2d 799,  
21 805 (1966) (citing Prosser on Torts 835 (3d ed.)). Six co-  
22 workers in the waiting room of the testing site do not amount to  
23 the "public in general" or a "large number of persons." See  
24 Tarlson v. United States, Civ. No. 13-3535, 2014 WL 605489, at \*4  
25 (N.D. Cal. Feb. 13, 2014) (holding that "[plaintiff's] claim does  
26 not meet the 'mass exposure' standard set out in California,  
27 because all those who were aware of Plaintiff's discharge were  
28 all professionally connected in the Coast Guard" and thus it was

1 not plausible that Foster's statements were "communicated to the  
2 general public or a diverse group of people completely  
3 unconnected"). The California Court of Appeal has held that as  
4 few as twenty persons sufficed as "mass exposure." See Kinsey v.  
5 Macur, 107 Cal. App. 3d 265, 272 (1st Dist. 1980). Kinsey is  
6 distinguishable, however, because those people were a "diverse  
7 group of people living in several states and totally unconnected  
8 either socially or professionally." Here the technician made the  
9 alleged disclosure to a non-diverse group of plaintiff's  
10 coworkers. Because such disclosure is not "publicity," plaintiff  
11 fails to allege a plausible claim for public disclosure of  
12 private facts, and the court must grant defendant's motion to  
13 dismiss that claim.

14 B. Intentional Infliction of Emotional Distress

15 The elements of an intentional infliction of emotional  
16 distress claim are (1) extreme and outrageous conduct by the  
17 defendant with the intention of causing, or reckless disregard of  
18 the probability of causing, emotional distress; (2) the plaintiff  
19 suffered severe or extreme emotional distress; and (3) actual and  
20 proximate causation. Hughes v. Pair, 46 Cal. 4th 1035, 1050  
21 (2009). "The California Supreme Court has set a 'high bar' for  
22 what can constitute severe distress." Wong v. Tai Jing, 189 Cal.  
23 App. 4th 1354, 1376 (6th Dist. 2010). "Severe emotional distress  
24 means emotional distress of such substantial quality or enduring  
25 quality that no reasonable [person] in civilized society should  
26 be expected to endure it." Hughes, 46 Cal. 4th at 1051 (holding  
27 that a plaintiff's "discomfort, worry, anxiety, upset stomach,  
28 concern, and agitation" did not rise to this level) (internal

1 quotation marks and citation omitted). A "highly unpleasant  
2 mental reaction such as fright, grief, shame, humiliation,  
3 embarrassment, anger, chagrin, disappointment or worry" is not  
4 "severe" if it is "trivial or transient." See Wong, 189 Cal.  
5 App. 4th at 1376.

6 Plaintiff alleges that as a result of the technician's  
7 comments he suffered "anguish, humiliation, discomfort, worry,  
8 anxiety, annoyance, and severe emotional distress." (Compl. ¶  
9 43.) The Complaint is silent, however, as to whether the  
10 distress was enduring. Under Iqbal, the conclusory allegation  
11 that plaintiff suffered severe emotional distress is  
12 insufficient. Iqbal, 556 U.S. at 678 ("Threadbare recitals of  
13 the elements of a cause of action, supported by mere conclusory  
14 statements, do not suffice.") Courts have repeatedly found  
15 similar allegations insufficient to state a cognizable IIED  
16 claim. See. e.g., Lawler v. Montblanc N. Am. LLC, 704 F.3d 1235,  
17 1246 (9th Cir. 2013) (holding that plaintiff's emotional injuries  
18 such as anxiety, sleeplessness, upset stomach, and muscle  
19 twitches "clearly" did not rise to the level of "severe");  
20 Connolly v. Remkes, Civ. No. 5:14-1344 LHK, 2014 WL 5473144, at  
21 \*14 (N.D. Cal. Oct. 28, 2014) (dismissing IIED claim where the  
22 plaintiff merely alleged "great worry and concern" without  
23 providing any facts of extreme emotional distress she may have  
24 suffered because "California courts have held that such  
25 allegations fail to establish the degree of harm necessary for a  
26 claim of intentional infliction of emotional distress"); San  
27 Joaquin Deputy Sheriff's Ass'n v. County of San Joaquin, 898 F.  
28 Supp. 2d 1177, 1192 (E.D. Cal. 2012) (Karlton, J.) (granting

1 defendant's motion to dismiss where plaintiff's allegations of  
2 severe emotional distress were conclusory). Therefore, because  
3 plaintiff fails to sufficiently allege severe emotional distress  
4 rising to the "high bar" set by the California Supreme Court, the  
5 court must grant defendant's motion to dismiss.<sup>1</sup>

6 C. Negligence and Negligent Infliction of Emotional Distress

7 Plaintiff pleads claims for negligence and negligent  
8 infliction of emotional distress separately. "A claim of  
9 negligent infliction of emotional distress is not an independent  
10 tort but the tort of negligence to which the traditional elements  
11 of duty, breach of duty, causation, and damages apply." Wong,  
12 189 Cal. App. 4th at 1377.<sup>2</sup> Plaintiff's negligence and NIED  
13 claims both allege that plaintiff suffered emotional distress as  
14 a result of defendant's negligence. Because plaintiff's  
15 allegations supporting his negligence claim are identical to his  
16 allegations supporting his NIED claim, the court will address  
17 those claims together.

18 The only damages plaintiff alleges are emotional  
19 distress, not injury to his person. (Compl. ¶ 38.) In  
20 California, "damages for negligently inflicted emotional

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21 <sup>1</sup> Because the court finds that plaintiff's failure to  
22 plead "severe emotional distress" is a sufficient ground for  
23 dismissal, the court need not address whether plaintiff plausibly  
alleges that the technician's behavior was "outrageous."

24 <sup>2</sup> This court has previously acknowledged that where a  
25 plaintiff alleges an NIED claim based on damages suffered by  
26 bystander to an accident caused by a defendant's negligence, the  
27 claim requires proving different elements. See Roberts v. Orange  
28 Glo, Civ. No. 2:14-421 WBS DAD, 2014 WL 5780961, at \*4 (Nov. 5,  
2014). However, here plaintiff's NIED claim is that ADTS  
breached a duty to him and caused him emotional distress as a  
result, which is exactly what his negligence claim alleges.

1 distress may be recovered in the absence of physical injury or  
2 impact . . . .'" Potter v. Firestone Tire & Rubber Co., 6 Cal.  
3 4th 965, 986 (1993) (quoting Burgess v. Superior Court, 2 Cal.  
4 4th 1064, 1074 (1992)). However,

5  
6 unless the defendant has assumed a duty to plaintiff  
7 in which the emotional condition of the plaintiff is  
8 an object, recovery is available only if the emotional  
9 distress arises out of the defendant's breach of some  
10 other legal duty and the emotional distress is  
11 proximately caused by that breach of a duty. Even  
12 then, with rare exceptions, a breach of the duty must  
13 threaten physical injury, not simply damage to  
14 property or financial interests.

15 Potter, 6 Cal. 4th at 985. Furthermore, "to recover damages for  
16 emotional distress on a claim of negligence where there is no  
17 accompanying personal, physical injury, the plaintiff must show  
18 that the emotional distress was 'serious.'" Wong, 189 Cal. App.  
19 4th at 1377. "Serious emotional distress" required for an NIED  
20 claim absent threat of physical harm is "functionally the same  
21 as" the articulation of "severe emotional distress" required for  
22 an IIED claim. Id.

23 Here, plaintiff does not allege that defendant's  
24 conduct threatened physical injury. He only alleges that, by  
25 failing to use certain accepted protocols to ensure the site was  
26 private, plaintiff suffered emotional distress. (Compl. ¶¶ 37-  
27 39.) Without any accompanying injury, plaintiff would have to  
28 allege that his emotional distress was "severe" to state a  
plausible NIED or negligence claim. See Wong, 189 Cal. App. 4th  
at 1377. Because, as previously discussed, the Complaint fails  
to allege "severe emotional distress," those claims both fail.

1 Accordingly, the court must grant defendant's motion to dismiss  
2 plaintiff's NIED and negligence claims.

3 IT IS THEREFORE ORDERED that defendant's motion to  
4 dismiss be, and the same hereby is, GRANTED.

5 Plaintiff has twenty days from the date this Order is  
6 signed to file an amended complaint, if he can do so consistently  
7 with this Order.

8 Dated: December 2, 2014

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10 WILLIAM B. SHUBB  
11 UNITED STATES DISTRICT JUDGE  
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