

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

<p>LASONJA PORTER,</p> <p style="padding-left: 40px;">Plaintiff,</p> <p style="padding-left: 80px;">vs.</p> <p>SERGEANT MUNOZ in his individual capacity, DOES 1- 10 in their individual capacities, CITY OF DAVIS POLICE DEPARTMENT, CITY OF DAVIS,</p> <p style="padding-left: 40px;">Defendants.</p> <hr style="width: 40%; margin-left: 0;"/>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>2:16-CV-01702 LEK</p>
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**ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANTS' MOTION TO DISMISS AND TO STRIKE**

On October 14, 2016, Defendants Sergeant Munoz and the City of Davis¹ ("the City," collectively "Defendants") filed their Motion to Dismiss and to Strike ("Motion"). [Dkt. no. 7.] Plaintiff Lasonja Porter ("Plaintiff") filed her memorandum in opposition on October 28, 2016, and Defendants filed their reply on November 10, 2016. [Dkt. nos. 9, 11.] The Court finds this matter suitable for disposition without a hearing pursuant to L.R. 230(g) of the Local Rules of the United States District Court for the Eastern District of California ("Local Rules"). After careful consideration of the Motion, supporting and

¹ Sergeant Munoz is named in his individual capacity, and the City is also named as the City of Davis Police Department. [Pltf.'s Complaint for Damages ("Complaint"), filed 7/22/16 (dkt. no. 1), at 2-3.]

1 opposing memoranda, and the relevant legal authority, Defendants'
2 Motion is HEREBY GRANTED IN PART AND DENIED IN PART for the
3 reasons set forth below. The Motion is GRANTED in all respects,
4 except that this Court DENIES Defendants' request that the
5 dismissal of Count IV be with prejudice.

6 **BACKGROUND**

7 The instant case arises from a probation search that
8 Sergeant Munoz - who Plaintiff had two traumatic previous
9 encounters with - and several other police officers executed at
10 her apartment on February 26, 2016. Her son Cairo was on
11 probation at the time, but only probation officers had conducted
12 his previous probation searches. According to the Complaint,
13 Plaintiff informed the police officers that her shoulder was very
14 tender because of an injury and that her mobility was limited.
15 After Sergeant Munoz and other officers entered the apartment,
16 Plaintiff attempted to go to her bedroom to retrieve her high
17 blood pressure medication because she was feeling overwhelmed by
18 the incident. [Complaint at 3-4.] As she was heading to her
19 bedroom, Sergeant Munoz "grabbed and tugged on her injured left
20 shoulder," causing her to suffer unbearable pain and extreme
21 anxiety. [Id. at 4.]

22 Sergeant Munoz asked Plaintiff where Cairo was, and she
23 responded that he was not at home. He then asked her which room
24 was Cairo's. Although Plaintiff identified Cairo's bedroom,

1 Sergeant Munoz searched the other bedrooms over Plaintiff's
2 objection before finally searching Cairo's bedroom. While
3 Sergeant Munoz and other officers were searching Cairo's room,
4 Cairo and his grandmother returned home. Officer Munoz abandoned
5 the search of Cairo's room to confront Cairo. He told Cairo that
6 they were looking for a person named Julio. Cairo said that he
7 had not seen Julio in years because the terms of his probation
8 prohibited such contact. Sergeant Munoz and the other officers
9 then left the apartment. Cairo was never restrained while the
10 officers were there, nor did the officers search him. Plaintiff
11 states that the officers did not offer her medical assistance or
12 attempt to obtain medical assistance for her before they left.
13 Plaintiff promptly sought medical attention for her left
14 shoulder. [Id. at 4-5.]

15 The Complaint alleges the following claims: a 42 U.S.C.
16 § 1983 claim against Sergeant Munoz alleging that his
17 unreasonable use of force violated Plaintiff's Fourteenth
18 Amendment right to substantive due process ("Count I"); a § 1983
19 claim against Sergeant Munoz alleging that the unreasonable
20 search violated Plaintiff's Fourth Amendment and Fourteenth
21 Amendment rights ("Count II"); a negligence claim against
22 Defendants based on bodily injury, pursuant to California
23 Government Code § 815.2 ("Count III"); a negligence claim against
24 Defendants based on the illegal search, pursuant to § 815.2

1 ("Count IV"); a negligent infliction of emotional distress
2 ("NIED") claim against Sergeant Munoz ("Count V"); and an
3 intentional infliction of emotional distress ("IIED") claim
4 against Sergeant Munoz ("Count VI"). The Complaint seeks the
5 following relief: general, compensatory, and punitive damages;
6 interest on economic damages; lost earnings; and attorney's fees
7 and costs.

8 In the instant Motion, Defendants ask this Court to
9 dismiss Counts I, III, IV, and V pursuant to Fed. R. Civ. P.
10 12(b)(6) and to strike the references to the Fourteenth Amendment
11 in Count II pursuant to Fed. R. Civ. P. 12(f). This Court does
12 not construe the Motion as seeking either the dismissal of the
13 portion of Count II based on the Fourth Amendment or the
14 dismissal of Count VI.

15 DISCUSSION

16 I. Counts I and II

17 Defendants argue that Count I fails to state a claim
18 upon which relief can be granted because an excessive force claim
19 must be brought pursuant to the Fourth Amendment, not the
20 Fourteenth Amendment. Similarly, Defendants argue that this
21 Court should strike the allegations regarding the Fourteenth
22 Amendment in Count II because an unreasonable search claim is
23 properly analyzed under the Fourth Amendment. Plaintiff
24 essentially concedes these arguments, but she argues that this

1 Court should grant her leave to amend to correct the deficiencies
2 in Counts I and II. [Mem. in Opp. at 4.] This Court agrees that
3 Plaintiff is entitled to the opportunity to cure the defects in
4 these claims by amendment. See Rodriguez v. Brown,
5 1:15-cv-01754-LJO-EPG-PC, 2016 WL 6494705, at *3 (E.D. Cal.
6 Nov. 1, 2016) ("Whether dismissal is with or without prejudice
7 will depend upon whether it is possible for Plaintiff to cure any
8 defects." (citing Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097,
9 1107-08 (9th Cir. 2003) (collecting cases))), *report and*
10 *recommendation adopted*, 2016 WL 7104173 (E.D. Cal. Dec. 6, 2016).

11 This Court therefore GRANTS Defendants' Motion insofar
12 as this Court DISMISSES Count I WITHOUT PREJUDICE and STRIKES the
13 portion of Count II based on the Fourteenth Amendment.

14 **II. Count III**

15 Defendants argue that: Plaintiff has not pled
16 sufficient allegations to support her negligence claim based on
17 bodily injury; and the factual allegations of Count III appear to
18 state a battery claim instead of a negligence claim. This
19 district court has stated:

20 "Under California law, '[t]he elements of
21 negligence are: (1) defendant's obligation to
22 conform to a certain standard of conduct for the
23 protection of others against unreasonable risks
24 (duty); (2) failure to conform to that standard
25 (breach of duty); (3) a reasonably close
26 connection between the defendant's conduct and
27 resulting injuries (proximate cause); and
28 (4) actual loss (damages).'" Corales v. Bennett,
29 567 F.3d 554, 572 (9th Cir. 2009) (quoting McGarry

1 v. Sax, 158 Cal. App. 4th 983, 994, 70 Cal. Rptr.
2 3d 519 (2008) (internal quotations omitted)).

3
4 Stoops v. Sherman, Case No. 1:16-cv-01026-AWI-SAB(PC), 2017 WL
5 56666, at *4 (E.D. Cal. Jan. 4, 2017). Count III alleges that:

6 As a proximate result of the offensive and
7 harmful touching of SERGEANT MUNOZ, plaintiff was
8 hurt and injured in her health, strength, and
9 activity, sustaining injury to her body and shock
10 and injury to her nervous system and person, all
11 of which injuries have caused, and continue to
12 cause, PLAINTIFF great mental, physical and
13 nervous pain and suffering. Plaintiff is informed
14 and believes and thereon alleges that such
15 injuries will result in some permanent disability
16 to her. As a result of such injuries, plaintiff
17 has suffered general damages.

18
19 [Complaint at 8 (emphases in original).] Plaintiff also alleges
20 that she has incurred, and will continue to incur, medical
21 expenses and other related expenses, and that her earning
22 capacity has been impaired. Thus, Plaintiff has pled proximate
23 cause and damages.

24 However, Plaintiff has not sufficiently pled duty and
25 breach of duty. The Complaint alleges that Sergeant Munoz
26 grabbed her injured shoulder even though she "was not the subject
27 of the search and was not posing a threat to the safety of the
28 officers or to the public," and that he and the other officers
29 "gave no verbal warning or instruction prior to the physical
30 contact." [Id.] These allegations are not sufficient to pled
31 that Sergeant Munoz owed Plaintiff a duty of care during the
32 execution of the probation search and that he breached the duty.

1 Further, Count III does not identify the basis for the City's
2 liability, except to allege that Sergeant Munoz "acted within the
3 course and scope of his employment." [Id.]

4 This Court also agrees with Defendants that, although
5 Plaintiff titled Count III as a negligence claim, Count III's
6 factual allegations may be more consistent with a battery claim.

7 This district court has stated:

8 A civil battery is "an offensive and
9 intentional touching without the victim's
10 consent." Kaplan v. Mamelak, 162 Cal. App.4th
11 637, 645, 75 Cal. Rptr. 3d 861 (2008). The
12 elements of a civil battery under California law
13 are: (1) defendant touched plaintiff, or caused
14 plaintiff to be touched, with the intent to harm
15 or offend plaintiff; (2) plaintiff did not consent
16 to the touching; (3) plaintiff was harmed or
17 offended by defendant's conduct; and (4) a
18 reasonable person in plaintiff's position would
19 have been offended by the touching. So v. Shin,
20 212 Cal. App. 4th 652, 669, 151 Cal. Rptr. 3d 257
21 (2013).

22
23 Robles v. Agreserves, Inc., 158 F. Supp. 3d 952, 985 (E.D. Cal.
24 2016) (some citations omitted).

25 For these reasons, this Court CONCLUDES that Count III
26 fails to state a plausible negligence claim against Defendants.
27 See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("To survive a
28 motion to dismiss, a complaint must contain sufficient factual
29 matter, accepted as true, to 'state a claim to relief that is
30 plausible on its face.'" (quoting Bell Atl. Corp. v. Twombly, 550
31 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))). This
32 Court therefore GRANTS Defendants' Motion insofar as this Court

1 DISMISSES Count III. The dismissal is WITHOUT PREJUDICE because
2 this Court CONCLUDES that is possible for Plaintiff to cure the
3 defects in Count III by amendment.

4 **III. Count IV**

5 Similar to Count III, Count IV fails to plead duty and
6 breach of duty. This Court therefore CONCLUDES that Count IV
7 fails to state a plausible negligence claim against Defendants.

8 Defendants argue that this Court should dismiss
9 Count IV with prejudice because the claim essentially alleges
10 that Sergeant Munoz negligently violated Plaintiff's Fourth
11 Amendment right to be free from unreasonable searches, and "[i]t
12 is well-established that negligent acts do not incur
13 constitutional liability." [Reply at 3 (citing Billington v.
14 Smith, 292 F.3d 1177, 1190 (9th Cir. 2002); Daniels v. Williams,
15 474 U.S. 327, 328 (1986)).] This Court disagrees with
16 Defendants' characterization of Count IV. This Court construes
17 Count IV as attempting to state an alternate theory of liability
18 regarding the allegedly illegal search, *i.e.*, even if Sergeant
19 Munoz's actions did not rise to the level of a constitutional
20 violation, they were negligent. This Court therefore rejects
21 Defendants' argument that Plaintiff cannot cure the defects in
22 Count IV by amendment.

23 Defendants' Motion is GRANTED IN PART AND DENIED IN
24 PART as to Count IV. The Motion is GRANTED insofar as Count IV

1 is DISMISSED, and the Motion is DENIED insofar as the dismissal
2 of Count IV is WITHOUT PREJUDICE.

3 **IV. Count V**

4 Defendants allege that Plaintiff's NIED claim fails to
5 state a plausible claim for relief because: 1) the Complaint does
6 not plead sufficient facts to support a NIED claim; 2) even if
7 Plaintiff has sufficient facts to support an NIED claim against
8 Sergeant Munoz, she has not pled the basis for the City's
9 liability; and 3) Plaintiff's NIED claim is redundant of her
10 negligence claims because she alleges that she suffered physical
11 injury and seeks emotional distress damages as parasitic damages.
12 This Court agrees with Defendants' third argument, and therefore
13 does not need to address Defendants' first and second arguments.
14 This district court has stated:

15 [T]here is no independent tort of negligent
16 infliction of emotional distress under California
17 law. (Burgess v. Superior Court, 2 Cal. 4th 1064,
18 1072 (1992) ("We have repeatedly recognized that
19 '[t]he negligent causing of emotional distress is
20 not an independent tort, but the tort of
21 negligence.'") (quoting Marlene F. v. Affiliated
22 Psychiatric Medical Clinic, Inc., 48 Cal. 3d 583,
23 588 (1989))). Negligent infliction of emotional
24 distress is instead a subset of negligence that
25 extends the ability to recover damages to indirect
26 victims who, while not suffering physical injury
27 as the result of a tortfeasor's acts, nonetheless
28 suffer severe emotional distress. See, e.g.,
29 Dillon v. Legg, 68 Cal. 2d 728, 747-48 (1968)
30 (allowing mother to pursue damages for emotional
31 trauma resulting from witnessing the death of her
32 child). However, **when emotional distress**
33 **accompanies physical injury, negligent infliction**
34 **of emotional distress is not the appropriate cause**

1 of action for seeking recovery of the resulting
2 damages. Rather, when a plaintiff is physically
3 injured and suffers emotional distress as a
4 result, damages stemming from the emotional
5 distress are treated as a "parasitic item" to be
6 recovered through a claim of ordinary negligence.
7 Thing v. La Chusa, 48 Cal. 3d 644, 651 (1989); see
8 also Summers v. Delta Airlines, Inc., 805 F. Supp.
9 2d 874, 887 (N.D. Cal. 2011) ("Under California
10 law, it is well-settled that in ordinary
11 negligence actions for physical injury, recovery
12 for emotional distress caused by that injury is
13 available as an item of parasitic damages.")
14 (quotation omitted).

15
16 Morse v. Cty. of Merced, No. 1:16-cv-00142-DAD-SKO, 2016 WL
17 3254034, at *12 (E.D. Cal. June 13, 2016) (some alterations in
18 Morse) (emphasis added).

19 Because Plaintiff asserts that she suffered physical
20 injury and emotional distress as a result of the allegedly
21 negligent conduct in this case, this Court CONCLUDES that
22 Plaintiff's independent NIED claim fails to state a plausible
23 claim for relief. Instead of asserting a separate NIED claim,
24 Plaintiff must seek her damages for emotional distress as a
25 component of her damages in her negligence claims. Thus, it is
26 not possible for Plaintiff to cure the defect in her independent
27 NIED claim. This Court GRANTS Defendants' Motion and DISMISSES
28 Count V WITH PREJUDICE. This Court emphasizes that the dismissal
29 is with prejudice insofar as Plaintiff cannot include an
30 independent NIED claim in her amended complaint, but without

31 //

1 prejudice to the inclusion of a request for emotional distress
2 damages as part of her negligence claims.

3 **CONCLUSION**

4 On the basis of the foregoing, Defendants' Motion to
5 Dismiss and to Strike, filed October 14, 2016, is HEREBY GRANTED
6 IN PART AND DENIED IN PART. The Motion is GRANTED insofar as:
7 Counts I and III are HEREBY DISMISSED WITHOUT PREJUDICE; the
8 allegations regarding the Fourteenth Amendment in Count II are
9 HEREBY STRICKEN; Count IV is HEREBY DISMISSED; and Count V is
10 HEREBY DISMISSED WITH PREJUDICE. The Motion is DENIED as to
11 Defendants' request to dismiss Count IV with prejudice. The
12 dismissal of Count IV is WITHOUT PREJUDICE.

13 The Court GRANTS Plaintiff leave to file an amended
14 complaint by **March 21, 2017**. If Plaintiff fails to file an
15 amended complaint by **March 21, 2017**, this case will proceed on
16 the remaining portions of the original Complaint - the portion of
17 Count II based on the Fourth Amendment and Count VI.

18 IT IS SO ORDERED.

19 DATED AT HONOLULU, HAWAII, January 20, 2017.



23 /s/ Leslie E. Kobayashi
24 Leslie E. Kobayashi
25 United States District Judge
26
27
28

29 **LASONJA PORTER VS. SERGEANT MUNOZ, ETC., ET AL; 2:16-CV-01702 LEK**