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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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DEBORAH RENA ARNOLD,

No. 2:17-cv-00543-JAM-CKD

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Plaintiff,

12

v.

**ORDER GRANTING DEFENDANT SUTTER
MEDICAL CENTER, SACRAMENTO'S
MOTION TO DISMISS**

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SUTTER VALLEY HOSPITALS dba
SUTTER MEDICAL CENTER,
14 SACRAMENTO, a California
corporation; GUY RICE, an
15 individual,

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Defendants.

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Plaintiff Deborah Rena Arnold sues Sutter Valley Hospitals

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dba Sutter Medical Center, Sacramento ("SMCS") and Guy Rice

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(collectively, "Defendants") after Defendant Rice kissed her

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without her consent. Second Am. Compl. ("SAC"), ECF No. 10-2.

22

Defendant SMCS now moves to dismiss two of Plaintiff's claims.

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Mot., ECF No. 13. Plaintiff opposes. Opp'n, ECF No. 15. For

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reasons explained below, the Court grants Defendant SMCS's

25

motion.¹

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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 June 20, 2017. In deciding this motion, the Court takes as true all well-pleaded facts in the operative complaint.

28

1 I. BACKGROUND

2 Plaintiff and Defendant Rice are employees at SMCS. See SAC
3 ¶¶ 3-4. In May 2016, Rice kissed Plaintiff, without her consent,
4 while the two were working. See id. ¶ 8. Plaintiff reported the
5 incident to Manvel Johnson, her co-worker. Id. ¶ 9. Johnson
6 then informed supervisor Jesse Yablonovsky about this incident
7 and other incidents in which Defendant Rice allegedly touched and
8 massaged other nurses without their consent. Id. After learning
9 about Rice's unconsented-to kiss with Plaintiff, Defendant SMCS
10 suspended him for "several weeks." See id. ¶ 10.

11 Rice eventually returned, and when he did SMCS assigned him
12 to the same work shifts as Plaintiff. See id. He "displayed a
13 lack of professional support and hostility in working with
14 [Plaintiff]" to "retaliat[e]" against her for "her initial
15 complaint against him." See id. In August 2016, Plaintiff
16 complained to supervisor Christina Walsh about the overlapping
17 work shifts, highlighting Rice's "unprofessional, hostile[,] and
18 menacing behavior." See id. ¶ 11. Three months later, Plaintiff
19 filed an administrative complaint with the Department of Fair
20 Employment and Housing ("DFEH"). See id. ¶ 12.

21 Despite Plaintiff's numerous complaints, she and Rice still
22 worked the same shifts. Id. ¶ 13. One day, Rice "began to
23 unnecessarily hover and linger around [Plaintiff]" to "menace
24 [her] in retaliation of her complaints" Id. A few weeks
25 later, Plaintiff met with Judy Lesh and Joyce De La Cruz to
26 discuss this hovering incident "and the development and
27 progression of [Plaintiff's] prior related complaints." See id.
28 ¶ 14. Yet SMCS took "no remedial actions," so Rice continued

1 working the same shifts as Plaintiff. See id.

2 Infuriated by "SMCS's inaction," Plaintiff asked DFEH to
3 issue a right-to-sue letter, see id. ¶ 15, and it did, id. ¶ 16.
4 Plaintiff then filed this lawsuit,² bringing some claims against
5 only SMCS, some against only Rice, and some against both
6 Defendants. She sues SMCS for gender discrimination (claim one)
7 and negligent infliction of emotional distress ("NIED") (claim
8 four). See SAC at 5-6, 10-11. She sues Rice for intentional
9 infliction of emotional distress ("IIED") (claim three) and
10 battery (claim five). See id. at 9-12. And she sues both
11 Defendants for sexual harassment and a hostile work environment
12 (claim two). See id. at 6-9.

13 Now before this Court is SMCS's motion to dismiss
14 Plaintiff's gender discrimination and NIED claims. See generally
15 Mot.; Def.'s Mem., ECF No. 13-1.

16 II. OPINION

17 A. Gender Discrimination Claim

18 Plaintiff brings her gender discrimination claim against
19 Defendant SMCS under Title VII of the Civil Rights Act of 1964,
20 42 U.S.C. § 2000e-2, and California's Fair Employment and
21 Housing Act ("FEHA"), Cal. Gov't Code § 12940. To establish a
22 prima facie case for a gender discrimination claim under either
23 Title VII or FEHA, a plaintiff must show (1) she belongs to a

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25 ² Plaintiff filed an original complaint, ECF No. 1, but soon
26 after filed a first amended complaint, ECF No. 4. Having
27 realized she sued the wrong defendant, Plaintiff requested leave
28 to voluntarily dismiss the wrong defendant and to file a second
amended complaint replacing it with Defendant SMCS. ECF No. 10.
This Court issued an order granting Plaintiff's request. ECF No.
11.

1 protected class, (2) she was qualified for the position, (3) she
2 suffered an adverse employment action, and (4) defendant treated
3 similarly situated men more favorably. See Villiarimo v. Aloha
4 Island Air, Inc., 281 F.3d 1054, 1062 (9th Cir. 2002); Guz v.
5 Bechtel Nat'l Inc., 24 Cal. 4th 317, 355 (2000) (applying same
6 standard for FEHA discrimination claim).

7 Plaintiff alleges SMCS "discriminated against [her], in
8 terms, conditions, and/or privileges of her employment on the
9 basis of her sex or gender as a female by exposing her to
10 harassment and requiring her to work in a hostile work
11 environment" to which "her male counterparts are not subject."
12 SAC ¶ 20.

13 The parties dispute whether Plaintiff properly pled this
14 claim. SCMS argues Plaintiff has not, explaining she cannot
15 plead an adverse employment action because SMCS did not fire,
16 demote, or make a personnel management decision that adversely
17 affected her. See Mem. at 6. Plaintiff maintains, however, she
18 has stated a claim because SMCS gave her an adverse job
19 assignment when it continued to assign Rice to her work shifts.
20 See Opp'n at 6. Plaintiff adds Rice retaliated against her for
21 reporting him and that such retaliation is protected activity.
22 See id. at 8-9.

23 The Court finds that Plaintiff sufficiently pleads the
24 first two elements. As a woman, SAC ¶ 8, she falls within a
25 protected class, and she is qualified for her position as a
26 registered nurse, as she performs competently, id. ¶ 7.

27 As for the third element, an adverse employment action,
28 "[u]nder both Title VII and the FEHA . . . is one that

1 materially affects the compensation, terms, conditions or
2 privileges of employment." Sanchez v. California, 90 F. Supp.
3 3d 1036, 1054 (E.D. Cal. 2015) (citing Chuang v. Univ. of
4 California Davis, Bd. of Trs., 225 F.3d 1115, 1125 (9th Cir.
5 2000). Plaintiff asserts SMCS "created and maintained a hostile
6 environment . . . by exposing her to unwelcomed sexual
7 advances," SAC ¶ 20, and that, although SMCS suspended Rice for
8 the unconsented-to kiss, SMCS continuously reassigned Rice to
9 Plaintiff's work shifts, notwithstanding her numerous complaints
10 about Rice's "unprofessional, hostile and menacing behavior,"
11 id. ¶¶ 10-11, 13.

12 The Court finds that Plaintiff sufficiently alleges facts
13 to support this third element of her claim, i.e. she alleges
14 SMCS kept assigning Rice to her work shifts, even after she told
15 SMCS about Rice's continuous hostile and menacing behavior. See
16 Alvarado v. Fed. Express Corp., No. C 04-0098 SI, 2008 WL
17 744819, at *1 (N.D. Cal. Mar. 18, 2008) ("schedule changes and
18 job assignment could be 'materially adverse' depending on the
19 context") (citing Burlington N. & Santa Fe Ry. Co. v. White, 548
20 U.S. 53, 67-69 (2006)).

21 But Plaintiff inadequately pleads the fourth element. She
22 alleges SMCS "requir[ed] her to work in a hostile environment
23 her male counterparts are not subject to." SAC ¶ 20. This
24 single, conclusory allegation does not suffice. See ANA Maria
25 Soares v. California, No. 2:16-00128 WBS EFB, 2016 WL 3519411,
26 at *1, 4-5 (E.D. Cal. June 28, 2016) (allegation that
27 "[s]imilarly situated male colleagues were treated more
28 favorably than Plaintiff" or that "[m]ale colleagues were

1 allegedly not subject to similar treatment," are nothing more
2 than "naked assertion[s] devoid of further factual enhancement")
3 (internal quotations and citations omitted). Nor has she
4 identified who at SMCS discriminated against her based on
5 gender. See id. at *5 (complaint "fails to allege who was
6 responsible for the [termination] decision").

7 Recognizing these flaws, Plaintiff, in her opposition,
8 argues Rice retaliated against her for complaining about him and
9 that such retaliation is protected activity. See Opp'n at 8-9.
10 However, Plaintiff never alleges a retaliation claim, see
11 generally SAC (not once citing Title VII's or FEHA's retaliation
12 statutory provisions), so she cannot now add it in her
13 opposition brief, see Arres v. City of Fresno, No. CV F 10-1628
14 LJO SMS, 2011 WL 284971, at *18 (E.D. Cal. Jan. 26, 2011) ("[A]
15 complaint is judged based on its allegations, not new facts or
16 claims raised in [a Rule 12(b)(6)] opposition.").

17 In sum, the Court finds Plaintiff fails to state a gender
18 discrimination claim against Defendant SMCS. The Court,
19 however, is not convinced there are no set of facts upon which
20 Plaintiff could state such a claim and, so, dismisses it with
21 leave to amend. Navarro v. Block, 250 F.3d 729, 732 (9th Cir.
22 2001).

23 B. NIED Claim

24 Plaintiff also sues Defendant SMCS for negligent infliction
25 of emotional distress. "NIED is not an independent tort in
26 California, but a subset of negligence." R. v. Nulick, No. 1:15-
27 cv-01378-JAM-EPG, 2016 WL 2756738, at *6 (citing Burgess v.
28 Superior Court, 2 Cal. 4th 1064, 1072 (1992) (elements include

1 duty, breach, causation, and damages)). Plaintiff alleges SMCS's
2 "discriminatory conduct towards [her] in subjecting her to sexual
3 harassment and a hostile work environment and invading her
4 privacy was negligent." SAC ¶ 48. SMCS moves to dismiss this
5 claim, arguing (1) Plaintiff cannot claim negligence because she
6 alleges intentional discrimination, and (2) California's Workers'
7 Compensation Act ("WCA") precludes her claim. See Mem. at 7-8.

8 The parties first dispute whether Plaintiff has stated a
9 claim. SMCS argues that the basis for Plaintiff's NIED claim is
10 SMCS's alleged discriminatory conduct, yet "discriminatory
11 conduct, by its nature, is intentional, not negligent," and so
12 "[o]ne cannot 'negligently discriminate' against another in a
13 disparate treatment case like this one because discrimination
14 requires proof of discriminatory motive." Id. at 7. Plaintiff
15 disagrees. She argues SMCS's "failure to properly handle" her
16 prior complaints and "allow[ing] Rice to work on the same
17 schedules as [she]" comprise the basis for her NIED claim. See
18 Opp'n at 11. In response, SMCS contends this argument
19 contradicts the SAC, where Plaintiff cites as the basis for her
20 claim SMCS's discriminatory conduct. See Reply, ECF No. 16, at
21 3.

22 The basis for Plaintiff's NIED claim is unclear. On the one
23 hand, she identifies negligent conduct that fundamentally caused
24 her harm. See SAC ¶ 36 ("SMCS has failed to exercise reasonable
25 care to prevent and promptly correct any harassing behavior of
26 Defendant Guy Rice and unreasonably failed to take preventive or
27 corrective opportunities to avoid the harm caused by Defendant
28 Guy Rice despite the numerous complaints of [Plaintiff], her co-

1 workers, and supervisors.”). This alone would suffice. See Tu
2 v. UCSD Med. Ctr., 201 F. Supp. 2d 1126, 1131 (S.D. Cal. 2002)
3 (to state an NIED claim, a plaintiff “must point to negligent
4 conduct that fundamentally caused the harm”) (internal citation
5 omitted).

6 On the other hand, Plaintiff identifies intentional conduct,
7 see, e.g., SAC ¶ 35 (SMCS “intentionally and knowingly engaged in
8 sexual harassment and/or created and maintained a hostile
9 environment for plaintiff”), which does not suffice, see Rascon
10 v. Diversified Maint. Sys., No. 1:13-CV-1578 AWI JLT, 2014 WL
11 1572554, at *10 (E.D. Cal. Apr. 17, 2014) (“[Defendant’s] actions
12 as described in the FAC appear to be intentional acts. As
13 intentional acts, [Defendant’s] acts are not negligent and cannot
14 form the basis of an NIED claim.”). Even Miller v. Fairchild
15 Indus., Inc., a case Plaintiff cites, supports this conclusion.
16 797 F.2d 727, 738 (9th Cir. 1986) (explaining that “[e]vidence
17 that [the employer] intentionally retaliated against [plaintiffs]
18 would preclude an assertion that this same intentional action
19 constituted negligence”).

20 In fact, Plaintiff’s key allegation underpinning her NIED
21 claim—SMCS’s “discriminatory conduct” in subjecting her to sexual
22 harassment and a hostile work environment was negligent—is also
23 problematic, as Plaintiff cites no authority showing
24 discriminatory conduct is the kind of negligent conduct
25 sufficient to state an NIED claim. Even after construing the
26 allegations in Plaintiff’s favor, this Court cannot overlook that
27 the basis for Plaintiff’s NIED claim contains allegations about
28 intentional conduct, rendering her NIED claim defective. See

1 Rascon, 2014 WL 1572554 at *10 (citing Tu, 201 F. Supp. 2d at
2 1131). The Court dismisses it with leave to amend.³

3 III. ORDER

4 For the reasons set forth above, the Court GRANTS Defendant
5 SMCS's motion to dismiss WITH LEAVE TO AMEND.

6 If Plaintiff elects to amend her SAC, she shall file her
7 third amended complaint within twenty days from the date of this
8 Order. No new causes of action may be included in the third
9 amended complaint. Defendants' responsive pleadings are due
10 within twenty days thereafter.

11 But if Plaintiff elects not to amend her SAC, the case will
12 proceed on the following remaining claims:

13 1. Plaintiff's sexual harassment and hostile work
14 environment claim against both Defendants SMCS and Rice (claim
15 two);

16 2. Plaintiff's IIED claim against Defendant Rice (claim
17 three); and

18 3. Plaintiff's battery claim against Defendant Rice (claim
19 five).

20 IT IS SO ORDERED.

21 Dated: August 2, 2017

22 
23 JOHN A. MENDEZ,
24 UNITED STATES DISTRICT JUDGE

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26
27 ³ The parties also dispute whether the WCA preempts Plaintiff's
28 NIED claim. See Mem. at 7-8; Opp'n at 11-12. Given this
dismissal, the Court need not discuss preemption.