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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JUDITH C. MAY,)
)
Plaintiff,)
)
v.)
)
CALIFORNIA HIGHWAY PATROL,)
et al.,)
)
Defendants.)
_____)

No. C 09-3460 BZ
**REPORT AND RECOMMENDATION TO
GRANT DEFENDANT'S MOTION TO
DISMISS**

On November 25, 2009, the California Highway Patrol ("CHP"), on behalf of all defendants¹ filed a motion to dismiss *pro se* plaintiff Judith May's ("plaintiff") complaint on the grounds that the Court lacks jurisdiction and the complaint fails to state a claim upon which relief may be granted pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6). As CHP has not consented to magistrate judge jurisdiction, I will have the case reassigned. In this report, I recommend the motion be **GRANTED**.

Plaintiff's complaint alleges that on July 31, 2002, two

¹ Plaintiff has never identified the two unnamed defendants. Thus, they have never been served.

1 unnamed CHP officers arrested her for drunk driving and
2 subjected her to unlawful search and seizure without due
3 process of law. Plaintiff alleges two causes of action:
4 first, the CHP failed to properly train and supervise the
5 unnamed officers; and second, that the unnamed officers
6 violated plaintiff's due process rights under the Fourth,
7 Fifth and Fourteenth Amendments to the United States
8 Constitution and 42 United States Code section 1983.

9 The Eleventh Amendment to the United States Constitution
10 provides: "The Judicial power of the United States shall not
11 be construed to extend to any suit . . . prosecuted against
12 one of the United States by Citizens of another State . . ."
13 Such sovereign immunity extends not only to the state, but
14 also to an agency of the state. Durning v. Citibank, 950 F.2d
15 1419, 1423 (9th Cir. 1991). In O'Leary v. California Highway
16 Patrol, the Ninth Circuit held that the California Highway
17 Patrol is an agency of the state for the purposes of the
18 Eleventh Amendment and thus enjoys sovereign immunity. 923
19 F.2d 862, 862 (9th Cir. 1991). In reaching this conclusion,
20 the Ninth Circuit noted that the "California Highway Patrol is
21 a state agency, see Cal. Gov't Code § 11000, and the State of
22 California has not consented to suit, see Atascadero State
23 Hosp. v. Scanlon, 473 U.S. 234, 241 (1985)." Here, as in
24 O'Leary, the State of California has not consented to suit.
25 Thus, the CHP enjoys sovereign immunity. Therefore, I
26 recommend defendant's motion to dismiss plaintiff's first
27 cause of action against CHP be **GRANTED**.

28 As to the second cause of action, the Ninth Circuit has

1 repeatedly held that for § 1983 claims, courts apply the forum
2 state's statute of limitations and tolling unless it is
3 inconsistent with federal law. Flink v. Shedler, 192 F.3d
4 911, 914 (9th Cir, 1999). Before January 1, 2003, the
5 California statute of limitations was one year. But effective
6 January 1, 2003, the statute of limitations became two years.
7 However, the new statute of limitations cannot be applied
8 retroactively. Maldonado v. Harris, 370 F.3d 945, 955 (9th
9 Cir. 2004).

10 Here, California statute of limitations is the applicable
11 law. The cause of action accrued on the date of the alleged
12 incident, July 31, 2002, that was almost six months before
13 January 1, 2003, the effective date of the enlarged period.
14 Therefore, the one-year statute of limitations governs. Yet,
15 plaintiff did not file her complaint until September 9, 2009,
16 more than seven years after the incident, her suit against the
17 unnamed officers is time-barred. Furthermore, plaintiff
18 provides no factual support to justify an application of the
19 tolling provisions. Therefore, I recommend defendant's motion
20 to dismiss plaintiff's second cause of action be **GRANTED**.

21 For the foregoing reasons, I recommend CHP's motion to
22 dismiss be **GRANTED**. The hearing scheduled for **January 20,**
23 **2010** is **VACATED**, and this matter will be reassigned.

24 Dated: January 14, 2010

25 

26 Bernard Zimmerman
United States Magistrate Judge

27 G:\BZALL\BZCASES\MAY V. CALIF HIGHWAY PATROL\REPORT AND RECOMMENDATION
28 GRANTING MOTION TO DISMISS.wpd