

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARGUERITE MANUEL-FERRELL,
Plaintiff,
v.
OAKLAND POLICE DEPARTMENT,
Defendant.

No. C 11-5041 CW
ORDER GRANTING
MOTION TO DISMISS
WITH LEAVE TO
AMEND

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INTRODUCTION

Plaintiff brings a second amended complaint (2AC)¹ against the Oakland Police Department (Defendant) based on alleged mistreatment during an arrest. She makes the following claims:
1) civil battery in violation of California Civil Code § 1708;
2) sexual battery in violation of California Civil Code § 1708.5;
3) negligent retention and supervision of employees; and
4) deprivation of her Fourth Amendment right to be free of unreasonable searches and seizures pursuant to 42 U.S.C. § 1983.

On October 20, 2011, Defendant filed a motion to dismiss the complaint because it fails to state a claim. Defendant asserted that 1) Plaintiff has failed to show that her injuries were caused by an official policy of Defendant, 2) Plaintiff is barred from raising a due process claim in relation to a search and seizure and 3) Plaintiff's state law claims fail to state a statutory

¹ Although styled as a "Second Amended Complaint", this is the first complaint brought in this Court.

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1 basis for recovery against Defendant. On November 3, 2011,
2 Plaintiff filed an opposition and, on November 9, 2011, Defendant
3 filed a reply. Because this case was reassigned to a new judge,
4 Defendant renoticed the motion to dismiss for a hearing on January
5 19, 2012. However, the motion is now fully briefed and ripe. The
6 Court takes it under submission on the papers. Having considered
7 all the papers filed by the parties, the Court grants the motion
8 to dismiss with leave to amend.

9 BACKGROUND

10 Plaintiff Marguerite Manuel-Ferrell alleges that on September
11 18, 2006 while she waited at a bus stop in Oakland California, a
12 man waved her over to his car. She got into the car at the
13 driver's invitation. He began to talk to her about sex, while she
14 protested that she was not a prostitute. Plaintiff agreed to see
15 the man later because she believed that was the only way he would
16 let her leave, and got out of the car.

17 After she exited the car a marked Oakland Police Department
18 car arrived. An officer got out, put Plaintiff in handcuffs and
19 told her that she was being arrested on suspicion of prostitution.
20 Plaintiff alleges that Officer Veguerra slammed her against a
21 fence and the police car, then grabbed and groped her genitals.
22 According to the complaint Officer Veguerra roughly shoved her
23 baton against Plaintiff's vaginal area and between her buttocks
24 and also touched her breast and buttocks. Additionally Plaintiff
25 alleges that Officer Chew touched her breast with the back of his
26 hand. As a result of the incident, Plaintiff claims emotional
27 distress and pain and suffering.

28

1 LEGAL STANDARD

2 A complaint must contain a "short and plain statement of the
3 claim showing that the pleader is entitled to relief." Fed. R.
4 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
5 state a claim, dismissal is appropriate only when the complaint
6 does not give the defendant fair notice of a legally cognizable
7 claim and the grounds on which it rests. Bell Atl. Corp. v.
8 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
9 complaint is sufficient to state a claim, the court will take all
10 material allegations as true and construe them in the light most
11 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
12 896, 898 (9th Cir. 1986). However, this principle is inapplicable
13 to legal conclusions; "threadbare recitals of the elements of a
14 cause of action, supported by mere conclusory statements," are not
15 taken as true. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009)
16 (citing Twombly, 550 U.S. at 555).

17 When granting a motion to dismiss, the court is generally
18 required to grant the plaintiff leave to amend, even if no request
19 to amend the pleading was made, unless amendment would be futile.
20 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
21 F.2d 242, 246-47 (9th Cir. 1990). In determining whether
22 amendment would be futile, the court examines whether the
23 complaint could be amended to cure the defect requiring dismissal
24 "without contradicting any of the allegations of [the] original
25 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
26 Cir. 1990).

DISCUSSION

I. Claims Under 42 U.S.C. § 1983

Plaintiff alleges that her Fourth Amendment right to be free of unreasonable search and seizure was violated by Defendant and that she has suffered, and continues to suffer, damages as a result. Defendant argues that it cannot be held liable under 42 U.S.C. § 1983 because Plaintiff's claims arise from a single incident and she pleads no facts that support the allegation that the assault against her was part of an official policy.

A local governmental entity is liable under section 1983 when actions pursuant to official municipal policy of some nature cause a constitutional tort. Oviatt v. Pearce, 954 F.2d 1470, 1474 (9th Cir. 1992); see also City of Canton v. Harris, 489 U.S. 378, 389 (1989). Furthermore, a local governmental body may be liable if it has a policy of inaction and such inaction amounts to a failure to protect constitutional rights. City of Canton, 489 U.S. at 388.

Plaintiff claims that Defendant "failed to monitor the conduct of Officer Veguerra after it had knowledge of her violent propensities as early as 2008." She also makes reference to one other incident involving Officer Veguerra and general allegations that Defendant was negligent in training or supervising her. However, the policy of inaction must be more than mere negligence; it must be a conscious or deliberate choice among various alternatives. Mortimer v. Baca, 594 F.3d 714 (9th Cir. 2010).

Moreover, in order to impose liability based on a policy of deliberate inaction, the Ninth Circuit has stated four conditions that a plaintiff must satisfy: "1) [the plaintiff] possessed a

1 constitutional right of which he was deprived; 2) the municipality
2 had a policy; 3) this policy 'amounts to deliberate indifference'
3 to the plaintiff's constitutional right; and 4) the policy is the
4 'moving force behind the constitutional violation.'" Oviatt, 954
5 F.2d at 1474, (quoting City of Canton, 489 U.S. at 389-91.)
6 Liability for an improper custom may not be predicated on isolated
7 or sporadic incidents; it must be founded upon practices of
8 sufficient duration, frequency and consistency that the conduct
9 has become a traditional method of carrying out policy. Trevino
10 v. Gates, 99 F.3d 911, 918 (9th Cir. 1996).

11 Plaintiff fails to plead any facts to support the existence
12 of a custom or widespread policy of inaction in relation to
13 abusive behavior during police searches. In fact, the complaint
14 alleges that the assault on Plaintiff was stopped by another
15 officer on the scene, indicating that the practice was not
16 necessarily "persistent and widespread." Monell v. Dep't of Soc.
17 Serv. of N.Y., 436 U.S. 658, 691 (1978); see also, Meehan v. Los
18 Angeles County, 856 F.2d 102 (9th Cir. 1988) (two incidents not
19 sufficient to establish custom); Davis v. Ellensburg, 869 F.2d
20 1230 (9th Cir. 1989) (manner of one arrest insufficient to
21 establish policy).

22 It appears from the moving papers that Plaintiff believes
23 that she has sued individual officers, and thus is not required to
24 allege that there is a "policy and practice" resulting in a
25 constitutional violation. However, the only named Defendant in
26 this suit is the Oakland Police Department. Therefore the motion
27 to dismiss is granted.

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1 II. Due Process Claims

2 In the fourth cause of action Plaintiff makes fleeting
3 reference to a violation of her right to due process. Defendant
4 asserts that because the claim relates to an allegedly
5 unreasonable search and seizure, it can only be brought under the
6 Fourth Amendment.

7 All claims that law enforcement officers have used excessive
8 force—deadly or not—in the course of an arrest, investigatory
9 stop, or other “seizure” of a free citizen should be analyzed
10 under the Fourth Amendment and its “reasonableness” standard,
11 rather than under a “substantive due process” approach. Graham v.
12 Connor, 490 U.S. 386, 395 (1989). Plaintiff does not argue due
13 process in either her complaint or opposition. However, to the
14 extent that Plaintiff intended to allege a due process claim in
15 addition to her claim under the Fourth Amendment, she is barred
16 from doing so.

17 III. State Tort Claims

18 Plaintiff brings one charge, negligent retention and
19 supervision, directly against Defendant, and two more claims which
20 rely on Defendant's vicarious liability for its employee's
21 actions. Defendant claims that Plaintiff does not plead her state
22 tort claims sufficiently because she fails to state the statutory
23 basis on which the public entities are liable in the first, second
24 and third causes of action.

25 Under California law a public entity is not liable under a
26 claim brought by a plaintiff unless liability is provided for by
27 statute or required by the state or federal constitution. Cal.
28 Gov. Code § 815; Cochran v. Herzog Engraving Co., 155 Cal. App. 3d

1 405, 409 (1984); Lundeen Coatings Corp. v. Department of Water &
2 Power, 232 Cal. App. 3d 816, 832 (1991). “[D]irect tort liability
3 of public entities must be based on a specific statute declaring
4 them to be liable, or at least creating some specific duty of care
5 . . . [o]therwise, the general rule of immunity for public
6 entities would be largely eroded by the routine application of
7 general tort principles. . .” Levine v. City of Los Angeles, 68
8 Cal. App. 3d 481, 487 (1977), see also Munoz v. City of Union
9 City, 120 Cal. App. 4th 1077 (2004). In order to state a cause of
10 action for government tort liability, every fact essential to the
11 existence of statutory liability must be plead with particularity,
12 including the existence of a statutory duty; duty cannot be
13 alleged simply by stating that defendant had a duty under the law.
14 Zuniga v. Housing Authority, 41 Cal. App. 4th 82, 96 (1995),
15 abrogated on other grounds by Zelig v. County of Los Angeles, 27
16 Cal. 4th 112 (2002).

17 Plaintiff does not dispute that Defendant is a public entity
18 and seems to misunderstand Defendant's argument, arguing only that
19 public entities can be held vicariously liable for the tortious
20 acts or omissions of their employees. Plaintiff brings suit for
21 battery under codified common law provisions, without including a
22 statutory provision that would make Defendant, as a public entity,
23 liable for these torts.

24 In order to state a claim, Plaintiff must include both the
25 statutory provisions which impose vicarious liability on public
26 entity employers and those which impose direct tort liability on
27 Defendant. Plaintiff's assertion that she cited the relevant
28 portions of the Tort Claims Act in a document attached to a

1 previous version of this complaint is insufficient. This is the
2 only version of the complaint that has been brought in this Court
3 and it is this complaint that Defendant has moved to dismiss.
4 Accordingly, Plaintiff's state tort claims are dismissed.

5 Plaintiff is granted leave to amend her complaint within
6 fourteen days so long as she can truthfully cure the deficiencies
7 noted above. If the amended complaint alleges only state claims,
8 this case will be remanded to state court.

9 If Plaintiff files an amended complaint, Defendant shall
10 answer or file a motion to dismiss fourteen days thereafter. If
11 Defendant moves to dismiss, Plaintiff's opposition shall be due
12 seven days after the motion is filed. Any reply shall be due
13 seven days after that. This motion will be decided on the papers.

14 CONCLUSION

15 For the foregoing reasons the motion to dismiss is GRANTED
16 with leave to amend.

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18 IT IS SO ORDERED.

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20 Dated: 12/22/2011

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CLAUDIA WILKEN
United States District Judge