

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JACQUELINE ZHANG,
Plaintiff,
v.
COUNTY OF MONTEREY, MONTEREY
COUNTY RESOURCE MANAGEMENT
AGENCY, and MONTEREY COUNTY
PARKS DEPARTMENT,
Defendants.

Case No. 17-CV-00007-LHK

**ORDER RE: VICARIOUS AND
RESPONDEAT SUPERIOR LIABILITY**

Plaintiff’s proposed jury instructions include an “Instruction to Vicarious Responsibility.” ECF No. 149, at 76. Plaintiff argues that vicarious and respondeat superior liability are applicable to the instant case because of statements made and actions taken by Mark Mariscal (“Mariscal”) and approved by Nick Chiulos (“Chiulos”). *Id.* at 79. Below, the Court briefly addresses vicarious and respondeat superior liability.

First, under Section 1983, a municipality is liable for a constitutional injury only where the municipality itself caused the injury through “execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.” *Monell v. Dep’t of Soc. Serv. of N.Y.*, 436 U.S. 658, 694 (1978).

The United States Supreme Court has therefore made clear that under Section 1983, “local

1 governments are responsible only for ‘their own illegal act.’ They are not vicariously liable under
2 § 1983 for their employees’ actions.” *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (citation
3 omitted). Thus, “[r]espondeat superior or vicarious liability will not attach under § 1983.” *City of*
4 *Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989). To the extent that Plaintiff seeks to establish
5 liability for the County of Monterey, Monterey County Resource Management Agency, and
6 Monterey County Parks Department under Section 1983, Plaintiff must establish the
7 municipality’s liability directly. The Court has already outlined the bases for municipal liability.
8 *See* ECF No. 188.

9 Second, Plaintiff argues that vicarious or respondeat superior liability may be used to
10 establish that Plaintiff had an implied-in-fact contract with the County that established a property
11 right in Plaintiff’s employment. *See* ECF No. 149, at 77-78. However, the Court finds no support
12 for that proposition.

13 A public employee is not entitled to due process based on deprivation of a property interest
14 in a position unless that employee has a “legitimate claim of entitlement” to the position. *See*
15 *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). That entitlement “must be granted by state
16 law,” *Koepping v. Tri-County Metropolitan Transp. Dist. of Oregon*, 120 F.3d 998, 1005 (9th Cir.
17 1997), or “some other independent source.” *Faurie v. Berkeley Unified School Dist.*, 2008 WL
18 820682, at *8 (N.D. Cal. Mar. 26, 2008). “Under California law, county charters, rules and
19 regulations generally determine whether there is such an entitlement.” *Weisbuch v. County of Los*
20 *Angeles*, 119 F.3d 778, 780-81 (9th Cir. 1997).

21 Thus, an “oral representation of [Plaintiff’s] supervisors,” “untethered to specific positive
22 law, is insufficient to create a property interest.” *Faurie*, 2008 WL 820682, at *8. “In other
23 words, expectations based on oral representations, employment history, or positive evaluations are
24 not sufficient to give the Plaintiff a property interest in [her] public employment.” *Id.* at *9.

25 Accordingly, Plaintiff may not use an implied-in-fact contract claim to establish a property
26 right in Plaintiff’s position in order to state a due process claim. As such, Plaintiff has no basis to
27 offer a theory of vicarious or respondeat superior liability to establish that Mariscal or Chiulos

1 entered into a binding contract with Plaintiff. Therefore, Plaintiff may not offer such a theory at
2 trial.

3 Moreover, in order for Plaintiff to establish a “legitimate claim of entitlement” to her
4 position with the County through Mariscal or Chiulos, Plaintiff must demonstrate that Plaintiff’s
5 entitlement was granted by “state law,” *Koepping*, 120 F.3d at 1005, or “some other independent
6 source.” *Faurie*, 2008 WL 820682, at *8. Accordingly, in order for statements or actions by
7 Mariscal or Chiulos to have the effect of creating a “legitimate claim of entitlement” in Plaintiff’s
8 position, Mariscal or Chiulos’ action must have been authorized or given legal force by a state law
9 or other statute or regulation. *See Weisbuch*, 119 F.3d at 780-81 (“Under California law, county
10 charters, rules and regulations generally determine whether there is such an entitlement.”).

11 Plaintiff argues that Mariscal’s statement and actions are sufficient to create a “legitimate
12 claim of entitlement” because Mariscal was an “Appointing Authority” for the County under the
13 Monterey County Policies and Procedures. ECF No. 149, at 79. Plaintiff further argues that as an
14 Appointing Authority, Mariscal had the authority to make Plaintiff a permanent employee through
15 his statement and actions. *Id.* However, beyond quoting a single sentence from the Monterey
16 County Policies and Procedures, Plaintiff has not produced evidence that Mariscal had the
17 requisite authority to alter Plaintiff’s employment status through his statements or actions and
18 thereby create a “legitimate claim of entitlement” to Plaintiff’s position. Furthermore, Plaintiff
19 fails to cite any state law or other statute or regulation that gave legal force to the actions of
20 Mariscal or Chiulos. Thus, Plaintiff has failed to establish a “legitimate claim of entitlement” to
21 her position with the County through Mariscal or Chiulos.

22 Accordingly, vicarious or respondeat superior liability do not apply, and Plaintiff may not
23 offer either theory at trial.

24 **IT IS SO ORDERED.**

25 Dated: June 6, 2021

26 

27 LUCY H. KOH
28 United States District Judge