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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CECILIA PORTILLO,

Plaintiff,

v.

CITY OF NATIONAL CITY, and DOES
1-10,

Defendants.

Case No.: 20-cv-2429 W (MDD)

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS [DOCS. 18,
21] WITHOUT LEAVE TO AMEND**

Pending before the Court are motions to dismiss by Defendant City of National City and Defendant National City Police Department under Federal Rule of Civil Procedure 12(b)(6). Plaintiff opposes the motions.

The Court decides the matter on the papers submitted and without oral argument. See Civ. L.R. 7.1(d.1). For the following reasons, the Court **GRANTS** Defendants' motions to dismiss [Docs. 18, 21] **WITHOUT LEAVE TO AMEND**.

1 **I. BACKGROUND**

2 **A. Facts giving rise to the lawsuit.**

3 In late October and early November 2019, Plaintiff Cecilia Portillo was a
4 “homeless vagrant living on the streets of the [Defendant] City of National City.” (SAC
5 [Doc. 16] ¶ 12.) The City was “performing a sweep in which they first notify the
6 homeless population in a specific area that the City will be coming by and removing all
7 items from the area permanently.” (*Id.*) The notice provided a date certain by when “the
8 homeless population was to have their belongings removed or risk losing them...” (*Id.*)

9 Portillo alleges that “[d]uring the ‘notice’ stage of the sweep,” an unknown City
10 worker taunted and harassed her with the specific intent to cause emotional distress.
11 (SAC ¶ 15.) Specifically, the employee threatened to take Portillo’s “property which
12 included a live pet dog” and taunted her about her mental illness. (*Id.*) He also followed
13 Portillo when she tried to get away from his taunts. (*Id.*)

14 The removal of items was to occur in approximately the beginning of November.
15 (SAC ¶ 16.) On the specific day, Portillo and the “unknown City worker became engaged
16 in the taunting and harassing behaviors over her property and her pet dog.” (*Id.*) The
17 worker made specific threats against her dog, which caused Portillo to suffer severe
18 emotional distress, resulting in her hospitalization and separation from her dog. (*Id.*)

19
20 **B. Procedural history**

21 On December 14, 2020, Portillo filed this lawsuit against the City. (*See Compl.*
22 [Doc. 1].) The original Complaint alleged that on November 5, 2019, the unknown City
23 employee sexually assaulted Portillo by groping her breasts, vaginal area, and buttocks
24 before she was able to fight him off and report the incident to the police. (*Id.* ¶ 9.) Based
25 on this conduct, the Complaint asserted the City was liable under the doctrine of
26 respondeat superior for: (1) violation of Civil Rights under 42 U.S.C. § 1983;

1 (2) intentional infliction of emotional distress; (3) gender violence in violation of
2 California Civil Code § 52.4; and (4) sexual battery. (*Id.* ¶¶ 15, 22, 27, 32.)

3 On April 19, 2021, the City filed a motion to dismiss the Complaint under Federal
4 Rule of Civil Procedure 12(b)(6). (*See MTD I* [Doc. 6].) The City argued, among other
5 things, that *respondeat superior* did not apply because the unknown City employee was
6 not acting within the scope of his employment when the alleged sexual assault occurred.
7 (*MTD P&A II* [Doc. 6-1] 5:5–11:22.) Portillo opposed the motion. (*See Opp’n* [Doc. 7].)
8 On November 2, 2021, this Court granted the motion to dismiss. (*MTD Order* [Doc. 10]
9 6:21-22.) The Court rejected Plaintiff’s *respondeat superior* theory because the
10 Complaint failed to allege facts “suggesting the City employee’s assault occurred as an
11 ‘outgrowth’ of the employment or that the risk of tortious injury was ‘inherent in the
12 working environment’ or ‘typical of or broadly incidental to the enterprise the employer
13 has undertaken.’” (*Id.* 5:22–28, citing Lisa M. v Henry Mayo Newhall Mem’l Hosp., 12
14 Cal. 4th 291, 298 (1995).) The order granted Portillo leave to amend. (*Id.* 6:15–18.)

15 On November 4, 2021, Portillo filed the FAC, which asserted three causes of
16 action against the City for: (1) violation of Civil Rights under 42 U.S.C. § 1983;
17 (2) intentional infliction of emotional distress; and (3) negligence. (*See FAC.*) The City
18 again moved to dismiss the FAC. (*See MTD II* [Doc. 12].) Portillo opposed the motion.
19 (*See Opp’n II* [Doc. 13].) On April 4, 2022, this Court granted the motion to dismiss,
20 finding Portillo’s state-law claims did not comply with the California Tort Claims Act
21 (CTCA) and the section 1983 claim was insufficiently pled. (*MTD II Order* 5:8–8:9.)
22 The order granted Portillo leave to amend her section 1983 claim. (*Id.* 8:13–15.)

23 On April 18, 2022, Portillo filed the SAC, which added the National City Police
24 Department (NCPD) as a defendant and asserts six causes of action for: (1) violation of
25 Right to Be Secure from Unreasonable Seizures under 42 U.S.C. § 1983; (2) violation of
26 Right to Due Process of Law under 42 U.S.C. § 1983; (3) violation of Civil Rights due to
27 a State Created Danger under 42 U.S.C. § 1983; (4) violation of Civil Rights under Cal.
28 Civ. Code § 52.1; (5) assault, battery, and sexual assault; and (6) violation of California

1 Constitution Art. I, §§ 7, 13, 28. (*See SAC.*) The City and NCPD now move to dismiss
2 the SAC. (*See City MTD III* [Doc. 18], *NCPD MTD* [Doc. 21].) Portillo opposes the
3 motions. (*See Opp'n to City MTD III* [Doc. 20], *Opp'n to NCPD MTD* [Doc. 23].)
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5 **II. LEGAL STANDARD**

6 The Court must dismiss a cause of action for failure to state a claim upon which
7 relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)
8 tests the legal sufficiency of the complaint. See Parks Sch. of Bus., Inc. v. Symington, 51
9 F.3d 1480, 1484 (9th Cir. 1995). A complaint may be dismissed as a matter of law either
10 for lack of a cognizable legal theory or for insufficient facts under a cognizable theory.
11 Balisteri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1990). In ruling on the
12 motion, a court must “accept all material allegations of fact as true and construe the
13 complaint in a light most favorable to the non-moving party.” Vasquez v. L.A. Cnty.,
14 487 F.3d 1246, 1249 (9th Cir. 2007).

15 A complaint must contain “a short and plain statement of the claim showing that
16 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Supreme Court has
17 interpreted this rule to mean that “[f]actual allegations must be enough to raise a right to
18 relief above the speculative level.” Bell Atl. Corp. v. Twombly, 550 U.S. 554, 555
19 (2007). The allegations in the complaint must “contain sufficient factual matter, accepted
20 as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556
21 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570).

22 Well-pled allegations in the complaint are assumed true, but a court is not required
23 to accept legal conclusions couched as facts, unwarranted deductions, or unreasonable
24 inferences. See Papasan v. Allain, 478 U.S. 265, 286 (1986); Sprewell v. Golden State
25 Warriors, 266 F.3d 979, 988 (9th Cir. 2001).

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1 **III. DISCUSSION**

2 **A. Section 1983 causes of action**

3 The City argues Portillo has failed to state a 1983 cause of action because she
4 again relies on vicarious liability against the City. (*MTD P&A III* [Doc. 18] 14:1–3.¹)
5 The Court agrees.

6 “A municipality may not be held liable under [42 U.S.C. § 1983] solely because it
7 employs a tortfeasor.” *Bd. of Cnty. Com’rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397,
8 403 (1997) (referencing *Monell v. Dept. of Social Services*, 436 U.S. 658, 689–92
9 (1978)). Instead, a plaintiff seeking to establish municipal liability under § 1983 must
10 prove that his or her injury was the result of a municipal policy or custom. *Id.* In order to
11 state a *Monell* claim against a municipality, a plaintiff must allege: (1) she was deprived
12 of a constitutional right; (2) the municipality had a policy; (3) the policy amounted to
13 deliberate indifference to her constitutional right; and (4) the policy was the moving force
14 behind the constitutional violation. *Lockett v. Cnty. of L.A.*, 977 F.3d 737, 741 (9th Cir.
15 2020).

16 Nowhere does Portillo allege a policy or custom. Instead, she bases her 1983
17 claims on *respondeat superior*. The first cause of action alleges that “defendant through
18 the acts of its employee injured plaintiff while in the performance of his duties as a city
19 worker.” (*SAC* ¶ 21.) In her second cause of action, Portillo alleges that “[a]s a direct
20 and proximate consequence of the acts of Defendants’ agents and employees, plaintiffs
21 have suffered and continue to suffer loss of her personal property...” (*Id.* ¶ 29.)
22 Similarly, the third cause of action alleges that “[a]s a direct and proximate consequence
23 of the acts of defendants’ agents and employees, plaintiff has suffered and continues to
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26 ¹ The City argues that the second and third causes of action must be dismissed because Portillo was only
27 granted leave to amend her section 1983 cause of action. (*Id.* 12:16.) This argument lacks merit
28 because the second and third causes of action are also brought under section 1983. (*SAC* ¶¶ 25–32.)
Although the City did not address the merits of those causes of action, the same analysis used for the
first cause of action applies to the second and third.

1 suffer actual and potential injury to her health and safety...” (*Id.* ¶ 32.) Because all three
2 of Portillo’s 1983 causes of action are based on the conduct of the unknown City
3 employee and not a policy or custom, Portillo fails to sufficiently state a section 1983
4 claim.

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6 **B. State-law causes of action**

7 The City argues Portillo’s state-law causes of action (fourth through sixth) should
8 be dismissed because she was only granted leave to amend her 1983 cause of action.
9 (*MTD Reply III* [Doc. 22] 4:5–8.) The Court agrees.

10 In dismissing Portillo’s FAC, the order stated that “[b]ecause the previous
11 dismissal order did not address the deficiencies with Portillo’s section 1983 cause of
12 action, the Court will grant Portillo **LEAVE TO AMEND** that cause of action.” (*MTD*
13 *II Order* 8:13–15.) Other district courts have held that similar language precludes the
14 inclusion of new causes of action in an amended complaint. See Solenne v. U.S. Bank
15 Nat’l Ass’n, 2014 WL 3341051, at *3 (S.D. Cal. July 8, 2014) (“Plaintiffs were only
16 given leave ‘to amend the claims which were dismissed without prejudice.’ (December
17 13 Order at 10). Plaintiffs were not granted permission to amend the complaint to assert
18 new claims, and did not seek permission from this Court. Plaintiffs’ attempt to assert
19 additional claims is therefore improper, and dismissal is appropriate.”) (citing Fed. R.
20 Civ. P. 15); see also Simmons v. Seal, 2008 WL 1869702, at *5 (N.D. Cal. Apr. 24,
21 2008) (“Furthermore, in the Order dismissing the initial complaint, the Court granted
22 leave to amend the complaint to correct pleading deficiencies, but did not give Plaintiff
23 permission to add any new claims.”) Because the order did not permit Portillo to amend
24 her complaint to add new causes of action, the Court will dismiss the state-law claims
25 without prejudice.

26 Moreover, when a court dismisses the federal claims from a complaint, it has
27 discretion on whether to retain supplemental jurisdiction over the state-law claims. See
28 28 U.S.C. § 1367(c)(3); see United Mine Workers v. Gibbs, 383 U.S. 715, 728 (1966).

1 Here, since the federal-question claims are dismissed, and because this case is at an early
2 stage in the pleadings, the Court also declines to exercise supplemental jurisdiction over
3 the state-law causes of action.

4
5 **C. National City Police Department**

6 In the SAC, Portillo also named Defendant NCPD in the sixth cause of action for
7 violation of the California Constitution Article I, sections 7, 13, and 28. (SAC ¶¶ 40–43.)
8 NCPD contends that the Police Department is not a separate suable entity from the City.
9 (*NCPD MTD P&A III* 6:5–6.) The Court disagrees.

10 NCPD’s argument is contrary to Ninth Circuit authority, which has held that the
11 police department may be sued in Federal Court because it is a public entity under
12 California Government Code § 811.2. See Shaw v. State of Cal. Dept. of Alcoholic
13 Beverage Control, 788 F.2d 600, 605 (9th Cir. 1986); see also Karim-Panahi v. L.A.
14 Police Dep’t, 839 F.2d 621, 624 n.2 (9th Cir. 1988) (“Municipal police departments are
15 ‘public entities’ under California law and, hence, can be sued in federal court for alleged
16 civil rights violations.”) District courts have also held that “both a municipality and a
17 municipality’s police department may be named in an action under California law if both
18 are amenable to suit.” Est. of Mendez v. City of Ceres, 390 F.Supp.3d 1189, 1205 (E.D.
19 Cal. 2019); see also Payne v. Cnty. of Calaveras, 2018 WL 6593347, at *3–4 (E.D. Cal.
20 Dec. 14, 2018) (“[A] department of a municipality can be sued separately *in addition* to
21 the municipality for the same alleged wrongs.”) (emphasis added); see also Hurth v.
22 Cnty. of L.A., 2009 WL 10696491, at *5 (“[I]f both a county and a county sheriff’s
23 department are amenable to suit, they may both be named in a single action.”). Therefore,
24 Court will not dismiss NCPD on this basis.

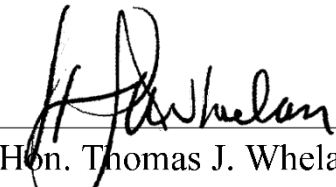
25 Nevertheless, the NCPD is only named in a state-law cause of action. Because
26 Portillo did not have leave to amend to add the state-law claims and because the Court
27 declines to exercise supplemental jurisdiction over the state-law claims, NCPD is
28 dismissed on that basis a defendant.

1 **IV. CONCLUSION & ORDER**

2 For the foregoing reasons, the Court **GRANTS** Defendants' motions to dismiss
3 [Docs. 18, 21] **WITHOUT LEAVE TO AMEND** and **WITHOUT PREJUDICE** as to
4 Plaintiff's state law claims.

5 **IT IS SO ORDERED.**

6 Dated: July 19, 2022

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9 Hon. Thomas J. Whelan
United States District Judge

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