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12 In Their Official and Individual Capacities

13
14 **UNITED STATES DISTRICT**
15 **EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION**

16 Pamela Kincaid, etc. et al.,) **CASE NO. 06-CV1445-OWW**
17)
18 Plaintiffs,) **MOTION FOR SUMMARY**
19) **ADJUDICATION AS TO ALL OR**
20 v.) **SOME OF THE CAUSES OF ACTION,**
21) **Fed. R. Civ. Proc. 56**
22 City of Fresno et al.,)
23) **Date: March 31, 2008**
24 Defendants.) **Time: 9:00 a.m.**
25) **Judge: Hon. Oliver W. Wanger**
26) **Courtroom: 3 (7th Floor)**
27)
28) **Trial Date: June 10, 2008**
) **Trial Judge: Hon. Oliver W. Wanger**

29 **I.**

30 **STATEMENT OF ISSUES**

31 A. Does the Doctrine of Qualified Immunity Shield Defendants Glenn and Province
32 from the Federal Causes of Action in Whole or in Part?
33
34

1 B. Does Plaintiffs' Failure to Comply with the Tort Claims Act Preclude the Recovery of
2 Money Damages on all State Causes of Action?

3 C. Are Plaintiffs' Prayers for Relief Supported by the Governing Law or the Undisputed
4 Facts at the Close of Discovery?

5 D. May Defendants Glenn and Province Recover their Legal Expenses if Plaintiffs'
6 Claims are Found Groundless?

7 **II.**

8 **STATEMENT OF FACTS**

9 Plaintiffs' Second Amended Complaint of March 1, 2007 ("SAC") added two named
10 Defendants who are employed by the California Department of Transportation (Caltrans).
11 Defendant James Province is a former Maintenance Area Superintendent, and Defendant Daryl
12 Glenn is a Maintenance Lead Worker. Both are sued in their individual and official capacities.

13 The SAC is primarily directed at the actions of the City defendants. Allegations against
14 the other Defendants are primarily derivative, with the City Defendants being

15 joined in and/or implemented by the remaining defendants, and each of them,
16 acting as the agent, servant, employee and/or in concert, and/or in conspiracy with
17 each of said other defendants. Each of the defendants caused, and is liable for, the
18 unconstitutional and unlawful conduct and resulting injuries by, among other
19 things, personally participating in said conduct or acting jointly or conspiring with
20 others who did so; by authorizing, acquiescing or setting in motion policies, plans,
21 and actions that led to the unlawful conduct; by failing to take action to prevent
22 the unlawful conduct; by failing and refusing with deliberate indifference to
maintain adequate training and supervision; and by ratifying the unlawful conduct
taken by employees under their direction and control, including failing to take
remedial and disciplinary action. (SAC, pps. 5-6, para. 30).

23 The specific charging allegations against Caltrans employees are at paragraphs 46 and 47
24 on pages 11 and 12 of the SAC. The purported bases for liability appear to be that Caltrans
25 employees "acquiesced in, and ratified" the City's actions because it allowed the City on state
26 property pursuant to encroachment permits "with knowledge of the unlawful and
27 unconstitutional conduct by City officials." (SAC para. 46).
28

1 Included in the brief list of the acts and omissions complained of are: that a Caltrans
2 maintenance lead worker, Defendant Daryl Glenn, received an e-mail communication from the
3 Fresno Police Department which he forwarded to his immediate supervisor, superintendent
4 Defendant James Province. It is further alleged that another e-mail was sent from Fresno P.D. to
5 Glenn requesting a meeting. That meeting eventually led to the issuance of an encroachment
6 permit for City employees to lawfully enter onto Caltrans property and, inter alia, erect a right-
7 of-way fence.

8 There are no allegations that Defendant Glenn or Defendant Province ever acted (or
9 failed to act) outside the immediate scope of their employment with respect to the events at issue
10 in the present controversy.

11 Discovery closed on January 31, 2008. Based on the charging allegations and the
12 evidentiary record, Caltrans Defendants Glenn and Province bring this notice of motion and
13 motion for summary adjudication on all or some of the claims.

14 III.

15 **POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

16 **A. Federal Causes of Action against Defendants Daryl Glenn and James Province are** 17 **Precluded by Qualified Immunity**

18 1. Standard for Summary Judgment

19 “[D]amages suits concerning constitutional violations need not proceed to trial, but can
20 be terminated on a properly supported motion for summary judgment based on the defense of
21 immunity.” *Butz v. Economou*, 438 U.S. 478, 508 (1978). If the law does not put a government
22 official on notice that his or her conduct would be clearly unlawful, summary judgment based on
23 qualified immunity is appropriate. *Saucier v. Katz*, 533 U.S. 194 (2001).

24 2. Three Bases for Qualified Immunity all Favor Summary Adjudication

25 Plaintiffs have taken the extraordinary measure of suing two Caltrans maintenance
26 workers in their individual capacities despite the fact they have not alleged any conduct
27 unrelated to the performance of their jobs. In order to protect rank and file employees from such
28 abusive tactics, courts have extended the principles of absolute immunity normally reserved for

1 state officials by creating a corollary. Qualified immunity is a judicially created doctrine that
2 stems from the conclusion that few individuals will enter public service if such service entails
3 the risk of personal liability for one's official decisions. *Malley v. Briggs*, 475 U.S. 335, 339
4 (1986). Qualified immunity protects "all but the plainly incompetent or those who knowingly
5 violate the law." *Hunter v. Bryant*, 502 U.S. 224 (1991). Naming Defendant Glenn is
6 particularly egregious since according to the SAC, his official decision consisted of receiving
7 two e-mail messages from the Fresno Police Department. Discovery subsequently revealed that
8 he also went to state-owned rights-of-way after the City employees had completed their clean-up
9 operations. Defendant Province not only received a forwarded e-mail message from Defendant
10 Glenn, he also attended at least one meeting with representatives from the City of Fresno to
11 discuss the logistics of a City clean-up operation on Caltrans-owned property, and also made
12 Caltrans equipment available for the City's use, thereby continuing a State-City partnership that
13 dates back to 1912.

14 Caltrans Defendants can show they are entitled to summary judgment based on qualified
15 immunity for three separate reasons:

- 16 • Plaintiffs' complaint fails to state a federal claim, *Siegert v. Gilley*, 500 U.S. 226,
17 233 (1991);
- 18 • Caltrans Defendants Glenn and Province objectively believed their conduct was
19 lawful in light of clearly established principles governing their conduct, *Anderson*
20 *v. Creighton*, 483 U.S. 635, 641 (1987);
- 21 • There is no genuine issue of material fact as to whether defendants engaged in
22 conduct violating plaintiffs' clearly established constitutional rights. *Burgess v.*
23 *Pierce County*, 918 F.2d 104, 106 n.3 (9th Cir. 1990).

24 a. Failure to State a Valid Federal Claim Against Defendants Glenn and Province

25 The analytical framework for a section 1983 claim is well-established. First, the
26 Plaintiffs must identify a federally protected right. In the case at bar, Plaintiffs sue for:

- 27 • "Denial of Constitutional Right Against Unreasonable Search and Seizure – Fourth
28 Amendment" SAC p. 16, citing "Fourth Amendment to the United States Constitutional
[sic] and 42 U.S.C. § 1983." (SAC p. 17, para. 65);

- 1
- 2 • “Denial of Constitutional Right to Due Process of Law – Fourteenth Amendment,” citing
- 3 same and 42 U.S.C. § 1983 (SAC p. 17, para 67); and
- 4 • “Denial of Constitutional Right to Equal Protection of the Laws – Fourteenth
- 5 Amendment,” again relying on 42 U.S.C. § 1983. (SAC p. 17 para. 69)

6 Next, Plaintiffs must demonstrate that they have suffered a direct injury as a result of the

7 defendants’ challenged conduct. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). In

8 order to have standing, Plaintiffs must “allege personal injury fairly traceable to the defendant’s

9 allegedly unlawful conduct....” *Allen v. Wright*, 468 U.S. 737 (1984).

10 Defendant Province’s challenged conduct is that he attended a meeting with

11 representatives from the City in order to coordinate a city sponsored clean-up operation on

12 Caltrans right-of-way and arrange for the use of Caltrans-owned equipment. Although

13 Defendant Province need not make any showing on a dispositive issue that Plaintiffs must

14 establish at trial, the record demonstrates that he attended the meeting for lawful purposes: to

15 coordinate logistics such that impacts to the transportation purposes of the property were

16 minimal, and to provide for the erection of a right-of-way fence which Caltrans was obligated to

17 authorize under Cal. Sts. & Hys. § 678. (Please see the Affidavit of James Province and the

18 Separate Statement of Facts, all filed herewith, which demonstrate the total vapidness of

19 Plaintiffs’ inability to assert any valid claims against Province and Glenn). Under *Martinez v.*

20 *California*, 444 U.S. 277 (1980), general tort principles of proximate cause apply to section

21 1983 actions. Even if a defendant in some manner participated in the chain of events causing a

22 constitutional deprivation, 1983 liability does not automatically attach: the defendant must have

23 actually caused the constitutional deprivation. *Estate of Brooks v. U.S.* (9th Cir 1999), 197 F.3d

24 1245,1248.

25 In order to allege a valid claim against private parties (such as Glenn and Province in

26 their individual capacities) for a deprivation of rights under section 1983, the complaint must

27 allege that *specific conduct* was a proximate cause of the injury. *Brower v. Inyo County*, 817

28 F.2d 540 (9th Cir. 1987), judgment rev’d on other grounds, 489 U.S. 593. In the case at bar, the

1 specific conduct alleged by Defendant Glenn is the receipt of two e-mail messages from City of
2 Fresno Defendants. The first he forwarded to his supervisor, Defendant Province, the second
3 requested a meeting. In the former instance, Defendant Glenn did exactly what he was
4 supposed to do: forward a communication to his supervisor. The other alternatives would have
5 been to delete the e-mail or to commit an ultra vires act by exceeding his institutional authority.
6 Imposition of liability for the first e-mail would be tantamount to making any individual with an
7 e-mail account subject to a 1983 suit. The second e-mail which requested a meeting also does
8 not establish grounds for liability. The working relationship between the state and the City of
9 Fresno dates back to 1912 at the latest and there is nothing untoward or sinister about a
10 partnership between two public entities that share adjacent property and face similar land use
11 issues.

12 Discovery failed to reveal additional overt acts or omissions on Defendant Glenn's part
13 that would impose liability under section 1983 either in his official or individual capacity.
14 Defendant Glenn did come to Caltrans-owned property following a city orchestrated clean-up
15 operation, but the record shows that he did not:

16 1) interact directly with members of the homeless community;
17 2) seize any personal property whatsoever;
18 3) personally witness any conduct that was clearly unconstitutional or illegal;
19 4) have any realistic opportunity or legal authority to intervene in a police action
20 conducted by armed, uniformed law enforcement personnel. (Affidavit of Daryl Glenn, esp.
21 para. 10).

22 All of the Plaintiffs' federal claims are defective with respect to Defendants Glenn and
23 Province. To summarize the arguments in Director Kempton's motion to dismiss briefly, the
24 proscription on Search and Seizure fails because Glenn and Province never interacted directly
25 with members of the homeless community during clean-up operations and therefore could not
26 have searched them, nor did they ever take possession of Plaintiffs' personal property. Glenn
27 and Province did not issue the encroachment permits that allowed City Defendants to enter onto
28 Caltrans property under color of law (in order to abate trespassing and concomitant health and

1 safety risks to the public) so cannot logically be held liable for City Defendants' searches and
2 seizures.

3 Due Process Claims against Glenn and Province are similarly misplaced. Procedural Due
4 Process violations did not occur as a matter of law because Plaintiffs did not deign to avail
5 themselves of available state remedies. *Zinermon v. Burch* (1990) 494 U.S. 113, 126. Plaintiffs
6 have not properly alleged nor shown a Substantive Due Process violation by Glenn or Province
7 because there has been no showing of grave unfairness in the discharge of their legal
8 responsibilities. *Silverman v. Barry* (1988, App DC) 269 US App DC 327, 845 F2d 1072, reh
9 den, en banc (1988, App DC) 271 US App DC 179, 851 F2d 434 cert den (1988) 488 US 956.
10 And even if Plaintiffs could establish every allegation made against Glenn (or Province),
11 liability still does not attach because "[i]nadvertent errors, honest mistakes, agency confusion,
12 even negligence in the performance of official duties, do not warrant redress under [section
13 1983]." *Silverman, supra*, citing *Ortega Cabrera v. Municipality of Bayamon*, 562 F.2d 91,
14 103 (1st Cir. 1977).

15 Plaintiffs' Equal Protection claim is spurious because the homeless are not an inherently
16 suspect class that receive heightened scrutiny and the laws regarding the maintenance of the
17 state highway system are narrowly tailored to effect legitimate government interests. See *e.g.*,
18 *Plyler v. Doe* 457 U. S. 202 (1982). There has been no evidentiary showing of selective
19 enforcement against the homeless' unauthorized encroachments by Caltrans in general or Glenn
20 or Province in particular. Nor does the record even suggest animus towards the homeless by
21 Province or Glenn (who incidentally has volunteered at homeless shelters and was romantically
22 involved with someone who was a member of that community at the time they met).

23 b. Defendants Glenn and Province objectively believed their conduct was lawful in light
24 of clearly established principles governing their actions.

25 The qualified immunity defense may be raised if it can be shown that those asserting it
26 did not violate clearly established statutory or constitutional rights of which a reasonable person
27 would have been aware. *Davis v. Scherer* (1984) 468 U.S. 183; *Harlow v. Fitzgerald* (1982)
28 457 U.S. 800. In addition, in personal capacity actions, defendants may assert personal

1 immunity defenses such as objectively reasonable reliance on existing law. *Hafer v. Meko*
2 (1991) 502 U.S. 21; *Kentucky v. Graham* (1985) 473 U.S. 159.

3 Glenn and Province were at all times pertinent to the instant suit employed in Caltrans'
4 Division of Maintenance. They are familiar with the state statutes that govern the maintenance
5 of the state highway system, including the process for disposing of unauthorized encroachments
6 on the state rights-of-way, more fully set forth in Director Kempton's motion to dismiss. Given
7 that the record shows that neither Glenn nor Province was personally present to observe any of
8 the alleged Constitutional violations by the City Defendants, it was objectively reasonable for
9 them to believe that their actions of corresponding and meeting with City representatives was
10 lawful conduct.

11 c. There is no genuine issue of material fact as to whether defendants engaged in conduct
12 violating plaintiffs' clearly established constitutional rights.

13 A court must consider whether there is a genuine issue of fact as to whether defendant
14 engaged in the conduct violating plaintiff's clearly established constitutional right. *Burgess v.*
15 *Pierce County*, 918 F.2d 104, 106 n.3 (9th Cir. 1990). As set forth above, neither the pleadings
16 nor discovery have revealed an act or omission of Glenn and Province that violated
17 Plaintiffs' clearly established constitutional rights. Plaintiffs have had ample opportunity to
18 adduce admissible evidence against Glenn and Province. "Personal involvement" of a named
19 defendant in a 1983 action of alleged constitutional deprivation is a prerequisite to an award of
20 damages. *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1997).

21 d. Dismissal of claims based on California law is appropriate if federal claims are
22 dismissed

23 If the federal causes of action are dismissed, it would be appropriate to dismiss the state
24 law claims against Glenn and Province. When a federal civil rights claim is dismissed before
25 trial, state claims which are appended thereto generally must fail as well. *Girard v. 94th Street*
26 *and Fifth Ave. Corp.*, 530 F.2d 66 (1976), *cert. den.* 425 U.S. 974 (1976).
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1 **B. State Law Claims Must Fail as a Matter of Law**

2 Failure to Present a Claim to the California Victim Compensation and Government Claims
3 Board Compels the Dismissal of All State Claims for Money or Damages.

4 The SAC alleges violations of, inter alia, the California Constitution Article 1, section
5 7(A), California Civil Code § 2080 et seq., California Government Code § 815.6, Civil Code §
6 52.1, and the common law of conversion.

7
8 Under California law, a government claim must be presented against the employing
9 entity, Caltrans, as a condition precedent to bringing suit against an employee or former
10 employee for money or damages. *Neal v. Gatlin*, 35 Cal.App.3d 871, 877-78. California
11 Government Code section 950.2 states in pertinent part that:
12

13 a cause of action against a public employee... for injury resulting from an
14 act or omission in the scope of his employment as a public employee is
15 barred if an action against the employing public entity for such injury is
16 barred under Part 3 (commencing with section 900) of this division
17 *This section is applicable even though the public entity is immune from*
liability for the injury." (Emphasis supplied).

18 While a plaintiff may join state or common law claims to federal claims in federal court,
19 the state claims are to be dismissed if they do not comply with the claims-presentation
20 requirements of the Tort Claims Act. *Karim-Panahi v. Los Angeles Police Dep't* (9th Cir,
21 1988) 839 F.2d 621, 627.
22

23 Section 950.2 is a necessary safeguard within the statutory framework of the Tort Claims
24 Act. As Professor Arvo Van Allstyn notes, the California Law Revision Commission
25 recognized that absent the protection, plaintiffs would be able to effectively circumvent the act
26 by naming a public entity's employees for work they perform in the ordinary course of business.
27 "Because the employing public entity is financially responsible for judgments against its
28

1 employees (Govt C section 825), the presentation of a claim is required in *all* cases.” Professor
2 Arvo Van Allstyne, California Government Tort Liability Practice, Continuing Education of the
3 Bar, 4th Ed. § 5.60.

4
5 Also, Plaintiffs must have been aware of the filing requirement because they filed claims
6 for relief against the City of Fresno and the named Defendants in the City’s employ pursuant to
7 Cal. Gov’t Code § 915(a). Plaintiffs never filed analogous state claims or applied for leave to
8 file a late claim with the Victim Compensation and Government Claims Board according to the
9 requirements of § 915(b).

10
11 Plaintiffs’ state claims must be dismissed for failure to comply with the Tort Claims Act.
12 *Ortega v. O’Connor*, (9th Cir. 1985) 764 F.2d 703, 707, *rev’d on other grounds*, 480 U.S. 709;
13 *Karim-Panahi v. Los Angeles Police Dep’t* (9th Cir, 1988) 839 F.2d 621, 627.

14
15 **C. Relief Sought Against Glenn and Province**

16 With respect to the relief sought, Glenn and Province address the pertinent prayers in turn.

17
18 Glenn and Province are Caltrans employees who are not able to direct Department of
19 Transportation policy. Injunctive relief against Glenn and Province would be a fruitless
20 exercise; if Glenn is to be enjoined from receiving electronic communications or frequenting
21 public rights-of-way, it should not be done to prevent the formation of a working partnership
22 between him and City of Fresno P.D. or other officials. James Province has been promoted and
23 no longer directs maintenance activities in Fresno.

24
25 No declaratory judgment is necessary to sanction Glenn’s or Province’s work-related
26 policies, practices, or conduct. The record with respect to them demonstrates concerted efforts
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28

1 to promote an effective, lawful partnership with another public agency in the interests of public
2 health and safety. The policies and practices bear repetition, not condemnation, and the working
3 relationship between the two public entities should continue when their mutual interests so
4 demand.

6 The record shows that neither Glenn nor Province ever had custody of any of the
7 Plaintiffs' personal property. As such, it would be factually impossible for them to return it.
8 (Affidavits of James Province; Daryl Glenn, esp. para. 10).

10 Plaintiffs may not recover money damages under California Civil Code sections 52 or
11 52.1, because they failed to satisfy the claims filing requirements set forth in the Tort Claims
12 Act. By its express terms, California Government Code section 815.6 applies only to public
13 entities, not employees.

15 Because the Plaintiffs have not made a prima facie showing of malice and have failed to
16 carry their initial burdens on the underlying causes of action, no punitive or exemplary damages
17 should be awarded.

19 Glenn and Province should not be liable for attorneys' fees or costs of suit. Quite to the
20 contrary, the actions against them have been frivolous from the outset. If a prevailing defendant
21 establishes that a claim is entirely groundless, a fee award is appropriate. *Saman v. Robbins*
22 (9th Cir. 1999) 173 F.3d 1150, 1158. In that case, the prevailing defendant officer had no
23 physical contact with the plaintiff in an excessive force case. In the instant case, Glenn and
24 Province are charged with unreasonable searches and seizures and deprivations of property
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1 notwithstanding the fact that neither of them ever had any direct contact with members of the
2 homeless community or ever took possession of any of their personal property.

3
4 **IV**

5 **CONCLUSION**

6 For any and all of the foregoing reasons, the suit against Defendants Daryl Glenn and
7 James Province should be dismissed and Plaintiffs should bear the Defendants' legal expenses in
8 an amount according to proof by post-ruling motion.

9 DATED: February 28, 2008.

10 Respectfully submitted:

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