

FILED
LOS ANGELES SUPERIOR COURT

FEB 20 2009

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BY PAUL SANCHEZ, DEPUTY

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

ELVETA LOUISE FRANCIS,
individually, and as class representative,

Plaintiff,

vs.

STATE OF CALIFORNIA, et al.,

Defendants.

Case No. BC302856

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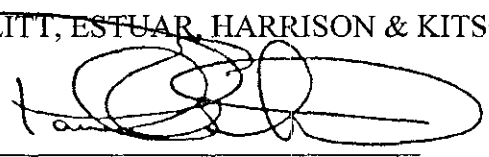
[Before the Hon. James P. Shook]

FILING OF NINTH CIRCUIT OPINION

Attached hereto is the opinion of the Ninth Circuit Opinion in the matter of *Francis, et al.*
v. State of California, et al, Appellate No. 06-56048, District Court No. CV-04-00039-DDP.

Dated: February 20, 2009

LITT, ESTUAR, HARRISON & KITSON, LLP


Barrett S. Litt
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Attorneys for Plaintiffs

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 11 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ELVETA LOUISE FRANCIS,
individually and as class representati v.

Plaintiff - Appellant,

V.

STATE OF CALIFORNIA; et al.,

Defendants - Appellees.

No. 06-56048

D.C. No. CV-04-00039-DDP

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dean D. Pregerson, District Judge, Presiding

Submitted September 4, 2008**
Pasadena, California

Before: SILVERMAN and BERZON, Circuit Judges, and BENITEZ***, District
Judge.

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without
oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Roger T. Benitez, United States District Judge for the
Southern District of California, sitting by designation.

Francis appeals the district court's dismissal of her federal claims asserted in her fourth amended complaint alleging that the Defendants violated 42 U.S.C. § 1983 when they failed to credit money toward inmates' restitution and to reimburse inmates for employment costs. Francis filed her action in state court, and Defendants removed to federal court. After dismissal of the federal claims, the district court remanded the state claims. Those claims are proceeding in state court as a certified class action. *Francis v. Cal.*, 2008 WL 1874426 (Cal. App. 2 Dist. Apr. 29, 2008).

We review the district court's 12(b)/(c) dismissal *de novo* and denial of leave to amend for an abuse of discretion. *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1036 (9th Cir. 2008); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008); *Orkin v. Taylor*, 487 F.3d 734, 738 (9th Cir.), *cert. denied*, 128 S.Ct. 491 (2007).

The district court did not err in dismissing the Fifth Amendment takings and Eighth Amendment excessive fines claims. The fourth amended complaint asserted those claims only against the state and state agency Defendants. States, state agencies, and state officers acting in their official capacities are not "persons" and cannot be sued for damages under 42 U.S.C. § 1983. *Arizonans for Official*

English v. Ariz., 520 U.S. 43, 69 n.24 (1997); *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989).

The district court did not err in dismissing the due process claim. The facts alleged in the fourth amended complaint allege only negligence. A negligent act of an official that causes loss of life, liberty, or property does not state a due process violation. *County of Sacramento v. Lewis*, 523 U.S. 833, 848-50 (1998); *Daniels v. Williams*, 474 U.S. 327, 328 (1986).

Finally, the district court did not abuse its discretion by denying leave to file a fifth amended complaint, particularly in light of Francis's failure to assert additional facts that she could allege to state her claims. *In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1097-98 (9th Cir 2002).

AFFIRMED.

FILED

***Francis v. State of California*, No. 06-56048**

DEC 11 2008

BERZON, Circuit Judge, dissenting.

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I respectfully dissent. I would hold that it was an abuse of discretion not to allow Francis to amend her complaint.

Although this was the Fourth Amended Complaint, the prior complaint had properly alleged Takings and Eighth Amendment causes of action against the individual defendants, and had been upheld, not dismissed, with regard to the Equal Protection cause of action. Francis explained to the district court that the failure to include the individual defendants in the headings of the Takings and Eighth Amendment causes of action was a clerical error, and also pointed out, correctly, that the text of the Eighth Amendment claim included the individual defendants, although the heading did not. As to the Equal Protection cause of action, Francis had had no earlier opportunity to attempt to amend it, as it had been upheld in the face of defendants' earlier motion to dismiss.

Litigation should be resolved on the merits where possible. Here, there was no prejudice to the court or the other litigants. Francis had made clear from the outset of the litigation her intention to sue the individual defendants on the constitutional causes of action, and was not responsible for any delay in seeking to amend the Equal Protection cause of action. It was, therefore, an abuse of

discretion to dismiss the complaint with rather than without prejudice.

I respectfully dissent.

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PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1055 Wilshire Boulevard, Suite 1880, Los Angeles, California 90017.

On February 20, 2009, I served true copies of the document described as **FILING OF NINTH CIRCUIT OPINION** in sealed envelopes, addressed as stated below:

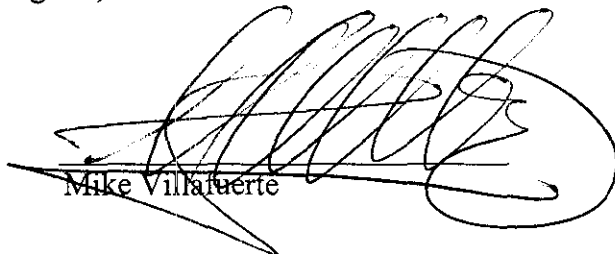
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[XX] BY MAIL

[XX] I caused such envelope to be deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully paid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Outgoing mail is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

Executed on February 20, 2009, at Los Angeles, California.


Mike Villafuerte