

FILED

UNITED STATES COURT OF APPEALS

JAN 08 2009

FOR THE NINTH CIRCUIT

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

ELVETA LOUISE FRANCIS,
individually and as class representati v.

Plaintiff - Appellant,

V.

STATE OF CALIFORNIA;
CALIFORNIA DEPARTMENT OF
CORRECTIONS CALIFORNIA
COMMUNITY CORRECTIONAL
CENTER; THE CALIFORNIA OFFICE
OF VICTIM SERVICES AND
RESTITUTION; CAL TERHUNE
individually and in his capacity as Director
of the Department of Corrections;
STEVEN CAMBRA, Jr., individually and
as Acting Director of the Department of
Corrections THERESA ROCHA,
individually and in her capacity as Acting
Director of the Department of Corrections;
EDWARD S. ALAMEIDA, Jr.,
individually and in his capacity as Director
of the Department of Corrections; TERRY
BOEHME, individually and in his capacity
as Restitution Services Manager; SANDI
MENEFEE, individually adn in her
capacity as Assistant Director of the
California Community Correctional Center
BENSON, Lieutenant, individually and in
his capacity as a Supervisor of the
California Correctional Center;
VOLUNTEERS OF AMERICA OF LOS
ANGELES,

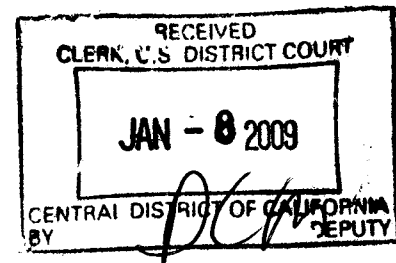
Defendants - Appellees.

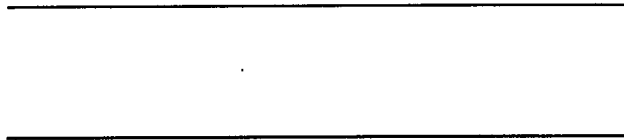
No. 06-56048

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

Central District of California, Los
Angeles

MANDATE





The judgment of this Court, entered 12/11/08, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure. Cost in favor of Appellee State of California in the amount of 102.60 and for Appellee Volunteers of America in the amount of \$45.32.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

By: Synitha Walker
Deputy Clerk

NOT FOR PUBLICATION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.