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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

ZERLEAN COOPER,)	1:10-cv-899 AWI DLB
)	
Plaintiff,)	
)	
v.)	ORDER ON DEFENDANTS’
)	MOTION TO DISMISS AND
MATTHEW CATE, Secretary of the)	MOTION TO STRIKE
California Department of Corrections &)	
Rehabilitation, et al.,)	
)	
Defendants.)	(Doc. No. 32)
)	

This is an employment discrimination case brought by Plaintiff Zerlean Cooper (“Cooper”) against her former employer the California Department of Corrections and Rehabilitation (“CDC”), Secretary of CDC Matthew Cate (“Cate”), Warden Mary Lattimore (“Lattimore”), Chief Deputy Warden Jose Cavazos (“Cavazos”), Associate Warden Michael Tann (“Tann”), and Captain Frank Sanders (“Sanders”) (collectively “Defendants”). The operative complaint is the Second Amended Complaint (“SAC”).¹ The SAC alleges various violations of Title VII and 42 U.S.C. § 1983 claims based on violations of the First and Fourteenth Amendments. Defendants move under Rule 12(b)(6) to dismiss the SAC, and move under Rule 12(f) to strike the request for punitive damages. For the reasons that follow, the Court will grant in part and deny in part the motion.

¹This case was stayed pursuant to stipulation on January 3, 2011, because Cooper had yet to receive a right to sue letter from the EEOC. On July 24, 2011, Cooper filed the SAC after obtaining an EEOC right to sue letter.

1 **BACKGROUND**

2 From the SAC, Cooper is a 56 year old African-American woman. Cooper began her
3 employment with CDC in 1987. Over the years, Cooper received numerous certificates from
4 CDC, including certificates for outstanding performance. In January 1996, Cooper was
5 promoted to the rank of Correctional Lieutenant. Cooper was assigned to the Central California
6 Women’s Facility (“the Prison”). There are approximately 27 correctional lieutenants, and less
7 than 3% of them are African-Americans. During the relevant time period, Cooper was the
8 Visiting Lieutenant. Cooper was responsible for guest and security clearances, mail room,
9 visitations (including several yearly programs), transportation, and parole hearings.

10 In August 2003, Cooper was a witness in a retaliation complaint filed by a female
11 coworker. Cooper was questioned and gave true answers about the allegations of retaliation,
12 Cooper’s knowledge of the complainant’s conversations with the Prison administration, and
13 Cooper’s training and knowledge regarding Prison policies and procedures.

14 On October 5, 2005, a Ms. Sanchez (who was an ex-felon), visited the Prison and
15 complained to another lieutenant that Cooper would not let Sanchez’s children enter the prison.
16 Sanchez had not followed the appropriate procedure. Sanchez used the term “nigger” twice
17 while referring to Cooper. On October 19, 2005, the prison refused to accept Cooper’s complaint
18 against Sanchez for discrimination. On December 26, 2006, the EEO Coordinator for the prison
19 notified Cooper that they would not accept her complaint about Sanchez.

20 On March 5, 2007, Cooper wrote a letter complaining about an undue and excessive work
21 load.²

22 On January 3, 2008, Capt. Harding made inappropriate or sexist comments to Cooper.³
23 On January 17, 2008, Cooper filed a formal complaint against Harding for hostile work
24 environment. In February 2008, CDC, Cate, and Lattimore allowed Cooper to withdraw her

25 _____
26 ²There are no further allegations relating to this letter, including whether a response was ever received.

27 ³Cooper had asked Harding about what appears to be a change in job staffing. Harding said, “First of all, I
28 told her (Officer Lingard) that she could keep her job, and the second reason, personally, is that I don’t have the balls
or huevos to tell her that she could not have the position, and I don’t want to eat crow.” Later, in the same
conversation, Harding flexed his chest and said, “If you’re lucky, I’ll get picked up as an associate warden.”

1 complaint against Harding. Cate and Lattimore did not take any action on their own regarding
2 Harding or any hostile environment.

3 On January 22, 2008, Warden Patrick, in front of Lattimore, made offensive comments to
4 Cooper while discussing job expectations.⁴ Neither Patrick nor Lattimore acknowledged that job
5 expectations and job assignments were based on seniority.

6 On December 29, 2008, Sanders upbraided and orally reprimanded Cooper about her job
7 performance, despite the absence of any complaints. Sanders also unjustifiably disciplined
8 Cooper by giving her on the job training and a job expectations memo, despite Cooper having
9 properly performed her duties.

10 On February 7, 2009, Cooper was passed over for/denied overtime by Sergeant Todisco.
11 Todisco was following her practice of overlooking employees whose seniority entitled them to be
12 assigned overtime. Cooper reported Todisco's policy to Tann and Sanders, but they did nothing
13 about it.

14 On April 7, 2009, Capt. Arrellano told Cooper that Tann had given instructions that
15 Cooper was to notify Arrellano whenever Cooper varied her work hours. Cooper filed a
16 grievance about this condition.

17 On April 20, 2009, Cooper filed an excluded employee grievance, in which she alleged
18 that she was being subjected to a hostile environment and retaliation. On June 22, 2009,
19 Lattimore responded to this grievance. Lattimore informed Cooper of the prison's zero tolerance
20 policy regarding hostile work environment, but found that Cooper's complaints were
21 unsubstantiated. Lattimore also stated that Cooper was not required to notify Capt. Arrellano
22 about work schedule changes.

23 On May 1, 2009, Tann attempted to set Cooper up by getting her to violate/approve of a
24 violation of established prison policy. Tann sent a sergeant and a captain with the driver's
25 licenses of individuals who were attempting to attend a Prison event. The captain told Cooper
26 that an additional security check of the licenses was unnecessary, despite established procedures

27
28 ⁴Warden Patrick said, ". . . you are not authorized to make any job changes or moves, and you should keep
your opinion to yourself because you know how people take it out of context and then it would be hanging on the
board there." As Cooper was leaving, Patrick asked, "Are my eyes still brown? Is there going to be any retaliation?"

1 to the contrary. Cooper did not listen to the captain, but instead followed the established
2 procedure.

3 On May 3, 2009, visiting staff were notified of the discontinuation of the Get On The Bus
4 program, and of the discontinuation of non-essential visiting at all CDC sites.

5 On May 7, 2009, Cooper was notified that visiting on weekends would be discontinued.
6 Cooper was also notified that all visiting staff, except for Supervisors and the Family Visiting
7 Officer, would not be redirected/reassigned on those days.

8 On May 8, 2009, Cooper was called into the Warden's office by Tann and informed by
9 Cavazos that the position of Visiting Lieutenant was being deleted, that Cooper would be
10 redirected to any vacant Lieutenant position, and that Cooper would be redirected to inmate
11 appeals on Tuesdays and Fridays.

12 On May 11, 2009, Tann exempted a Visiting Sergeant from redirection, but did not
13 exempt Cooper.

14 On June 9, 2009, Capt. Scott called Cooper into her office for on the job training
15 regarding administrative segregation. It appears that Capt. Scott told Cooper that Sanders had
16 recommended Cooper for progressive discipline.⁵

17 On July 17, 2009, Cooper was ordered to report to the Madera County Hospital for
18 random drug testing.

19 On July 31, 2009, at the direction of Tann, Capt. Scott spoke to Cooper on two subjects.
20 Scott told Cooper that Tann wanted Cooper written up.⁶

21 On October 2, 2009, Cooper returned from her regular days off and attempted to sign up
22 for overtime on Third Watch. She was denied overtime by Sergeant Todisco. Todisco told
23 Cooper that Operations Procedure C-065 was being utilized for correctional officers and
24 correctional lieutenants. However, such a practice is contrary to Article 20 of the Departmental
25 Operations Manual Supplement.

26 On December 30, 2009, Cooper retired early after 22 years of service. Cooper alleged

27 ⁵There is no allegation, however, that Cooper was actually disciplined.

28 ⁶There is no allegation, however, that Cooper was actually written up.

1 that the prolonged and sustained harassment by Defendants adversely affected her physical and
2 emotional health, including dangerously high blood pressure.

3 On May 19, 2010, Cooper filed this lawsuit.

4 5 LEGAL FRAMEWORK

6 Under Federal Rule of Civil Procedure 12(b)(6), a claim may be dismissed because of the
7 plaintiff's "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A
8 dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the
9 absence of sufficient facts alleged under a cognizable legal theory. Johnson v. Riverside
10 Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008); Navarro v. Block, 250 F.3d 729, 732 (9th
11 Cir. 2001). In reviewing a complaint under Rule 12(b)(6), all allegations of material fact are
12 taken as true and construed in the light most favorable to the non-moving party. Marceau v.
13 Blackfeet Hous. Auth., 540 F.3d 916, 919 (9th Cir. 2008); Vignolo v. Miller, 120 F.3d 1075,
14 1077 (9th Cir. 1999). However, the Court is not required "to accept as true allegations that are
15 merely conclusory, unwarranted deductions of fact, or unreasonable inferences." In re Gilead
16 Scis. Sec. Litig., 536 F.3d 1049, 1056-57 (9th Cir. 2008); Sprewell v. Golden State Warriors, 266
17 F.3d 979, 988 (9th Cir. 2001). To "avoid a Rule 12(b)(6) dismissal, "a complaint must contain
18 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."
19 Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009); see Bell Atl. Corp. v. Twombly, 550 U.S. 544,
20 555, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that
21 allows the court draw the reasonable inference that the defendant is liable for the misconduct
22 alleged." Iqbal, 129 S.Ct. at 1949. The Ninth Circuit has distilled the following principles from
23 *Iqbal* and *Twombly*:

24 First, to be entitled to the presumption of truth, allegations in a complaint or
25 counterclaim may not simply recite the elements of a cause of action, but must
26 contain sufficient allegations of underlying facts to give fair notice and to enable
27 the opposing party to defend itself effectively. Second, the factual allegations that
are taken as true must plausibly suggest an entitlement to relief, such that it is not
unfair to require the opposing party to be subjected to the expense of discovery
and continued litigation.

28 Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. Cal. 2011). If a Rule 12(b)(6) motion is granted,

1 “[the] district court should grant leave to amend even if no request to amend the pleading was
2 made, unless it determines that the pleading could not possibly be cured by the allegation of other
3 facts.” Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc). In other words, leave to
4 amend need not be granted where amendment would be futile. Gompper v. VISX, Inc., 298 F.3d
5 893, 898 (9th Cir. 2002).

6 7 DEFENDANTS’ MOTION

8 1. 42 U.S.C. § 1983 Claims Against CDC

9 Arguments

10 CDC contends that it is entitled to Eleventh Amendment immunity for all of Cooper’s §
11 1983 claims. While unclear, Cooper appears to argue that front pay and back pay are equitable or
12 prospective remedies and thus, are not barred by the Eleventh Amendment.

13 Resolution

14 “The Eleventh Amendment bars suits against the State or its agencies for all types of
15 relief” Krainski v. State ex rel. Bd. of Regents, 616 F.3d 963, 967 (9th Cir. 2010). Unless a
16 State has waived its Eleventh Amendment immunity or Congress has overridden it, a State or one
17 of its agencies or departments cannot be sued directly in its own name, regardless of the relief
18 sought. See Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985); Pennhurst State Sch. & Hosp.
19 v. Halderman 465 U.S. 89, 100 (1984); Krainski, 616 F.3d at 967; Dittman v. California, 191
20 F.3d 1020, 1025 (9th Cir.1999). Further, states and their agencies or departments are not
21 considered “persons” for purposes of 42 U.S.C. § 1983. Will v. Michigan Dep’t of State Police,
22 491 U.S. 58, 70 (1989); Maldonado v. Harris, 370 F.3d 945, 951 (9th Cir. 2004); Doe v.
23 Lawrence Livermore Nat’l Lab., 131 F.3d 836, 839 (9th Cir. 1997).

24 Here, § 1983 does not abrogate Eleventh Amendment immunity. Kentucky, 473 U.S. at
25 169 n.17; Dittman 191 F.3d at 1026. CDC is an agency of the State of California, and California
26 has not waived its immunity for claims brought under 42 U.S.C. § 1983. Brown v. California
27 Dep’t of Corr., 554 F.3d 747, 752 (9th Cir. 2009); Dittman, 191 F.3d at 1026. Because CDC is
28 not a person under 42 U.S.C. § 1983 and has not waived its Eleventh Amendment immunity,

1 dismissal with prejudice of all of Plaintiff's § 1983 claims against CDC is appropriate.⁷ See
2 Will, 491 U.S. at 70; Kentucky, 473 U.S. at 167 n.14; Pennhurst 465 U.S. at 100; Krainski, 616
3 F.3d at 967; Brown, 554 F.3d at 752; Dittman 191 F.3d at 1025-26.

4
5 **2. Fourteenth Amendment – Due Process (First Claim)**

6 *Arguments*

7 Defendants argue that Cooper fails to identify any statute that creates a property right to
8 her specific position as a Visiting Lieutenant or to overtime pay. Mere expectations to overtime
9 pay or the particular position are not cognizable property interests. Alternatively, the law was not
10 so clear that the Defendants would have realized that their conduct violated clearly established
11 law. Thus, qualified immunity is appropriate.

12 Cooper argues that she was a full-time, permanent employee who could only be
13 terminated for cause. Because she could only be terminated for cause, she had a protected
14 property interest in continued employment.

15 *Discussion*

16 **a. Procedural Due Process**

17 “In procedural due process claims, the deprivation by state action of a constitutionally
18 protected interest in life, liberty or property is not in itself unconstitutional; what is
19 unconstitutional is the deprivation of such an interest without due process of law.” Zinerman v.
20 Burch, 494 U.S. 113, 125 (1986). Thus, the “constitutional violation actionable under § 1983 is
21 not complete when the deprivation occurs; it is not complete unless and until the State fails to
22 provide due process.” Id. at 126. A 42 U.S.C. § 1983 claim based upon Fourteenth Amendment
23 procedural due process has three elements: (1) a liberty or property interest protected by the
24 Constitution; (2) a deprivation of the interest by the government; and (3) lack of process. Ulrich
25 v. City & County of San Francisco, 308 F.3d 968, 974 (9th Cir. 2002); Portman v. County of

26
27 _____
28 ⁷Cooper's argument regarding prospective relief is not persuasive. Prospective relief is available when a state official is sued in his official capacity. Doe, 131 F.3d at 839. Here, each of the state officials are sued in their personal capacity only. Also, it is not clear that Plaintiff's front and back pay claims constitute prospective relief for immunity purposes. Cf. Dube v. Tex. HHS Comm'n, 2011 U.S. Dist. LEXIS 99680 (W.D. Tex. Sept. 6, 2011).

1 Santa Clara, 995 F.2d 898, 904 (9th Cir. 1993). Public employees have a “property interest” in
2 the terms and conditions of their employment if that interest is established “by existing rules or
3 understandings that stem from an independent source such as state law -- rules or understandings
4 that secure certain benefits and that support claims of entitlement to those benefits.” Board of
5 Regents v. Roth, 408 U.S. 564, 576-77 (1972); Ulrich, 308 F.3d at 975. “If under state law,
6 employment is at-will, then the claimant has no property interest in the job.” Portman, 995 F.2d
7 at 904. Under California law, “a ‘permanent employee,’ dismissible only for cause, has a
8 property interest in his continued employment which is protected by due process.” Dorr v.
9 County of Butte, 795 F.2d 875, 876 (9th Cir. 1986); Skelly v. State Personnel Bd., 15 Cal.3d 194,
10 207-08 (1975).

11 Here, Cooper’s opposition does not address Defendants’ argument regarding the position
12 of Visiting Lieutenant or overtime opportunities. Thus, Cooper has not shown a protected
13 property interest in the position of Visiting Lieutenant or in overtime opportunities. Cf. Stiesberg
14 v. California, 80 F.3d 353, 357 (9th Cir. 1996) (holding that a failure to follow administrative
15 procedure prior to transfer to a lateral position did not implicate a protected property interest).
16 Accordingly, to the extent that the SAC can be read to allege a protected property interest in the
17 position of Visiting Lieutenant or in over time pay, those claims will be dismissed.

18 Cooper’s opposition, however, indicates that she had a property interest in continued
19 employment because she was only subject to termination for cause. The Court takes this to be a
20 procedural due process argument. Cf. Dorr, 795 F.2d at 876; Skelly, 15 Cal.3d at 207-08.
21 However, in the SAC, this cause of action does not actually identify a protected property interest
22 of any kind, does not allege how Defendants deprived her of the protected property interest, and
23 does not allege a lack of process. Cf. Portman, 995 F.2d at 904. Thus, the first cause of action
24 does not adequately allege a violation of the Fourteenth Amendment’s due process clause. See
25 Navarro, 250 F.3d at 732; Portman, 995 F.2d at 904. Dismissal is appropriate.⁸

26
27 ⁸Defendants’ qualified immunity argument is based on the loss of the Visiting Lieutenant position and on
28 denial of overtime opportunities. Defendants did not raise qualified immunity with respect to a procedural due
process property right to continued employment. Because Defendants did not raise the issue, the Court will not
address whether qualified immunity would be appropriate for such a procedural due process claim.

1 **b. Substantive Due Process**

2 Cooper’s opposition does not expressly address substantive due process. As noted above,
3 Cooper’s opposition is limited to contending that she had a right to continued employment. The
4 SAC alleges conduct from 2005 through 2009. The Ninth Circuit has recognized that there is a
5 circuit split on the issue of whether a public employee has a substantive due process right to
6 continued employment. See Lum v. Jensen, 876 F.2d 1385, 1389 (9th Cir. 1989). The Ninth
7 Circuit has noted that most courts have rejected a substantive due process right to continued
8 public employment. See Engquist v. Oregon Dept. of Ag., 478 F.3d 985, 996-97 (9th Cir. 2007).
9 However, the Ninth Circuit has yet to decide whether such a substantive due process right
10 actually exists. See Dunn v. Reynolds Sch. Dist. No. 7, 2010 U.S. Dist. LEXIS 121401 (D. Or.
11 Nov. 15, 2010). The Court will assume for purposes of this motion only that Cooper had a
12 substantive due process right to continued employment and that the Defendants violated that
13 right. In light of the circuit split and the silence of the Ninth Circuit, a reasonable official in the
14 Defendants’ positions would not have known that their conduct violated the Fourteenth
15 Amendment’s substantive due process protections. See Pearson v. Callahan, 129 S.Ct. 808, 815-
16 16, 821 (2009); Lum, 876 F.2d at 1389. Therefore, Defendants are entitled to qualified immunity
17 on Cooper’s substantive due process claim. See Pearson, 129 S.Ct. at 815-16, 821; Kern v. Clark
18 County, 231 Fed. Appx. 622 (9th Cir. 2007); Lum 876 F.2d at 1389.

19
20 **3. Fourteenth Amendment – Hostile Work Environment (Second Claim)**

21 Arguments

22 Defendants argue that there are no allegations that show Cooper was subjected to
23 harassing conduct because of race. There are no comments by any Defendant that are race-based,
24 and there are no allegations that Cate engaged in any harassing conduct.

25 Cooper does not directly address this claim in opposition. With respect to all 42 U.S.C. §
26 1983 claims, Cooper states that she has alleged sufficient conduct for supervisory liability.
27 Further, with respect to Title VII hostile work environment, Cooper states that she can prove that
28 she was subjected to a racially hostile work environment and CDC failed to take remedial action.

1 Discussion

2 Discriminatory harassment in the form of a hostile work environment may be actionable
3 through a 42 U.S.C. § 1983 claim based on a violation of the Fourteenth Amendment’s equal
4 protection clause. See Kelly v. City of Oakland, 198 F.3d 779, 781 (9th Cir. 1999); Bator v.
5 Hawaii, 39 F.3d 1021, 1028 (9th Cir. 1994); Lelaind v. City & County of San Francisco, 576
6 F.Supp.2d 1079, 1100 (N.D. Cal. 2008). A plaintiff alleging a hostile work environment based
7 on race must show: (1) that she was subjected to verbal or physical conduct based on her race or
8 national origin; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently
9 severe or pervasive so as to alter the conditions of her employment and create an abusive work
10 environment.⁹ Galdamez v. Potter, 415 F.3d 1015, 1023 (9th Cir. 2005); Vasquez v. County of
11 Los Angeles, 349 F.3d 634, 642 (9th Cir. 2003). The work environment must be both
12 subjectively and objectively hostile. Galdamez, 415 F.3d at 1023; McGinest v. GTE Serv. Corp.,
13 360 F.3d 1103, 1113 (9th Cir. 2004). In determining whether a work environment is objectively
14 hostile, courts “look to all of the circumstances, including the frequency, severity, and nature
15 (i.e., physically threatening or humiliating as opposed to merely verbally offensive) of the
16 conduct.” Galdamez, 415 F.3d at 1023; Vasquez, 349 F.3d at 642. The objective hostility of the
17 environment is considered “from the perspective of a reasonable person belonging to the racial or
18 ethnic group of the plaintiff.” Galdamez, 415 F.3d at 1023; McGinest, 360 F.3d at 1015. Also,
19 under the equal protection clause, a defendant’s discrimination must be intentional. See Bator,
20 39 F.3d at 1028 n.7; Sischo-Nownejad v. Merced Cmty. Coll. Dist., 934 F.2d 1104, 1112 (9th
21 Cir. 1991).

22 Here, there are insufficient allegations regarding a racially hostile environment. The SAC
23 alleges that Cooper is African-American. See SAC at ¶ 3. The SAC also alleges that less than
24 3% of the correctional Lieutenants at the Prison are African-American. See id. at ¶ 6. The SAC
25 also alleges that, in October 2005, Ms. Sanchez (a visitor to the prison) complained about Cooper
26 not allowing Sanchez’s children into the prison. See id. at ¶ 8. While complaining about Cooper
27

28 ⁹In Title VII and Equal Protection cases, courts apply the same standards for a hostile work environment.
Feingold v. New York, 366 F.3d 138, 158-59 (2d Cir. 2004); Williams v. Seniff, 342 F.3d 774, 791 (7th Cir. 2003).

1 to another lieutenant, Sanchez twice referred to Cooper as a “nigger.” Id. Cooper then filed a
2 complaint of discrimination against Sanchez. See id. at ¶ 9. On October 16, 2005, and then on
3 December 26, 2006, the prison refused to accept Cooper’s complaint. See id. at ¶ 9(a). The SAC
4 continues to describe either additional complaints or conduct by the Defendants spanning a time
5 frame from March 5, 2007, through December 30, 2009. See id. at ¶ 9(b)-(u). Finally, under the
6 second cause of action, the SAC alleges that Defendants “subjected or caused Cooper to be
7 subjected to a deprivation of her right to the equal protection of the law because of her race
8 (African American)” Id. at ¶ 18. There are no other allegations that relate to race.

9 While Cooper does not have to allege all of her supporting evidence, her factual
10 allegations must plausibly show an objectively hostile work environment based on race. See
11 Iqbal, 129 S.Ct. at 1949; Johnson, 534 F.3d at 1122. The only allegation that indicates racial
12 hostility or seems to readily relate to race was an isolated comment in October 2005 by Sanchez,
13 who was a non-employee/co-worker. Isolated incidents are generally insufficient to establish a
14 hostile work environment. See Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998); Harris
15 v. Forklift Sys., 510 U.S. 17, 21 (1996) (“ . . . mere utterance of an . . . epithet which engenders
16 offensive feelings in an employee does not sufficiently affect the conditions of employment . . .
17 .”). There is nothing about the remaining allegations that relate in any way to race. That is, as
18 the allegations stand, there is no indication of an objectively, racially hostile work environment.
19 Accordingly, dismissal of this cause of action is appropriate.¹⁰

21 **4. First Amendment – Retaliation (Third Claim)**

22 Arguments

23 Defendants argue that Cooper has pled no facts that indicate that the individual
24 defendants acted with a retaliatory intent. Notably, there are no allegations that any of the
25 individual defendants knew about any protected activity by Cooper. Without such knowledge,
26

27 ¹⁰Dismissal of this cause of action against Cate is appropriate for an additional reason. The second cause of
28 action does not indicate that Cate either acquiesced in or somehow created a racially hostile work environment. See
Menotti v. City of Seattle, 409 F.3d 1113, 1149 (9th Cir. 2005). Indeed, up to and including the second cause of
action, there are no factual allegations regarding any conduct by Cate.

1 there can be no retaliatory intent.

2 Cooper does not address this argument or defend this cause of action expressly.

3 Discussion

4 First Amendment retaliation claims against a government employer are analyzed through
5 a sequential five-step inquiry: (1) whether the plaintiff spoke on a matter of public concern; (2)
6 whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's
7 protected speech was a substantial or motivating factor in the adverse employment action; (4)
8 whether the state employer had an adequate justification for treating the employee differently
9 from other members of the general public; and (5) whether the state employer would have taken
10 the adverse employment action even absent the protected speech. Huppert v. City of Pittsburg,
11 574 F.3d 696, 702 (9th Cir. 2009); Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009).

12 Here, it is not at all clear to the Court which conduct Cooper contends is protected by the
13 First Amendment. As a consequence, the Court cannot determine whether the individual
14 Defendants even had knowledge of Cooper's protected speech. If a defendant does not have
15 knowledge of protected speech, then the protected speech cannot be a substantial or motivating
16 factor in any adverse employment actions. See Alpha Energy Savers, Inc. v. Hansen, 381 F.3d
17 917, 928 (9th Cir. 2004); Keyser v. Sacramento City Unified Sch. Dist., 265 F.3d 741, 750-52
18 (9th Cir. 2001). In the absence of an opposition, the Court will dismiss this cause of action for
19 two reasons: (1) failure to sufficiently identify which speech is entitled to First Amendment
20 protection, and (2) failure to allege that the Defendants had knowledge of the protected speech.

21
22 **5. 42 U.S.C. § 1986 – Failure To Supervise (Fourth Claim)**

23 In opposition, Plaintiff states that she does not oppose dismissal of this cause of action.
24 See Opposition at 1 n.1. In light of the express non-opposition, the Court will dismiss this claim.

25
26 **6. Fourteenth Amendment – Constructive Discharge (Fifth Claim)**

27 Arguments

28 Defendants argue that there are no allegations that Cate personally participated in any

1 conduct. There are also no allegations that Cate knew of improper conduct against Cooper, or
2 that he implemented or promulgated a policy that harmed Cooper. Thus, there is no supervisor
3 liability available against Cate. Further, the allegations are not sufficiently severe that they rise
4 to the level of a constructive discharge. For example, the Ninth Circuit has held that there was
5 no constructive discharge as a matter of law where an employee was told that he should leave
6 employment, was told he would be referred for counseling, was assigned cases that were beneath
7 him, and was given the cold shoulder, but was never demoted, disciplined, or docked pay. Here,
8 there are no allegations of pay cuts, demotions, or discipline. The allegations are not so severe
9 that a reasonable person would have found the working conditions to be intolerable.

10 Cooper argues that the SAC plausibly shows a constructive discharge since it alleges a
11 series of events, and those events led to the creation of a hostile environment and a constructive
12 discharge. The continuous acts would have caused any reasonable person to resign.

13 Discussion

14 To establish a § 1983 equal protection violation, a plaintiff must show “that the
15 defendants, acting under color of state law, discriminated against them as members of an
16 identifiable class and that the discrimination was intentional.” Flores v. Morgan Hill Unified
17 Sch. Dist., 324 F.3d 1130, 1134 (9th Cir. 2003). That is, a plaintiff must show that the
18 defendant acted with an intent or purpose to discriminate against her based upon her membership
19 in a protected class. Serrano v. Francis, 345 F.3d 1071, 1082 (9th Cir. 2003); Barren v.
20 Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998). Here, there are no allegations under this cause
21 of action that plausibly suggest that Defendants intentionally engaged in conduct because of
22 Cooper’s membership in an identifiable class. Thus, dismissal is appropriate.¹¹

23 With respect to due process, Cooper does not indicate whether she is relying on
24 substantive due process or procedural due process. To the extent that she relies on substantive
25 due process, for the reasons discussed above, qualified immunity is appropriate. See Pearson,

27 ¹¹Contrary to Cate’s argument, the allegations under this cause of action indicate that Cate knew that
28 Cooper’s working conditions had become intolerable, but he failed to take corrective action. See SAC at ¶ 28. This
indicates supervisor liability. See Menotti, 409 F.3d at 1149. Nevertheless, since there is no equal protection claim
pled, there is no supervisor liability for an equal protection claim.

1 129 S.Ct. at 815-16, 821; Kern, 231 Fed. Appx. at 622; Lum 876 F.2d at 1389. To the extent that
2 Cooper relies on procedural due process, dismissal is appropriate because she has failed to allege
3 a lack of process. See Portman, 995 F.2d at 904.

4 Also, if state law provides a sufficient property interest in continued employment, then
5 conduct that rises to the level of a constructive discharge may constitute a deprivation of that
6 property interest. See Huskey v. City of San Jose, 204 F.3d 893, 900-02 (9th Cir. 2000); Parrett
7 v. Connersville, 737 F.2d 690, 694 (7th Cir. 1984). “A constructive discharge occurs when the
8 working conditions deteriorate. . . to the point that they become sufficiently extraordinary and
9 egregious to overcome the normal motivation of a competent, diligent, and reasonable employee
10 to remain on the job to earn a livelihood and to serve his or her employer.” Poland v. Chertoff,
11 494 F.3d 1174, 1184 (9th Cir. 2007); Brooks v. City of San Mateo, 229 F.3d 917, 930 (9th Cir.
12 2000). The bar for a constructive discharge is set high. Poland, 494 F.3d at 1184. Constructive
13 discharge requires a showing that a reasonable person in the plaintiff’s position would have felt
14 that she was forced to quit because of intolerable and discriminatory working conditions.
15 Huskey, 204 F.3d at 900. Whether working conditions have become so intolerable as to justify a
16 reasonable employee’s decision to resign is normally a question of fact for the jury, but, in
17 appropriate cases, the court may determine that a plaintiff’s allegations are insufficient to
18 establish intolerable working conditions. Huskey, 204 F.3d at 900; (citing Schnidrig v.
19 Columbia Mach., Inc., 80 F.3d 1406, 1411-12 (9th Cir. 1996)).

20 Here, the SAC contains a lengthy list of occurrences that Cooper contends plausibly
21 shows a constructive discharge. Between 2006 and 2009, the SAC alleges two instances of harsh
22 words from supervisors (in January 2008 and December 2008),¹² one instance of discipline (in
23 December 2008),¹³ one instance of being asked by a superior to do something against established
24 policy (in May 2009), two instances of being denied overtime (in February 2009 and October

25
26 ¹²There was also the incident with Capt. Harding that occurred in January 2008, but Cooper withdrew her
27 complaint against Harding. Without further explanation, the withdrawal of the complaint indicates that the incident
was minor in nature.

28 ¹³The SAC alleges that Cooper was informed of two instances (in June 2009 and July 2009) where either
Tann or Sanders wanted Cooper disciplined or “written up.” However, there are no other allegations that Cooper
was actually disciplined. Paragraph 9(g) is the only section that expressly alleges that Cooper was disciplined.

1 2009), and redirection and loss of duties following a directive that all CDC facilities, not just the
2 Prison, reduce all non-essential visitation (in May 2009).¹⁴ There are no allegations that Cooper
3 was demoted or suffered a cut in pay.¹⁵ These events allegedly led to Cooper's resignation on
4 December 29, 2009.¹⁶

5 This case appears to be similar to *Huskey*. In that case, David Huskey experienced a
6 lower performance evaluation, cold relationships with his supervisors and staff, harsh criticisms
7 from his supervisors, reassignments, significantly reduced responsibilities, was told that he
8 should look for a new job, and was told that if he stayed at the office that he would be sent to
9 counseling. See Huskey, 204 F.3d at 896-98. This conduct occurred between November 1995
10 and December 1996. See id. The Ninth Circuit found that this conduct was not sufficiently
11 intolerable to constitute a constructive discharge. See id. at 901. "Because he failed to allege
12 facts sufficient to support a finding of constructive discharge, Huskey also failed to allege facts
13 sufficient to support a finding that he was deprived of a property interest." Id. at 902.

14 It is true that there are differences between Cooper's allegations and the facts in *Huskey*.¹⁷
15 However, it is not apparent that those differences are material. Cooper's opposition is brief and
16

17 ¹⁴However, in March 2007, Cooper complained in writing about an undue and excessive work load. There
18 are no allegations to indicate that Cooper's work load was reduced in response to this letter. Without further
19 allegations, a reduction in Cooper's duties would seem to be consistent with Cooper's March 2007 letter.

20 ¹⁵As noted, Cooper alleges two instances of being denied overtime. However, Cooper does not allege that
21 she was guaranteed any amount of overtime as part of her compensation. Thus, her pay was not cut.

22 ¹⁶There are other occurrences alleged in the SAC, but those allegations, as currently pled, are not probative.
23 For instance, Cooper alleges that she was sent for "random drug testing." However, as pled, random drug testing is
24 just that – random. There are no allegations that the drug testing was not truly random, or that her position was
25 exempt from such testing, or that she was excessively tested. Cooper also alleges that she received on the job
26 training. On its face, on the job training would appear to be innocuous. The SAC does not allege either that on job
27 training constitutes a discipline or that Cooper's on the job training was improper or unjustified. Cooper also alleges
28 that, in April 2009, Tann directed that Cooper was to inform another captain if Cooper deviated from her schedule.
However, Lattimore countermanded this order in response to Cooper's complaint, and there is no indication that
Cooper ever actually reported to the captain. In other words, Cooper's complaint was sustained, and she obtained
relief from Lattimore. Finally, Cooper alleges that her April 2009 complaint of discrimination and harassment was
not sustained. However, the facts alleged in the SAC do not show actionable discrimination or harassment.

¹⁷For example, there are no allegations that a superior asked Huskey to do something that was contrary to
established policy. However, Tann made the request on May 1, 2009. There is no indication that he or anyone else
ever again asked Cooper to violate established policy. In other words, over seven months elapsed from this incident
in May to Cooper's December resignation. Further, there is no indication that any negative consequences flowed
from this incident.

1 significantly does not address *Huskey* in any manner. Cooper does not cite cases that either
2 distinguish *Huskey* or indicate that the facts as currently pled are sufficient to show a constructive
3 discharge. As noted, constructive discharge is a high bar. Poland, 494 F.3d at 1184. This theory
4 requires facts that indicate working conditions are so severe and intolerable that a reasonable
5 person would feel forced to quit. See Poland, 494 F.3d at 1184; Huskey, 204 F.3d at 900. As
6 currently pled, the facts are too similar to *Huskey* and do not indicate that a reasonable person
7 would have found the conditions intolerable.¹⁸ Dismissal of this claim is appropriate. See
8 Huskey, 204 F.3d at 896-902.

9
10 **7. Title VII – Race – Terms & Conditions (Sixth & Eleventh Claims)**

11 Arguments

12 Defendants argue that Cooper has failed to allege a constructive discharge, and thus has
13 failed to allege any adverse employment actions. Further, this claim fails because there are no
14 facts which indicate that other employees were treated more favorably

15 Discussion

16 Title VII prohibits discrimination in the employment context “because of” *inter alia* an
17 employee’s race. See 42 U.S.C. § 2000e-2(a)(1); McGinest, 360 F.3d at 1112. One way of
18 showing discrimination because of race is through direct evidence, such as the use of racial
19 epithets by decision makers or being told that the adverse conduct is occurring because of race.
20 Dominguez-Curry v. Nev. Transp. Dep’t, 424 F.3d 1027, 1038-39 (9th Cir. 2005). Another
21 method of showing that discrimination is because of race is by establishing a *prima facie* case of
22 discrimination through the *McDonnell Douglas* framework, which requires a plaintiff to show:
23 (1) he belongs to a protected class; (2) he was qualified for the position; (3) he was subject to an
24 adverse employment action; and (4) similarly situated employees not in his protected class
25 received more favorable treatment. Kang v. U. Lim Am., Inc., 296 F.3d 810, 818 (9th Cir. 2002).

26 Here, Cooper’s allegations are too conclusory. There is an absence of factual allegations

27
28 ¹⁸The Court is not requiring a heightened pleading standard. It is not necessary for Cooper to allege every fact that she has to support her constructive discharge claim. However, the numerous facts that are pled do not show an objectively egregious and intolerable work environment.

1 that plausibly indicate that Cooper was treated disparately because of her race. There are no
2 allegations that decision makers used racial epithets or told Cooper that what was occurring was
3 because of her race. Further, there are no allegations that other similarly situated employees, who
4 were not of Cooper's race, were treated more favorably. While Cooper does not need to marshal
5 and allege her entire case, she needs to allege enough facts that plausibly indicate that adverse
6 employment actions were taken against her because of race.¹⁹ See Iqbal, 129 S.Ct. at 1949; Starr,
7 652 F.3d at 1216. Dismissal of this cause of action is appropriate.

8
9 **8. Title VII – Gender – Terms & Conditions (Seventh & Eleventh Claims)**

10 *Defendant's Argument*

11 Defendants argue that this claim fails for the same reasons as her Title VII race claim.
12 Cooper fails to allege that she suffered an adverse action and that male employees with similar
13 qualifications were treated more favorably.

14 *Discussion*

15 For the same reason that Cooper's Title VII racial disparate treatment claim is not
16 sufficiently alleged, so too is this claim for Title VII gender/sex disparate treatment. There are
17 neither allegations of direct evidence related to gender, nor are there allegations that indicate that
18 similarly situated men were treated more favorably. See Dominguez-Curry, 424 F.3d at 1038-39;
19 Villiarimo v. Aloha Island Air, Inc. 281 F.3d 1054, 1062 (9th Cir. 2002). The SAC does not
20 plausibly indicate that adverse employment actions were taken against Cooper because of gender.
21 Accordingly, dismissal is appropriate.

22
23 **9. Title VII – Retaliation (Eighth Claim)**

24 *Defendant's Argument*

25 Defendants concede that Cooper's filed complaint against Capt. Harding is protected
26 activity under Title VII. However, there are insufficient facts alleged to indicate a causal link
27

28 ¹⁹For example, as discussed below, an allegation like the one found at ¶ 42 (dealing with disparate treatment due to age) would be sufficient.

1 between any adverse action and Cooper's protected complaint. Cooper does not attempt to link
2 any of the acts alleged against the individual defendants, nor does she even allege that the
3 individual defendants were aware of Cooper's protected activity.

4 Cooper states that the individual Defendants knew about Cooper's protected activity, and
5 the adverse actions that they took against her were temporally related to her protected activity.

6 Discussion

7 In order to establish a prima facie case of retaliation under Title VII, a plaintiff must
8 show that: (1) she engaged in an activity protected under Title VII; (2) her employer subjected
9 her to an adverse employment action; and (3) a causal link exists between the protected activity
10 and the adverse employment action. See Nilsson v. City of Mesa, 503 F.3d 947, 953-54 (9th Cir.
11 2007); Brooks, 229 F.3d at 928. The second element requires a showing that "a reasonable
12 employee would have found the challenged action materially adverse, which in this context
13 means it well might have dissuaded a reasonable worker from making or supporting a charge of
14 discrimination." Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006);
15 Morales-Vallellanes v. Potter, 605 F.3d 27, 33 (1st Cir. 2010). "[C]ausation can be inferred from
16 timing alone where an adverse employment action follows on the heels of protected activity."
17 Van Asdale v. Int'l Game Tech., 577 F.3d 989, 1002 (9th Cir. 2009). However, the plaintiff must
18 show that the particular decision maker who authorized or committed the adverse employment
19 action was aware that the plaintiff had engaged in protected activity. Raad v. Fairbanks N. Star
20 Borough, 323 F.3d 1185, 1197 (9th Cir. 2003); Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796
21 (9th Cir. 1982); Gunther v. County of Washington, 623 F.2d 1303, 1316 (9th Cir. 1979).

22 Here, there are insufficient allegations regarding a link from protected conduct to adverse
23 employment actions. Further, there are insufficient allegations that those who engaged in the
24 adverse employment actions had knowledge of Cooper's protected conduct. Defendants are
25 correct that the only individuals who appear to have been aware of protected conduct were Cate
26 and Lattimore. See SAC at ¶¶ 9(e), (j). However, there are no allegations that either Cate or
27 Lattimore did anything towards/against Cooper. The conduct alleged is by other individuals who
28 are not alleged to have had knowledge of any protected conduct by Cooper. Cf. Raad, 323 F.3d

1 at 1197; Cohen, 686 F.2d at 796; Gunther, 623 F.3d at 1316. Without allegations that the
2 individuals who adversely treated Cooper were aware of her protected conduct, or at least were
3 acting pursuant to the orders of those who were aware of Cooper's protected conduct, see id., the
4 SAC's retaliation claim has not been plausibly alleged. Dismissal of this claim is appropriate.

5
6 **10. Title VII – Retaliatory Hostile Work Environment (Ninth Claim)**

7 *Defendant's Argument*

8 Defendants argue that Cooper has failed to allege facts from which it can be plausibly
9 inferred that those who were responsible for creating the hostile environment knew that Cooper
10 had engaged in protected activity.

11 *Discussion*

12 It is possible for words or conduct that are done in retaliation for protected conduct to
13 eventually rise to the level of a hostile work environment. See Hardage v. CBS Broad. Inc., 427
14 F.3d 1177, 1189 (9th Cir. 2005). However, Defendants are correct. For the same reason that
15 Cooper's eighth claim for retaliation fails, so too fails this claim. See Raad, 323 F.3d at 1197;
16 Cohen, 686 F.2d at 796; Gunther, 623 F.3d at 1316. Dismissal is appropriate.

17
18 **11. Title VII – Race – Hostile Work Environment (Tenth Claim)**

19 *Defendant's Argument*

20 Defendants argue that, for the same reasons that her second cause of action fail, so too
21 fails this claim for hostile work environment.

22 *Discussion*

23 CDC is correct. For the same reasons that were discussed with respect to the second
24 cause of action, dismissal of this cause of action is appropriate.

25
26 **12. Age Discrimination in Employment Act (Twelfth Claim)**

27 *Defendant's Argument*

28 Defendants argue that there are no facts alleged that show younger employees were

1 treated more favorably. The allegation that younger employees were treated better is an
2 insufficient, conclusory statement.

3 Cooper states that the SAC sufficiently alleges a claim for age discrimination.

4 Discussion

5 At ¶ 42, the SAC alleges: “. . . CDC treated employees with [Cooper’s] rank and
6 classification who were substantially younger than she more favorably than it treated her,
7 including but not limited to, not redirecting them to out of class positions” This allegation
8 sufficiently identifies an example of how substantially younger employees were treated more
9 favorably. Dismissal is not appropriate.

10
11 **13. Punitive Damages**

12 Arguments

13 Defendants argue that, because there are no viable claims alleged against the individual
14 defendants, her request for punitive damages fails.

15 Cooper argues that punitive damages may be awarded against the individual Defendants.

16 Discussion²⁰

17 The only viable claim alleged in the SAC is pursuant to the Age Discrimination in
18 Employment Act (ADEA) (29 U.S.C. § 621 et seq.). However, punitive damages are not
19 available under the ADEA. See Ahlmeyer v. Nevada Sys. of Higher Educ., 555 F.3d 1051, 1059
20 (9th Cir. 2009); Bruno v. Western Elec. Co., 829 F.2d 957, 966-967 (10th Cir. 1987). Because
21 there are no viable causes of action alleged against the individual Defendants, Cooper’s prayer
22 for punitive damages will be dismissed.

23
24 **CONCLUSION**

25 Defendants move to dismiss all of claims against them.

26
27
28

²⁰This motion is brought as a motion to strike. Recently, the Ninth Circuit held that a Rule 12(f) motion is not the proper vehicle to dismiss damages that are not available as a matter of law; instead, a Rule 12(b)(6) or Rule 56 motion is proper. See Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 974-75 (9th Cir. 2010). As such, the Court will view Defendants’ Rule 12(f) motion as a Rule 12(b)(6) motion.

1 As to the 42 U.S.C. § 1983 claims against CDC, dismissal with prejudice is appropriate
2 because CDC enjoys Eleventh Amendment immunity and is not a person under that law.

3 As to the first cause of action for violation of the Fourteenth Amendment due process
4 clause, dismissal is appropriate. With respect to any substantive due process claim, the law is not
5 clearly established that a public employee has a substantive due process right to continued
6 employment. Thus, qualified immunity is appropriate, and dismissal of such a claim will be with
7 prejudice. With respect to any procedural due process claims about the particular position of
8 Visiting Lieutenant or overtime opportunity, dismissal with prejudice is appropriate because
9 Cooper's opposition does not address Defendants' arguments and did not distinguish *Stiesberg*.
10 With respect to a procedural due process right to continued employment, dismissal is appropriate
11 because the first cause of action does not expressly identify a protected property interest, explain
12 how she was deprived of that interest, or allege a lack of process. However, since it is not clear
13 that amendment of this claim would be futile, dismissal will be without prejudice.

14 As to the second cause of action for violation of the Fourteenth Amendment equal
15 protection clause, the SAC's allegations do not plausibly indicate that an objectively hostile
16 environment was created. Because it is not clear that amendment would be futile, dismissal will
17 be without prejudice.

18 As to the third cause of action for retaliation, dismissal is appropriate because the SAC
19 does not sufficiently identify which speech is entitled to First Amendment protection, and does
20 not sufficiently allege that the Defendants had knowledge of protected speech. Because it is not
21 clear that amendment would be futile, dismissal will be without prejudice.

22 As to the fourth cause of action for violation of 42 U.S.C. § 1986, dismissal is appropriate
23 because Cooper has agreed to withdraw this cause of action.

24 As to the fifth cause of action for Fourteenth Amendment constructive discharge,
25 dismissal is appropriate for the same reasons identified under the first cause of action.
26 Additionally, dismissal is appropriate because the allegations do not sufficiently indicate
27 objectively intolerable working conditions. Because it is not clear that amendment would be
28 futile, dismissal of any constructive discharge procedural due process claim will be without

1 prejudice.²¹

2 As to the sixth cause of action for Title VII disparate treatment based on race, dismissal is
3 appropriate since the SAC does not plausibly indicate that Cooper was treated disparately
4 because of her race. Because it is not apparent that amendment would be futile, dismissal will be
5 without prejudice.

6 As to the seventh cause of action for Title VII disparate treatment based on gender,
7 dismissal is appropriate since the SAC does not plausibly indicate that Cooper was treated
8 disparately because of her gender. Because it is not apparent that amendment would be futile,
9 dismissal will be without prejudice.

10 As to the eighth cause of action for Title VII retaliation, dismissal is appropriate because
11 there are insufficient allegations that those who engaged in retaliatory conduct either knew of the
12 protected conduct or were directed to act by those who were aware of the protected conduct.
13 Because it is not apparent that amendment would be futile, dismissal will be without prejudice.

14 As to the ninth cause of action for Title VII retaliatory hostile work environment,
15 dismissal without prejudice is appropriate for the same reasons that the eighth cause of action
16 was dismissed.

17 As to the tenth cause of action for Title VII racial hostile work environment, dismissal
18 without prejudice is appropriate for the same reasons that the second cause of action was
19 dismissed.

20 As to the eleventh cause of action, dismissal is appropriate because it is duplicative of the
21 sixth and seventh causes of action.

22 As to the twelfth cause of action, dismissal is inappropriate because the SAC alleges that
23 younger employees were treated more favorably with respect to redirection/reassignment.

24 Finally, dismissal without prejudice of the SAC's prayer for punitive damages is
25 appropriate because there are no viable causes of action in the SAC that provide for punitive
26 damages.

27
28 ²¹Defendants did not move for qualified immunity on the fifth cause of action. However, from the SAC and
the opposition, it is not clear that there is any distinction between the first and fifth causes of action. As such,
qualified immunity is appropriate for any substantive due process claim regarding continued public employment.

1 Accordingly, IT IS HEREBY ORDERED that Defendants' motion to dismiss is
2 GRANTED in part, and DENIED in part as follows:

- 3 1. All 42 U.S.C. § 1983 claims against Defendant CDC are DISMISSED with prejudice;
- 4 2. The Fourteenth Amendment substantive due process claims against the individual
5 Defendants are DISMISSED with prejudice on the grounds of qualified immunity;
- 6 3. The fourth cause of action is DISMISSED pursuant to Cooper's agreed dismissal;
- 7 4. The eleventh cause of action is DISMISSED as duplicative;
- 8 5. The first, second, third, fifth, sixth, seventh, eighth, ninth, and tenth causes of action are
9 DISMISSED without prejudice;
- 10 6. Cooper may file an amended complaint that is consistent with this order within twenty
11 (20) days of service of this order; and
- 12 7. If Cooper does not file a timely amended complaint, then Defendants may file an answer
13 within twenty-seven (27) days of service of this order.

14 IT IS SO ORDERED.

15 Dated: November 15, 2011



CHIEF UNITED STATES DISTRICT JUDGE