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NOT FOR PUBLICATION
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Claudia Cristina Rosen,

No. CV-10-0584-PHX-FJM

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Plaintiff,

ORDER

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vs.

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Community Education Centers, Inc.,

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Defendant.

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The court has before it plaintiff’s motion for leave to file a second amended complaint (doc. 34), defendant Community Education Center’s (“CEC”) response (doc. 37), and plaintiff’s amended reply (doc. 44).¹ Defendant CEC owns and operates private prisons, pursuant to a contract with the Arizona Department of Corrections. Since 2007, plaintiff has been employed by CEC as an officer at Yuma Detention Center Facility. Antonio Morales was also employed by defendant CEC, and was plaintiff’s immediate supervisor. Plaintiff claims that on May 19, 2009, Morales assaulted and battered her. Plaintiff alleges that the assault was based upon her gender.

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In her first complaint, Plaintiff named Morales as a defendant (doc. 1). Following

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¹Plaintiff has also filed a third motion for leave to amend her complaint (doc. 46). As it is not yet ripe, we do not consider the amendments proposed in that motion.

1 receipt of the complaint, defense counsel wrote to plaintiff’s counsel to outline perceived
2 deficiencies in several of the counts, including the claims for constructive discharge,
3 violation of public policy, wrongful retaliation, and wrongful termination. Response to
4 Motion to Amend, ex. A. Plaintiff subsequently filed a first amended complaint, which
5 asserted a new claim for negligent supervision against defendant CEC (doc. 19). Defense
6 counsel again wrote to plaintiff’s counsel, this time requesting the dismissal of the
7 constructive discharge, wrongful termination, and negligent supervision claims against CEC,
8 and the modification of the wrongful retaliation claim. Response to Motion to Amend, ex.
9 B. Plaintiff’s lawyer agreed to dismiss the wrongful termination and negligent supervision
10 claims, “if and only if” defendant agreed to forego a motion to dismiss and to timely file an
11 answer to plaintiff’s complaint, and reserved the right to move for the addition of claims later
12 “as circumstances may warrant.” Response to Motion to Amend, ex. C. The parties
13 stipulated to the dismissal of the wrongful termination and negligent supervision claims
14 against CEC (doc. 22), and CEC filed an answer (doc. 21). Additionally, plaintiff never
15 served Morales, and thus he was dismissed, pursuant to Rule 4(m), Fed. R. Civ. P. (doc. 26).

16 Plaintiff now seeks leave to assert a new claim against CEC for a violation of her civil
17 rights, revive her negligent supervision claim, bring Morales back in as a defendant, and add
18 a claim for assault and battery against Morales. Plaintiff’s motion was timely filed in
19 accordance with the Rule 16 Scheduling Order (doc. 30). Defendant opposes the motion on
20 the grounds of futility, bad faith, and dilatory motive.

21 **I**

22 Defendant argues that plaintiff’s claim for a violation of her civil rights is futile.
23 Plaintiff claims that defendants CEC and Morales conspired to deprive plaintiff of her First
24 Amendment right to petition the government for redress of her grievances by retaliating
25 against her for reporting the assault, in violation of 42 U.S.C. § 1985(3). Plaintiff also
26 alleges that defendants further violated her rights by illegally obstructing the police
27 investigation of the assault and battery against her, and by “denying her right to not be
28 retaliated against for free speech, and her right to protection under Title VII, in violation of

1 42 U.S.C. § 1983.” Amended Complaint, 38–39, ¶ 184.

2 Under Rule 15(a)(2), Fed. R. Civ. P., we grant leave to amend pleadings when “justice
3 so requires.” We deny leave to amend on the basis of futility when the amended complaint
4 could not withstand a motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P. See Townsend
5 v. University of Alaska, 543 F.3d 478, 486 n.6 (9th Cir. 2008) (the “basis for futility is more
6 accurately characterized as a failure to state a claim for relief.”). Therefore, we consider
7 whether plaintiff’s amended complaint contains “well-pleaded factual allegations” that
8 “plausibly give rise to an entitlement to relief” for a violation of her civil rights. Ashcroft
9 v. Iqbal, ___ U.S. ___, ___, 129 S.Ct. 1937, 1950 (2009).

10 “Section 1985(3) provides no substantive rights itself; it merely provides a remedy for
11 violation of the rights it designates.” Great American Federal Sav. & Loan Ass’n v.
12 Novotny, 442 U.S. 366, 372, 99 S.Ct. 2345, 2349 (1979). To state a claim under section
13 1985, plaintiff must allege that defendants (1) conspired; (2) for the purpose of depriving,
14 any person or class of persons of equal protection or equal privileges and immunities; and
15 (3) one or more of the conspirators did or caused to be done any act in furtherance of the
16 object of the conspiracy; whereby another was (4a) injured in his person or property or (4b)
17 deprived of having and exercising any right or privilege of a United States citizen. Griffin
18 v. Breckenridge, 403 U.S. 88, 102–03, 91 S.Ct. 1790, 1798–99 (1971).

19 First, defendant argues that plaintiff cannot show that there was a conspiracy, because
20 a corporation cannot conspire with its agents or employees acting within the scope of their
21 employment. Although defendant claims that it is “well-settled” that a corporation cannot
22 conspire with its employees, they cite no binding precedent to that effect. In fact, there is
23 some disagreement about the applicability of the intracorporate conspiracy doctrine to actions
24 under section 1985, and the United States Court of Appeals for the Ninth Circuit has not yet
25 addressed the issue. See Mustafa v. Clark County School Dist., 157 F.3d 1169, 1181 (9th
26 Cir. 1998) (“This circuit has not yet addressed whether individual members of a single
27 governmental entity can form a ‘conspiracy’ within the meaning of section 1985.”). See also
28 Dickerson v. Alachua County Com’n, 200 F.3d 761, 769, n.9 (11th Cir. 2000) (reviewing the

1 state of the law on the applicability of the intracorporate conspiracy doctrine to section
2 1985(3) claims in different circuits). Moreover, even if a corporation cannot conspire with
3 itself for purposes of a section 1985 claim, “an intracorporate conspiracy may be established
4 where individual defendants are also named and those defendants act outside the scope of
5 their employment for personal reasons.” Garza v. City of Omaha, 814 F.2d 553, 556 (8th
6 Cir. 1987).

7 In her amended complaint, plaintiff does allege that Morales assaulted and battered
8 her while performing his normal course of duties, in accordance with his employment
9 contract with defendant CEC. Amended Complaint, 7, ¶ 25. But we do not interpret this
10 assertion to necessarily mean that Morales was operating on behalf of CEC when he
11 allegedly assaulted and battered plaintiff. Certainly such violence was not in the normal
12 course of his duties, even if it allegedly occurred while Morales was performing his usual
13 work.

14 However, this does not mean that plaintiff has asserted factual allegations that could
15 plausibly entitle her to relief under section 1985. While it is theoretically possible that CEC
16 conspired with other employees or former employees to deprive plaintiff of her civil rights,
17 she offers no allegations to substantiate such an unlikely scenario. The generalized
18 accusation that defendants CEC, Morales, and unnamed employees conspired to deprive
19 plaintiff of her rights, without any indication of the nature of the conspiracy, is insufficient.
20 Therefore, plaintiff has not stated a claim for the element of conspiracy under 42 U.S.C. §
21 1985(3).

22 Additionally, plaintiff has not alleged facts sufficient to establish the second element
23 of a section 1985 claim, the deprivation of plaintiff’s right with a discriminatory purpose.
24 A right created by Title VII is not actionable under § 1985(3). Great American, 442 U.S. at
25 378, 99 S.Ct. at 2352. Thus, plaintiff must show defendant deprived her of another right with
26 “invidiously discriminatory animus.” Griffin, 403 U.S. at 102, 91 S.Ct. at 1798. That
27 discriminatory animus must arise from plaintiff’s membership in a protected class. “Section
28 1985(3) extends beyond race only when the class in question can show that there has been

1 a governmental determination that its members require and warrant special federal assistance
2 in protecting their civil rights.” Orin v. Barclay, 272 F.3d 1207, 1217 n.4 (9th Cir. 2001).
3 Individuals who wish to petition the government are not such a group, and are therefore not
4 protected by section 1985. Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1538 (9th Cir. 1992).

5 Plaintiff claims that it is possible that CEC and its employees conspired to deprive
6 plaintiff of her First Amendment right to petition the government because she is female.
7 Women can constitute a protected class. See Life Ins. Co. of North America v. Reichardt,
8 591 F.2d 499, 505 (9th Cir. 1979) (“women purchasers of disability insurance are a sufficient
9 class”). Plaintiff thus characterizes her claim as an assertion that defendant CEC and its
10 employees, who were operating outside the scope of their employment, conspired to deprive
11 her of her First Amendment right to petition the government for redress, and did so because
12 she is a woman. This is purely speculative, and plaintiff does not offer factual allegations
13 to back up her hypothetical discriminatory animus that motivated the alleged deprivation of
14 her rights. Therefore, plaintiff has not sufficiently plead the second element of a conspiracy
15 claim.

16 We also deny leave to amend to assert any claims for a violation of 42 U.S.C. § 1983.
17 Plaintiff references section 1983 in her claim for a violation of her civil rights, but she has
18 not alleged that any defendant operated under color of law. Any claim under section 1983
19 fails as a matter of law. See Adickes v. S. H. Kress & Co., 398 U.S. 144, 150, 90 S.Ct. 1598,
20 1604 (1970).

21 Because her proposed claim for a violation of her civil rights is futile, we deny leave
22 to amend to add the claim.

23 II

24 Defendant argues that plaintiff’s proposed claim for negligent supervision is futile
25 because under the Arizona Workers’ Compensation Act, the right to recover pursuant to the
26 statute is the “exclusive remedy against the employer or any co-employee acting in the scope
27 of his employment,” unless the injury is caused by defendant’s “wilful misconduct.” A.R.S.
28 § 23-1022(A). Defendant contends that a claim for negligent conduct by supervisors is

1 precluded by the statute. See Irvin Investors, Inc. v. Superior Court In and For County, 166
2 Ariz. 113, 115, 800 P.2d 979, 981 (Ct.App. 1990) (citing Ford v. Revlon, Inc., 153 Ariz. 38,
3 734 P.2d 580 (1987)) (fellow employee’s sexual harassment of plaintiff was an “unexpected
4 injury-causing event” within the coverage of the compensation statute); see also Mosakowski
5 v. PSS World Medical, Inc., 329 F.Supp.2d 1112, 1131 (D.Ariz. 2003).

6 Plaintiff argues that the claim is not futile because it is possible that “some set of
7 facts” may show that plaintiff’s injuries were caused by actions taken outside the scope of
8 any defendant’s employment, but for which CEC would be liable. Plaintiff also claims that
9 because her injuries were allegedly caused by defendant Morales’s assault, a clearly
10 intentional act, her claims falls within the “willful misconduct” exception to the Worker’s
11 Compensation statute.

12 We conclude that plaintiff’s negligent supervision claim is futile. First, plaintiff’s
13 highly speculative “some set of facts” does not constitute “well-pleaded factual allegations.”
14 Iqbal, ___ U.S. at ___, 129 S.Ct. at 1950. Second, in her complaint, plaintiff alleges that
15 defendant CEC knew or should have known about the “harassers” wrongful conduct, and
16 was in a position to intervene to protect plaintiff, which it failed to do. Thus, plaintiff asserts
17 her negligent supervision claim against CEC, not Morales or any other employee. However,
18 plaintiff does not explain how a corporate defendant could have been acting outside the scope
19 of employment, but in a manner for which it would be liable. Third, the culpability at issue
20 in her negligent supervision claim is that of defendant CEC, not that of Morales. Therefore,
21 even if Morales acted willfully when he allegedly assaulted plaintiff, plaintiff’s claim for
22 negligent supervision does not come under the wilful misconduct exception.

23 Plaintiff’s claim for negligent supervision fails as a matter of law. Because we deny
24 leave to amend due to futility, we need not address defendant’s argument that the reassertion
25 of this claim constitutes bad faith on the part of plaintiff.

26 III

27 Defendant argues that plaintiff’s attempt to reassert claims against Morales is made
28 in bad faith and demonstrates a dilatory motive. Plaintiff named Morales in her first

1 complaint, but never served him. Plaintiff later dismissed Morales (as well as three other
2 named defendants and all fictitious defendants), pursuant to Rule 41(a)(1)(A)(I), Fed. R. Civ.
3 P. Defendant argues that plaintiff's attempt to re-name Morales, triggering a new 120 day
4 service period, is an end run around Rule 4(m), Fed. R. Civ. P., and our scheduling order,
5 which required the dismissal of any party not yet served, unless parties showed cause for the
6 failure to serve (doc. 24). Plaintiff counters that defendant's allegations of bad faith ignore
7 that plaintiff expressly reserved the right to move to add claims at a later time, "as
8 circumstances may warrant." Plaintiff further claims that because Morales was never served,
9 there is no prejudice in renaming him. Last, plaintiff explains that she had hoped to hold off
10 on deciding whether to name Morales until the criminal charges against him, stemming from
11 the alleged assault, were resolved. However, because that case is still ongoing, plaintiff
12 decided to proceed with her claims against Morales.

13 In determining whether to grant leave to amend, we consider the presence of bad faith
14 and dilatory motive. See United States ex rel. Lee v. SmithKline Beecham, Inc., 245 F.3d
15 1048, 1052 (9th Cir. 2001). We share defendant's concern about the inefficiency of naming,
16 dropping, and then renaming a defendant. Additionally, plaintiff's contention that she
17 wanted to decide whether or not to name Morales after the resolution of the criminal case
18 does not explain why she named him in her first complaint. However, we agree with plaintiff
19 that the addition of the claims against Morales does not prejudice him, as he has not yet had
20 to respond to plaintiff's complaint. Moreover, under Rule 15(a), Fed. R. Civ. P., we grant
21 leave to amend freely. We conclude that justice requires that plaintiff have the opportunity
22 to seek redress against the individual she believes assaulted her. Nevertheless, plaintiff better
23 serve Morales promptly so that he may comply with our Rule 16 order.

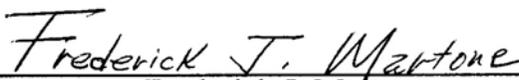
24 **V**

25 **IT IS ORDERED GRANTING IN PART AND DENYING IN PART** plaintiff's
26 motion to amend (doc. 34). **IT IS ORDERED GRANTING** plaintiff leave to amend to
27 assert claims against Antonio Morales. **IT IS ORDERED DENYING** plaintiff leave to
28 assert a claim for a violations of 42 U.S.C. § 1985(3) and 42 U.S.C. § 1983 and for negligent

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supervision.

DATED this 7th day of October, 2010.



Frederick J. Martone
United States District Judge