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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

BARBARA WEBB,

NO. CIV. S-10-0012 LKK/CMK

Plaintiff,

v.

O R D E R

COUNTY OF TRINITY, LINDA  
WRIGHT, LAURIE SUMNER,  
ELIZABETH HAMILTON, and  
DOES 1 through 50, inclusive,

Defendants.

\_\_\_\_\_/

Plaintiff Barbara Webb was formerly employed by the County of Trinity ("County") as a Social Worker Supervisor II. She alleges in her third amended complaint ("TAC") that after various misdeeds by her supervisor and other county employees, she was wrongfully demoted and then terminated. After proceedings before the California State Personnel Board ("SPB"), the County was ordered to reinstate plaintiff, but the County has refused to comply with this order. Following the County's refusal to comply with the SPB order, plaintiff brought the instant action.

1           Since the submission of her original complaint, plaintiff's  
2 claims have narrowed considerably, and plaintiff's operative  
3 complaint now states only one claim, namely that defendants  
4 violated plaintiff's First Amendment right to free speech by  
5 retaliating against her for complaining about the misuse of public  
6 funds. Plaintiff alleges that defendants retaliated against her by  
7 scheming and lying to have her fired, by demoting and subsequently  
8 terminating her employment, and by refusing to reinstate her  
9 despite an SPB order instructing them to do so. Defendants,  
10 however, construe plaintiff's complaint as potentially enumerating  
11 more than one claim. Defendants contend that plaintiff attempts to  
12 articulate several theories of liability for violation of her  
13 "constitutional rights" based on defendants' failure to rehire her  
14 in violation of the SPB order. Defendants also challenge  
15 plaintiff's theory of liability as to defendants Laurie Sumner  
16 ("Sumner"), one of plaintiff's non-supervisory coworkers employed  
17 as a Social Worker, and Elizabeth Hamilton ("Hamilton"), an  
18 Americorps volunteer working under plaintiff's supervision at the  
19 time of plaintiff's termination.

20           Defendants move to partially dismiss the TAC. Specifically,  
21 they move to dismiss the remaining claims against Sumner and  
22 Hamilton as well as any claim based on the "failure to rehire" SPB-  
23 related allegations. In opposing the motion, plaintiff disputes  
24 each of defendants' challenges and reiterates that she invokes the  
25 failure to rehire solely as further evidence of defendants'  
26 continued retaliation against her.

1 The court resolves the motion to dismiss on the papers and  
2 after oral argument. For the reasons stated below, the motion  
3 to dismiss is GRANTED in part and DENIED in part.

4 **I. BACKGROUND**

5 **A. Events Leading to Plaintiff's Termination**

6 Plaintiff began working for the County in August 1999 as a  
7 Social Worker Supervisor II. TAC ¶ 10. In early 2007, plaintiff  
8 concluded that defendant Linda Wright ("Wright"), her supervisor,  
9 was allegedly misdirecting federal funds intended for Child Welfare  
10 Services to the Sheriff's Department. See TAC ¶ 11-12. In January  
11 2007, plaintiff told County Sheriff Lorrac Craig ("Sheriff") that  
12 she did not think the funds should be directed to the Sheriff's  
13 department. TAC ¶ 12. She also told defendant Wright that she was  
14 concerned about the misuse of the funds and would tell auditors  
15 about the alleged misuse during the upcoming federal/state audit.  
16 Id. Three days after plaintiff voiced her concerns to Wright,  
17 plaintiff alleges that Wright "had a clandestine meeting . . . at  
18 Wright's home" with defendant Sumner to discuss a plan "regarding  
19 supervising the Child Welfare Unit." Plaintiff appears to claim  
20 that this meeting initiated the scheme between Wright, Sumner, and  
21 Hamilton, to demote and terminate plaintiff.

22 On February 7, 2007, plaintiff received a notice of intent to  
23 demote. TAC ¶ 15. Plaintiff was placed on administrative leave at  
24 that time. While on leave, plaintiff reported the misuse of funds  
25 to various legislators and other public officials. TAC ¶ 16. On  
26 April 16, 2007, she received notice of her disciplinary demotion

1 to the position of Social Worker III, with a final effective date  
2 of April 16, 2007. Id. She was ordered to return to work on April  
3 30, 2007. Id. Prior to her scheduled return, on April 25, the  
4 County sent a notice of intent to terminate to plaintiff. TAC ¶ 17.  
5 On May 25, 2007, plaintiff received a notice of termination,  
6 effective the same day. Id. Plaintiff continued to report the  
7 alleged misuse of public funds to public officials even after  
8 receiving the notice of termination. TAC ¶ 18.

9 Plaintiff maintains that the demotion and termination were  
10 based on "false allegations" that defendants Wright, Sumner, and  
11 Hamilton made against her as part of their scheme to discredit  
12 plaintiff and to have her demoted and fired so that she would be  
13 unable to tell auditors about the misused funds. TAC ¶ 19, 24.  
14 Plaintiff claims that both Sumner and Hamilton benefitted from her  
15 termination in that they respectively received a promotion and a  
16 permanent position as a Social Worker following plaintiff's  
17 termination. Id.

#### 18 **B. State Administrative Proceedings**

19 Plaintiff challenged her demotion and dismissal before a a  
20 state administrative law judge ("ALJ"). The ALJ held over a dozen  
21 hearings on the matter over the course of two years. Plaintiff  
22 subsequently appealed the ALJ's decision to the SPB. TAC ¶ 20. The  
23 SPB ordered the County to reinstate plaintiff as a Social Worker  
24 III and to give her back pay and benefits, which the County refused  
25 to do. Id. In April 2010, plaintiff alleges that the County made  
26 a sham offer of employment to plaintiff by offering plaintiff a

1 position with the Sheriff's Department, contingent on a  
2 probationary period, for which plaintiff alleges she is not  
3 qualified and cannot pursue, even if it were a legitimate offer,  
4 as a result medical instruction. TAC ¶ 21, 23.

5 Plaintiff argues that none of these events, including the  
6 County's refusal to reinstate her, would have taken place had she  
7 refrained from voicing her concerns regarding the federal funds.  
8 TAC ¶ 22.

### 9 **C. Procedural History**

10 The instant suit was initially filed in state court. Before  
11 serving the complaint on any defendant, plaintiff substituted a  
12 first amended complaint. After service, defendants removed the suit  
13 to federal court on the basis of the federal claims alleged  
14 therein. Defendants then filed a motion to dismiss the complaint  
15 in its entirety. On the parties' stipulation, the court granted  
16 this motion in full and granted plaintiff leave to file an amended  
17 complaint without reaching the merits of the motion. Plaintiff  
18 filed a second amended complaint ("SAC") and defendants filed a  
19 motion to dismiss that complaint in its entirety. On August 10,  
20 2010, the court granted the second motion to dismiss with prejudice  
21 as to all state law claims, denied the motion regarding the alleged  
22 First Amendment violation that is the focus of this complaint, and  
23 granted the motion as to all other federal law claims dismissing  
24 them without prejudice. ECF No. 35. Plaintiff filed the TAC on  
25 August 30, 2010. ECF No. 37.

26 ////

1       **II. STANDARD FOR A FED. R. CIV. P. 12(b)(6) MOTION TO DISMISS**

2           A Fed. R. Civ. P. 12(b)(6) motion challenges a complaint's  
3 compliance with the pleading requirements provided by the Federal  
4 Rules. Under Federal Rule of Civil Procedure 8(a)(2), a pleading  
5 must contain a "short and plain statement of the claim showing that  
6 the pleader is entitled to relief." The complaint must give  
7 defendant "fair notice of what the claim is and the grounds upon  
8 which it rests." Bell Atlantic v. Twombly, 550 U.S. 544, 555  
9 (2007) (internal quotation and modification omitted).

10          To meet this requirement, the complaint must be supported by  
11 factual allegations. Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S.  
12 Ct. 1937, 1950 (2009). "While legal conclusions can provide the  
13 framework of a complaint," neither legal conclusions nor conclusory  
14 statements are themselves sufficient, and such statements are not  
15 entitled to a presumption of truth. Id. at 1949-50. Iqbal and  
16 Twombly therefore prescribe a two step process for evaluation of  
17 motions to dismiss. The court first identifies the non-conclusory  
18 factual allegations, and the court then determines whether these  
19 allegations, taken as true and construed in the light most  
20 favorable to the plaintiff, "plausibly give rise to an entitlement  
21 to relief." Id.; Erickson v. Pardus, 551 U.S. 89 (2007).

22          "Plausibility," as it is used in Twombly and Iqbal, does not  
23 refer to the likelihood that a pleader will succeed in proving the  
24 allegations. Instead, it refers to whether the non-conclusory  
25 factual allegations, when assumed to be true, "allow[] the court  
26 to draw the reasonable inference that the defendant is liable for

1 the misconduct alleged." Iqbal, 129 S.Ct. at 1949. "The  
2 plausibility standard is not akin to a 'probability requirement,'  
3 but it asks for more than a sheer possibility that a defendant has  
4 acted unlawfully." Id. (quoting Twombly, 550 U.S. at 557). A  
5 complaint may fail to show a right to relief either by lacking a  
6 cognizable legal theory or by lacking sufficient facts alleged  
7 under a cognizable legal theory. Balistreri v. Pacifica Police  
8 Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

### 9 III. ANALYSIS

#### 10 A. Whether Non-Supervisory Co-Employees Can Act Under Color 11 of Law.

12 Defendants assert that plaintiff's § 1983 claim is legally  
13 insufficient as to defendants Sumner and Hamilton because non-  
14 supervisory co-employees and subordinates of the plaintiff do not  
15 purport to wield state-conferred authority over the plaintiff, and  
16 therefore could not have acted "under color of law." Defs.' Mem.  
17 at 4-5.

18 A person acts under color of law for purposes of 42 U.S.C. §  
19 1983 if that person "exercise[s] power possessed by virtue of state  
20 law and made possible only because the wrongdoer is clothed with  
21 the authority of state law." West v. Atkins, 487 U.S. 42, 49 (1988)  
22 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).  
23 Whether a state employee acts under color of law turns on the  
24 relationship of the wrongful act to the performance of the  
25 defendant's state duties. Dang Vang v. Vang Xiong X Toyed, 944 F.2d  
26 476, 479 (9th Cir. 1991). Defendants' suggestion that retaliatory

1 behavior towards a co-worker can never implicate state power is  
2 unfounded in both logic and law. A state official may be liable for  
3 co-worker retaliation under section 1983 when the retaliation is  
4 related to state-conferred authority or duties - the same test that  
5 applies when the victim is not a state employee. See Dang Vang, 944  
6 F.2d at 479. Accordingly, the court must determine whether Sumner  
7 and Hamilton's actions in this case were sufficiently "related to  
8 the duties and powers incidental to the job" of a social worker and  
9 an Americorps volunteer,<sup>1</sup> respectively, to state a claim. See  
10 Anthony v. County of Sacramento, Sheriff's Dept., 845 F. Supp.  
11 1396, 1400 (E.D. Cal. 1994) (citing Dang Vang, 944 F.2d at 480).

12 Plaintiff has pled no facts demonstrating that either the job  
13 of a social worker or an Americorps volunteer includes  
14 responsibility for the distribution of funds to Children's  
15 Protective Services and, therefore, encompasses responding to  
16 complaints about misuse of public funds. Without such  
17 responsibility, defendants could not have abused the positions  
18 given to them by the state in allegedly retaliating for speech  
19 protesting improper use of public funds. Therefore, the allegations  
20 that defendants Sumner and Hamilton told retaliatory "lies" about  
21 plaintiff cannot support a viable claim under section 1983.  
22 Although the "false allegations" allegedly occurred in a state-  
23 created workplace, they are independent of the defendants' state

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25 <sup>1</sup> The court assumes, without deciding, that an Americorps  
26 volunteer is a state employee for purposes of section 1983  
liability.



1 roles and functions. See Dang Vang, 944 F.2d at 479-80. Thus, the  
2 court grants defendants' motion to dismiss plaintiff's claim  
3 insofar as they are premised upon a theory that Sumner and  
4 Hamilton's actions in this case were sufficiently related to the  
5 duties and powers incidental to the job for liability under § 1983  
6 to lie.

7 **B. Establishing Section 1983 Liability Via Conspiracy**

8 Plaintiff also attempts to establish defendants Sumner and  
9 Hamilton's liability under § 1983 by alleging that they conspired  
10 with defendant Wright "to deprive plaintiff of constitutional  
11 rights." TAC ¶ 4. An allegation that a private person conspired  
12 with a state official satisfies the requirement that a defendant  
13 acted under color of state authority. Franklin v. Terr, 201 F.3d  
14 1098, 1100 (9th Cir. 2000).

15 To establish the defendants' liability for a conspiracy, a  
16 plaintiff must demonstrate the existence of " 'an agreement or  
17 'meeting of the minds' to violate constitutional rights.' "  
18 Mendocino Env'tl. Center v. Mendocino County, 192 F.3d 1283, 1301  
19 (9th Cir. 2000) (citing United Steelworkers of America v. Phelps  
20 Dodge Corp., 865 F.2d 1539, 1540-41 (9th Cir.1989) (en banc)). The  
21 defendants must have, "by some concerted action, intend[ed] to  
22 accomplish some unlawful objective for the purpose of harming  
23 another which results in damage." Gilbrook v. City of Westminster,  
24 177 F.3d 839, 856 (9th Cir. 1999). Such an agreement need not be  
25 overt, and may be inferred on the basis of circumstantial evidence  
26 such as the actions of the defendants. See id. at 856. For example,

1 demonstrating that the alleged conspirators have committed acts  
2 that "are unlikely to have been undertaken without an agreement"  
3 may allow a jury to infer the existence of a conspiracy. Mendocino  
4 Env'tl. Center, 192 F.3d at 1301 (quoting Kunik v. Racine County,  
5 946 F.2d 1574, 1580 (7th Cir. 1991)).

6 In the instant case, plaintiff has sufficiently pled  
7 circumstantial facts indicating a possible "agreement" between  
8 defendants Wright, Sumner, and Hamilton to demote and terminate  
9 plaintiff. Specifically, plaintiff alleges that Sumner met with  
10 Wright, at Wright's home, to discuss supervision of the unit that  
11 was under plaintiff's supervision at that time. Plaintiff further  
12 alleges that her demotion was based on false allegations that  
13 Wright, Sumner, and Hamilton made after this meeting took place.  
14 TAC ¶ 14.

15 Further, plaintiff alleges that defendant Hamilton  
16 participated in the conspiracy to have plaintiff demoted and fired  
17 by making "false allegations" against her. TAC ¶ 19. Plaintiff has  
18 not pled any facts expressly indicating, circumstantially or  
19 otherwise, that Hamilton made the false allegations as a result an  
20 agreement with Wright. Nonetheless, the timing of Hamilton's  
21 allegedly false statements and the subsequent benefits obtained by  
22 Hamilton after plaintiff's termination are sufficient to infer a  
23 conspiracy.<sup>2</sup>

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24  
25 <sup>2</sup> While the court does not decide whether an Americorps  
26 volunteer is a state employee, it notes that even if such a  
volunteer is not, she may nevertheless be a state actor under §  
1983 where conspiracy with government officials is alleged. See

1 Defendants contend that even assuming they can be said to have  
2 conspired to retaliate against plaintiff for exercising her First  
3 Amendment rights, defendants cannot be held liable for conspiracy  
4 because the intracorporate conspiracy doctrine, which states that  
5 a conspiracy requires agreement between two or more persons or  
6 distinct business entities, would bar such a claim. See United  
7 States v. Hughes Aircraft Co., Inc., 20 F.3d 974, 979 (9th Cir.  
8 1994). The doctrine provides that, as a matter of law, an entity  
9 cannot conspire with its own employees or agents. Hoefler v. Fluor  
10 Daniel, Inc., 92 F. Supp. 2d 1055, 1057 (C.D. Cal. 2000).

11 Defendants assert that defendants are County employees or  
12 County volunteers alleged to have conspired to demote and terminate  
13 plaintiff in retaliation for expressing concern regarding Wright's  
14 misuse of public funds and, thus, that no liability can attach if  
15 the intracorporate conspiracy doctrine applies. Defs.' Mem. at 7.  
16 Defendants concede that the Ninth Circuit has not expressly  
17 addressed whether the doctrine applies either to government  
18 entities or to civil rights claims, see id., but argue that this  
19 court should follow the reasoning of other courts that have applied  
20 the doctrine in both cases.

21 Five circuits have extended the intracorporate conspiracy  
22 doctrine to actions under §§ 1983 and 1985, while five others have  
23 severely limited or questioned the applicability of the doctrine  
24 in the civil rights context. However, even those circuits that

25 \_\_\_\_\_  
26 Adickes v. Kress & Co., 398 U.S. 144 (1970).

1 extend the doctrine to civil rights cases would not apply it here.  
2 Courts have recognized an exception where an officer or agent has  
3 " 'an independent personal stake in achieving the corporation's  
4 illegal objective.' " Buschi v. Kirven, 775 F.2d 1240, 1252 (4th  
5 Cir. 1985); see also Garza v. City of Omaha, 814 F.2d 553, 556 (8th  
6 Cir. 1987).

7       If it were clear that the individual defendants acted pursuant  
8 to a single County policy or objective, the question may be viewed  
9 as more difficult. However, there is no indication that defendants  
10 were acting pursuant to an official County policy or objective. In  
11 fact, plaintiff alleges that "Wright was misdirecting federal  
12 funds" and that Wright threatened to terminate plaintiff if she  
13 informed anyone, including the Board of Supervisors, of Wright's  
14 "misconduct." See TAC ¶ 12, 24. Thus, plaintiff alleges that Wright  
15 had a personal stake in seeking first to deter and later to  
16 retaliate against plaintiff for voicing her concerns regarding the  
17 misuse of public funds. As for defendants Sumner and Hamilton,  
18 plaintiff alleges that they stood to gain, respectively, a  
19 promotion and permanent employment as a result of aiding defendant  
20 Wright in her efforts to demote and terminate plaintiff. TAC ¶ 19.  
21 Plaintiffs allegations, therefore, suggest that defendants were  
22 acting for their own personal purposes. Under these circumstances,  
23 it is clear that the intracorporate conspiracy doctrine does not  
24 apply in this case, even assuming that the doctrine is applicable  
25 to civil rights cases and government entities at all. Accordingly,  
26 the Court denies defendants' motion to dismiss plaintiff's against

1 Sumner and Hamilton insofar as it is premised upon a conspiracy  
2 theory.

3 **C. Denial of a Privilege Created by State Law May**  
4 **Constitute Retaliation**

5 Defendants misconstrue plaintiff's retaliation claim as a §  
6 1983 claim premised on violation of state law. Rather, plaintiff  
7 alleges that defendant Wright, "acting as policymaker on behalf of  
8 the County . . . refused to return plaintiff to work as a Social  
9 Worker III" in violation of an SPB order in retaliation for  
10 plaintiff's exercise of her right of free speech. This constitutes  
11 an allegation of violation of the First Amendment to the U.S.  
12 Constitution, which is actionable under § 1983. In order to prevail  
13 on her claim under § 1983, the plaintiff must prove: (1) she engaged  
14 in constitutionally protected activity; (2) as a result, she was  
15 subjected to adverse action by the defendant that would chill a  
16 person of ordinary firmness from continuing to engage in the  
17 protected activity; and (3) there was a substantial causal  
18 relationship between the constitutionally protected activity and  
19 the adverse action. Blair v. Bethel Sch. Dist., 608 F.3d 540, 543  
20 (9th Cir. 2010) (citing Pinard v. Clatskanie Sch. Dist. 6J, 467  
21 F.3d 755, 770 (9th Cir. 2006)).

22 Here, plaintiff has stated a colorable claim that defendants  
23 retaliated against her by failing to rehire her in violation of the  
24 SPB order. TAC ¶ 22. The alleged refusal of reinstatement in  
25 violation of the SPB order constitutes a denial of a governmental  
26 benefit redressable by § 1983. See e.g., Manhattan Beach Police

1 Officers v. Manhattan Beach, 881 F.2d 816, 819 (9th Cir. 1989).  
2 Therefore, defendants' motion to dismiss the portion of the  
3 retaliation claim that is premised on the County's failure to  
4 reinstate plaintiff is denied.

5 **D. April 2010 Job Offer**

6 Defendants further argue that, even if plaintiff's claim of  
7 retaliation based on the failure to rehire is a viable one,  
8 defendants' are immunized from liability stemming from the April  
9 2010 job offer and the failure to reinstate plaintiff under the  
10 Noerr-Pennington doctrine because the job offer and discussions of  
11 reinstatement "occurred in the course of . . . settlement  
12 negotiations." Defs.' Mem. at 14-15.

13 The Noerr-Pennington doctrine provides that those who petition  
14 the government are "generally immune from statutory liability for  
15 their petitioning conduct." Sosa v. DIRECTV Inc., 437 F.3d 923, 929  
16 (9th Cir. 2006); see also Empress LLC v. City and County of San  
17 Francisco, 419 F.3d 1052, 1056 (9th Cir. 2005) (applying doctrine  
18 to claims under § 1983 that are based on the petitioning of public  
19 authorities). This doctrine simply does not provide any protection  
20 to defendants. Defendants nowhere argue that in making a settlement  
21 offer to plaintiff that they were petitioning the government.  
22 Indeed, it seems unlikely that they could.

23 Defendants, however, do raise a concern as to whether the  
24 offer was made in the context of a settlement discussion. Evidence  
25 of offers to compromise are generally inadmissible. Fed. R. Civ.  
26 P. 408. The purpose of this rule is to "protect the confidentiality

1 of settlement negotiations." McCown v. City of Fontanta, 565 F.3d  
2 1097, 1105 (9th Cir. 2009); see Rhoades v. Avon Products, Inc., 504  
3 F.3d 1151, 1161 (9th Cir. 2007) ("Rule 408 is designed to ensure  
4 that parties may make offers during settlement negotiations without  
5 fear that those same offers will be used to establish liability  
6 should settlement efforts fail.").

7 Defendants assert that the April 2010 job offer "occurred in  
8 the course of and pursuant to settlement negotiations" and,  
9 therefore, is protected activity. Plaintiff, however, maintains  
10 that the April 2010 job offer was completely unrelated to  
11 settlement negotiations. Pl's. Opp. at 7. Under the circumstances,  
12 the court lacks evidence sufficient to determine whether the offer  
13 was made during settlement discussions. Thus, this aspect of  
14 defendants' motion is denied without prejudice.

15 **IV. CONCLUSION**

16 For the reasons stated above, the court GRANTS IN PART  
17 Defendants' motion to dismiss, ECF No. 38, and ORDERS AS FOLLOWS:

18 (1) Defendants' motion is granted only insofar as  
19 plaintiff's claim against Sumner and Hamilton is  
20 premised upon the theory that their action in this case  
21 are sufficiently related to the duties and powers  
22 incidental to their jobs for § 1983 liability to lie.

23 (2) Defendants' motion is otherwise DENIED. The surviving  
24 theories of liability include, inter alia, that Sumner  
25 and Hamilton are liable under § 1983 as conspirators  
26 with government officials and that defendants' failure

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to reinstate plaintiff in violation of the SPB order constitutes a violation of the First Amendment.

(3) Defendants' motion to dismiss allegations of the April 2010 job offer premised upon the Noerr-Pennington doctrine are DENIED WITH PREJUDICE.

(4) Defendants' motion to dismiss allegations of the April 2010 job offer as privileged or otherwise inadmissible is DENIED WITHOUT PREJUDICE.

IT IS SO ORDERED.

DATED: November 3, 2010.

  
LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT