

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOANNE WARWICK,
Plaintiff,
v.

No. C 08-03904 CW
ORDER GRANTING
DEFENDANTS' SUMMARY
JUDGMENT MOTIONS

UNIVERSITY OF THE PACIFIC; CALIFORNIA
DEPARTMENT OF CORRECTIONS AND
REHABILITATION; PATRICIA MILLER;
MATTHEW CATE; MARVIN SPEED; TED RICH;
MICHAEL BRADY; CLAUDIA BELSHAW; JILL
BROWN; JOHN D. STOKES; and GARY
SWARTHOUT,
Defendants.

_____ /
This case arises out of Plaintiff's May 31, 2005 termination as a California Parole Advocacy Program (CalPAP) attorney. Defendant University of the Pacific (UOP) has filed a motion for summary judgment and Defendants California Department of Corrections and Rehabilitation (CDCR), Patricia Miller, Matthew Cate,¹ Marvin Speed, Ted Rich, Michael Brady, Claudia Belshaw, Jill Brown, John D. Stokes and Gary Swarthout have filed a separate motion for summary judgment. Plaintiff Joanne Warwick opposes the

¹Matthew Cate is the Secretary of the CDCR and was not appointed until May, 2008. Although Cate was not the Secretary during the relevant time period of Plaintiff's factual allegations, he was named as a Defendant for the limited purpose of injunctive relief.

1 motions.² The motions were heard on April 8, 2010. Having
2 considered oral argument and all of the papers filed by the
3 parties, the Court GRANTS Defendants' motions for summary judgment.

4 BACKGROUND

5 The CalPAP program was created as a result of the permanent
6 injunction in Valdivia v. Schwarzenegger, No. Civ. S-94-0671 (E.D.
7 Cal. Mar. 9, 2004), which required the State of California to
8 establish a parole revocation attorney program.³ CalPAP is
9 operated by UOP through a contract with the State of California.
10 CalPAP trains, appoints and assigns panel-contracted attorneys to
11 all parolees facing parole revocation proceedings. CalPAP
12 attorneys are paid \$180 per case that they are assigned.

13 In November, 2004, Plaintiff signed an agreement with CalPAP
14 to become an at-will independently contracted CalPAP panel
15 attorney. Case assignments as a CalPAP attorney were dependent on
16 "satisfying the conditions for admittance to correctional
17 facilities" pursuant to the applicable California regulations, such
18 as California Code of Regulations Title 15 §§ 3172.1 and 3178.
19 Fourth Amended Complaint (4AC), Exh. 1 at 1.

20 During her tenure as a CalPAP attorney, Plaintiff voiced her
21 concerns about (1) how clients were assigned to CalPAP attorneys,
22 (2) her difficulties in gaining access to San Quentin to meet with

23 ²Plaintiff does not oppose the motion with respect to the
24 claims against Patricia Miller, Michael Brady, Claudia Belshaw,
25 John Stokes and Gary Swarthout. Therefore, the Court grants
26 summary judgment in favor of those Defendants on all claims brought
27 against them. Plaintiff opposes the motion with respect to the
28 claims against Matthew Cate, Marvin Speed, Ted Rich, Jill Brown,
UOP and CDCR.

³The Court grants Defendant CDCR's request to take judicial
notice of the terms of the injunction.

1 her clients and (3) that Board of Parole Hearings (BPH)⁴ and CDCR
2 officials failed to comply with the law and impeded her ability to
3 serve her parolee clients. She claims that Defendants conspired to
4 terminate her employment with CalPAP in retaliation for voicing
5 several of these concerns.

6 For instance, in February, 2005, Plaintiff complained to a
7 CalPAP supervising staff attorney, Andrew Walker, that, even though
8 she was able to visit her clients in county jail, once they were
9 transferred to San Quentin, she was not given clearance to visit
10 them and they were reassigned to other CalPAP attorneys. Walker
11 wrote to Mary Swanson, the CalPAP program director, stating,
12 "Joanne Warwick is throwing a fit b/c she is not on the Clearance
13 List" for San Quentin. Fuentes Decl., Exh. B(1). Although not
14 clear from the record, apparently San Quentin maintained a list of
15 CalPAP attorneys who were authorized to visit the prison. Swanson
16 contacted Claudia Belshaw, the CDCR employee at San Quentin who
17 acted as the liaison for the Valdivia Task Force, and helped
18 arrange for Plaintiff to be added to this list. It is also not
19 clear from the record exactly when Plaintiff was officially added
20 to the list, but Plaintiff believes that she was added sometime in
21 April, 2005. Warwick Decl., ¶ 19.⁵

22 In April, 2005, Plaintiff also complained to Walker about her
23 difficulties with representing a particular parolee, Johnny Hodge.

24

25 ⁴BPH is a division of CDCR.

26 ⁵To the extent that the Court relied upon evidence to which
27 Defendants objected, the objections are overruled. The Court did
28 not rely on any inadmissible evidence in reaching its decision. To
the extent the Court did not rely on evidence to which Defendants
objected, the objections are overruled as moot.

1 Plaintiff represented Hodge before he was transferred to San
2 Quentin. When Hodge was transferred to San Quentin, Sonia
3 Sandoval, a "prison representative,"⁶ told her that he probably
4 would be assigned to a different CalPAP attorney. Id. Sandoval
5 agreed not to let any other CalPAP attorney see him because
6 Plaintiff was originally assigned to him. Warwick Decl. ¶ 19.

7 Plaintiff visited Hodge and he told her that a different
8 CalPAP attorney had been assigned to him. Plaintiff claims that
9 Hodge's new attorney convinced him to accept a bad plea bargain by
10 telling him that Plaintiff thought the plea deal was in his best
11 interest. Plaintiff claims that she never spoke to Hodge's new
12 attorney about the plea deal and would never have recommended that
13 he take such a deal. Plaintiff was concerned that Hodge did not
14 receive appropriate representation. She complained to Walker.
15 Walker reported this incident to CalPAP Senior Staff Attorney, Paul
16 Lacy. Walker also notified Ted Rich, Deputy Commissioner of the
17 BPH, about the incident. Plaintiff continued to visit Hodge, but
18 claims to have done so "not as a UOP/CalPAP attorney but based on
19 her previous clearance." Opposition at 7. She helped Hodge file a
20 complaint with the California State Bar against the other CalPAP
21 attorney. Plaintiff claims that Lacy responded angrily to her when
22 the two discussed the bar complaint. Warwick Decl. ¶ 26.

23 On May 20, 2005, Plaintiff expressed her frustrations with the
24 CalPAP program in a nine-page letter that she faxed to BPH
25 Executive Director Marvin Speed. In the letter, Plaintiff wrote
26 about "malfeasance by parole and [BPH] staff and how the Valdivia

27
28 ⁶Ms. Sandoval's official position with CDCR and her
relationship to CalPAP is not clear from the record.

1 Injunction and parolee due process rights were not being
2 respected." Warwick Decl. ¶ 28. Plaintiff named Rich, as well as
3 many other BPH and CDCR officials, as those who were responsible
4 for the problems with CalPAP. Warwick Decl., Exh. D. Some of her
5 specific complaints in the letter include denial of access to her
6 clients' files, lack of notice regarding her clients' hearings,
7 failure of prison officials to investigate violations by prison
8 guards and vindictive acts taken against her clients whenever they
9 made complaints to prison officials. Plaintiff also telephoned
10 Speed and left him a voicemail about her concerns.

11 Speed forwarded the voicemail to his special assistant, Ramon
12 Lopez. Lopez wrote Speed an email describing some of the contents
13 of the voicemail. He noted, "One disturbing bit of information
14 from the BRR⁷ is that he observed this attorney 'hug' the parolee
15 in the hallway following a hearing, telling him that 'everything
16 would be alright.'" Fuentes Decl., Exh. A(1). Speed forwarded
17 Lopez's email to Mary Swanson asking her for advice on how to deal
18 with Plaintiff's concerns raised in her letter. Speed did not
19 mention the hug incident or Lopez's email. Swanson responded by
20 asking Speed to fax her the letter and telling him that "we can
21 take it from here." Id. She also told him, "You may want to
22 advise her, in writing, that there are procedures in place for the
23 [BPH] to hear cases and that she should follow those procedures. I
24 can assure you that we will deal with this as swiftly as possible
25 on our end." Id. She also asked Speed, "Is CDC going to take any
26 action regarding her clearance into the institutions? Part of the

27
28 ⁷BRR appears to be an acronym for a prison official, but the parties do not define it for the Court.

1 agreement to be a contract attorney with CalPAP is that the
2 attorney has standing to enter the institution. I would like to
3 know what action CDC is planning on taking." Id. Speed responded,
4 "I need to check on the CDC side. I will get back to you on this."
5 Id.

6 On May 24, 2005, Lacy called Plaintiff to say that the
7 "'higher-ups' at the [BPH] were not happy with [her] letter."
8 Warwick Decl. ¶ 29.

9 On May 26, 2005, Plaintiff picked up a parolee named David
10 Frenna when he was released from San Quentin and drove him to the
11 Ukiah parole office⁸ for an initial interview with Michael Miller,
12 his parole officer. Mr. Miller claims that, prior to arriving for
13 the visit, Plaintiff called him and told him that she had "paid for
14 a motel room for parolee Frenna using her CalPAP earnings since she
15 couldn't do much else for him." M. Miller Decl. ¶ 4. Mr. Miller
16 informed his supervisor, David Romero, of this telephone call.
17 This information was relayed by email to CDCR Facilities Captain
18 Patricia Miller on the morning of May 27. Ms. Miller became
19 concerned that "Plaintiff might have become overly-familiar with
20 her clients." P. Miller Decl. ¶ 5. She was worried that such
21 "over-familiarity could jeopardize the safety and security of an
22 institution, e.g. an inmate might attempt to use an outsider to
23 smuggle contraband into prison, or to carry coded messages outside
24 of prison in order to commit crime." Id. Therefore, Ms. Miller
25 telephoned Belshaw to share this information. Ms. Miller wanted
26

27 ⁸The Court takes judicial notice that Ukiah is approximately
28 100 miles from San Quentin, a drive of approximately two hours.
Google Maps, <http://maps.google.com>.

1 Belshaw to give this information to the warden "in hopes of pulling
2 [Plaintiff's] Gate Pass Clearance." P. Miller Decl., Exh. A.
3 Belshaw stated that she referred the information to the warden's
4 office because only the warden of an institution can revoke a gate
5 pass clearance. Belshaw Dep. 75:19-23.

6 Also on May 27, Mike Brady, a CDCR employee, sent an email to
7 Swanson and Speed stating, "There appears to be a continuing
8 problem with Ms. Warwick being over familiar with the parolees.
9 There is an inquiry into her behavior, and I would suggest that you
10 suspend giving her work pending the outcome of the inquiry. This
11 is a very serious matter in that it seriously compromises the
12 safety and security of the institution and the revocation process.
13 Your cooperation would be greatly appreciated." Fuentes Decl.,
14 Exh. (D)(3). Included in Brady's email was an email from another
15 CDCR employee, George Lehman, which stated, in relevant part, "Ted
16 Rich tells me that Ms. Warwick picked up a parolee at the gate upon
17 release, took him out to lunch, went with him to the parole office,
18 made a scene by demanding gate money and then took him to a motel.
19 I have no idea how these facts were authenticated but it sounds
20 kinda bad. Has CalPAP severed ties with her? Has CDCR even been
21 notified of any of the going's-on? Ted wanted to go to the Warden
22 with this information and I told him not to unless I called him
23 back. I want our DC's [Deputy Commissioner's] to stay out of this
24 if possible." Id. Swanson was out of the office, but she replied
25 to the email and told Brady that she would have Rick Heyer "handle
26 this matter during [her] absence." Id. Rick Heyer was a senior
27 attorney at CalPAP.

28 On the same day, May 27, the warden, Jill Brown, became aware

1 of Plaintiff's familiarity with parolees. Brown recalls talking on
2 the telephone about Plaintiff, although she can't remember whom she
3 spoke with or at what point in the day she spoke with this
4 individual. Lui Decl., Brown Dep. 37:24-38:2. Brown learned that
5 Plaintiff "visited an inmate after his revocation proceedings had
6 already been concluded, which was unusual given the fact that she
7 was, according to what [Brown] was told, his CalPAP attorney, and
8 CalPAP attorneys had contact with their clients prior to and in
9 preparation for the revocation proceedings." Id. at 27:6-12.
10 Brown was also told that Plaintiff "picked up [an] inmate at the
11 gate, drove him to the Ukiah parole office, engaged in some
12 discussion with the parole agent there and then subsequently
13 accompanied or drove the parolee [sic], now parolee, to a motel in
14 Ukiah." Id. at 30:6-10. With this information, Brown was
15 "sufficiently concerned" about the safety and security of San
16 Quentin that she decided to revoke Plaintiff's gate clearance
17 temporarily. Id. at 40:3. She concluded that she had "reason to
18 believe at that point that it was possible that [Plaintiff] used
19 her status as a CalPAP attorney to gain access to the institution
20 for personal reasons, and that was my concern." Id. at 83:15-18.
21 At the time Brown made this decision, she did not know that CalPAP
22 might terminate Plaintiff if Plaintiff could no longer enter San
23 Quentin.

24 Later that day, Plaintiff's gate clearance was revoked. Prior
25 to losing her gate clearance, Plaintiff did not receive any warning
26 that she had violated any policy, any notice that her gate
27 clearance would be revoked or any hearing to challenge the
28 revocation. CDCR did not provide Plaintiff with a written

1 explanation for the reason behind her gate clearance revocation
2 until March 1, 2006, long after it had been reinstated. At that
3 time, CDCR claimed that her "visiting privileges" had been
4 suspended because she had continued to visit prisoners in her role
5 as a CalPAP attorney after the legal proceedings concerning parole
6 had concluded. CDCR stated, "The Department considers such action
7 as an abuse of the privilege of attorney visiting and constitutes
8 good cause for a suspension of visiting privileges." Warwick
9 Decl., Exh. O.

10 On May 30, 2005, Heyer sent a letter to Plaintiff, which
11 terminated CalPAP's contract with Plaintiff. Warwick Decl., Exh.
12 K. CalPAP removed Plaintiff from the panel because her gate
13 clearance was revoked. Id.; Fuentes Decl. ¶ 6, Exh. D(5). On July
14 22, 2005, Brown's successor, Acting Warden John Stokes, restored
15 Plaintiff's gate clearance. After Plaintiff's San Quentin gate
16 clearance was reinstated, she contacted CalPAP and requested to be
17 placed back on the CalPAP attorney panel. Swanson notified
18 Plaintiff that CalPAP did "not anticipate a need to contract with
19 [Plaintiff] in the future." Warwick, Exh. H.

20 Plaintiff asserts the following claims: (1) Violation of 42
21 U.S.C. § 1983; (2) Negligent Supervision; (3) Breach of Contract;
22 (4) Intentional Interference with Prospective Economic Advantage;
23 (5) Intentional Interference with Contractual Relations;
24 (6) Negligence; and (7) Declaratory Relief.

25 LEGAL STANDARD

26 Summary judgment is properly granted when no genuine and
27 disputed issues of material fact remain, and when, viewing the
28 evidence most favorably to the non-moving party, the movant is

1 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
2 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
3 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
4 1987).

5 The moving party bears the burden of showing that there is no
6 material factual dispute. Therefore, the court must regard as true
7 the opposing party's evidence, if supported by affidavits or other
8 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815
9 F.2d at 1289. The court must draw all reasonable inferences in
10 favor of the party against whom summary judgment is sought.
11 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
12 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
13 1551, 1558 (9th Cir. 1991).

14 Material facts which would preclude entry of summary judgment
15 are those which, under applicable substantive law, may affect the
16 outcome of the case. The substantive law will identify which facts
17 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
18 (1986).

19 Where the moving party does not bear the burden of proof on an
20 issue at trial, the moving party may discharge its burden of
21 production by either of two methods:

22 The moving party may produce evidence negating an
23 essential element of the nonmoving party's case, or,
24 after suitable discovery, the moving party may show that
25 the nonmoving party does not have enough evidence of an
26 essential element of its claim or defense to carry its
27 ultimate burden of persuasion at trial.

28 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d
1099, 1106 (9th Cir. 2000).

If the moving party discharges its burden by showing an

1 absence of evidence to support an essential element of a claim or
2 defense, it is not required to produce evidence showing the absence
3 of a material fact on such issues, or to support its motion with
4 evidence negating the non-moving party's claim. Id.; see also
5 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v.
6 NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the
7 moving party shows an absence of evidence to support the non-moving
8 party's case, the burden then shifts to the non-moving party to
9 produce "specific evidence, through affidavits or admissible
10 discovery material, to show that the dispute exists." Bhan, 929
11 F.2d at 1409.

12 If the moving party discharges its burden by negating an
13 essential element of the non-moving party's claim or defense, it
14 must produce affirmative evidence of such negation. Nissan, 210
15 F.3d at 1105. If the moving party produces such evidence, the
16 burden then shifts to the non-moving party to produce specific
17 evidence to show that a dispute of material fact exists. Id.

18 If the moving party does not meet its initial burden of
19 production by either method, the non-moving party is under no
20 obligation to offer any evidence in support of its opposition. Id.
21 This is true even though the non-moving party bears the ultimate
22 burden of persuasion at trial. Id. at 1107.

23 DISCUSSION

24 I. First Cause of Action: Section 1983 Free Speech Claim

25 Plaintiff alleges that Defendants UOP, Rich, Speed and Cate
26 violated § 1983 by depriving her of her constitutional First
27 Amendment and due process rights. Section 1983 authorizes an
28 injured person to assert a claim for relief against a person who,

1 acting under color of state law, violated the claimant's federally
2 protected rights. To state a prima facie case, the plaintiff must
3 allege both (1) a deprivation of a federal right and (2) that the
4 person who deprived the plaintiff of that right acted under color
5 of state law. See West v. Atkins, 487 U.S. 42, 48 (1988); Flagg
6 Bros., Inc. v. Brooks, 436 U.S. 149, 155 (1978); Gomez v. Toledo,
7 446 U.S. 635, 640 (1980).

8 A. Section 1983 Claim Against Defendants Rich and Speed
9 Plaintiff asserts that Rich and Speed retaliated against her
10 for exercising her First Amendment rights. She argues that Speed
11 and Rich were upset by her May 20, 2005 complaint letter and
12 plotted with Swanson to retaliate against her by "set[ting] in
13 motion the series of events that resulted in [her] gate pass being
14 revoked." Opp. at 18. Plaintiff asserts that, after she wrote
15 this letter, Speed and Rich "began insinuating that [she] engaged
16 in sexual relations with inmates" and that these insinuations
17 "created the basis for the warden's decision to revoke the gate
18 pass." Id.

19 Plaintiff must be able to prove that her "expressive conduct
20 was a substantial or motivating factor for the adverse action"
21 taken against her. Alpha Energy Savers, Inc. v. Hansen, 381 F.3d
22 917, 923 (9th Cir. 2004). To prove this, a plaintiff can
23 "(1) introduce evidence that the speech and adverse action were
24 proximate in time, such that a jury could infer that the action
25 took place in retaliation for the speech; (2) introduce evidence
26 that the employer expressed opposition to the speech; or
27 (3) introduce evidence that the proffered explanations for the
28 adverse action were false and pretextual." Anthoine v. North

1 Central Counties Consortium, 605 F.3d 740, 750 (9th Cir. 2010)
2 (citing Coszalter v. City of Salem, 320 F.3d 968, 975 (9th Cir.
3 2003)). Plaintiff relies on the first and third prongs.

4 Plaintiff has provided evidence of a close temporal link. Her
5 May 20, 2005 letter to the BPH Executive Director, Speed, described
6 due process violations, a lack of enforcement of the Valdivia
7 injunction, and concerns with Defendant Rich, among other BPH and
8 CDCR employees. Her gate clearance was revoked on May 27, 2005.

9 However, "[w]hether an adverse employment action is intended
10 to be retaliatory is a question of fact that must be decided in the
11 light of the timing and the surrounding circumstances.'" Anthoine,
12 2010 WL 2026040, at *7 (quoting Coszalter, 320 F.3d at 977)
13 (emphasis added). The surrounding circumstances establish that
14 Speed and Rich did not have any involvement in revoking Plaintiff's
15 gate clearance, and Plaintiff presents no evidence that they did.
16 Further, there is no evidence that the proffered explanations for
17 the adverse action were false or pretextual.

18 There is also no evidence that Rich knew about Plaintiff's
19 May, 2005 complaint letter. There is no evidence that Speed or
20 Rich insinuated to the warden, or anybody else, that Plaintiff
21 engaged in "sexual relations" with parolees. In fact, there is no
22 evidence that Speed or Rich told the warden anything about
23 Plaintiff. There is no evidence that Speed or Rich had any
24 authority to revoke Plaintiff's gate clearance, took part in the
25 decision to revoke Plaintiff's gate clearance or asked Brown to
26 revoke Plaintiff's gate clearance. In short, there is no evidence
27 that Speed or Rich "set in a motion a series of events" that led to
28 Plaintiff's gate clearance being revoked in retaliation for her

1 exercising her First Amendment rights.⁹ Therefore, the Court
2 grants Speed and Rich summary judgment on the § 1983 claims
3 asserted against them.¹⁰

4 B. Section 1983 Claim Against Cate

5 Defendant Cate is sued in his official capacity as the
6 Secretary of CDCR. In this position, Cate is responsible for the
7 policies, practices and customs of CDCR. Because the Court
8 concludes that there is no evidence that Rich, Speed or Brown
9 revoked Plaintiff's gate clearance in retaliation for her protected
10 speech, Cate is not liable for CDCR policies, practices and customs
11 related to any alleged retaliatory clearance revocation.

12 C. Section 1983 Claim Against Defendant UOP

13 Normally, private entities like UOP are not liable under
14 § 1983 because the statute imposes limitations only on state action
15 under color of state law and does not reach the conduct of private
16 parties. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n,
17 531 U.S. 288, 295 (2001). However, Plaintiff claims that UOP is
18 liable under § 1983 because it conspired with state actors.

19 As noted above, there is no evidence that any state actors
20 violated Plaintiff's constitutional rights. Even if such evidence
21 exists, Plaintiff's § 1983 claim against UOP fails because there
22 is no evidence of a conspiracy between UOP and state actors to
23

24 ⁹There is also no evidence that Brown, on her own accord,
25 revoked Plaintiff's gate clearance in retaliation for exercising
her First Amendment rights.

26 ¹⁰Because the Court concludes that Plaintiff's gate clearance
27 was not revoked in retaliation for exercising her First Amendment
rights, it need not address the parties' arguments concerning
28 whether she was a public employee or whether Garcetti v. Ceballos,
547 U.S. 410 (2006), applies.

1 violate her constitutional rights.

2 An agreement or conspiracy between a government actor and a
3 private party is sufficient to satisfy the state action test. See
4 Dennis v. Sparks, 449 U.S. 24, 29 (1980) (private individual
5 jointly acting with state officials may be engaged in conspiracy
6 and acting "under color of state law"). Establishing liability
7 for a conspiracy between a private actor and a state actor is no
8 different from establishing liability for a conspiracy between two
9 state actors. Franklin v. Fox, 312 F.3d 423, 441 (9th Cir. 2002).
10 The plaintiff must show "an agreement or meeting of the minds to
11 violate constitutional rights." Id. "To be liable, each
12 participant in the conspiracy need not know the exact details of
13 the plan, but each participant must at least share the common
14 objective of the conspiracy." Id. (internal quotation marks
15 omitted).

16 Plaintiff's evidence falls short of this standard. Plaintiff
17 claims that Mary Swanson, the CalPAP program director, and Speed,
18 the executive director of the BPH, agreed to fabricate a reason to
19 terminate Plaintiff. Swanson knew that Plaintiff needed a valid
20 San Quentin gate clearance in order to maintain eligibility as a
21 CalPAP attorney. Plaintiff asserts that, once Swanson learned
22 that Plaintiff made a complaint to Speed about the CDCR, all
23 Swanson had to do was tell Speed that revocation of the San
24 Quentin gate clearance would essentially terminate Plaintiff's
25 contract as a CalPAP attorney. Thus, Plaintiff simply points to
26 the May 20 email in which Swanson notified Speed that part of the
27 agreement to be a contract attorney with CalPAP was that each
28 attorney needed clearance to enter a prison. Fuentes Decl., Exh.

1 A(1). Swanson asked, "I would like to know what action CDC is
2 planning on taking," and Speed replied, "I need to check on the
3 CDC side." Id. Plaintiff has not presented any evidence that
4 Speed followed up on this. Plaintiff argues that, had "Ms.
5 Swanson never told defendant Speed that pulling Ms. Warwick's gate
6 pass would be cause for termination, the strong likelihood is that
7 defendants Speed and Rich would never have engaged in their rumor
8 campaign, and Ms. Warwick would still be a UOP/CalPAP attorney
9"

10 However, the fact that Swanson told Speed about the effect of
11 revoking a gate clearance is not sufficient to raise an inference
12 that Swanson and Speed had an agreement to terminate Plaintiff in
13 retaliation for complaining about UOP, CalPAP, CDCR or BPH.
14 Moreover, there is no evidence that Speed or Swanson discussed the
15 matter with Brown, or with anyone who influenced Brown's decision
16 to revoke Plaintiff's gate clearance. Further, because Plaintiff
17 was an at-will independent contractor, UOP did not need to create
18 a "cause" to remove her from the CalPAP panel of attorneys.

19 Because Plaintiff has not presented any evidence of a
20 conspiracy between UOP and any state actors, Plaintiff's § 1983
21 claim against UOP fails.¹¹

22 _____
23 ¹¹Plaintiff asserts a § 1983 claim against Defendant UOP under
24 the theory that its employees violated her constitutional rights.
25 The Ninth Circuit has not addressed whether a plaintiff can pursue
26 § 1983 claims against a private entity under a respondeat superior
27 theory of liability. However, the law is clear that government
28 entities may not be held vicariously liable for the
unconstitutional acts of their employees under the theory of
respondeat superior. See Board of County Comm'rs v. Brown, 520
U.S. 397, 403 (1997); Monell v. Dept. of Social Services of the
City of N.Y., 436 U.S. 658, 691 (1978); Fuller v. City of Oakland,

(continued...)

1 D. Due Process Claims

2 Plaintiff argues that she has a cause of action against CDCR
3 Defendants for violation of her due process rights which survives
4 summary judgment because CDCR Defendants did not properly move on
5 this cause of action. However, Plaintiff's operative complaint
6 fails even to plead a due process claim. The only constitutional
7 violation that Plaintiff alleges is a violation of her free speech
8 rights under the First Amendment. Although Plaintiff's complaint
9 includes the words "due process" in passing, it does not put State
10 Defendants on notice that Plaintiff is alleging this type of claim.
11 Plaintiff's complaint does not even identify the particular
12 property interest at issue that is allegedly protected by the
13 Constitution. Because Plaintiff's allegations are couched in terms
14 of a retaliation claim, not a due process claim, Plaintiff may not
15 assert a due process claim at this late stage in the litigation.

16 Even if Plaintiff could assert a due process claim, she has
17 not established that she had a property interest in her San Quentin
18

19 ¹¹(...continued)
20 47 F.3d 1522, 1534 (9th Cir. 1995). Many other circuits, as well
21 as several district courts in the Ninth Circuit, have concluded
22 that a private entity is liable under § 1983 only when its official
23 policy or custom causes a deprivation of constitutional rights.
24 See e.g., Dubbs v. Head Start, Inc., 336 F.3d 1194, 1216 (10th Cir.
25 2003); Jackson v. Illinois Medi-Car, Inc., 300 F.3d 760, 766 (7th
26 Cir. 2002); Burke v. North Dakota Department of Corrections and
27 Rehabilitation, 294 F.3d 1043, 1044 (9th Cir. 2002); Austin v.
28 Paramount Parks, Inc., 195 F.3d 715, 729 (4th Cir. 1999); Harvey v.
Harvey, 949 F.2d 1127, 1129-30 (11th Cir. 1992); Rojas v.
Alexander's Dep't Store, 924 F.2d 406, 408-09 (2d Cir. 1990);
Carrea v. California, 2009 WL 1770130, *8 (C.D. Cal.); Brown v.
Carnevale, 2008 WL 4570342, *5 (D. Or.); Tater-Alexander v.
Amerjan, 2008 WL 961233, *12 (E.D. Cal.). Plaintiff has not
presented any evidence that UOP maintained an official policy or
custom that caused a deprivation of her constitutional rights. For
this additional reason, the Court concludes that Plaintiff's § 1983
claim against UOP fails.

1 gate clearance and was entitled to notice of revocation, a hearing
2 and an appeal. The California regulation cited by Plaintiff, 15
3 California Code of Regulations § 3178, generally describes the
4 rules for attorney visits and consultations. It does not confer a
5 right for an attorney to receive a prison gate clearance.

6 Similarly, it is not clear that the regulations that set forth
7 the procedures for excluding individuals from a prison confer a
8 constitutionally protected property interest. The Ninth Circuit
9 has held that "a substantive property right cannot exist
10 exclusively by virtue of a procedural right." Dorr v. County of
11 Butte, 795 F.2d 875, 877 (9th Cir. 1986). Thus, "while state law
12 may create an interest in having officials adhere to state
13 procedures, those procedures alone do not give rise to a
14 'legitimate claim of entitlement' that is subject to the
15 protections of the federal due process clause." Federal Deposit
16 Ins. Corp. v. Henderson, 940 F.2d 465, 475 (9th Cir. 1991) (quoting
17 Memphis Light, Gas & Water v. Craft, 436 U.S. 1, 9 (1978)).
18 Moreover, Plaintiff's gate clearance was suspended on an emergency
19 basis with no opportunity for a notice or a hearing; and it was
20 reinstated within sixty days. Accordingly, Plaintiff's allegation
21 that she has a constitutionally protected interest in a prison gate
22 clearance and thus in the state prison procedures is unsupported.

23 II. State Law Immunities

24 State Defendants argue that Plaintiff's tort claims are barred
25 under various sections of the California Government Claims Act.
26 Section 821 provides that a "public employee is not liable for an
27 injury caused by his adoption of or failure to adopt an enactment
28 or by his failure to enforce an enactment." Cal. Gov't Code § 820.

1 Section 821.2 states that a public employee is not liable for
2 denying or revoking a permit, approval, or similar authorization.
3 Section 820.2 states that a public employee is not liable for
4 discretionary acts "whether or not such discretion be abused."
5 CDCR, as a public entity, also enjoys similar immunities. See Cal.
6 Gov't Code § 818.2 (not liable for an injury caused by failing to
7 enforce any law), § 818.4 (not liable for revoking any permit or
8 "similar authorization"), § 818.8 (not liable for
9 misrepresentations by its employees "whether or not such
10 misrepresentations be negligent or intentional"). Because of these
11 immunities, State Defendants -- CDCR, Rich, Speed and Brown --
12 cannot be held liable in tort for the revocation of Plaintiff's San
13 Quentin gate clearance.

14 However, even if State Defendants were not immune, Plaintiff's
15 state tort claims would fail.

16 III. Second and Sixth Causes of Action: Negligent Supervision
17 Claims and Negligence Respectively

18 Plaintiff alleges negligent supervision and negligence claims
19 against CDCR and Brown. Plaintiff alleges that CDCR supervisors
20 engaged in acts of negligent supervision by failing properly to
21 train their employees on the enforcement of California's prison
22 visitation laws. Plaintiff also alleges that CDCR Defendants
23 failed to protect her from having her gate clearance revoked and
24 therefore being terminated as a CalPAP attorney. Specifically,
25 Plaintiff alleges that CDCR Defendants misinterpreted and
26 misapplied the following regulations: Cal. Code of Regs. tit. 15,
27 §§ 3172.1 (Approval/Disapproval of Prospective Visitors), 3176
28 (Denial, Restriction, Suspension, Termination or Revocation of

1 Visits and Exclusion of a Person), 3176.1 (Visitor Violation
2 Process), 3176.3 (Exclusion of a Person from Institutions/
3 Facilities), 3178 (Attorney Visitations and Consultation), and 3179
4 (Appeals Relating to Visiting). However, California courts do not
5 impose negligence liability on an agency for failing to follow its
6 regulations. Desert Healthcare Dist. v. PacifiCare FHP, Inc., 94
7 Cal. App. 4th 781, 793 (2001) ("a negligence duty cannot be derived
8 from an administrative regulation."). Therefore, Plaintiff's
9 negligent supervision and negligence claims against CDCR Defendants
10 for improperly revoking a prison gate clearance based on CDCR's own
11 regulations fail.

12 IV. Third Cause of Action: Breach of Contract

13 Plaintiff alleges a breach of contract claim against UOP. She
14 also alleges that UOP breached the implied covenant of good faith
15 and fair dealing by cutting her caseload and by terminating her for
16 complaining about the CalPAP program. To prevail on a breach of
17 contract claim, Plaintiff must establish four elements: "(1) the
18 existence of a valid contract; (2) Plaintiff's performance or
19 excuse for nonperformance; (3) Defendant's unjustified or unexcused
20 failure to perform; and (4) damage to Plaintiff." Lincoln Nat'l
21 Corp. v. TakeCare, Inc., 1998 WL 281290, *3 (N.D. Cal.); see also
22 First Commercial Mortgage Co. v. Reece, 89 Cal. App. 4th 731, 745
23 (2001).

24 The terms of Plaintiff's agreement with UOP to become a CalPAP
25 panel attorney do not guarantee Plaintiff any set amount of parolee
26 clients. The agreement states, "CalPAP will assign cases to panel
27 attorneys at its sole discretion, and inclusion in the panel
28 attorney list is not a guarantee of case assignment." (emphasis

1 added). Under the agreement, CalPAP had complete discretion to
2 assign no cases to Plaintiff.

3 UOP argues that it did not have any obligation to give
4 Plaintiff a hearing before she was removed from the attorney list
5 because the agreement states that "CalPAP panel attorneys serve on
6 the panel at-will." The agreement further states, "Either CalPAP
7 or the individual attorney may remove the attorney's name from the
8 panel attorney list at any time, provided that written notice is
9 given to the other party." Plaintiff does not contest that she was
10 given written notice of her termination. Rather, Plaintiff asserts
11 that UOP breached the contract when it conspired with CDCR to
12 revoke her gate clearance, because she needed a gate clearance to
13 carry out her duties. Because the Court concludes that Plaintiff's
14 evidence does not support such a conspiracy, her breach of contract
15 and breach of the implied covenant of good faith and fair dealing
16 claims fail.

17 V. Fourth Cause of Action: Intentional Interference with
18 Prospective Economic Advantage

19 Plaintiff alleges intentional interference with prospective
20 economic advantage (IIPEA) against CDCR Defendants.

21 To state a claim for the tort of IIPEA, Plaintiff must show,
22 for each Defendant: (1) an economic relationship between Plaintiff
23 and a third party containing the probability for future economic
24 benefit for Plaintiff; (2) Defendant's knowledge of this
25 relationship; (3) intentional acts by Defendant designed to disrupt
26 the relationship; (4) actual disruption of the relationship;
27 (5) damages proximately caused by Defendant's acts; and (6) that
28 Defendant's acts were wrongful by some legal measure other than the

1 fact of the interference itself. Korea Supply Co. v. Lockheed
2 Martin Corp., 29 Cal. 4th 1134, 1153-54 (2003).

3 "California law has long recognized that the core of
4 intentional interference business torts is interference with an
5 economic relationship by a third-party stranger to that
6 relationship, so that an entity with a direct interest or
7 involvement in that relationship is not usually liable for harm
8 caused by pursuit of its interests." Marin Tug & Barge, Inc. v.
9 Westport Petroleum, Inc., 271 F.3d 825 (9th Cir. 2001). See also,
10 ViChip Corp. v. Lee, 438 F. Supp. 2d 1087, 1097 (N.D. Cal. 2006)
11 ("[T]he core of intentional interference business torts is
12 interference with an economic relationship by a third-party
13 stranger to that relationship").

14 Here, CDCR Defendants are not "strangers" or "interlopers"
15 regarding Plaintiff's duties under the CalPAP contract. The CDCR
16 contracted with UOP to create and run CalPAP to provide parolees
17 with legal representation because the Valdivia injunction required
18 CDCR to provide for such representation. CalPAP attorneys are
19 retained solely to perform work involving the CDCR and the CDCR
20 could choose not to renew its contract with CalPAP if the CDCR
21 became dissatisfied with the performance of CalPAP's attorneys.
22 Thus, CDCR had a direct, continuing and substantial interest in the
23 performance of CalPAP attorneys. CDCR Defendants are not
24 "strangers" or "interlopers" subject to an IIEPA claim.

25 VI. Fifth Cause of Action: Intentional Interference with
26 Contractual Relations

27 Plaintiff alleges intentional interference with contractual
28 relations (IICR) against CDCR Defendants.

1 Plaintiff admits that her contract to serve as a CalPAP panel
2 attorney was at-will. Under California law, a party who interferes
3 with an at-will contract cannot be sued for interference with
4 contract. Lovesy v. Armed Forces Benefits Ass'n, 2008 WL 696991,
5 at *11 (N.D. Cal.) ("[A]s a matter of law, a claim for interference
6 with contract is improper if the contract is 'at will.'"). Any
7 such claim is more properly viewed as an interference with a
8 prospective economic advantage. Reeves v. Hanlon, 33 Cal. 4th
9 1140, 1152 (2004).

10 VII. Seventh Cause of Action: Declaratory Judgment

11 Plaintiff requests a declaratory judgment that she will not
12 have to explain the May, 2005 gate clearance revocation as would be
13 required by Cal. Code Regs. tit. 15 § 3178(d).¹² Such declaratory
14 relief is not appropriate because this order summarily adjudicates
15 all claims in favor of Defendants. Therefore, there is no present
16 and actual controversy between the parties.

17 //
18 //
19 //
20 //
21 //
22 //
23 //
24 //

25
26 ¹²Cal. Code Regs. tit. 15 § 3178(d) provides in relevant part,
27 "An attorney who wishes to consult in person with an inmate shall
28 contact the institution/facility at which the inmate is housed. . .
Requesting attorneys must . . . explain any prior suspension or
exclusion from a correctional facility"

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

For the foregoing reasons, the Court GRANTS CDCR Defendants' motion for summary judgment (Docket No. 127) and GRANTS UOP's motion for summary judgment (Docket No. 128). The clerk shall enter judgment in favor of Defendants and Plaintiff shall bear Defendants' costs.

IT IS SO ORDERED.

Dated: 07/06/10



CLAUDIA WILKEN
United States District Judge