

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,<sup>1</sup> 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

\_\_\_\_\_

<sup>1</sup>Matthew 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.<sup>2</sup> 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.<sup>3</sup> 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 <sup>2</sup>Plaintiff 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.

<sup>3</sup>The 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)<sup>4</sup> 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.<sup>5</sup>

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

24

---

25 <sup>4</sup>BPH is a division of CDCR.

26 <sup>5</sup>To 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,"<sup>6</sup> 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 <sup>6</sup>Ms. 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 BRR<sup>7</sup> 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 <sup>7</sup>BRR 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 office<sup>8</sup> 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 <sup>8</sup>The 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.<sup>9</sup> Therefore, the Court  
2 grants Speed and Rich summary judgment on the § 1983 claims  
3 asserted against them.<sup>10</sup>

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 <sup>9</sup>There 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 <sup>10</sup>Because 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.<sup>11</sup>

---

22  
23 <sup>11</sup>Plaintiff 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 <sup>11</sup>(...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).<sup>12</sup> 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 <sup>12</sup>Cal. 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