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

JOANNE WARWICK,
Plaintiff,

v.

UNIVERSITY OF THE PACIFIC; CALIFORNIA
DEPARTMENT OF CORRECTIONS AND
REHABILITATION; PATRICIA MILLER; AND
DAVID ROMERO,

Defendants.

No. C 08-03904 CW
ORDER GRANTING
MOTIONS TO DISMISS

Defendant University of the Pacific (UOP) has filed a Rule 12(b)(6) motion to dismiss all claims against it, and has moved for attorneys' fees. Defendant California Department of Corrections and Rehabilitation (CDCR) has filed a Rule 12(b)(6) motion to dismiss all claims against it. Defendant Patricia Miller has filed a Rule 12(b)(6) motion to dismiss and a motion for a more definite statement. Plaintiff opposes the motions. Defendant David Romero has not filed any motions.¹

The motions were heard on October 30, 2008. Having considered

¹ It appears that Romero may not have been served. If he was not served within 120 days of the filing of the complaint, Plaintiff must move for leave of the Court pursuant to Federal Rule of Civil Procedure 4 for an extension of time to serve him.

1 all of the papers filed by the parties, the Court GRANTS UOP's,
2 CDCR's and Miller's motions to dismiss. The Court DENIES Miller's
3 motion for a more definite statement. The Court sua sponte
4 dismisses the claims against Romero. Plaintiff is granted leave to
5 amend her complaint.

6 BACKGROUND

7 The following facts are alleged in the Second Amended Verified
8 Complaint. This case arises out of Plaintiff's May 31, 2005
9 termination as a California Parole Advocacy Program (CalPAP)
10 attorney. The CalPAP program was created as a result of the
11 permanent injunction in Valdivia v. Schwarzenegger, No. Civ. S-94-
12 0671 (E.D. Cal Mar. 9, 2004), which required the State of
13 California to establish a parole revocation attorney program.
14 CalPAP is administered by the McGeorge School of Law, at the UOP, a
15 private university, pursuant to a contract with CDCR. Plaintiff
16 argues in her opposition brief that she was employed by both UOP
17 and CDCR under a joint employer theory.

18 During her tenure as a CalPAP attorney, Plaintiff voiced her
19 concerns that the program was not complying with the law in serving
20 its parolee clients. Plaintiff claims she made the following
21 constitutionally protected expressions: assisting a parolee client
22 in filing a grievance with the State Bar Association over due
23 process issues; contacting class counsel for Valdivia to report
24 that CalPAP attorneys were not receiving proper training and
25 support in accordance with the injunction; relaying to other CalPAP
26 attorneys her concerns over violations of her clients' due process
27 rights; reporting to the Board of Prison Terms (BPT) and UOP/CalPAP
28 a due process violation over the issuance of a subpoena; informing

1 BPT, UOP/CalPAP and Valdivia class counsel of a lack of access to
2 client files; and filing a complaint with BPT Executive Director
3 Marvin Speed about violations of her clients' rights under state
4 and federal law as well as the CDC Operations Manual.

5 Plaintiff alleges that her employment with UOP was terminated
6 in retaliation for voicing her concerns. She claims that
7 Defendants Miller and Romero conspired to, and did, "cause" her
8 termination. Plaintiff states that she was terminated in effect by
9 having her San Quentin State Prison parole attorney gate clearance
10 withheld, and subsequently revoked on May 27, 2005. Plaintiff
11 claims she was officially terminated May 31, 2005.

12 Plaintiff originally filed her lawsuit in state court on
13 September 7, 2006. She did not name or serve UOP as a Defendant;
14 instead she named the "California Parole Advocacy Program, a
15 business entity, form unknown." Plaintiff also named Does One
16 through Twenty-Five as Defendants. On July 2, 2008, Plaintiff
17 filed an amendment to her amended verified complaint in state
18 court, substituting UOP for Doe One. The parties stipulated to
19 allow Plaintiff to file a Second Amended Verified Complaint on July
20 18, 2008, naming Defendants UOP, CDCR, Miller and Romero and adding
21 claims under Title 42 U.S.C. § 1983. Defendant UOP then removed
22 the action to this Court based upon federal question jurisdiction
23 arising from Plaintiff's newly added § 1983 claims. Defendant CDCR
24 joined in the notice of removal.

25 Plaintiff pleads ten causes of action in her Second Amended
26 Verified Complaint: (1) Violation of 42 U.S.C. § 1983; (2) Wrongful
27 Termination in Violation of Public Policy; (3) Negligent
28 Supervision; (4) Intentional Infliction of Emotional Distress;

1 (5) Violation of California Labor Code § 1102.5 and California
2 Government Code §§ 8547 et seq. (both of which protect "whistle-
3 blowers"); (6) Breach of Contract; (7) Intentional Interference
4 with Prospective Economic Advantage; (8) Intentional Interference
5 with Contractual Relations; (9) Negligence; and (10) Declaratory
6 Relief.

7 LEGAL STANDARD

8 A complaint must contain a "short and plain statement of the
9 claim showing that the pleader is entitled to relief." Fed. R.
10 Civ. P. 8(a). A motion to dismiss under Rule 12(b)(6) for failure
11 to state a claim should be granted only when the complaint does not
12 give the defendant fair notice of a legally cognizable claim and
13 the grounds on which it rests. See Bell Atl. Corp. v. Twombly, ___
14 U.S. ___, 127 S. Ct. 1955, 1964 (2007). The plaintiff must plead
15 "more than labels and conclusions, and a formulaic recitation of
16 the elements of a cause of action will not do." Id. at 1964-1965.
17 The Twombly Court emphasized that it did not require a heightened
18 standard beyond fact pleading, just that there must be facts
19 sufficient to state a claim that is "plausible on its face." Id.
20 at 1974.

21 In considering whether the complaint is sufficient to state a
22 claim, the court will take all material allegations as true and
23 construe them in the light most favorable to the plaintiff. NL
24 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

25 When granting a motion to dismiss, the court is generally
26 required to grant the plaintiff leave to amend, even if no request
27 to amend the pleading was made, unless amendment would be futile.
28 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911

1 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment
2 would be futile, the court examines whether the complaint could be
3 amended to cure the defect requiring dismissal "without
4 contradicting any of the allegations of [the] original complaint."
5 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).

6 Pursuant to Federal Rule of Civil Procedure 12(e), a party may
7 move for a more definite statement when a pleading to which a
8 responsive pleading is permitted is "so vague or ambiguous that a
9 party cannot reasonably be required to frame a responsive
10 pleading." Where a pleading "fails to specify the allegations in a
11 manner that provides sufficient notice, a defendant can move for a
12 more definite statement under Rule 12(e)." Swierkiewicz v. Sorema
13 N.A., 534 U.S. 506, 514 (2002). A Rule 12(e) motion is proper
14 "where the complaint is so general that ambiguity arises in
15 determining the nature of the claim or the parties against whom it
16 is being made." Sagan v. Apple Computer, Inc., 874 F. Supp. 1072,
17 1077 (C.D. Cal. 1994).

18 DISCUSSION

19 I. Statute of Limitations

20 As noted above, Plaintiff did not name or serve UOP until
21 July, 2008, nor did she bring her § 1983 claims until then.

22 The statute of limitations for § 1983 claims borrows from the
23 most analogous state statute of limitations; in California, the
24 personal injury statute of limitations of two years applies. Berg
25 v. California Horse Racing Bd., 419 F. Supp. 2d 1219, 1225 (E.D.
26 Cal. 2006). Plaintiff alleges she was terminated May 31, 2005.
27 Therefore, her claims arising from the termination accrued on that
28 date. The § 1983 claims filed after May 30, 2007 are therefore

1 time-barred unless they relate back to the original complaint. All
2 of Plaintiff's other claims also carry statutes of limitations of
3 two years, with the exception of the breach of contract claim.
4 Therefore, these claims are also time-barred against UOP if they do
5 not relate back to the original complaint.

6 Because the relevant amendments and service of process
7 preceded removal to federal court, the Court must look to state
8 procedural rules to determine whether the claims relate back for
9 statute of limitations purposes. Anderson v. Allstate Ins. Co.,
10 630 F.2d 677, 682 (9th Cir. 1980)

11 A. Relation Back of the Section 1983 Claim Against All
12 Defendants

13 All moving Defendants argue that the § 1983 claims are time-
14 barred because they were not plead in the original complaint. The
15 California relation-back doctrine requires that the newly added
16 causes of action must (1) rest on the same general set of facts;
17 (2) involve the same injury; and (3) refer to the same injury-
18 causing instrumentality as the original complaint. Norgart v.
19 Upjohn Co., 21 Cal. 4th 383, 408-409 (1999).

20 The § 1983 claims rest on the same set of facts, involve the
21 same injuries and refer to the same injury-causing instrumentality
22 as the original claims. Therefore, the § 1983 claims relate back
23 under California procedural rules and are not time-barred, at least
24 as to Defendants named in the original complaint.

25 B. Claims Against UOP

26 Under California law, if a complaint is amended after the
27 statute of limitations has run, to identify a Doe defendant and to
28 assert a cause of action against that defendant not included in the

1 original complaint, the amended complaint will relate back for
2 statute of limitations purposes if: (1) the original complaint
3 stated a valid cause of action against the now-identified Doe
4 defendant; (2) the plaintiff was "genuinely ignorant" of the
5 defendant's identity or the facts rendering the defendant liable
6 when the original complaint was filed; and (3) the amended
7 complaint is based on the "same general set of facts" as the
8 original and refers to the same accident and same injuries. Austin
9 v. Massachusetts Bonding & Ins. Co., 56 Cal. 2d 596, 600-601 (1961)
10 The purpose of California Code of Civil Procedure § 474, which
11 allows for fictitious names in pleadings, is to enable a plaintiff
12 to bring suit before it is barred by the statute of limitations.
13 Id. at 602.

14 UOP does not dispute that it was properly substituted as a Doe
15 Defendant. To prevent the claims against UOP from relating back to
16 the original complaint, the burden would be on UOP to prove
17 Plaintiff's earlier awareness of its identity and of the facts
18 creating its liability. See Breceda v. Gamsby, 267 Cal. App. 2d
19 167, 179 (1968). UOP has not made any such arguments. Therefore
20 all of the claims against UOP relate back for statute of
21 limitations purposes.

22 II. Section 1983 Free Speech Claim

23 Plaintiff alleges that each Defendant violated § 1983 by
24 depriving her of her constitutional first amendment and due process
25 rights.² Section 1983 authorizes an injured person to assert a
26

27 ² Plaintiff claims, in a conclusory manner, that Defendants
28 deprived her of her right to due process secured by the Fifth and
(continued...)

1 claim for relief against a person who, acting under color of state
2 law, violated the claimant's federally protected rights. To state
3 a prima facie case, the plaintiff must allege both (1) a
4 deprivation of a federal right and (2) that the person who deprived
5 the plaintiff of that right acted under color of state law. See
6 West v. Atkins, 487 U.S. 42, 48 (1988); Flagg Bros., Inc. v.
7 Brooks, 436 U.S. 149, 155 (1978); Gomez v. Toledo, 446 U.S. 635,
8 640 (1980).

9 A. Section 1983 Claim Against Defendant UOP

10 Normally, private entities like UOP are not liable under
11 § 1983 because the Fourteenth Amendment imposes limitations only on
12 state action under color of state law and does not reach the
13 conduct of private parties. Brentwood Acad. v. Tenn. Secondary
14 Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001). Plaintiff seems to
15 claim that UOP may be liable because it conspired with state
16 actors.

17 An agreement or conspiracy between a government actor and a
18 private party is sufficient to satisfy the state action test. See
19 Dennis v. Sparks, 449 U.S. 24, 29 (1980) (private individual
20 jointly acting with state officials may be engaged in conspiracy
21 and acting "under color of state law"). However, conclusory
22 allegations of a conspiracy between a state actor and a private

23 _____
24 ²(...continued)

25 Fourteenth Amendments by "failing to provide due process in
26 connection with plaintiff's termination." Second Amended Verified
27 Complaint at ¶ 26. Plaintiff makes no factual allegations to
28 support this claim other than that she was terminated. The due
process claim is insufficiently plead. Furthermore, this claim
would not apply to UOP, because employees of private entities have
no constitutional right to due process before they are terminated,
nor to Miller and Romero because they were not her employers.

1 party which are not supported by material facts are insufficient
2 to state a claim against the private party under § 1983. See
3 Woodrum v. Woodward County, Okla., 866 F.2d 1121, 1126 (9th Cir.
4 1989); Simmons v. Sacramento County Superior Court, 318 F.3d 1156,
5 1161 (9th Cir. 2003). To establish liability against UOP based on
6 a conspiracy with a state actor, Plaintiff must allege facts
7 showing the essential elements of conspiracy, namely that UOP and
8 a state actor (1) agreed to accomplish an illegal objective;
9 (2) committed one or more acts in its furtherance; and (3) had the
10 intent to commit the underlying offense. See United States v.
11 Penagos, 823 F.2d 346, 348 (9th Cir. 1987).

12 Plaintiff has not plead facts sufficient to state a § 1983
13 claim against UOP. For this reason, UOP's motion to dismiss is
14 GRANTED. Plaintiff is granted leave to amend.

15 B. Section 1983 Claim Against Defendant CDCR

16 CDCR moves to dismiss the § 1983 cause of action against it
17 because, as a matter of law, a state or state agency is not a
18 "person" under § 1983 and may not be sued for damages under that
19 section. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71
20 (1989); Mitchell v. L.A. Cmty. Coll. Dist., 861 F.2d 198, 201 (9th
21 Cir. 1988). CDCR is correct. Likewise, Plaintiff's theory
22 alleging respondeat superior liability against CDCR also fails as
23 a matter of law. Taylor v. List, 880 F.2d 1040, 1045 (1989)
24 ("[t]here is no respondeat superior liability under section
25 1983"); see also Palmer v. Sanderson, 9 F.3d 1433, 1438 (9th Cir.
26 1993).

27 Officials of the CDCR, in their official capacity, may be
28 sued for an injunction. The Eleventh Amendment permits suits for

1 prospective injunctive relief against state officials in their
2 official capacities. Frew ex rel. Frew v. Hawkins, 540 U.S. 431,
3 437 (2004) (citing Ex parte Young, 209 U.S. 123 (1908)). In such
4 a case, a federal court may order prospective relief and measures
5 ancillary to prospective relief but may not award money damages or
6 its equivalent. Green v. Mansour, 474 U.S. 64, 71-73 (1985).
7 Plaintiff has requested an injunction in a conclusory fashion. In
8 her amended complaint, she may specify the injunctive relief she
9 is requesting against the appropriate CDCR officials.

10 CDCR's motion to dismiss the § 1983 claims against it is
11 GRANTED. Plaintiff is granted leave to amend. She may attempt to
12 allege a claim against one or more CDCR officials for specified
13 injunctive relief.

14 C. Section 1983 Claims Against Defendants Miller and Romero
15 As a CDCR employee, Miller may not be sued for damages in her
16 official capacity under § 1983. However, Plaintiff indicates that
17 she is suing Miller in her individual capacity.

18 An individual defendant is liable for money damages under
19 § 1983 only if the defendant personally participated in or
20 otherwise proximately caused the unconstitutional deprivations of
21 which the plaintiff complains. Leer v. Murphy, 844 F.2d 628, 634
22 (9th Cir. 1988). To establish individual liability, Plaintiff
23 must allege one of the following: (1) Defendant personally
24 participated in or ordered the constitutional violation;
25 (2) Defendant, acting in a supervisory capacity, failed to train
26 properly or supervise personnel, resulting in the violation;
27 (3) Defendant was responsible for an official policy or custom
28 which caused the violation; or (4) Defendant knew of the violation

1 and failed to prevent it. Taylor, 880 F.2d at 1045; Ybarra v.
2 Reno Thunderbird Mobile Home Village, 723 F.2d 675, 680 (9th Cir.
3 1984).

4 Plaintiff alleges that Miller conspired with UOP to terminate
5 her in retaliation for exercising her First Amendment rights.
6 However, as noted above, conclusory allegations of a conspiracy
7 which are not supported by material facts are insufficient to
8 state a claim under § 1983. Woodrum, 866 F.2d at 1126.

9 Further, Plaintiff does not plead facts from which one could
10 infer that Plaintiff's exercise of free speech caused Miller to
11 revoke her gate pass, which led to her termination. For example,
12 Plaintiff does not allege that Miller knew of her protected
13 speech, nor that it occurred in temporal proximity to the
14 revocation of the gate pass. Therefore the § 1983 claim against
15 Miller is dismissed. Plaintiff is granted leave to amend to
16 allege, if she truthfully can, facts from which causation and
17 conspiracy may be inferred.

18 The claims against CDCR employee Romero are virtually
19 identical to those against Miller. Although Romero has not moved
20 to dismiss, a court may dismiss sua sponte claims against a non-
21 moving defendant when the claims against that defendant are very
22 similar to those against a moving defendant. See Silverton v.
23 Dep't of Treasury, 644 F.2d 1341, 1345 (9th Cir. 1981).

24 Therefore, the Court dismisses the § 1983 claim against Romero as
25 well, with leave to amend.

26 III. Wrongful Termination in Violation of Public Policy

27 Under California law, an employee may maintain a tort cause
28 of action against his or her employer where the employer's

1 discharge of the employee contravenes fundamental public policy.
2 Foley v. Interactive Data Corp., 47 Cal. 3d 654, 666 (1988). Such
3 claims are often referred to as Tameny claims, after the decision
4 in Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 176-177
5 (1980). A claim for wrongful termination in violation of public
6 policy must be based on a fundamental policy established by a
7 constitutional, statutory or regulatory provision. Green v. Ralee
8 Eng'g Co., 19 Cal. 4th 66, 76, 90 (1998).

9 Plaintiff claims that Defendants UOP and CDCR terminated her
10 in violation of the public policy against punishing employees for
11 exercising their rights to free speech under the United States and
12 California constitutions. Plaintiff also cites the public policy
13 established by California whistleblower protection statutes
14 (Government Code §§ 8547 et seq. and California Labor Code
15 §§ 1102.5 et seq.), California Code of Civil Procedure § 284,
16 regarding substitution of counsel, and Title 15 of the California
17 Code of Regulations, governing Crime Prevention and Corrections,
18 as sources of public policy for this claim.

19 A. Wrongful Termination Claim Against UOP

20 California courts of appeal are somewhat divided as to whether
21 Tameny free speech claims are cognizable against private employers.
22 One court recently held that "the First Amendment prohibition
23 against government intrusions into free speech fails to establish
24 public policy forbidding free-speech-based terminations by private
25 employers." Grinzi v. San Diego Hospice Corp., 120 Cal. App. 4th
26 72, 81 (2004). But see, Ali v. L.A. Focus Publ'n., 112 Cal. App.
27 4th 1477, 1486-1488 (2003) (finding a triable issue as to whether
28 private employee who engaged in "off-duty" political speech was

1 wrongfully terminated in violation of the public policy in favor of
2 free speech). Ali is distinguishable, however, because Plaintiff's
3 speech was not off-duty and was directly related to her job.

4 The other sources of public policy upon which her claim rests
5 are also insufficiently plead. As will be discussed below,
6 Government Code §§ 8547 et seq. do not apply to Plaintiff because,
7 as a CalPAP parole attorney, she did not meet the statutory
8 definition of "state employee." The reference to Title 15 is too
9 broad. Plaintiff provides authority in her opposition brief that
10 Tameny claims based on Labor Code § 1102.5 are cognizable;³ however,
11 she does not explain how UOP allegedly violated that public policy
12 with facts sufficient to state a claim. Plaintiff does not explain,
13 nor cite any authority, for her theory that § 284 of the Code of
14 Civil Procedure "inures to the benefit of the public" rather than to
15 the interests of an individual. See Ross v. RagingWire
16 Telecommunications, Inc., 42 Cal. 4th 920, 932 (2008) (quoting
17 Stevenson v. Superior Court, 16 Cal. 4th 880, 889-890 (1997)).

18 Plaintiff has failed to state a Tameny claim against UOP.
19 UOP's motion to dismiss is GRANTED. Plaintiff is granted leave to
20 amend to allege that UOP violated a public policy applicable to it
21 as a private employer.

22 B. Wrongful Termination Claim Against CDCR

23 Plaintiff pleads various employment causes of action against

24 ³ The anti-retaliation provision of § 1102.5 provides:

25 An employer may not retaliate against an employee for
26 disclosing information to a government or law enforcement
27 agency, where the employee has reasonable cause to
28 believe that the information discloses a violation of
state or federal statute, or a violation or noncompliance
with a state or federal rule or regulation.

1 both UOP and CDCR and alleges in her opposition brief that she was
2 jointly employed by both entities. However, because Plaintiff has
3 not alleged in her complaint that CDCR was her employer or joint
4 employer, her employment claims against CDCR are dismissed with
5 leave to amend to add this allegation, if she truthfully can do so.

6 Plaintiff has not cited any statutory authority supporting her
7 argument that she is a state employee. California public employment
8 is held by statute, not by contract. See Lachtman v. Regents of
9 Univ. of California, 158 Cal. App. 4th 187, 207 (2007) (citing
10 Miller v. State of California, 18 Cal.3d 808, 813 (1977)).

11 Under certain circumstances, two entities can be held liable as
12 joint employers of an employee. The Ninth Circuit has endorsed a
13 four-factor "economic realities" test for determining joint
14 employment in the context of the Fair Labor Standards Act (FLSA).
15 Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1324 (9th Cir.
16 1991). Under this test, a court must examine whether the alleged
17 joint employer (1) had the power to hire and fire the employee;
18 (2) supervised and controlled employee work schedules or conditions
19 of employment; (3) determined the rate and method of payment; and
20 (4) maintained employment records. Id. (citing Bonnette v.
21 California Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir.
22 1983) (applying test in the FLSA context), abrogated on other
23 grounds by Garcia v. San Antonio Metropolitan Transit Authority, 469
24 U.S. 528, 539 (1985)).

25 Plaintiff argues that CDCR controlled access to a site
26 essential to her work, San Quentin State Prison. Without such
27 access, Plaintiff could not perform her job duties. Plaintiff
28 alleges that CDCR employees, including Miller and Romero, supervised

1 and controlled her conditions of employment. Apparently UOP
2 determined Plaintiff's wage because it contracted with her.
3 Plaintiff does not indicate which entity maintained employment
4 records. Significantly, Plaintiff alleges that she signed an
5 employment contract with UOP, which presumably set out certain
6 conditions of her employment that would be relevant to the Court's
7 determination of the joint employer question. However, Plaintiff
8 does not provide a copy, or any detail about the terms of her
9 contract. This information would likely illustrate the
10 circumstances of her employment with UOP, including pay practices,
11 supervisory authority and any terms under which the employment
12 relationship could be terminated.

13 In sum, Plaintiff has not specifically plead that she was a
14 state employee, nor has she alleged sufficient facts from which the
15 Court could infer that she was a state employee under a joint
16 employer theory. Plaintiff must plead such facts in order to state
17 a claim against CDCR as her employer.

18 Plaintiff's Tameny claim against CDCR has other defects.
19 First, a public entity is liable for its acts or omissions only as
20 provided by statute, and therefore a common law Tameny claim
21 generally does not lie against a public entity. Cal. Gov. Code
22 § 815(a); see Ross v. San Francisco Bay Area Rapid Transit Dist.,
23 146 Cal. App. 4th 1507, 1514 (2007); Palmer v. Regents of the Univ.
24 of California, 107 Cal. App. 4th 899, 909 (2003).

25 In addition, Plaintiff has failed to allege that she made a
26 written claim to the CDCR pursuant to the requirements of the
27 California Tort Claims Act, Government Code § 945.4, which requires
28 the presentation of a written claim to a state agency as a

1 prerequisite to filing suit. If she has not presented such a claim
2 to CDCR, Plaintiff may not pursue any state law tort claims against
3 it. The wrongful termination claim against CDCR is dismissed with
4 leave to amend if Plaintiff can truthfully allege she has exhausted
5 her administrative remedies under the TCA and that she was jointly
6 employed by CDCR and UOP.

7 IV. Negligent Supervision Claims Against UOP and CDCR

8 Plaintiff pleads negligent supervision claims against UOP and
9 CDCR. Plaintiff claims that UOP failed to protect her from having
10 her gate pass revoked and being terminated. California's Workers'
11 Compensation Act provides the exclusive remedy for claims of
12 negligence which occur in the course and scope of employment. Cal.
13 Lab. Code § 3602(a); see, e.g., Cole v. Fair Oaks Fire Prot. Dist.,
14 43 Cal. 3d 148, 161 (1987); Coit Drapery Cleaners, Inc. v. Sequoia
15 Ins. Co., 14 Cal. App. 4th 1595, 1606 (1993) (an employee may not
16 sue his or her employer for negligent supervision). The only way
17 such a claim could succeed is if Plaintiff could allege that the
18 injury did not occur in the normal course of employment. See Cole,
19 43 Cal. 3d at 158-159. Because Plaintiff did not allege that, the
20 negligent supervision claim against UOP is dismissed. Plaintiff is
21 granted leave to amend.

22 With respect to CDCR, as with the wrongful termination claim,
23 Plaintiff has failed to exhaust her administrative remedies under
24 the TCA by presenting a written claim to CDCR. Furthermore, if
25 Plaintiff could successfully allege that she was jointly employed by
26 CDCR, this claim would most likely be preempted by the California
27 Workers' Compensation Act.

28 CDCR's motion to dismiss the negligent supervision claim

1 against it is GRANTED. Plaintiff is granted leave to amend.

2 V. Intentional Infliction of Emotional Distress (IIED)

3 Plaintiff claims she has suffered physical and mental injuries
4 as a result of her wrongful termination and treatment by Defendants.
5 To state such a claim, a plaintiff must plead (1) extreme and
6 outrageous conduct by the defendant with the intention of causing,
7 or reckless disregard of the probability of causing, emotional
8 distress; (2) the plaintiff suffered severe or extreme emotional
9 distress; and (3) the plaintiff's injuries were actually or
10 proximately caused by the defendant's outrageous conduct. Berkley
11 v. Dowds, 152 Cal. App. 4th 518, 533 (2007). The conduct must be so
12 extreme as to "exceed all bounds of that usually tolerated in a
13 civilized community." Unterberger v. Red Bull N. America, Inc., 162
14 Cal. App. 4th 414, 423 (2008) (citations omitted). The distress
15 must be so severe that "no reasonable [person] in a civilized
16 society should be expected to endure it." Fletcher v. W. Nat'l Life
17 Ins. Co., 10 Cal. App. 3d 376, 397 (1970). Plaintiff fails to
18 specify how each Defendant's conduct was "extreme and outrageous"
19 enough to sustain a claim for intentional infliction of emotional
20 distress. Plaintiff argues that extreme and outrageous conduct may
21 be plead simply by pleading a constitutional violation. Plaintiff
22 relies on a case that does not stand for this proposition. See
23 Blair v. City of Pomona, 223 F.3d 1074, 1081 (9th Cir. 2000). As
24 plead, Plaintiff fails to state a claim against any Defendant.

25 A. IIED Claim Against UOP

26 Plaintiff's IIED claim against it will most likely be preempted
27 by the California Workers' Compensation Act. Cal. Labor Code
28 §§ 3201 et seq. Claims that arise out of the normal course of

1 employment are preempted. See Livitsanos v. Superior Court, 2 Cal.
2 4th 744, 756 (1992). Plaintiff has not alleged that her tort claims
3 arise outside of the normal course of business. Therefore, the IIED
4 claim against UOP is dismissed. Plaintiff is granted leave to
5 amend, if she can truthfully allege this.

6 B. IIED Claim Against CDCR

7 In addition to the general problems with the IIED claim
8 discussed above, Plaintiff's failure to allege exhaustion of TCA
9 administrative remedies bars the IIED claim against CDCR. CDCR's
10 motion to dismiss is GRANTED. Plaintiff is given leave to amend if
11 she can allege that she filed a claim pursuant to the TCA.

12 C. IIED Claims Against Miller and Romero

13 The TCA includes a requirement that "one who sues a public
14 employee on the basis of acts or omissions in the scope of the
15 defendant's employment [must] have filed a claim against the public-
16 entity employer." Briggs v. Lawrence, 230 Cal. App. 3d 605, 613
17 (1991); Cal. Gov't Code § 950.2. Plaintiff has not alleged that she
18 filed a TCA claim with the CDCR containing her claims against Miller
19 and Romero. Nor has Plaintiff alleged that Miller and Romero acted
20 outside of the scope of their employment. The IIED claims against
21 Miller and Romero are therefore dismissed with leave to amend.

22 VI. Labor Code § 1102.5 and Government Code § 8547

23 At the October 30, 2008 hearing on Defendants' motions,
24 Plaintiff conceded that she had not exhausted administrative
25 remedies as to the Labor Code § 1102.5 claim. Therefore, this claim
26 is dismissed with prejudice against all Defendants.

27 Government Code §§ 8547 et seq., the California Whistleblower
28 Protection Act, protects from retaliation "state employees" who

1 report "waste, fraud, abuse of authority, violation of law, or
2 threat to public health." Cal. Gov. Code § 8547.1. The statute
3 defines "state employee" as "any individual appointed by the
4 Governor or employed or holding office in a state agency." Cal.
5 Gov. Code § 8547.2. Plaintiff does not allege that she was
6 appointed by the Governor, nor does she allege that she is employed
7 or holds office in a state agency. Though the issue of joint
8 employment for the purposes of other causes of action may be
9 determined differently, as a matter of law, under Government Code
10 § 8547.2, Plaintiff was not a "state employee" and cannot state a
11 claim under the Whistleblower Protection Act. Therefore,
12 Defendants' motions to dismiss the Government Code § 8547 claims
13 against them are GRANTED with prejudice because amendment would be
14 futile.

15 VII. Breach of Contract

16 Plaintiff pleads a breach of contract claim against UOP only.
17 She also alleges that UOP breached the implied covenant of good
18 faith and fair dealing by cutting her caseload and by conspiring to
19 have her gate clearance suspended or revoked, or ratifying the
20 suspension or revocation, in order to terminate her under the terms
21 of the contract. Second Amended Verified Complaint at ¶ 52. To
22 prevail on a breach of contract claim, Plaintiff must establish four
23 elements: "(1) the existence of a valid contract; (2) Plaintiff's
24 performance or excuse for nonperformance; (3) Defendant's
25 unjustified or unexcused failure to perform; and (4) damage to
26 Plaintiff." Lincoln Nat'l Corp. v. TakeCare, Inc., 1998 WL 281290,
27 *3 (N.D. Cal.); see also First Commercial Mortgage Co. v. Reece, 89
28 Cal. App. 4th 731, 745 (2001).

1 Plaintiff has not attached her contract with UOP to her
2 complaint, nor has she provided any detail about its relevant
3 provisions. Plaintiff claims she contracted to provide legal
4 representation to parolees and UOP agreed to secure Plaintiff's
5 clearance into CDCR facilities. Plaintiff does not provide
6 information about, for example, provisions of the contract regarding
7 whether Plaintiff was employed "at-will," whether the contract set a
8 certain period of time for Plaintiff's employment or how the
9 contract could be terminated. Plaintiff has not clearly alleged
10 what contractual obligation was breached. Further, Plaintiff fails
11 to allege that she adequately performed her contractual obligations.

12 Plaintiff also fails to allege a breach of the implied covenant
13 of good faith and fair dealing. The implied covenant of good faith
14 and fair dealing acts as a "supplement to the express contractual
15 covenants, to prevent a contracting party from engaging in conduct
16 that frustrates the other party's rights to the benefits of the
17 agreement." Waller v. Truck Ins. Exchange, Inc., 11 Cal. 4th 1, 36
18 (1995) (citations omitted). "Absent [a] contractual right, however,
19 the implied covenant has nothing upon which to act as a supplement,
20 and 'should not be endowed with an existence independent of its
21 contractual underpinnings.'" Id. Plaintiff has not sufficiently
22 alleged the nature of her contract with UOP, nor has she alleged how
23 UOP breached any supplemental implied covenant. Therefore,
24 Plaintiff has not adequately stated a claim for breach of the
25 implied covenant of good faith and fair dealing.

26 UOP's motion to dismiss this cause of action is GRANTED with
27 leave to amend.

28

1 VIII. Intentional Interference with Prospective Economic Advantage

2 Plaintiff alleges intentional interfere with prospective
3 economic advantage (IPEA) against CDCR, Miller and Romero.

4 To state a claim for the tort of intentional interference with
5 prospective economic advantage, Plaintiff must show, for each
6 Defendant: (1) an economic relationship between Plaintiff and a
7 third party containing the probability for future economic benefit
8 for Plaintiff; (2) Defendant's knowledge of this relationship;
9 (3) intentional acts by Defendant designed to disrupt the
10 relationship; (4) actual disruption of the relationship; (5) damages
11 proximately caused by Defendant's acts; and (6) that Defendant's
12 acts were wrongful by some legal measure other than the fact of the
13 interference itself. Korea Supply Co. v. Lockheed Martin Corp., 29
14 Cal. 4th 1134, 1153-54 (2003).

15 A. IPEA claim against CDCR

16 This claim is barred by Plaintiff's failure to allege
17 exhaustion of her administrative remedies under the TCA, for the
18 reasons discussed above. Furthermore, Plaintiff has failed to
19 clearly allege element (6) of the cause of action, that CDCR's
20 actions were wrongful by some legal measure other than the
21 interference itself. CDCR's motion to dismiss the IPEA claim is
22 GRANTED. Plaintiff is granted leave to amend.

23 B. IPEA claims against Miller and Romero

24 Likewise, Plaintiff has not adequately plead element (6) of
25 this cause of action against Miller and Romero: that Miller's and
26 Romero's acts were wrongful by some legal measure other than the
27 interference itself. Plaintiff may be able to plead that the acts
28 were wrongful because they were in retaliation for Plaintiff

1 exercising her First Amendment rights. To state such a claim,
2 Plaintiff must plead facts from which one could infer that her
3 protected speech caused Miller's and Romero's actions.

4 Furthermore, this claim is barred by Plaintiff's failure to
5 allege exhaustion of administrative remedies under the TCA.
6 Miller's motion to dismiss is GRANTED and her IIPEA claim against
7 Romero is also dismissed for the same reasons. Plaintiff is granted
8 leave to amend.

9 IX. Intentional Interference with Contractual Relations

10 Plaintiff alleges intentional interference with contractual
11 relations (IICR) against Defendants CDCR, Miller and Romero.
12 To state a claim for intentional interference with contractual
13 relations, Plaintiff must show: (1) an enforceable contract between
14 Plaintiff and a third party; (2) Defendant's knowledge of the
15 existence of that contract; (3) Defendant's intentional acts or
16 conduct, designed to induce a breach or interruption of the
17 contractual relationship; (4) actual breach or disruption of the
18 relationship; and (5) resulting damage. Reeves v. Hanlon, 33 Cal.
19 4th 1140, 1148 (2004).

20 This cause of action against CDCR, as well as against Miller
21 and Romero, is barred by the TCA, as discussed above, and is
22 dismissed.

23 X. Negligence

24 To state a cause of action for negligence, Plaintiff must
25 allege the traditional elements of duty, breach, actual causation,
26 and proximate causation. See United States Liab. Ins. Co. v.
27 Haidinger-Hayes, Inc., 1 Cal. 3d 586, 594 (1970). Plaintiff has
28 failed to plead these elements as to any Defendant.

1 As to UOP, this claim, like the other tort claims discussed
2 above, is preempted by the California Workers' Compensation Act.
3 Consequently, UOP's motion to dismiss is GRANTED with leave to amend
4 if Plaintiff can allege that UOP's actions were outside of the
5 employment bargain.

6 As to CDCR, the negligence cause of action is barred by the
7 TCA. Plaintiff has failed to plead that she filed a claim with CDCR
8 for this tort prior to filing suit.

9 As to Miller and Romero, this claim is likewise barred by the
10 TCA. Even if it were not barred, Plaintiff has failed to allege the
11 requisite elements of the tort. Plaintiff alleges that Miller and
12 Romero owed her a general duty to use ordinary care, citing
13 California Civil Code § 1714, which provides, "Everyone is
14 responsible, not only for the result of his or her willful acts, but
15 also for an injury occasioned to another by his or her want of
16 ordinary care or skill in the management of his or her property or
17 person, except so far as the latter has, willfully or by want of
18 ordinary care, brought the injury upon himself or herself." The
19 settled standard for determining the exercise of due care is the
20 hypothetical conduct of a reasonably prudent person. See, e.g.,
21 Mosley v. Arden Farms Co., 26 Cal. 2d 213, 216 (1945). Plaintiff
22 has not alleged how Miller or Romero breached this general duty of
23 care.

24 Plaintiff also alleges that a duty was established by her
25 employment contract, the Valdivia injunction and California Code of
26 Regulations Title 15 §§ 3285 et seq., 3172.1 et seq. and 3176. The
27 employment contract with UOP imposes no duty upon Miller or Romero.
28 The Valdivia injunction establishes a duty to parolees but it does

1 not establish a duty to Plaintiff, because Plaintiff is not a
2 beneficiary of the injunction. The regulations Plaintiff cites
3 govern, inter alia, mandatory disclosures to prison visitors; the
4 reporting of prison fights; prisoner cell and body inspections;
5 signage to inform the public of the prison facility; trespassing;
6 granting discretion to approve or disapprove visitors; and visiting
7 hours. The Court can glean no duty to Plaintiff established by
8 these regulations.

9 Miller's motion to dismiss this claim is GRANTED and the
10 negligence claim against Romero is dismissed for the same reasons.
11 Plaintiff is granted leave to amend if she can truthfully allege a
12 basis for a duty Miller and Romero have towards Plaintiff and that
13 she complied with the requirements of the TCA.

14 XI. Declaratory Relief

15 Plaintiff requests declaratory judgment on two issues: (1) that
16 CalPAP's representation of parolees does not comply with applicable
17 rules of professional conduct required by the State Bar of
18 California, California state law, federal law, the Valdivia
19 injunction and "VRP" and (2) that Plaintiff "did not do anything
20 wrong to merit suspension/revocation of her clearance at San Quentin
21 State Prison." Second Amended Verified Complaint at ¶ 77.

22 Plaintiff has no standing for the first part of her declaratory
23 judgment demand. Plaintiff is not a party to the Valdivia lawsuit,
24 she is not a California parolee, and she is no longer a parole
25 attorney with the CalPAP program. The second part of Plaintiff's
26 demand is duplicative of her first nine claims. It is also overly
27 broad. Therefore, Plaintiff fails to state a claim for declaratory
28 relief. This claim is dismissed against all Defendants. Plaintiff

1 is granted leave to amend.

2 XII. UOP's Motion for Attorneys' Fees and Costs

3 UOP cites no legal basis for this motion. Therefore the motion
4 is DENIED.

5 CONCLUSION

6 For the foregoing reasons, the Court GRANTS UOP's, CDCR's and
7 Miller's motions to dismiss. The Court DENIES as moot Miller's
8 motion for a more definite statement. The Court sua sponte
9 dismisses Plaintiff's claims against Romero. Plaintiff is granted
10 leave to amend her complaint as to each claim, with the exception of
11 the Labor Code § 1102.5 and the Government Code § 8547 claims which
12 are dismissed with prejudice because amendment would be futile.

13 Plaintiff may file and serve a third amended complaint within
14 twenty (20) days of this order. Defendants shall respond twenty
15 (20) days thereafter. Any motions to dismiss shall be noticed for
16 February 5, 2009 at 2:00 p.m. Plaintiff shall file a single brief
17 in opposition to Defendants' motions to dismiss. A further case
18 management conference will be held on February 5, 2009 at 2:00 p.m.,
19 whether or not any motions to dismiss are filed.

20

21 IT IS SO ORDERED.

22

23

24 Dated: 11/21/08

25

26

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CLAUDIA WILKEN
United States District Judge