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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 CHRIS BALDWIN,

12 Plaintiff,

13 v.

14 JACOB CUTTING et al.,

15 Defendants.  
16

Case No.: 3:16-cv-903-L-KSC

**ORDER REGARDING SUBJECT  
MATTER JURISDICTION**

17 In this civil rights action, Defendants filed motions to dismiss for lack of subject  
18 matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and failure to state a  
19 claim under Rule 12(b)(6). (Docs. no. 6 & 8.) The Court issued an order to show cause  
20 ("OSC") why the action should not be dismissed as preempted by the Civil Service  
21 Reform Act, 5 U.S.C. §1101 *et seq.* ("CSRA"), and denied the motions without prejudice  
22 pending briefing on the OSC. (Doc. no. 18.) The Court finds the CSRA does not  
23 preempt this action.

24 **I. BACKGROUND**

25 According to the allegations in the complaint, Plaintiff was employed by the  
26 United States Border Patrol ("Border Patrol"). In the course of his employment, he  
27 befriended San Diego County Sheriff's Deputy Jessica Leon. Leon's relative David  
28 William Centrone became a suspect in an investigation of the West Coast Crips,

1 commenced by the East County Gang Task Force ("Task Force"). The Task Force  
2 believed that Leon provided sensitive law enforcement information to Centrone. They  
3 tapped her mobile phone.

4 Because of the wiretap, the Task Force members were able to read text messages  
5 exchanged between Plaintiff and Leon. In 2014, Defendants Kai Mandelleh, El Cajon  
6 Police Department SWAT officer, and Zeath Sanchez, San Diego County Deputy Sheriff,  
7 both detectives with the Task Force, investigated Plaintiff's association with Leon. They  
8 believed that Leon sought to extract law enforcement sensitive information from Plaintiff.  
9 Plaintiff contends the suspicion was unreasonable to begin with and contrary to evidence,  
10 because he had no contact with Task Force members during the relevant time. Instead,  
11 he claims, that the investigation, including his interview, was in retaliation for Plaintiff's  
12 disparaging text messages about the Task Force investigation, the competency of the  
13 officers involved, and Defendant Jacob Cutting, El Cajon Police Department SWAT  
14 officer and former husband of Plaintiff's lover San Diego County Sheriff's Deputy  
15 Sharlene Wilson. The interview did not relate to leaking sensitive information to Leon,  
16 but to Plaintiff's romantic relationship with Wilson.

17 The Task Force ultimately concluded that Plaintiff did not pass sensitive law  
18 enforcement information to Leon, but nevertheless informed the Border Patrol, Plaintiff's  
19 employer, that Plaintiff had been questioned for associating with Leon and was  
20 uncooperative. Border Patrol opened an internal investigation. Although Plaintiff's  
21 interview was recorded, the Task Force refused to provide the Border Patrol with the  
22 recording to corroborate Plaintiff's contention that he cooperated.

23 Plaintiff contends that by pursuing unfounded allegations against him and passing  
24 false information to the Border Patrol, Defendants intentionally circumvented his  
25 constitutional rights for purposes of retaliation by Cutting, who was jealous, and Sanchez,  
26 for criticizing him for an error in collecting evidence. Plaintiff claims Defendants'  
27 conduct caused him physical, mental and emotional injury requiring medical leave and  
28 mental health treatment.

1 Plaintiff also complains that Defendants' false reports to the Border Patrol damaged  
2 his employment opportunities. Plaintiff was removed from the United States Marshal's  
3 San Diego Regional Fugitive Task Force. His superiors informed him of a Border Patrol  
4 policy to remove an agent from a task force upon request from a member of any of the  
5 other participating agencies, that he was removed without an internal investigation, and  
6 would not be allowed to apply for assignment to other task forces, because San Diego  
7 Sheriff's Department was a partner in most of them. Before conclusion of an internal  
8 investigation, Plaintiff was reassigned to the Border Patrol Imperial Beach station, his  
9 duties were downgraded, and he was turned down for multiple other assignments.  
10 Although Plaintiff ultimately secured a position as a criminal investigator with  
11 Immigration and Customs Enforcement, his acceptance was delayed pending the  
12 conclusion of Border Patrol's internal investigation. He is pursuing a grievance through  
13 the National Border Patrol Council.

14 Plaintiff filed the pending action against Cutting, Mandelleh and Sanchez alleging  
15 violation of his constitutional rights under 42 U.S.C. §1983, conspiracy to deny him due  
16 process under 42 U.S.C. §1985, and conspiracy to interfere with federal officer's duties  
17 under 42 U.S.C. §1985(1). Defendants filed a motion to dismiss arguing, among other  
18 things, that the Court lacks subject matter jurisdiction because Plaintiff's claims are  
19 preempted by the CSRA. The issue was not adequately briefed, and in light of the  
20 Court's duty to satisfy itself of the subject matter jurisdiction before proceeding to the  
21 merits, *see Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); *Ruhrigas AG v. Marathon*  
22 *Oil Co.*, 526 U.S. 574, 577, 583 (1999), the Court issued the OSC. If the CSRA applies,  
23 it preempts all of Plaintiff's claims.

## 24 **II. DISCUSSION**

25 "The CSRA established a comprehensive system for reviewing personnel action  
26 taken against federal employees." *Elgin v. Dept. of the Treasury*, 567 U.S. 1, \_\_\_, 132 S.  
27 Ct. 2126, 2130 (2012) (internal citation and quotation marks omitted). "Congress  
28 intended the CSRA to be the sole mechanism through which employment disputes are

1 settled." *Collins v. Bender*, 195 F.3d 1076, 1080 (9th Cir. 1999). Where it applies, its  
2 administrative procedures preempt federal court jurisdiction. *Mangano v. United States*,  
3 529 F.3d 1243, 1246 (9th Cir. 2008) (internal quotation marks, citations, and brackets  
4 omitted); *Elgin*, 132 S. Ct. at 2134. Preemption applies even if it leaves the employee  
5 without a remedy. *Orsay v. U.S. Dep't of Justice*, 289 F.3d 1125, 1128-29 (9th Cir.  
6 2002), abrogated on other grounds by *Millbrook v. U.S.*, \_\_\_ U.S. \_\_\_, 113 S.Ct. 1441  
7 (2013).

8 CSRA applies if the conduct underlying the complaint can be challenged as a  
9 prohibited personnel practice. *Mangano*, 529 F.3d at 1247. "The CSRA defines  
10 'prohibited personnel practices' as any 'personnel action' taken by someone in authority  
11 that violates one of ... enumerated practices. 'Personnel action,' in turn, is defined  
12 comprehensively ... ." *Id.* (citing 5 U.S.C. § 2302(b) for "personnel practices" and 5  
13 U.S.C. § 2302(a)(2)(A) for "personnel action"); *see also Orsay*, 289 F.3d at 1129 (CSRA  
14 provisions regarding personnel actions contain "broad language," and Ninth Circuit case  
15 law gives it an "inclusive construction"). Personnel practices are prohibited reasons for  
16 taking personnel actions. *Orsay*, 289 F.3d at 1129 (citing 5 U.S.C. §2302(b)). Even if a  
17 prohibited reason for the conduct at issue is not the primary reason for the personnel  
18 action, it is sufficient if it is "implicit" in the complaint. *Id.* When a claim falls within its  
19 broad ambit, the CSRA preempts constitutional, statutory, and tort claims. *See, e.g.,*  
20 *Mangano*, 529 F.3d at 1247 (infliction of emotional distress, intentional interference with  
21 right to practice chosen profession, abuse of process); *Orsay*, 289 F.3d at 1129-32  
22 (Privacy Act claim under 5 U.S.C. §552a); *Saul*, 928 F.2d at 834 (*Bivens* claim for  
23 unlawful search and seizure of personal mail).

24 The fact that a plaintiff complains about the conduct of third parties rather than his  
25 employer or supervisor, does not necessarily change the analysis. This issue was  
26 addressed in *Orsay*, where other defendants were named in addition to the plaintiff's  
27 employer:  
28

1 The CSRA reaches “prohibited personnel practices” by “[a]ny  
2 employee who has authority to take, recommend, or approve  
3 any personnel action” “with respect to an employee in ... a  
4 covered position in an agency.” 5 U.S.C. § 2302(a)(2)(A) & (b)  
5 (emphasis added). The CSRA contains no specific requirement  
6 that the employee that engaged in the prohibited personnel  
practice be an employee of the organization that employs the  
employee subject to the adverse personnel determination.

7 *Orsay*, 289 F.3d at 1131. For purposes of the CSRA, “any employee” is a federal  
8 employee. *See id.* § 2105.

9 However, the CSRA does not preempt federal claims involving conduct that does  
10 not fall within one of its broadly construed categories of personnel action. *Brock v.*  
11 *United States*, 64 F.3d 1421, 1424-25 (9th Cir. 1995); *see also Orsay*, 289 F.3d at 1131  
12 (CSRA preemption applies when “the underlying conduct ... involve[s] a ‘personnel  
13 action.’”). For example, wiretapping, warrantless searches, or uncompensated takings,  
14 *Bush v. Lucas*, 462 U.S. 367, 386 n.28 (1983), aiming a loaded weapon, *Orsay*, 289 F.3d  
15 at 1129, rape and sexual assault, *Brock*, 64 F.3d at 1424-25, or warrantless search of the  
16 employee's home, *Collins*, 195 F.3d at 1079-80, fall outside the CSRA's broad scope.

17 In large part, Plaintiff complains about the actions taken by the Border Patrol, his  
18 employer, in response to Defendants' alleged unconstitutional conduct. Plaintiff was  
19 removed from the U. S. Marshals San Diego Regional Fugitive Task Force and denied  
20 other employment opportunities. (Compl. at 16; *see also id.* (“damages include, but are  
21 not limited to: being transferred off the U.S. Marshals San Diego Regional Fugitive Task  
22 Force, deprivation of other prestigious assignments, an inability to laterally transfer to  
23 other agencies, a potential compromise of ability to pass regular required background  
24 checks, and the loss of overtime opportunities.”) To the extent Plaintiff complains about  
25 Border Patrol's actions, the allegations fall within several categories of “personnel action”  
26 under the CSRA -- “transfer or reassignment” under 5 U.S.C. §2302(a)(2)(A)(iv),  
27 “decision concerning pay, benefits or awards” under §2302(a)(2)(A)(ix), and “any other  
28 significant change in duties, responsibilities, or working conditions” under

1 §2302(a)(2)(A)(xii). They also fall within "prohibited personnel practices" -- "willfully  
2 obstruct any person in respect to such person's right to compete for employment" under  
3 §2302(b)(4); "discriminate ... against an employee ... on the basis of conduct which does  
4 not adversely affect the performance of the employee" under §2302(b)(10); and  
5 "personnel action [which violates] the merit system principles" under §2302(b)(12).<sup>1</sup>

6 However, the Border Patrol is not a named Defendant. None of the named  
7 Defendants are federal employees with authority to take any employment action as to  
8 Plaintiff. (See Compl. at 2-3.) Plaintiff complains he was investigated and questioned by  
9 Defendants ostensibly because he was suspected of leaking sensitive information about a  
10 local law enforcement operation. In reality, he alleges, he was investigated and  
11 questioned for private reasons -- to interfere in his romantic relationship, and get even for  
12 criticizing Sanchez. Under either scenario, the connection between Defendants' conduct  
13 and Plaintiff's employment is highly attenuated. *See Collins*, 195 F.3d at 1079.

14 Defendants were not federal employees, and their conduct occurred outside Plaintiff's  
15 workplace for non-work related reasons. Defendants' conduct therefore falls outside the  
16 broad scope of "personnel action" and "personnel practice" as defined in the CSRA.

17 For the foregoing reasons, Plaintiff's claims are not preempted by the CSRA.

18  
19 IT IS SO ORDERED.

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21 Dated: May 22, 2017

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24 Hon. M. James Lorenz  
25 United States District Judge  
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27 <sup>1</sup> The merit system principles include "fair and equitable treatment" of employees,  
28 including "proper regard for their ... constitutional rights," and protection of employees  
"against arbitrary action." 5 U.S.C. §2301(b)(2)&(8)(A).