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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

2:12-CV-1158 JCM (CWH)

THOMAS THATCHER SCHEMKES,

Plaintiff(s),

v.

JACOB TRANSPORTATION
SERVICES, LLC, et al.,

Defendant(s).

ORDER

Presently before the court is plaintiff Thomas Thatcher Schemkes’ motion to dismiss defendants’ counterclaim. (Doc. # 23). Defendants Jacob Transportation Services, LLC, James Jimmerson, and Carol Jimmerson filed a response in opposition (doc. # 30), and plaintiff filed a reply (doc. # 34).

Also before the court is plaintiff’s motion for a stay. (Doc. # 33). Defendants filed a response in opposition. (Doc. # 36).

Also before the court is defendants’ motion for summary judgment. (Doc. # 26). Plaintiff filed a response in opposition. (Doc. # 31).

I. Background

The instant case centers upon claims of retaliation in violation of the Fair Labor Standards Act (“FLSA”).

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1 Plaintiff was employed by defendant Jacob Transportation Services (“Jacob Transportation”)
2 as a limousine driver from November 2008 until July 2, 2009. Plaintiff claims that several months
3 after beginning his employment, he regularly complained to his manager that he was not being paid
4 for all of the hours he worked. On June 19, 2009, plaintiff filed a lawsuit against Jacob
5 Transportation alleging various pay violations under the FLSA.

6 On July 2, 2009, Jacob Transportation terminated plaintiff’s employment. Defendants claim
7 that this decision came as a result of their discovery that plaintiff had made numerous
8 misrepresentations in his employment application, including a failure to disclose that he had been
9 cited for stealing from a prior limousine company as an employee.

10 Without denying the allegations against him, plaintiff argues that defendants’ explanation
11 for his termination is merely pretext, and that he was actually fired for bringing his FLSA claims
12 against Jacob Transportation.

13 Plaintiff specifically alleges that defendants violated Section 215(a)(3) of the FLSA by
14 terminating him because he filed an FLSA complaint against Jacob Transportation. Plaintiff also
15 asserts that defendants’ conduct violated Nev. Rev. Stat. §§ 613.480(4) and 50.070. Finally, plaintiff
16 claims that defendants committed tortious discharge in violation of public policy under Nevada law.

17 Defendants allege a counterclaim that the instant suit constitutes an abuse of process by
18 plaintiff.

19 For the purposes of clarity, the court will first address plaintiff’s motion to dismiss, then
20 plaintiff’s motion for a stay, followed by defendants’ motion for summary judgment.

21 **II. Motion to Dismiss**

22 *A. Legal Standard*

23 A court may dismiss a complaint for “failure to state a claim upon which relief can be
24 granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short and plain
25 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell*
26 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual
27 allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the elements
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1 of a cause of action.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citation omitted).

2 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550 U.S.
3 at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to
4 “state a claim to relief that is plausible on its face.” *Iqbal*, 129 S.Ct. at 1949 (citation omitted).

5 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when
6 considering motions to dismiss. First, the court must accept as true all well-pled factual allegations
7 in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 1950.
8 Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not
9 suffice. *Id.* at 1949.

10 Second, the court must consider whether the factual allegations in the complaint allege a
11 plausible claim for relief. *Id.* at 1950. A claim is facially plausible when the plaintiff’s complaint
12 alleges facts that allows the court to draw a reasonable inference that the defendant is liable for the
13 alleged misconduct. *Id.* at 1949.

14 Where the complaint does not permit the court to infer more than the mere possibility of
15 misconduct, the complaint has “alleged—but not shown—that the pleader is entitled to relief.” *Id.*
16 (internal quotations omitted). When the allegations in a complaint have not crossed the line from
17 conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

18 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,
19 1216 (9th Cir. 2011). The *Starr* court stated, “First, to be entitled to the presumption of truth,
20 allegations in a complaint or counterclaim may not simply recite the elements of a cause of action,
21 but must contain sufficient allegations of underlying facts to give fair notice and to enable the
22 opposing party to defend itself effectively. Second, the factual allegations that are taken as true must
23 plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to
24 be subjected to the expense of discovery and continued litigation.” *Id.*

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1 *B. Analysis*

2 A claim for abuse of process under Nevada law requires: “(1) an ulterior purpose . . . other
3 than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the
4 regular conduct of the proceeding.” *LaMantia v. Redisi*, 38 P.3d 877, 879 (Nev. 2002).

5 Defendants claim that plaintiff has abused process by filing the instant suit because he did
6 so with the intention of subjecting defendants “to a multiplicity of suits in order to force concessions
7 in the original suit.” (Doc. # 30 p. 25). However, Nevada law clearly holds that “the mere filing of
8 a complaint is insufficient to establish the tort of abuse of process.” *Laxalt v. McClatchy*, 622 F.
9 Supp. 737, 752 (D. Nev. 1985).

10 Though defendants correctly assert that plaintiff has filed two separate complaints alleging
11 violations of the FLSA, these complaints address entirely independent facts and separate causes of
12 action. The prior suit was a collective action in which plaintiff alleged that Jacob Transportation
13 failed to pay all similarly situated employees as required under the FLSA. The present suit involves
14 allegations regarding plaintiff’s termination.

15 The fact that plaintiff filed the instant claims in a separate suit is understandable, considering
16 the discrete factual issues involved and that the claims in this case would have posed an unnecessary
17 distraction to the resolution of the prior FLSA suit. Accordingly, the court finds that plaintiff’s act
18 of filing the complaint in this case, as a matter of law, cannot constitute an abuse of process.

19 Accordingly, the court will grant plaintiff’s motion to dismiss.

20 **III. Motion for a Stay**

21 Plaintiff requests that this action be stayed due to the fact that defendants rely on an
22 “employment application and related employment package” document and some reports from the
23 Nevada Transportation Authority that plaintiff claims have never been produced by defendants in
24 this case. However, defendants clarify that they produced this evidence in plaintiff’s earlier action,
25 and defendants have consistently stated that they intended to rely upon these documents in this
26 matter.

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1 Therefore, because plaintiff was given these very documents along with more than 10,145
2 pages of additional discovery in the prior action, and was put on notice that these documents were
3 to be used in this case, the court finds that plaintiff has suffered no prejudice. Accordingly, plaintiff's
4 motion for a stay will be denied.

5 **IV. Motion for Summary Judgment**

6 *A. Legal Standard*

7 The Federal Rules of Civil Procedure provide for summary adjudication when the pleadings,
8 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,
9 show that “there is no genuine issue as to any material fact and that the movant is entitled to a
10 judgment as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is “to
11 isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24
12 (1986).

13 In determining summary judgment, a court applies a burden-shifting analysis. “When the
14 party moving for summary judgment would bear the burden of proof at trial, it must come forward
15 with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial.
16 In such a case, the moving party has the initial burden of establishing the absence of a genuine issue
17 of fact on each issue material to its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213
18 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

19 In contrast, when the nonmoving party bears the burden of proving the claim or defense, the
20 moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential
21 element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to
22 make a showing sufficient to establish an element essential to that party's case on which that party
23 will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails
24 to meet its initial burden, summary judgment must be denied and the court need not consider the
25 nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

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1 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
2 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*
3 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing
4 party need not establish a material issue of fact conclusively in its favor. It is sufficient that “the
5 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions
6 of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 631 (9th
7 Cir. 1987).

8 In other words, the nonmoving party cannot avoid summary judgment by relying solely on
9 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045
10 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the
11 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue
12 for trial. *See Celotex Corp.*, 477 U.S. at 324.

13 At summary judgment, a court’s function is not to weigh the evidence and determine the
14 truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*,
15 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all justifiable
16 inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is
17 merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at
18 249–50.

19 *B. Analysis*

20 1. FLSA Retaliation

21 29 U.S.C. § 215(a) provides that it is unlawful for any person “to discharge or in any other
22 manner discriminate against any employee because such employee has filed any complaint or
23 instituted or caused to be instituted any proceeding under [the FLSA].”

24 Claims pursuant to this section require that “a plaintiff [] make a *prima facie* showing of (1)
25 participation in protected activity under the FLSA; (2) an adverse employment action; and (3) a
26 causal link between the activity and the adverse action. If a plaintiff meets this burden, the defendant
27 must then articulate a legitimate reason for its decision [unrelated to the FLSA action]. The burden
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1 then shifts to the plaintiff to demonstrate that the proffered reason is [pretextual].” *Hagan v.*
2 *Echostar Satellite, L.L.C.*, 529 F.3d 617, 624 (5th Cir. 2008) (citing *McDonnell Douglas Corp. v.*
3 *Green*, 411 U.S. 792 (1973)).

4 I. Prima Facie Case

5 It is undisputed that plaintiff initiated an action against Jacob Transportation seeking unpaid
6 wages, which is an activity protected by the FLSA. It is also undisputed that defendants terminated
7 plaintiff’s employment, which certainly qualifies as an adverse employment action. The fact that
8 plaintiff’s termination occurred less than two weeks after he initiated his FLSA action creates an
9 inference of a causal relationship between plaintiff’s initial FLSA claim and his termination.

10 Therefore, plaintiff has established a prima facie claim for impermissible FLSA retaliation
11 in violation of 29 U.S.C. § 215(a)(3).

12 ii. Legitimate Reasons Unrelated to the FLSA Action

13 Defendants provide evidence showing that plaintiff made material misrepresentations in his
14 initial application for employment. Plaintiff misrepresented the dates he had worked for the Clark
15 County School District in order to conceal the fact that he had previously been employed by
16 Presidential Limousine.

17 Additionally, defendants present extensive documentation demonstrating that plaintiff
18 misrepresented the reason for his termination from a prior employer, CLS Transportation. Plaintiff
19 had been a limousine driver for CLS until an investigation by the Nevada Department of Business
20 and Industry revealed that, unbeknownst to CLS, plaintiff had been using CLS’ vehicles to give
21 limousine rides to clients in exchange for cash in violation of company policies and Nevada law.
22 (Doc. # 28 pp. 48-51). After investigators contacted CLS, plaintiff was terminated from his
23 employment.

24 However, plaintiff failed to disclose the true circumstances surrounding his departure from
25 CLS when he applied to Jacob Transportation. Defendants claim that they were made aware of
26 plaintiff’s misrepresentations due to inconsistencies between his employment application and facts
27 that were alleged in his initial FLSA action. Defendants claim that their decision to terminate
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1 plaintiff was motivated by the misrepresentations in plaintiff's employment application as well as
2 the fact that plaintiff was accused of violating Nevada law during his employment with CLS.

3 An employer cannot be expected to ignore an employee's material misrepresentations and
4 prior acts of deception merely because it became aware of these events due to an FLSA action.
5 Indeed, if it had not been for plaintiff filing the initial FLSA action, defendants may never have
6 learned of his transgressions, but to hold defendants' reasons for termination not to be legitimate
7 would functionally grant an employee immunity for any fireable offense any time the employee
8 alleged that the employer had violated the FLSA. The court finds that defendants have fulfilled their
9 burden to demonstrate that they terminated plaintiff's employment for a legitimate reason unrelated
10 to his FLSA complaint.

11 iii. Pretext

12 "A plaintiff can prove pretext in two ways: (1) indirectly, by showing that the employer's
13 proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not
14 believable, or (2) directly, by showing that unlawful discrimination more likely motivated the
15 employer." *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1171 (9th Cir. 2007) (internal citations, quotations,
16 and alterations omitted). "All the evidence as to pretext—whether direct or indirect—is to be
17 considered cumulatively." *Id.*

18 Plaintiff fails to provide any evidence demonstrating that defendants' proffered explanation
19 is merely pretextual. Plaintiff does not deny the allegations that he misrepresented his prior
20 experience on his application for employment or that he failed to disclose any information regarding
21 the investigation that lead to his departure from CLS.

22 Plaintiff does claim that a manager told him at the time of his termination that "it was too bad
23 [plaintiff] filed his lawsuit" and that a different manager hung up a picture of plaintiff "as an
24 example of what happens to drivers who sue the company." (Doc. # 31 p. 3). However, plaintiff is
25 unable to provide any evidence to support these allegations.

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1 Accordingly, the court finds that plaintiff has not provided evidence from which a reasonable
2 person could conclude that defendants' explanation for his termination was pretextual. As such, the
3 court will grant defendants' motion for summary judgment as it relates to this claim.

4 2. Nevada Statutory Claims

5 Plaintiff claims that defendants violated Nev. Rev. Stat. § 613.480 by terminating him. This
6 section prohibits employers from taking adverse actions against employees who take legal action
7 against their employers for requiring, encouraging, suggesting, or requesting that they take a
8 polygraph test. *See* Nev. Rev. Stat. § 613.480. In his response to the motion for summary judgment,
9 plaintiff points out that defendants had a policy of requiring employees to submit to a polygraph tests
10 upon suspicion that an employee was "involved in a criminal act or missing company monies." (Doc.
11 # 31 p. 7). However, the complaint fails to allege that defendants made even the slightest insinuation
12 that plaintiff should take a polygraph test.

13 Nev. Rev. Stat. § 50.070 prohibits employers from taking adverse action against employees
14 based on their service as a witness. *See Shoen v. Amerco, Inc.*, 896 P.2d 469, 475 (Nev. 1995).
15 Plaintiff fails to provide any evidence demonstrating that his termination occurred due to his service
16 as a witness in the prior FLSA action or any other case.

17 Accordingly, the court will grant defendants' motion for summary judgment as to these
18 claims.

19 3. Tortious Discharge in Violation of Public Policy

20 Under Nevada law, a claim for tortious discharge in violation of public policy requires that
21 (1) an employer, in its discharge of an employee, violated the public policy of Nevada and (2) that
22 there is no adequate statutory remedy available under Nevada law to allow victims to bring suit and
23 recover tort damages for their injuries. *See D'Angelo v. Gardner*, 819 P.2d 206, 216-17 (Nev. 1991).

24 Plaintiff alleges that defendants committed a tortious discharge by terminating him for filing
25 an FLSA claim against Jacob Transportation. However, as stated earlier, plaintiff fails to provide
26 evidence demonstrating that defendants' proffered reason for his discharge was pretextual.
27 Therefore, without ruling on the question as to whether an employer's termination of an employee
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1 for filing a claim under the FLSA could constitute a tortious discharge under Nevada law, the court
2 finds that plaintiff has failed to meet his evidentiary burden. Accordingly, the court will grant
3 defendants' motion for summary judgment as to this claim.

4 Accordingly,


5 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff's motion to
6 dismiss defendants' counterclaim (doc. # 23) be, and at the same time hereby is, GRANTED.

7 IT IS FURTHER ORDERED that plaintiff's motion for a stay (doc. # 33) is DENIED.

8 IT IS FURTHER ORDERED that defendants' motion for summary judgment (doc. # 26) is
9 GRANTED. The clerk is instructed to close the case and enter judgment accordingly.

10 DATED March 3, 2014.

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UNITED STATES DISTRICT JUDGE