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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

KRISTY HENDERSON,)
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 Plaintiff,)
)
 vs.)
)
 JOHN BONAVENTURA et al.,)
)
 Defendants.)
 _____)

2:13-cv-01921-RCJ-VCF

ORDER

This case arises out of the termination of a Deputy Constable of the Las Vegas Township Constable’s Office (“LVTCO”). Pending before the Court is Defendants’ Motion to Dismiss or for Summary Judgment (ECF No. 67). For the reasons given herein, the Court grants the motion as a motion for summary judgment.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Kristy Henderson was a Deputy Constable with LVTCO for several years, having been appointed by Defendant Constable John Bonaventura’s predecessor. (Compl. ¶ 8, Oct. 21, 2013, ECF No. 1). After Bonaventura was elected, Defendant Deputy Constable Lou Toomin directed Plaintiff to appear in a pilot episode of a reality television program about LVTCO, which she did. (*Id.* ¶ 9). Bonaventura soon began making sexual comments to Henderson on a regular basis, asking her to sit on his face and wear a miniskirt and garters to work, telling her that her “hard body” made part of his body hard, and other vulgar and sexually

1 harassing comments. (*Id.* ¶ 10).

2 In January 2012, members of the Clark County Board of Commissioners expressed their
3 concern over the proposed reality show because it depicted several deputies using profanity and
4 abusive language with members of the public, as well as other unprofessional and embarrassing
5 behavior. (*Id.* ¶ 12). The Board held a hearing on January 3, 2012 at which they expressed
6 displeasure with the idea of the show, and Deputy John Watkins, whom Bonaventura had sent to
7 represent him, assured the Board that Bonaventura had no intention of moving forward with the
8 show. (*Id.* ¶ 13).

9 In early 2012, Lt. Hadi Sadjadi (presumably also of the LVTCO, though not explicitly so
10 alleged) questioned Plaintiff and her boyfriend, Deputy Ray Jacoby, about an incident involving
11 Jacoby that had resulted in a citizens complaint against him. (*See id.* ¶¶ 14–15). Plaintiff did not
12 receive forty-eight hours notice of the interview, and during the interview, Sadjadi did not inform
13 Plaintiff of her rights under the “Peace Officer’s Bill of Rights in Chapter 289 of the Nevada
14 Revised Statutes (“NRS”) or of her right to representation. (*Id.* ¶ 14). When Plaintiff complained
15 of the alleged violations of Chapter 289, Lt. Sadjadi told her to speak to Bonaventura. (*See id.*
16 ¶ 17). Deputy Chief Dean Lauer ultimately gave Plaintiff a verbal warning as a result of the
17 incident. (*Id.* ¶ 16). When Plaintiff spoke with Bonaventura about the alleged Chapter 289
18 violations at her interview with Lt. Sadjadi, Bonaventura told her LTVCO “would not love her
19 again” until she “dumped Ray [Jacoby].” (*Id.* ¶ 18). She was also told not to worry, because
20 LTVCO needed its “female, its Jew, and its black.” (*Id.* ¶ 18).¹

21 In early July 2012, Toomin directed Plaintiff to write a biography for the reality show,
22 because the producers wanted to feature her in the show. (*Id.* ¶ 19). Plaintiff expressed her
23 concerns because LVTCO had assured the Board that there would be no show after the Board

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25 ¹Plaintiff does not directly allege here, or elsewhere in the Complaint, whether she is African-American and/or Jewish.

1 expressed its concerns, and Toomin told her it was a secret and that she should not tell anyone.
2 (*Id.*). Plaintiff contacted County Commissioner Steve Sisolak to express her concerns but also
3 wrote the biography as instructed, telling her superiors she was only complying out of fear of
4 reprisal for non-compliance. (*Id.*). Plaintiff then advised Bonaventura and Toomin that she
5 would not participate in the realty show. (*Id.* ¶ 20). On July 13, 2012, Bonaventura terminated
6 Plaintiff. (*Id.*).

7 Plaintiff exhausted her administrative remedies with the Equal Employment Opportunity
8 Commission (“EEOC”) and received a Right-to-Sue Letter (“RTS”) on August 30, 2013. (*Id.*
9 ¶¶ 22–24).² Plaintiff sued Bonaventura, Toomin, LTVCO (collectively “LTVCO Defendants”),
10 and Clark County in this Court less than ninety days later on October 21, 2013. The Complaint
11 lists seven nominal causes of action: (1) Hostile Workplace Environment (“HWE”) under Title
12 VII; (2) Sexual Harrassment (Quid Pro Quo) under Title VII; (3) Retaliation under Title VII; (4)
13 Breach of Contract; (5) Violations of Chapter 289 and the Due Process Clauses of the U.S. and
14 Nevada Constitutions; (6) Breach of the Implied Covenant of Good Faith and Fair Dealing (in
15 both contract and tort); and (7) Wrongful Discharge. Clark County moved to dismiss, and
16 LTVCO Defendants moved to dismiss or, in the alternative, for summary judgment. The Court
17 granted the County’s motion when Plaintiff failed to timely oppose it. The Court dismissed the
18 fourth, fifth, and sixth causes of action as against LTVCO Defendants for improper claim-
19 splitting based on a pending state court case. The Court dismissed the seventh cause of action as
20 against LTVCO Defendants based on Nevada’s employment-at-will doctrine. LTVCO
21 Defendants have now filed a successive motion to dismiss or for summary judgment as against
22 the remaining three causes of action under Title VII.

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25 ²Plaintiff does not allege the nature of the charge of discrimination to the EEOC, but
presumably it was for sex discrimination.

1 **II. LEGAL STANDARDS**

2 **A. Dismissal**

3 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
4 claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of
5 what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47
6 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
7 that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule
8 12(b)(6) tests the complaint’s sufficiency. *See N. Star Int’l v. Ariz. Corp. Comm’n*, 720
9 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for
10 failure to state a claim, dismissal is appropriate only when the complaint does not give the
11 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell*
12 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is
13 sufficient to state a claim, the court will take all material allegations as true and construe them in
14 the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th
15 Cir. 1986). The court, however, is not required to accept as true allegations that are merely
16 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
17 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
18 with conclusory allegations is not sufficient; a plaintiff must plead facts pertaining to his own
19 case making a violation plausible, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79
20 (2009) (citing *Twombly*, 550 U.S. at 556) (“A claim has facial plausibility when the plaintiff
21 pleads factual content that allows the court to draw the reasonable inference that the defendant is
22 liable for the misconduct alleged.”). In other words, under the modern interpretation of Rule
23 8(a), a plaintiff must not only specify or imply a cognizable legal theory (*Conley* review), but
24 also must plead the facts of his own case so that the court can determine whether the plaintiff has
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1 any plausible basis for relief under the legal theory he has specified or implied, assuming the
2 facts are as he alleges (*Twombly-Iqbal* review).

3 “Generally, a district court may not consider any material beyond the pleadings in ruling
4 on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the
5 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner*
6 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, “documents
7 whose contents are alleged in a complaint and whose authenticity no party questions, but which
8 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
9 motion to dismiss” without converting the motion to dismiss into a motion for summary
10 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule
11 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*
12 *Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court
13 considers materials outside of the pleadings, the motion to dismiss is converted into a motion for
14 summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir.
15 2001).

16 **B. Summary Judgment**

17 A court must grant summary judgment when “the movant shows that there is no genuine
18 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
19 Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson v.*
20 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there
21 is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* A
22 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
23 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). In determining summary
24 judgment, a court uses a burden-shifting scheme:

1 When the party moving for summary judgment would bear the burden of proof at
2 trial, it must come forward with evidence which would entitle it to a directed verdict
3 if the evidence went uncontroverted at trial. In such a case, the moving party has the
initial burden of establishing the absence of a genuine issue of fact on each issue
material to its case.

4 *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations
5 and internal quotation marks omitted). In contrast, when the nonmoving party bears the burden
6 of proving the claim or defense, the moving party can meet its burden in two ways: (1) by
7 presenting evidence to negate an essential element of the nonmoving party's case; or (2) by
8 demonstrating that the nonmoving party failed to make a showing sufficient to establish an
9 element essential to that party's case on which that party will bear the burden of proof at trial. *See*
10 *Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary
11 judgment must be denied and the court need not consider the nonmoving party's evidence. *See*
12 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

13 If the moving party meets its initial burden, the burden then shifts to the opposing party to
14 establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
15 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party
16 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the
17 claimed factual dispute be shown to require a jury or judge to resolve the parties' differing
18 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d
19 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary judgment
20 by relying solely on conclusory allegations unsupported by facts. *See Taylor v. List*, 880 F.2d
21 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and
22 allegations of the pleadings and set forth specific facts by producing competent evidence that
23 shows a genuine issue for trial. *See Fed. R. Civ. P. 56(e); Celotex Corp.*, 477 U.S. at 324.

24 At the summary judgment stage, a court's function is not to weigh the evidence and
25 determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson*, 477

1 U.S. at 249. The evidence of the nonmovant is “to be believed, and all justifiable inferences are
2 to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely
3 colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

4 **III. ANALYSIS**

5 Defendants argue that they are entitled to discretionary immunity against the Title VII
6 claims under state law. In Nevada, certain governmental actors have discretionary immunity
7 under certain circumstances, Nev. Rev. Stat. § 41.032, even where the State of Nevada has
8 otherwise waived its common law sovereign immunity, *see id.* § 41.031. But Congress validly
9 stripped the States of their common law sovereign immunity as to Title VII claims (and created
10 jurisdiction for such suits in federal court pursuant to § 5 of the Fourteenth Amendment,
11 notwithstanding the Eleventh Amendment bar to federal jurisdiction over such claims that
12 otherwise applies) via the Civil Rights Act of 1964. *See generally Fitzpatrick v. Bitzer*, 427 U.S.
13 445 (1976) (Rehnquist, J.). Defendants therefore have no discretionary immunity, which is
14 simply a limited reservation of the common law sovereign immunity that Congress has stripped
15 with respect to Title VII.

16 Defendants also argue that the Court should abstain under the *Colorado River* doctrine.
17 *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) involved
18 parallel state and federal proceedings concerning water rights in Colorado. The United States
19 filed suit in federal court to secure its rights to certain water as against approximately 1000
20 individual users. One of the defendants in the federal action then filed a parallel suit in state
21 court, and several other defendants filed a motion to dismiss the federal action for lack of
22 jurisdiction. The district court granted the motion. The Supreme Court found that jurisdiction
23 was not lacking and abstention was inappropriate but nevertheless ruled that dismissal was
24 appropriate based on the need to avoid duplicative litigation and “(w)ise judicial administration,
25 giving regard to conservation of judicial resources and comprehensive disposition of litigation.”

1 *Id.* at 817. The case was anomalous because it permitted a federal court to dismiss a case over
2 which it in fact had jurisdiction and where abstention was not appropriate. *See id.* at 821–26
3 (Stewart, J., dissenting). Even the majority noted that “[t]he doctrine of abstention, under which
4 a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an
5 extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy
6 properly before it.” *Id.* at 813 (majority opinion) (citation and internal quotation marks omitted).
7 Moreover, *Colorado River* is tightly fact-bound to the water-rights context. *See Arizona v. San*
8 *Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 571 (1983) (noting that “water rights adjudication is
9 a virtually unique type of proceeding”); *id.* at 572 (Marshall, J., dissenting) (noting that the
10 *Colorado River* doctrine “govern[s] controversies involving federal water rights”). Even
11 assuming the Court intended a broader application, the *Colorado River* doctrine is simply not an
12 abstention doctrine based on considerations of federal–state comity, as is often argued by
13 litigants attempting to avoid federal court, but rather is a *sui generis* doctrine designed to
14 maximize the overall efficiency of co-pending litigation. *Moses H. Cone Mem’l Hosp. v.*
15 *Mercury Constr. Corp.*, 460 U.S. 1, 14–15 (1983) (“[In *Colorado River*], we held that the
16 District Court’s dismissal was proper on another ground—one resting not on considerations of
17 state–federal comity or on avoidance of constitutional decisions, as does abstention, but on
18 ‘considerations of “[w]ise judicial administration, giving regard to conservation of judicial
19 resources and comprehensive disposition of litigation.’” (second alteration in original)). The
20 factors to consider when deciding to dismiss under *Colorado River* include the inconvenience of
21 the federal forum, the desirability of avoiding piecemeal litigation, and the order in which the
22 competing fora obtained jurisdiction. *Id.* at 15 (citing *Colorado River*, 424 U.S. at 818–19). The
23 decision is “highly weighted in favor of the exercise of jurisdiction.” *Id.* at 16.

24 Here, there is no indication of competing jurisdiction over a res or a complex system of
25 property rights, and the Court has already dismissed the improperly split claims. There is nothing

1 inappropriate about a litigant maintaining a suit in federal court on federal causes of action while
2 maintaining another suit in state court on state causes of action simply because the claims arise
3 out of the same event or series of events. Indeed, where such a litigant brings all claims in
4 federal court, the district court has explicit statutory discretion to decline jurisdiction over the
5 state law claims if those claims predominate. *See* 28 U.S.C. § 1367(c)(2). But there are simply
6 no state law claims remaining to dismiss in this case, and the Court will not dismiss federal
7 claims under *Colorado River*.

8 Defendants also argue that Plaintiff was an at-will employee. The Court has already
9 determined that issue in favor of Defendants and dismissed the seventh cause of action,
10 accordingly. The issue is still relevant to the remaining Title VII claims, however, and the Court
11 addresses why, *infra*.

12 Defendants also argue that Plaintiff failed to exhaust her administrative remedies under
13 state law. But the only administrative remedies a Title VII plaintiff must exhaust are those under
14 Title VII, and Defendants do not argue any failure to exhaust those remedies. They only argue
15 that Plaintiff failed to exhaust her state law remedies under Chapter 289 of the Nevada Revised
16 Statutes, which governs general employment grievances by peace officers under the civil service
17 laws. That issue is irrelevant to the Title VII claims. Section 2000e-5(c) requires a Title VII
18 plaintiff to first exhaust administrative remedies with any state law agency providing a remedy
19 for violation of Title VII-type standards, but the Nevada Equal Rights Commission (“NERC”)
20 has a work-sharing agreement with the EEOC such that filing a complaint with either agency
21 constitutes a constructive filing with the other, *EEOC v. Dinuba Med. Clinic*, 222 F.3d 580, 585
22 (9th Cir. 2000), and the effect of the agreement is therefore to obviate the requirement to
23 separately file with the state agency under section 2000e-5(c). A plaintiff necessarily gives
24 NERC an opportunity to review a charge in the first instance by filing with the EEOC, because
25 charges filed with the EEOC are forwarded to (and therefore constructively filed with) the NERC

1 via the work-sharing agreement, and the EEOC defers consideration for sixty days while NERC
2 reviews the charge. *See id.* Even if the EEOC failed to forward the charge to NERC as required
3 under the agreement as a factual matter, Plaintiff could not be faulted for the failure. In light of
4 the work-sharing agreement between EEOC and NERC, she did everything expected of her to
5 give the NERC a chance to review the charge when she filed a charge with the EEOC. *See*
6 *Laquaglia v. Rio Hotel & Casino, Inc.*, 186 F.3d 1172, 1176 (9th Cir. 1999) (“In determining
7 whether Laquaglia’s claim was ‘dual-filed,’ it does not matter whether or not her January 19th
8 charge actually was forwarded to the EEOC—only whether it was intended to be forwarded
9 under the worksharing agreement. For purposes of the constructive filing of a charge with the
10 EEOC, it is irrelevant whether the state agency actually followed the referral provisions in the
11 agreement or erroneously began investigating a complaint that should have been forwarded to the
12 EEOC. Waiver provisions in workshare agreements should not be ‘contingent upon scrupulous
13 compliance’ with the referral provisions; otherwise, claimants with potentially meritorious
14 claims might be denied relief as a result of bureaucratic mix-ups. With that in mind, we read the
15 worksharing agreement at issue to grant dual-filed status to all Title VII charges within the
16 ‘mutual jurisdiction’ of both the NERC and the EEOC.” (citations omitted)).

17 Finally, Defendants argue that Plaintiff was not an “employee” under Title VII because
18 she was part of the personal staff of an elected official:

19 The term “employee” means an individual employed by an employer, except
20 that *the term “employee” shall not include any person elected to public office in any*
21 *State or political subdivision of any State by the qualified voters thereof, or any*
22 *person chosen by such officer to be on such officer’s personal staff, or an appointee*
23 *on the policy making level or an immediate adviser with respect to the exercise of the*
24 *constitutional or legal powers of the office. The exemption set forth in the preceding*
25 *sentence shall not include employees subject to the civil service laws of a State*
government, governmental agency or political subdivision. With respect to
employment in a foreign country, such term includes an individual who is a citizen
of the United States.

1 42 U.S.C. § 2000e(f) (emphasis added). It appears undisputed that Bonaventura himself was not
2 an “employee” under this definition. Plaintiff affirmatively alleges Bonaventura’s public election
3 to his position. The question is whether Plaintiff was a “person chosen by [Bonaventura] to be
4 on [his] personal staff.” This question is not irrelevant to the Title VII claims, as Plaintiff argues.
5 If Plaintiff falls within this definition, she is simply not an “employee” who may sue under Title
6 VII. In the context of deputy law enforcement officers, the Courts of Appeals distinguish
7 between employees and non-employees for the purposes of Title VII based on the level of
8 discretion the elected official has over the alleged employee’s continued employment and the
9 amount of direct contact the alleged employee has with the official on a day-to-day basis. Where
10 a deputy does not report directly to the elected official or where the deputy does report directly to
11 the elected official, but only because the force is very small and otherwise functions as a typical
12 police officer as opposed to a specialized assistant, the deputy is not excluded as an “employee”
13 under subsection (f). *See, e.g., Cromer v. Brown*, 88 F.3d 1315, 1323–24 (4th Cir. 1996). On the
14 other hand, where a deputy serves at the pleasure of the elected official who may remove him at
15 will (as opposed to those subject to state or local civil service laws) and where the elected official
16 is the only public official to whom the deputy reports, the deputy is part of the elected official’s
17 “personal staff” excluded as an “employee” under subsection (f). *See, e.g., Owens v. Rush*, 654
18 F.2d 1370, 1375–76 (10th Cir. 1981) (citing *Ramirez v. San Mateo Cnty.*, 639 F.2d 509, 513 (9th
19 Cir. 1981)).

20 In *Ramirez*, the district court had dismissed the plaintiff’s Title VII claim for refusal to
21 hire him as a deputy district attorney based upon his national origin. *See* 639 F.2d at 510. The
22 Court of Appeals affirmed, finding that the deputy district attorney position at issue was directly
23 on point with the assistant district attorney position at issue in *Wall v. Coleman*, 393 F. Supp. 826
24 (S.D. Ga. 1975). *See id.* at 512–13. The Court of Appeals noted that in *Wall*, the district court
25 had noted that the assistant district attorneys “do what he delegates to them, serve at his pleasure

1 and work as his assistants instead of working as assistants for all district attorneys of this state . .
2 . .” *Id.* at 513 (quoting *Wall*, 393 F. Supp. at 831). The court continued:

3 A similar distinctiveness characterizes the position of deputy district attorney
4 in San Mateo County. Unlike most other county workers, deputy district attorneys
5 serve at the pleasure of their superior, the district attorney, who has plenary power
6 of appointment and removal. Also unlike others employed by the county, deputies
7 are not subject to the normal protections of the county civil service system.

8 This characterization of the deputy’s position in county law tells us much
9 about the working relationship the county envisions between district attorney and
10 deputy. The exclusive powers of selection and retention indicate that deputies
11 perform to the district attorney’s personal satisfaction rather than to the more
12 generalized standards applied to other county workers by the civil service system.
13 Such a level of personal accountability is consistent with the highly sensitive and
14 confidential nature of the work which deputies perform as well as with the
15 considerable powers of the deputy to represent the district attorney in legal
16 proceedings and in the eyes of the public. We conclude that when a job includes this
17 level of personal accountability to one elected official, it is precisely the sort of job
18 Congress envisioned to be within the “personal staff” of that official and thus exempt
19 from Title VII.

20 *Id.* at 513 (citation omitted).

21 Here, Defendants argue, and Plaintiff does not appear to dispute, that Plaintiff was
22 terminable at will by Bonaventura. Exhibit 1 to the previous motion contains, *inter alia*,
23 Plaintiff’s Revocation, Appointment, and Employee Agreement. (*See* ECF No. 24-2). The
24 Appointment indicates that Bonaventura appointed Plaintiff and that she would hold her office
25 until “December 31, 2012, or upon revocation by the Constable at an earlier time.”
(Appointment, Jan. 3, 2012, ECF No. 24-2, at 2). The Agreement also indicated at-will
employment. (*See* Agreement, Jan. 19, 2012, ECF No. 24-2, at 3). Bonaventura revoked
Plaintiff’s appointment on July 13, 2012. (*See* Revocation, July 13, 2012, ECF No. 24-2, at 1).
Contrary to Plaintiff’s argument in response, the fact that Plaintiff was terminable at will by
Bonaventura is therefore relevant to whether a Title VII claim can lie, because if she was
terminable at will, she was less likely to be an “employee” under Title VII where her supervisor
was a publicly elected official. This argument is therefore not merely a rehash of the at-will

1 employment issue resolved in the previous order as to the state law claims, but is directly
2 relevant to the Title VII claims. Although the legal standards that govern a Title VII claim are
3 pure matters of federal law, certain conclusions of state law constitute *facts* relevant to
4 application of the federal standards. Most importantly, whether a plaintiff enjoyed state civil
5 service law protection requires a conclusion of state law, but the answer to that question
6 constitutes a fact that is clearly relevant to determining the mixed question of law and fact
7 whether a plaintiff is an “employee” under Title VII. A case Plaintiff herself quotes in relevant
8 part recognizes the distinction between an inappropriate argument that state law can govern Title
9 VII’s standards directly and an appropriate argument that state law can provide facts relevant to
10 applying Title VII’s standards. *See Calderon v. Martin Cnty.*, 639 F.2d 271, 272–73 (11th Cir.
11 1981) (“State law is relevant insofar as it describes the plaintiff’s position, including his duties
12 and the way he is hired, supervised and fired. A state court determination that a particular type of
13 worker is not an ‘employee’ for purposes of state statutes, however, does not in itself resolve the
14 issue of whether that worker is an employee for purposes of Title VII.”). Because is it
15 undisputed that Plaintiff was terminable at will by Bonaventura, if Defendants have also shown
16 that it is undisputed that Plaintiff was not protected by any civil service laws, the Court should
17 grant summary judgment to Defendants under *Ramirez* unless Plaintiff has produced evidence
18 showing a genuine issue of material fact as to the nature of the relationship.

19 Plaintiff points out that deputy constables must be “certified by the Peace Officers’
20 Standards and Training Commission as a category I or category II peace officer” before being
21 appointed and that they may not make policy decisions. *See Nev. Rev. Stat. § 258.060*. But this
22 does not indicate civil service protection or that the appointing authority does not have plenary
23 hiring and firing power. The requirement of a professional certification by a state professional
24 body has nothing whatsoever to do with the employment relationship between an elected official
25

1 and his appointees. Presumably, the deputy district attorneys in *Ramirez* were required to be
2 certified to practice law by the California State Bar.

3 Next, a lack of policy-making authority does not indicate that the appointee is not a
4 member of the elected official’s “personal staff” under the statute. Personal staff may or may not
5 have policy-making authority. Policy-making authority is not a factor relevant to whether an
6 appointee is on an elected official’s “personal staff,” but rather is an additional, disjunctive way
7 to show that an appointee is not an “employee” under Title VII:

8 [T]he term “employee” shall not include any person elected to public office in any
9 State or political subdivision of any State by the qualified voters thereof, or any
10 person chosen by such officer to be on such officer’s personal staff, *or* an appointee
on the policy making level or an immediate adviser with respect to the exercise of the
constitutional or legal powers of the office.

11 42 U.S.C. 2000e(f) (emphasis added). Defendants have not argued that Plaintiff had policy
12 making authority, nor need they.

13 Plaintiff also points out that deputy constables are “peace officers” by statute. *See id.*
14 § 258.070(1)(a). But this designation alone merely indicates an appointee’s powers under state
15 law, not the nature of an appointee’s legal relationship with her supervisor. To say that deputy
16 constables are peace officers and therefore cannot be “mere” personal staff is a non-sequitur.
17 The deputy district attorneys in *Ramirez* presumably had the power to represent the state in court
18 just as the district attorney himself did.

19 Next, the distinction between deputy constables in large townships and small townships
20 has nothing to do with the employment relationship, but only with limitations on the deputy
21 constables’ power in small townships absent additional certifications. *Compare id., with id.*
22 § 258.070(2). In fact, the additional limitations in small townships also apply to elected
23 constables *themselves*, not only to their deputies. *See id.* § 258.070(2). The distinction has
24 nothing to do with employment relationships between elected constables and deputy constables.

1 Plaintiff also argues that the statutes permit constables to hire “clerical and operational
2 staff” as the constable’s work requires. *See id.* § 258.065(1). Such staff are not peace officers.
3 *See id.* § 258.065(2)(a). But this statute simply indicates that constables may appoint two classes
4 of workers: deputies and non-deputy clerical workers. It does not assist in determining whether
5 either class of workers are “personal staff” under the meaning of Title VII.

6 Plaintiff’s best argument is that there were sergeants, lieutenants, and other personnel in
7 LVTCO chain of command between her and Bonaventura, which is consistent with the
8 allegations in the Complaint concerning a “Deputy Chief” and a “Lieutenant.” This fact could
9 support a finding that Plaintiff was an “employee” under Title VII. *See Cromer*, 88 F.3d at
10 1323–24. This was not the case in *Ramirez* or *Wall*, where the deputy and assistant district
11 attorneys reported directly to the respective district attorneys. Defendants have not provided any
12 evidence showing that Plaintiff reported directly to Bonaventura with no intermediary. The
13 Court therefore finds that there is a genuine issue of material fact as to the command structure
14 that is relevant to the determination of the “employee” issue under § 2000e(f).³

15 In reply, Defendants additionally argue that all constables and their deputies are “public
16 officers and electors” in Nevada. *See Nev. Const. art. XV, § 3.* The citation is to a section of the
17

18 ³Because the exemptions in § 2000e(f) are to be construed narrowly, *see, e.g., Gunaca v.*
19 *State of Tex.*, 65 F.3d 467, 471 (5th Cir. 1995), it appears unlikely that one could ever be held to
20 be a member of an elected official’s “personal staff” where the person does not even report
21 directly to the elected official, but only to an intermediary in a para-military chain of command.
22 The Supreme Court has adopted a similar approach with respect to the presidential appointment
23 power. *Cf. Edmond v. United States*, 520 U.S. 651, 662–63 (1997) (“Generally speaking, the
24 term ‘inferior officer’ connotes a relationship with some higher ranking officer or officers below
25 the President: Whether one is an ‘inferior’ officer depends on whether he has a superior. It is
not enough that other officers may be identified who formally maintain a higher rank, or possess
responsibilities of a greater magnitude. If that were the intention, the Constitution might have
used the phrase ‘lesser officer.’ Rather, in the context of a Clause designed to preserve political
accountability relative to important Government assignments, we think it evident that ‘inferior
officers’ are officers whose work is directed and supervised at some level by others who were
appointed by Presidential nomination with the advice and consent of the Senate.”).

1 Nevada Constitution imposing term limits and limiting eligibility to run for public office to those
2 who are eligible to vote. Section 2000e(f) exempts those “elected to public office.” It appears as
3 if Defendants attempt to fit into this definition any person who is a public official and a qualified
4 elector, i.e., a person qualified to vote. The Court rejects this word-jumble-style interpretation of
5 section 2000e(f). Defendants also repeat arguments made in the motion, but they do not
6 satisfactorily address the command structure issue, which the Court finds creates a genuine issue
7 of material fact as to whether Plaintiff is an “employee” under Title VII. Plaintiff’s deposition
8 does not indicate explicitly to whom she reported directly, but in several places she indicates
9 having reported to persons in the chain of command other than Bonaventura himself.

10 Next, Defendants argue that the retaliation claim must fail. Defendants reason that
11 because Plaintiff was not an “employee,” Title VII does not apply, and her complaints about
12 sexual harassment were therefore not protected activity under the statute. This argument falls
13 with the argument under 2000e(f).

14 Next, Defendants argue that Plaintiff should be judicially estopped from bringing her
15 claims because she failed to disclose the litigation in her bankruptcy schedules. In *Hamilton v.*
16 *State Farm Fire & Casualty Co.*, 270 F.3d 778 (9th Cir. 2001) (Brunetti, J.), the Court of
17 Appeals ruled that a plaintiff was judicially estopped from bringing claims against his insurance
18 company where he had failed to list those claims as assets of the bankruptcy estate in his
19 bankruptcy proceedings. “In the bankruptcy context, a party is judicially estopped from asserting
20 a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor’s
21 schedules or disclosure statements.” *Id.* at 783. “Hamilton is precluded from pursuing claims
22 about which he had knowledge, but did not disclose, during his bankruptcy proceedings, and that
23 a discharge of debt by a bankruptcy court, under these circumstances, is sufficient acceptance to
24 provide a basis for judicial estoppel, even if the discharge is later vacated.” *Id.* at 784. In other
25 words, a plaintiff may not in equity conceal a contingent claim from his creditors and obtain a

1 more favorable discharge in bankruptcy than he would have obtained had he disclosed the
2 contingent claim and then bring the previously concealed claim later as a civil case. *Hamilton* is
3 on all fours with the present case. Defendants adduce Plaintiff's bankruptcy schedules. Plaintiff
4 petitioned for Chapter 7 bankruptcy in this District on August 3, 2012 (Case No. 12-bk-19119-
5 LBR). She received a discharge on November 7, 2012. Item 21 of Schedule B of the Petition for
6 "Other contingent and unliquidated claims of every nature" lists nothing. Plaintiff filed a
7 charge of discrimination with the EEOC on August 27, 2012, three weeks after she petitioned for
8 bankruptcy and two months before she received a discharge. Plaintiff does not appear to have
9 ever disclosed to the bankruptcy court the existence of her contingent claims, i.e., the present
10 Title VII claims. The Court therefore finds that Plaintiff is judicially estopped from bringing the
11 present Title VII claims. Additionally, the Court agrees with Defendants that under the
12 circumstances of this case Toomin is not an "employer" who can be sued under Title VII at all
13 and that Bonaventura can only be sued in his official capacity.

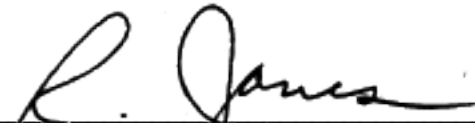
14 **CONCLUSION**

15 IT IS HEREBY ORDERED that the Motion to Dismiss or for Summary Judgment (ECF
16 No. 67) is GRANTED as a motion for summary judgment.

17 IT IS FURTHER ORDERED that the Clerk shall enter judgment and close the case.

18 IT IS SO ORDERED.

19 Dated this 17th day of April, 2014.

20 
21 _____
22 ROBERT C. JONES
23 United States District Judge
24
25