

1 probation because of that speech. (*Id.*). Plaintiff alleged that his speech “fostered important
2 Nevada public policy as evidenced in statutes and in the Nevada Constitution, to include the
3 proper housing and well-being of inmates and the safety of the communities in which inmates
4 [were] housed.” (*Id.* at 5).

5 Plaintiff alleged two causes of action. (*Id.*). In the first cause of action, Plaintiff alleged
6 that Skolnik had acted under color of State law, pursuant to 42 U.S.C. § 1983, and had
7 violated Plaintiff’s right to free speech under the First Amendment. (*Id.*). In the second cause
8 of action, Plaintiff alleged that the State of Nevada was liable for Skolnick’s actions pursuant
9 to the theory of tortious discharge. (*Id.*).

10 **II. Summary Judgment Exhibits**

11 On May 27, 2010, Plaintiff received a letter from Donald Helling, Deputy Director of the
12 Nevada Department of Corrections, stating that Plaintiff had failed to attain permanent status
13 with the State of Nevada, Department of Corrections and was being rejected from probation
14 effective that day. (Gov’t Ex. C (#33-1) at 6). In his deposition, Plaintiff testified to the
15 following. (Gov’t Ex. D (#33-1) at 8). Plaintiff had written letters to the editors in the *Reno*
16 *Gazette Journal* and the *Nevada Appeal* and had participated in their newspaper blogs. (*Id.*
17 at 9). Plaintiff did not use his true name when he blogged and did not have any specific
18 knowledge that Skolnik had specifically read Plaintiff’s opinions or letters to the editor. (*Id.* at
19 10). When Plaintiff testified at the Internal Finance Committee (“IFC”), Skolnik was there.
20 (*Id.*). Skolnik spoke to Plaintiff and stated that “he could agree to not closing the Nevada State
21 Prison if the proposal that officers had put forward to go to 12-hour shifts, 84 hours per pay
22 period as straight pay was okay with the officers, that he could back that.” (*Id.* at 11). Skolnik
23 also told Plaintiff that “[h]e also was at pains to say that he did not blame [the employees] for
24 being down there in opposing the closure of NSP.” (*Id.*). Plaintiff did not remember speaking
25 to the IFC about “the proper housing and well-being of inmates and the safety of the inmate
26 communities.” (*Id.*). Plaintiff wore civilian clothes when he testified in front of the IFC. (*Id.*).

27 During the deposition, Plaintiff stated that he had testified during the special session
28 of the Nevada Legislature in February 2010. (*Id.* at 12). At the special session, Plaintiff

1 testified “in favor of the proposal for 12-hour shifts, seven shifts per pay period, as straight pay
2 as a method of reducing the department’s budget by some two to five percent.” (*Id.*). During
3 that testimony, Plaintiff had worn his uniform. (*Id.* at 13). His testimony in favor of 12-hour
4 shifts at straight pay related to the proper housing and well-being of inmates and safety of
5 inmate conditions “[t]o the extent that it would allow full coverage by officers without [them]
6 having to be on skeleton shifts . . . and without having to close Nevada State Prison.” (*Id.* at
7 15). Plaintiff believed that he had been rejected from his probation for speaking out in public
8 forums. (Pl. Ex. 1 (#37-1) at 6). He was aware of the administrative regulations that prohibited
9 him from campaigning, lobbying, or engaging in other political activities during the hours of
10 state employment, on state property, or in uniform. (*Id.* at 7). Plaintiff admitted that he was
11 “off duty” when he had testified in front of the Legislature. (*Id.* at 8).

12 On June 29, 2009, Plaintiff had signed an acknowledgment that stated he had read and
13 familiarized himself with the administrative regulations governing staff conduct, rules, and
14 regulations. (Gov’t Ex. F (#33-2) at 7). Pursuant to the regulations, an employee engaged in
15 “improper political activity” by “[u]sing or promising to use any official authority or influence for
16 the purpose of influencing the vote or political action of any person or for any consideration.”
17 (Gov’t Ex. G. (#33-2) at 17). Accordingly to the Nevada Department of Corrections
18 Administrative Regulation 350, “[t]he wearing of a uniform for off duty functions is not
19 authorized.” (Gov’t Ex. H (#33-3) at 2, 17).

20 Skolnik testified to the following in his deposition. (Gov’t Ex. E (#33-2) at 2). There was
21 an investigation into Plaintiff’s case, but he did not recall whether he or another deputy director
22 had initiated it. (*Id.* at 3). Skolnik recalled that Plaintiff “was in uniform without any
23 authorization testifying as if he were on the job at the time. And the suggestion [had been]
24 made, since he was a probationary employee, that he be terminated from probation for that
25 act.” (*Id.*). Skolnik did not disagree with the termination recommendation, even though he
26 could have if he wanted to. (*Id.*). Skolnik was not aware of any articles that Plaintiff had written
27 for the newspaper. (*Id.* at 4). He did not read the *Reno Gazette-Journal* unless somebody
28 gave him something specific to read. (*Id.*). Nobody had told him that an officer in uniform

1 while waiting to testify had called him a “damn liar.” (*Id.*).

2 Helling testified to the following at his deposition. (Pl. Ex. 6 (#37-1) at 67). He was one
3 of the deputy directors at the Department of Corrections. (*Id.*). The basis for ending Plaintiff’s
4 probation was that Plaintiff had violated several procedures and regulations by testifying in his
5 uniform and making comments while in uniform prior to the hearing. (*Id.* at 68). Helling
6 opened an investigation through the inspector general and informed the director that one had
7 been opened. (*Id.* at 71). Helling discussed his findings and recommendation with Skolnik
8 and Skolnik told Helling to “do what you feel is right.” (*Id.* at 73). Skolnik did not assert any
9 objections to the recommendation. (*Id.*).

10 On May 24, 2010, Helling reported his investigation findings to the Office of the
11 Inspector General. (Gov’t Ex. J (#33-3) at 23). Helling found that, on February 22, 2010,
12 Plaintiff had engaged in improper political activity, i.e. using or promising to use any official
13 authority or influence for the purpose of influencing the vote or political action of any person
14 or for any consideration when he testified in a Senate hearing in uniform without the approval
15 of the Director of Corrections. (*Id.* at 24). Helling also found that, on February 22, 2010,
16 Plaintiff had engaged in unbecoming conduct, i.e. any conduct whether on or off duty which
17 negatively reflects upon the image of the State of Nevada or the Department of Corrections
18 when he was wearing his uniform in a Senate waiting room and made condescending remarks
19 to other people about the Director of Corrections. (*Id.*). Helling stated that evidence showed
20 that Plaintiff had called the Director a “liar” and a “bold face liar” while waiting to testify in
21 uniform in a Senate waiting room. (*Id.*). Helling recommended that Plaintiff be “rejected from
22 his probationary status.” (*Id.* at 25). On May 25, 2010, Helling informed Plaintiff that the
23 misconduct allegations had been sustained and that the recommended action was rejection
24 from probation. (*Id.* at 26).

25 LEGAL STANDARD

26 In reviewing a motion for summary judgment, the court construes the evidence in the
27 light most favorable to the nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.
28 1996). Pursuant to Fed.R.Civ.P. 56, a court will grant summary judgment “if the movant shows

1 that there is no genuine dispute as to any material fact and the movant is entitled to judgment
2 as a matter of law.” Fed.R.Civ.P. 56(a). Material facts are “facts that might affect the outcome
3 of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106
4 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A material fact is “genuine” if the evidence is such
5 that a reasonable jury could return a verdict for the nonmoving party. *Id.*

6 The moving party bears the initial burden of identifying the portions of the pleadings and
7 evidence that the party believes to demonstrate the absence of any genuine issue of material
8 fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265
9 (1986). A party asserting that a fact cannot be or is genuinely disputed must support the
10 assertion by “citing to particular parts of materials in the record, including depositions,
11 documents, electronically stored information, affidavits or declarations, stipulations (including
12 those made for purposes of the motion only), admissions, interrogatory answers, or other
13 materials” or “showing that the materials cited do not establish the absence or presence of a
14 genuine dispute, or that an adverse party cannot produce admissible evidence to support the
15 fact.” Fed. R. Civ. P. 56(c)(1)(A)-(B). Once the moving party has properly supported the
16 motion, the burden shifts to the nonmoving party to come forward with specific facts showing
17 that a genuine issue for trial exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
18 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). “The mere existence of a
19 scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be
20 evidence on which the jury could reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 252,
21 106 S.Ct. at 2512. The nonmoving party cannot defeat a motion for summary judgment “by
22 relying solely on conclusory allegations unsupported by factual data.” *Taylor v. List*, 880 F.2d
23 1040, 1045 (9th Cir. 1989). “Where the record taken as a whole could not lead a rational trier
24 of fact to find for the nonmoving party, there is no genuine issue for trial.” *Matsushita*, 475
25 U.S. at 587, 106 S.Ct. at 1356.

26 **DISCUSSION**

27 Defendants filed a motion for summary judgment. (Mot. for Summ. J. (#33) at 1).
28 Defendants argue that Plaintiff fails to establish a claim for First Amendment retaliation

1 because he did not speak on a matter of public concern, did not speak as a private citizen, and
2 cannot show that any of his speech was a motivating factor for his rejection from probation.
3 (*Id.* at 9-10). Defendants also assert that they had a legitimate interest in terminating Plaintiff
4 after he violated the policy that prohibited Plaintiff from wearing his uniform for an off-duty
5 function. (*Id.* at 11). Defendants argue that Plaintiff cannot establish a claim for tortious
6 discharge because there is nothing outrageous about disciplining an employee who is subject
7 to discipline. (*Id.* at 12). Defendants also argue that Neidert has not established any evidence
8 that Skolnik directed or participated in Plaintiff's discipline. (*Id.* at 14).

9 In response, Plaintiff responds that Assistant Director Don Helling rejected Plaintiff from
10 probation. (Resp. to Mot. to Summ. J. (#37) at 2). Plaintiff asserts that Skolnik could have
11 stopped the termination after Helling talked to him about recommending termination, but
12 Skolnik did not object to the termination. (*Id.* at 6, 8).¹

13 To assert a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate that he was
14 deprived of a constitutional right by a person acting under color of law. *Vang v. Toyed*, 944
15 F.2d 476, 479 (9th Cir. 1991). To establish a First Amendment retaliation claim against a
16 government employer, a court must consider the following:

- 17 (1) whether the plaintiff spoke on a matter of public concern; (2) whether the
18 plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's
19 protected speech was a substantial or motivating factor in the adverse
20 employment action; (4) whether the state had an adequate justification for
treating the employee differently from other members of the general public; and
(5) whether the state would have taken the adverse employment action even
absent the protected speech.

21 *Desrochers v. City of San Bernardino*, 572 F.3d 703, 708-09 (9th Cir. 2009). Under the first
22 step, the plaintiff bears the burden of showing that the speech addressed an issue of public
23 concern based on the content, form, and context of a given statement, as revealed by the
24 whole record. *Id.* A matter of public concern involves "issues about which information is

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26 ¹ Plaintiff states that Skolnik could be held liable for conspiracy under § 1983 with
27 Helling. (Resp. to Mot. to Summ. J. (#37) at 9). To the extent that Plaintiff is attempting to
28 raise a new cause of action for conspiracy in his opposition to summary judgment, the Court
dismisses that attempt. See *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir.
2008) (holding that raising a new claim in a summary judgment motion is insufficient to present
the claim to the district court).

1 needed or appropriate to enable the members of society to make informed decisions about
2 the operation of their government.” *Id.* at 710. Under the second step, the “plaintiff bears the
3 burden of showing the speech was spoken in the capacity of a private citizen and not a public
4 employee.” *Eng v. Cooley*, 552 F.3d 1062, 1071 (9th Cir. 2009). Under the third step, the
5 plaintiff bears the burden of showing that the State took an adverse employment action and
6 that the speech was a substantial or motivating factor in the adverse action. *Id.*

7 Here, the Court finds that Plaintiff’s Legislative testimony at the special session was a
8 matter of public concern because Plaintiff linked his testimony to the proper housing and well-
9 being of inmates and the safety of the inmate communities.² The Court also finds that Plaintiff
10 testified as a private citizen because he was off-duty and had no official duty to deliver the
11 speech at issue. Nevertheless, the Court finds that there is a genuine dispute of material fact
12 as to whether Plaintiff’s speech was a substantial or motivating factor in Plaintiff’s termination
13 based on the discussion at oral argument. At oral argument, Defendants’ counsel stated that,
14 although the Director did not encourage off-duty employees to testify in uniform, the Director
15 had made exceptions after Plaintiff’s termination. At oral argument, Defendants’ counsel
16 stated that the director had permitted off-duty, uniformed employees to testify before the
17 Legislature as long as the employees stated on the record that they were testifying “off duty.”
18 The Court finds that, based on the statements made at oral argument, there is a genuine issue
19 of material fact as to whether Plaintiff’s speech, rather than his uniform violation, was a
20 substantial or motivating factor for his termination.

21 Accordingly, the Court denies summary judgment on the First Amendment retaliation
22 claim based on Plaintiff’s speech at the Legislative special session. The Court also denies
23 summary judgment on the tortious discharge claim. *See D’Angelo v. Gardner*, 819 P.2d 206,

25 ² To the extent that Plaintiff alleges First Amendment retaliation based on newspaper
26 blogs and testimony in front of the IFC, the Court grants summary judgment to Defendants.
27 Plaintiff fails to demonstrate that Skolnik knew about the blogs and, therefore, cannot
28 demonstrate that the blogs were a substantial motivating factor in his termination. Additionally,
with respect to the IFC testimony, Plaintiff admits that he limited his speech to a discussion
about how to save his job through shift and pay period changes, which is not a matter of public
concern. (See Gov’t Ex. D (#33-1) at 11-12).

1 212 (Nev. 1991) (holding that “[a]n employer commits a tortious discharge by terminating an
2 employee for reasons which violate public policy”).

3 **CONCLUSION**

4 For the foregoing reasons, IT IS ORDERED that Defendants’ Motion for Summary
5 Judgment (#33) is DENIED.

6 IT IS FURTHER ORDERED that, per the discussions at oral argument, the parties
7 engage in a settlement conference with Judge Cobb prior to trial.

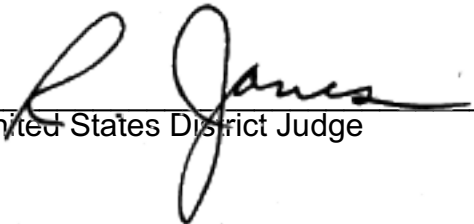
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10 DATED: This _7th_ day of October, 2011.

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United States District Judge

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