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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

BRYAN WAGNER,	)	3:11-cv-00537-ECR-RAM
	)	
Plaintiff,	)	
	)	
vs.	)	<b><u>Order</u></b>
	)	
WASHOE COUNTY,	)	
	)	
Defendant.	)	
	)	
	)	

**I. Background**

On July 26, 2011, Plaintiff Bryan Wagner filed a complaint alleging age discrimination and retaliation. On March 30, 2012, the Court dismissed (#16) Plaintiff's complaint and granted leave to amend. On April 24, 2012, Plaintiff filed an amended complaint (#19). On May 7, 2012, Defendant Washoe County filed a second motion to dismiss (#21), claiming that the amended complaint (#19) must be dismissed for failure to state a claim upon which relief may be granted.

The facts as alleged in the amended complaint (#19) are as follows. Plaintiff was born on November 8, 1954. (Am. Compl. ¶ 4.) Plaintiff was hired in 1994 by Defendant Washoe County. (Id. ¶ 5.) In 2009, Plaintiff was assigned to an increasing number of menial tasks in comparison to younger workers. (Id. ¶ 6.) Plaintiff's projects were ignored in favor of younger employees' projects, and

1 Plaintiff was subjected to different terms and conditions of  
2 employment than younger employees. (Id.) In December 2009,  
3 Plaintiff was passed over for promotion as a result of his age;  
4 although Plaintiff had a longer total time in service, a superior  
5 educational background, and higher overall qualifications, a  
6 younger, less qualified candidate was selected for promotion. (Id.  
7 ¶ 7.) In addition, Plaintiff alleges that Washoe County follows a  
8 standard custom and pattern of discriminating and harassing older  
9 employees; for example, the Division Director of Environmental  
10 Health directed another older employee to retire to make room for a  
11 younger employee. (Id. ¶ 8.)

12 Plaintiff also alleges that he was retaliated against due to  
13 his complaints concerning the alleged age discrimination. In March  
14 17, 2010, Plaintiff was subjected to an investigation as a result of  
15 Plaintiff's formal complaint concerning age discrimination. (Id. ¶  
16 19.) Plaintiff was issued a letter of reprimand which was later  
17 rescinded on appeal and replaced by a letter of expectations. (Id.)  
18 Plaintiff also alleges that his friends at Washoe County were  
19 threatened by supervisors due to their friendship with him. (Id. ¶  
20 20.) Plaintiff also alleges that he was repeatedly criticized and  
21 harassed as retaliation against his age discrimination claim. (Id.  
22 ¶¶ 22-27.)

## 23 24 **II. Legal Standard**

25 A motion to dismiss under Federal Rule of Civil Procedure  
26 12(b)(6) will only be granted if the complaint fails to "state a  
27 claim to relief that is plausible on its face." Bell Atl. Corp. v.

1 Twombly, 550 U.S. 544, 570 (2007); see also Ashcroft v. Iqbal, 129  
2 S. Ct. 1937, 1953 (2009) (clarifying that Twombly applies to  
3 pleadings in "all civil actions"). On a motion to dismiss, except  
4 where a heightened pleading standard applies, "we presum[e] that  
5 general allegations embrace those specific facts that are necessary  
6 to support the claim." Lujan v. Defenders of Wildlife, 504 U.S.  
7 555, 561 (1992) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S.  
8 871, 889 (1990)) (alteration in original); see also Erickson v.  
9 Pardus, 551 U.S. 89, 93 (2007) (noting that "[s]pecific facts are  
10 not necessary; the statement need only give the defendant fair  
11 notice of what the . . . claim is and the grounds upon which it  
12 rests.") (internal quotation marks omitted). Moreover, "[a]ll  
13 allegations of material fact in the complaint are taken as true and  
14 construed in the light most favorable to the non-moving party." In  
15 re Stac Elecs. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996)  
16 (citation omitted).

17       Although courts generally assume the facts alleged are true,  
18 courts do not "assume the truth of legal conclusions merely because  
19 they are cast in the form of factual allegations." W. Mining  
20 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Accordingly,  
21 "[c]onclusory allegations and unwarranted inferences are  
22 insufficient to defeat a motion to dismiss." In re Stac Elecs., 89  
23 F.3d at 1403 (citation omitted).

24       Review on a motion pursuant to Fed. R. Civ. P. 12(b)(6) is  
25 normally limited to the complaint itself. See Lee v. City of L.A.,  
26 250 F.3d 668, 688 (9th Cir. 2001). If the district court relies on  
27 materials outside the pleadings in making its ruling, it must treat

1 the motion to dismiss as one for summary judgment and give the non-  
2 moving party an opportunity to respond. FED. R. CIV. P. 12(d);  
3 see United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003). "A  
4 court may, however, consider certain materials – documents attached  
5 to the complaint, documents incorporated by reference in the  
6 complaint, or matters of judicial notice – without converting the  
7 motion to dismiss into a motion for summary judgment." Ritchie, 342  
8 F.3d at 908.

9       If documents are physically attached to the complaint, then a  
10 court may consider them if their "authenticity is not contested" and  
11 "the plaintiff's complaint necessarily relies on them." Lee, 250  
12 F.3d at 688 (citation, internal quotations, and ellipsis omitted).  
13 A court may also treat certain documents as incorporated by  
14 reference into the plaintiff's complaint if the complaint "refers  
15 extensively to the document or the document forms the basis of the  
16 plaintiff's claim." Ritchie, 342 F.3d at 908. Finally, if  
17 adjudicative facts or matters of public record meet the requirements  
18 of Fed. R. Evid. 201, a court may judicially notice them in deciding  
19 a motion to dismiss. Id. at 909; see FED. R. EVID. 201(b) ("A  
20 judicially noticed fact must be one not subject to reasonable  
21 dispute in that it is either (1) generally known within the  
22 territorial jurisdiction of the trial court or (2) capable of  
23 accurate and ready determination by resort to sources whose accuracy  
24 cannot reasonably be questioned.").

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1 **III. Discussion**

2 **A. Age Discrimination Claim**

3 Washoe County claims that the age discrimination claim must be  
4 dismissed because the amended complaint (#19) includes only legal  
5 conclusions and not factual allegations. We disagree. The Age  
6 Discrimination in Employment Act ("ADEA") makes it unlawful for an  
7 employer "to fail or refuse to hire or to discharge any individual  
8 or otherwise discriminate against any individual with respect to his  
9 compensation, terms, conditions, or privileges of employment,  
10 because of such individual's age." 29 U.S.C. § 623(a). To  
11 establish a prima facie case of age discrimination, a plaintiff must  
12 demonstrate that he was (1) at least forty years old, (2) performing  
13 his job satisfactorily, (3) subjected to an adverse employment  
14 action; and (4) was replaced by a substantially younger employee  
15 with equal or inferior qualifications. See Diaz v, Eagle Produce  
16 Ltd. P'ship, 521 F.3d 1201, 1207 (9th Cir. 2008).

17 We disagree with Washoe County's contention that the amended  
18 complaint (#19) contains insufficient factual allegations to support  
19 an age discrimination claim. The amended complaint (#19) clearly  
20 sets forth Plaintiff's age, over forty, and multiple specific  
21 allegations of age discrimination. For example, Plaintiff alleges  
22 that he was passed over for promotion in December 2009 in favor of a  
23 younger, less qualified candidate. (Am. Compl. ¶ 7 (#19).) We  
24 believe that the allegations in the amended complaint (#19) are  
25 sufficient to survive a motion to dismiss.

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1           **B. Retaliation Claim**

2           Washoe County claims that the retaliation claim must be  
3 dismissed because any suggestion of retaliation is purely  
4 speculative. We disagree that Plaintiff has failed to provide  
5 specific factual allegations relating to his retaliation claim, as  
6 the amended complaint (#19) sets forth in great detail allegations  
7 of retaliation.

8           However, Washoe County's argument that the alleged acts of  
9 retaliation do not rise to the level of adverse employment action  
10 merits consideration.<sup>1</sup> A plaintiff may establish a prima facie case  
11 of retaliation by showing that "(1) he engaged or was engaging in  
12 activity protected under Title VII, (2) the employer subjected him  
13 to an adverse employment decision, and (3) there was a causal link  
14 between the protected activity and the employer's action." Yartzoff  
15 v. Thomas, 809 F.2d 1371, 1375 (9th Cir. 1987). In Yartzoff, the  
16 Ninth Circuit noted that "[t]ransfers of job duties and undeserved  
17 performance ratings, if proven, would constitute 'adverse employment  
18 decisions.'" Id. at 1376. Plaintiff alleges, *inter alia*, that he was  
19 subjected to an internal investigation that resulted in an  
20 undeserved letter of reprimand following his formal complaint of age  
21 discrimination. While not all of Plaintiff's extensive allegations  
22 concerning retaliation may rise to the level of adverse employment

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25           <sup>1</sup> The Court notes that Washoe County made this argument in its  
26 reply, thereby preventing Plaintiff from responding to the argument.  
27 While the Court does not approve of such tactics or oversights in the  
28 initial motion to dismiss, the Court shall consider this argument as  
it fairly characterizes a possible deficiency in the retaliation  
claim.

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1 actions, we find that Plaintiff has alleged facts sufficient to  
2 support a claim of retaliation.

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4 **IV. Conclusion**

5 **IT IS, THEREFORE, HEREBY ORDERED** that Defendant's second motion  
6 to dismiss (#21) is **DENIED**.

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11 DATED: September 25, 2012.

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13 UNITED STATES DISTRICT JUDGE