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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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TRAVIS HETTINGER,

Case No. 3:13-cv-00364-MMD-WGC

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Plaintiff,

ORDER

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v.

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MICHAEL FIPPS, et al.,

(Defendants' Motion to Dismiss – dkt. no. 4)

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Defendants.

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I. SUMMARY

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Before the Court is Defendants Michael Fipps, Jeromie Sorhouet, and Thor Dyson's Motion to Dismiss or in the Alternative Motion for Summary Judgment. (Dkt. no. 4.) For the reasons set forth below, the Motion to Dismiss is granted.

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II. BACKGROUND

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Plaintiff Travis Hettinger alleges the following skeletal facts. (See dkt. no. 1.)

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Plaintiff Travis Hettinger was employed by the Nevada Department of Transportation ("NDOT") for approximately fifteen (15) years. Beginning on September 22, 2009, Plaintiff was employed as a Highway Maintenance Worker III by NDOT. On December 27, 2011, Plaintiff's driver's license expired. Plaintiff renewed his license on January 12, 2012. Plaintiff claims that he told his supervisor about the lapse, without identifying which of the supervisors named in the complaint (Jeromie Sorhouet or Thor Dyson) he told. Plaintiff further fails to identify the date on which he informed his supervisor, but given that he claims to have not realized the license was expired before January 11, 2012, it

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1 could not have been before that date. Allegedly his supervisor told Plaintiff it was not a
2 problem. On April 17, 2012, Plaintiff received a Specificity of Charges (NPD-41) from
3 Highway Maintenance Manager Michael Fipps recommending that Plaintiff be terminated
4 for not having a valid driver's license while operating state vehicles or equipment.
5 Plaintiff was terminated on May 7, 2012.

6 Plaintiff admits that having a commercial driver's license is an essential function of
7 his job as a Highway Maintenance Worker III. Plaintiff alleges, however, that he was
8 terminated in retaliation for acting as a witness in an investigation of his supervisor
9 Jeromie Sorhouet for alleged misappropriation of state property. While Plaintiff does not
10 provide the timeline for this investigation, he does assert that Sorhouet learned that
11 Plaintiff participated as a witness before Plaintiff was terminated.

12 Plaintiff failed to describe the administrative process that preceded this case,
13 which Defendants outline in their Motion. (See dkt. no. 4 at 1-4.) Defendants state that
14 after Plaintiff's receipt of the NPD-41, NDOT reviewed the charges, conducted a pre-
15 disciplinary hearing, concluded that Plaintiff had operated the equipment without a valid
16 driver's license, and terminated Plaintiff. Following his termination, Plaintiff filed an
17 appeal with the Nevada Division of Human Resource Management ("DHRM") pursuant
18 to NRS 486.390. Both Plaintiff and NDOT were represented by counsel at a hearing on
19 August 28, 2012. The Hearing Officer issued an administrative decision on August 31,
20 2012, affirming NDOT's termination of Plaintiff. Following the administrative decision,
21 Plaintiff declined to file a petition for judicial review in Nevada state court.

22 Plaintiff brings a single claim in the instant suit: (1) liability under 42 U.S.C. § 1983
23 for violation of the First Amendment of the United States Constitution. Defendants seek
24 dismissal with prejudice or in the alternative move for summary judgment.

25 **III. LEGAL STANDARD**

26 **A. Motion to Dismiss**

27 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which
28 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide

1 “a short and plain statement of the claim showing that the pleader is entitled to relief.”
2 Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While
3 Rule 8 does not require detailed factual allegations, it demands more than “labels and
4 conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v.*
5 *Iqbal*, 556 US 662, 678 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).
6 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550
7 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient
8 factual matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at
9 678 (internal citation omitted).

10 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
11 apply when considering motions to dismiss. First, a district court must accept as true all
12 well-pled factual allegations in the complaint; however, legal conclusions are not entitled
13 to the assumption of truth. *Id.* at 679. Mere recitals of the elements of a cause of action,
14 supported only by conclusory statements, do not suffice. *Id.* at 678. Second, a district
15 court must consider whether the factual allegations in the complaint allege a plausible
16 claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint
17 alleges facts that allow a court to draw a reasonable inference that the defendant is
18 liable for the alleged misconduct. *Id.* at 678. Where the complaint does not permit the
19 court to infer more than the mere possibility of misconduct, the complaint has “alleged —
20 but not shown — that the pleader is entitled to relief.” *Id.* at 679 (internal quotation marks
21 omitted). When the claims in a complaint have not crossed the line from conceivable to
22 plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

23 A complaint must contain either direct or inferential allegations concerning “all the
24 material elements necessary to sustain recovery under *some* viable legal theory.”
25 *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,
26 1106 (7th Cir. 1989) (emphasis in original)).

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1 **B. Motion for Summary Judgment**

2 The purpose of summary judgment is to avoid unnecessary trials when there is no
3 dispute as to the facts before the court. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18
4 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when the pleadings,
5 the discovery and disclosure materials on file, and any affidavits "show there is no
6 genuine issue as to any material fact and that the movant is entitled to judgment as a
7 matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). An issue is "genuine"
8 if there is a sufficient evidentiary basis on which a reasonable fact-finder could find for
9 the nonmoving party and a dispute is "material" if it could affect the outcome of the suit
10 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).
11 Where reasonable minds could differ on the material facts at issue, however, summary
12 judgment is not appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.
13 1995). "The amount of evidence necessary to raise a genuine issue of material fact is
14 enough 'to require a jury or judge to resolve the parties' differing versions of the truth at
15 trial." *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (*quoting First Nat'l*
16 *Bank v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968)). In evaluating a summary
17 judgment motion, a court views all facts and draws all inferences in the light most
18 favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793
19 F.2d 1100, 1103 (9th Cir. 1986).

20 The moving party bears the burden of showing that there are no genuine issues
21 of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). "In
22 order to carry its burden of production, the moving party must either produce evidence
23 negating an essential element of the nonmoving party's claim or defense or show that
24 the nonmoving party does not have enough evidence of an essential element to carry its
25 ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210
26 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56's requirements,
27 the burden shifts to the party resisting the motion to "set forth specific facts showing that
28 there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. The nonmoving party "may

1 not rely on denials in the pleadings but must produce specific evidence, through
2 affidavits or admissible discovery material, to show that the dispute exists,” *Bhan v. NME*
3 *Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do more than simply show
4 that there is some metaphysical doubt as to the material facts.” *Orr v. Bank of Am.*, 285
5 F.3d 764, 783 (9th Cir. 2002) (internal citations omitted). “The mere existence of a
6 scintilla of evidence in support of the plaintiff’s position will be insufficient.” *Anderson*,
7 477 U.S. at 252.

8 **IV. DISCUSSION**

9 Defendants argue that Plaintiff’s First Amendment claim is barred under *res*
10 *judicata*. Alternatively, Defendants seek dismissal on the merits.

11 **A. Res Judicata**

12 “Claim preclusion is a broad doctrine that bars bringing claims that were
13 previously litigated as well as some claims that were never before adjudicated.”
14 *Clements v. Airport Auth. of Washoe County*, 69 F.3d 321, 327 (9th Cir.1995). It is well
15 settled that “[w]hen a state agency acts in a judicial capacity to resolve disputed issues
16 of fact and law properly before it, and when the parties have had an adequate
17 opportunity to litigate those issues, federal courts must give the state agency’s fact-
18 finding and legal determinations the same preclusive effect to which it would be entitled
19 in that state’s courts.” *Olson v. Morris*, 188 F.3d 1083, 1086 (9th Cir. 1999). Plaintiff was
20 represented and given the opportunity to make arguments and cross-examine the
21 opposing party’s witnesses. (See dkt. no. 4-1.)

22 In Nevada, there are three elements to claim preclusion: (1) Was the issue
23 decided in the prior adjudication identical with the one presented in the action in
24 question? (2) Was there a final judgment on the merits? and (3) Was the party against
25 whom the plea is asserted a party or in privity with a party to the prior adjudication?
26 *Holcombe v. Hosmer*, 477 F.3d 1094, 1097-98 (9th Cir. 2007).

27 Defendants have demonstrated that all three claim preclusion requirements are
28 met. First, the issues presented in both the prior adjudication and the instant action are

1 identical. In both, Plaintiff challenged his termination and argued that he was terminated
2 in retaliation for acting as a witness in an investigation of his supervisor, Jeromie
3 Sorhouet. (See dkt. no. 4-1 at 9.) Second, there was a final judgment on the merits. The
4 Administrative Hearing Officer issued an administrative decision affirming NDOT's
5 termination. (See *id.*) Plaintiff did not appeal within the designated time period, making
6 the administrative decision final. See NRS 233B.130(2)(c). Third, the party against whom
7 preclusion is asserted, Mr. Hettinger, was the moving party in the administrative
8 proceeding, as well as the instant case. See *Paradise Palms Cmty. Ass'n v. Paradise*
9 *Homes*, 505 P.2d 596, 599 (Nev. 1973).

10 In response to Defendants' Motion, Plaintiff argues that "[i]ssue preclusion is not
11 available based on a Nevada personnel hearing officer's ruling." (Dkt. no. 9 at 1.) The
12 sole authority cited in support of this proposition is *Dias v. Elique*, 436 F.3d 1125, 1129-
13 30 (9th Cir. 2006). *Dias* does not stand for the proposition that issue preclusion is not
14 available to Nevada personnel hearing determinations. In *Dias*, the Ninth Circuit found
15 that issue preclusion was inappropriate because "the hearing officer did not resolve the
16 same factual issues involved to the same degree required by Appellants' § 1983 and
17 related state-law claims." *Id.* at 1129. The hearing officer in *Dias* only found that the
18 termination decision was supported by "substantial evidence" while the plaintiff's § 1983
19 claim, and state-law claims, required proof by a "preponderance of the evidence." *Id.*

20 Neither Plaintiff nor Defendants address the relevant portion of *Dias* and, as a
21 result, neither briefed the relative standards in the administrative proceeding as
22 compared to the standards applied by this Court. As the Court's review of the
23 administrative decision, provided by Defendants, suggests that it was made under a less
24 stringent standard of proof than is required for a § 1983 challenge, the Court declines to
25 find at this stage that it is barred by *res judicata*. As a result, the Court will address
26 Defendants' claim for dismissal on the merits.

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1 **B. First Amendment Claim Under 42 U.S.C. § 1983**

2 Alternatively, Defendants argue that Plaintiff has failed to state a cognizable First
3 Amendment claim.

4 It is well settled that the state may not abuse its position as employer to stifle “the
5 First Amendment rights [its employees] would otherwise enjoy as citizens to comment on
6 matters of public interest.” *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). The
7 Supreme Court has explained that “[t]he problem in any case is to arrive at a balance
8 between the interests of the [public employee], as a citizen, in commenting upon matters
9 of public concern and the interest of the State, as an employer, in promoting the
10 efficiency of the public services it performs through its employees.” *Id.* The current Ninth
11 Circuit test for evaluating a First Amendment retaliation claim of a government official
12 considers five factors: “(1) whether the plaintiff spoke on a matter of public concern;
13 (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the
14 plaintiff’s protected speech was a substantial or motivating factor in the adverse
15 employment action; (4) whether the state had an adequate justification for treating the
16 employee differently from other members of the general public; and (5) whether the state
17 would have taken the adverse employment action even absent the protected speech.”
18 *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009). Defendants argue that Plaintiff
19 cannot establish prong five of the *Eng* test as Plaintiff has admitted that he committed a
20 fireable offense by driving without a valid driver’s license.

21 Evidence that a termination was motivated by unprotected activity is not by itself
22 sufficient to defeat a First Amendment challenge. *See id.* at 1073-74. In this case,
23 however, Plaintiff has not only admitted to driving without a valid license, he has failed to
24 allege facts suggesting that the state “would [not] have taken the adverse action if the
25 proper reason alone had existed.” *Knickerbocker v. City of Stockton*, 81 F.3d 907, 911
26 (9th Cir. 1996). Plaintiff simply alleges that the relevant speech occurred in the time
27 between committing the offense and getting fired and that the speech was the cause of
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1 termination. As a result, Plaintiff has failed to plead facts sufficient to survive a motion to
2 dismiss.

3 **V. CONCLUSION**

4 The Court notes that the parties made several arguments and cited to several
5 cases not discussed above. The Court has reviewed these arguments and cases and
6 determines that they do not warrant discussion as they do not affect the outcome of the
7 Motion.

8 It is therefore ordered that Defendants' Motion to Dismiss (dkt. no. 4) is granted.
9 Plaintiff's claim is dismissed.

10 DATED THIS 5th day of May 2014.

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13 MIRANDA M. DU
14 UNITED STATES DISTRICT JUDGE
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