APPENDIX TO THE PETITION FOR A WRIT OF MANDAMUS

TABLE OF CONTENTS

APPENDIX A - United States Court of Appeals for the Ninth Circuit

Order, April 23, 2020 ..... 1a

APPENDIX B - United States Court of Appeals for the Ninth Circuit

Order, July 31, 2020 ..... 2a

APPENDIX C - United States District Court for the District of Nevada

Order Finding University Teachers Absolved of Individual

Liability, October 20, 2017 ..... 3a

APPENDIX D - United States District Court for the District of Nevada

Minute Order Recusal of District Judge Boulware, October 17,

2018 ..... 23a

APPENDIX E - United States District Court for the District of Nevada

Minute Order Assigning District Judge Gordon, October 18, 2018 ..... 24a

APPENDIX F - United States District Court for the District of Nevada

Order Denying Request for Post-Recusal Status Conference,

February 28, 2019 ..... 25a

APPENDIX G - United States District Court for the District of Nevada

Order Granting, in Part, Defendants' Summary Judgment, and

Sua Sponte, Ordering Supplemental Motions for Summary Judgment, March 12, 2019 ..... 31a

APPENDIX H - United States District Court for the District of Nevada Order Denying Motions for Recusal/ Disqualification, Reconsideration, and Change of Venue, July 11, 2019 ..... 59a

APPENDIX I - United States District Court for the District of Nevada Order Denying Motion to Reconsider Recused-Judge's Orders, January 27, 2020 ..... 64a

APPENDIX J - United States District Court for the District of Nevada Minute Order Assigning Magistrate Judge Youchah, February 18, 2020 ..... 79a

APPENDIX K - United States District Court for the District of Nevada Order Denying Certification for Interlocutory Appeal, February 20, 2020 ..... 80a

APPENDIX L - United States District Court for the District of Nevada Order Setting Trial and Mandating Pretrial Settlement Conference, June 4, 2020 ..... 81a

APPENDIX M - United States District Court for the District of Nevada Order Setting Pretrial Settlement Conference, July 24, 2020 ..... 83a

APPENDIX N - Local Rules of Practice, United States District Court District of Nevada, LR 16-6 – Early Neutral Evaluation 88a

APPENDIX O - United States District Court for the District of Nevada

Stipulation and Order Rescheduling Pretrial Settlement

Conference, September 3, 2020 ..... 93a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-70896

In re: DARREN HEYMAN,

Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA, LAS VEGAS,

Respondent,

STATE OF NEVADA, ex rel. on behalf of Board of Regents of the Nevada System of Higher Education on behalf of University of Nevada, Las Vegas; et al.,
Real Parties in Interest.

Filed: April 23, 2020

ORDER

Before: MURGUIA, OWENS, and BENNETT, Circuit Judges.

Petitioner has not demonstrated that this case warrants the intervention of the court by means of the extraordinary remedy of mandamus. *See Bauman v. U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-70896

In re: DARREN HEYMAN,

Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA, LAS VEGAS,

Respondent,

STATE OF NEVADA, ex rel. on behalf of Board of Regents of the Nevada System of Higher Education on behalf of University of Nevada, Las Vegas; et al.,
Real Parties in Interest.

Filed: July 31, 2020

ORDER

Before: MURGUIA, OWENS, and BENNETT, Circuit Judges.

Petitioner's motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court (Docket Entry No. 5). *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civ. No. 2:15-cv-01228-RFB-GWF

DARREN HEYMAN, Plaintiff

v.

THE STATE OF NEVADA EX REL. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION ON BEHALF OF THE UNIVERSITY OF NEVADA, LAS VEGAS; NEAL SMATRESK; DONALD SNYDER; STOWE SHOEMAKER; RHONDA MONTGOMERY; CURTIS LOVE; SARAH TANFORD; PHILLIP BURNS; KRISTIN MALEK; LISA MOLL-CAIN; DEBRA PIERUSCHKA; ELSA SIDHU AND DOES I- X INCLUSIVE, Defendants

---

Filed: October 20, 2017

ORDER

I. INTRODUCTION

Before the Court are two Motions to Dismiss. The first was filed by Defendant Neal Smatresk ("Smatresk") (ECF No. 45), and the second was jointly filed by all Defendants in the case (ECF No. 47). After reviewing the parties' submissions, for the reasons discussed below, the Court GRANTS both Motions to Dismiss.

II. BACKGROUND

Plaintiff Darren Heyman ("Plaintiff") filed his original Complaint in the Eighth Judicial District Court of Clark County on May 11, 2015, and filed an Amended Complaint in the same court on June 10, 2015. (ECF No. 1). Plaintiff's Amended

Complaint listed fifteen causes of action, including fourteen state law claims and one Title IX claim. The Defendants named in the state court action were the State of Nevada ex rel. Board of Regents of the Nevada System of Higher Education on behalf of the University of Nevada, Las Vegas ("UNLV"), Neal Smatresk ("Smatresk"), Donald Snyder ("Snyder"), Stowe Shoemaker ("Shoemaker"), Rhonda Montgomery ("Montgomery"), Curtis Love ("Love"), Sarah Tanford ("Tanford"), Phillip Burns ("Burns"), Kristen Malek ("Malek"), and Lisa Moll-Cain ("Moll-Cain") (collectively, "Removing Defendants"). On June 29, 2015, the Removing Defendants removed the case to this Court, arguing that Plaintiff's Amended Complaint added a federal law claim. (ECF No. 1). Removing Defendants filed a First Motion to Dismiss on July 13 [*sic*], 2015. (ECF No. 9). Plaintiff filed a First Motion for Leave to File Amended Complaint on August 10, 2015. (ECF No. 18). Removing Defendants filed a Response on August 18, 2015. (ECF No. 20). Plaintiff filed a Response to the First Motion to Dismiss on August 24, 2015. (ECF No. 21). The next day, Plaintiff filed a Reply to the Response to the First Motion for Leave to File Amended Complaint. (ECF No. 22). Removing Defendants filed a Reply to Plaintiff's Response to the First Motion to Dismiss on September 3, 2015. (ECF No. 24). On March 31, 2016, the Court entered a Minute Order granting Plaintiff's Motion for Leave to File Amended Complaint, and denying Removing Defendants' Motion to Dismiss without prejudice.

Plaintiff filed the operative Amended Complaint on April 13, 2016. (ECF No. 28).[1] In addition to the fifteen causes of action alleged in the First Amended Complaint, Plaintiff pleads sixteen other causes of action in the SAC. The SAC also added two new defendants, Debra Pieruschka ("Pieruschka") and Elda Sidhu ("Sidhu"). Defendant Smatresk filed a Motion to Dismiss on May 13, 2016. (ECF No. 45). All Defendants, including Pieruschka and Sidhu, also filed a Joint Motion to Dismiss on May 13, 2016. (ECF No. 47). On May 30, 2016, Plaintiff filed Responses to the Motions to Dismiss. (ECF Nos. 99, 100). On June 9, 2016, Defendants filed Replies to the Responses. (ECF Nos. 109, 110).

The causes of action Plaintiff alleges are:

- 1) Defamation, against UNLV, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;
- 2) Invasion of Privacy — False Light, against UNLV, Montgomery, Love, Tanford, Malek, and Moll-Cain;
- 3) Civil Conspiracy, against UNLV, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;
- 4) Concerts of action, against UNLV, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;
- 5) Intentional Infliction of Emotional Distress, against UNLV, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;

[1] In the Motion papers, the parties agree that this Amended Complaint should be referred to as the "Second Amended Complaint," as Plaintiff has filed a First Amended Complaint in state court. Therefore, the Court will refer to the document as the "Second Amended Complaint" or "SAC".

- 6) Breach of Contract, against UNLV, Smatresk, Snyder, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;
- 7) Contractual Breach of Implied Covenant of Good Faith and Fair Dealing, against UNLV, Smatresk, Snyder, Shoemaker, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;
- 8) Tortious Breach of Implied Covenant of Good Faith and Fair Dealing, against UNLV, Smatresk, Snyder, Shoemaker, Montgomery, Love, Tanford, and Burns;
- 9) Constructive Fraud, against UNLV, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;
- 10) Deceit or Misrepresentation, against UNLV, Snyder, Burns, and Shoemaker;
- 11) Detrimental Reliance, against UNLV, Snyder, Shoemaker, and Burns;
- 12) Fraud in the Inducement, against UNLV, Smatresk, Snyder, Shoemaker, and Burns;
- 13) Fraud / Intentional Misrepresentation, against UNLV, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;
- 14) Sexual Harassment in violation of Nevada Fair Employment Practices Act, against UNLV, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;
- 15) Sexual Harassment in violation of Title IX, against UNLV;

- 16) Negligence, against UNLV, Smetrask [*sic*], Snyder, Shoemaker, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;
- 17) Negligent Hiring, Training, Supervision, and Retention, against UNLV, Smatresk, Snyder, and Shoemaker;
- 18) Malicious Prosecution, against UNLV, Debra Pieruschk [*sic*] and Sidhu;
- 19) Defamation, against UNLV, Pieruschka, and Sidhu;
- 20) Invasion of Privacy — False Light, against UNLV, Pieruschka, and Sidhu;
- 21) Civil Conspiracy, against UNLV, Pieruschka, Sidhu, Snyder, Shoemaker, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;
- 22) Concert of action, against UNLV, Pieruschka, Sidhu, Snyder, Shoemaker, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;
- 23) Intentional Infliction of Emotional Distress, against UNLV, Pieruschka, and Sidhu;
- 24) Neglience [*sic*], against UNLV, Pieruschka, and Sidhu;
- 25) Contractual Breach of the Implied Covenant of Good Faith and Fair Dealing, against UNLV, Pieruschka, and Sidhu;
- 26) Intentional Infliction of Emotional Distress, against UNLV;
- 27) Negligence, against UNLV;
- 28) Breach of Contract, against UNLV;

- 29) Contractual Breach of the Implied Covenant of Good Faith and Fair Dealing, against UNLV;
- 30) Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing, against UNLV; and
- 31) Civil Conspiracy, against UNLV, Pieruschka, Sidhu, Snyder, Shoemaker, Montgomery, Love, Tanford, and Burns.

Claims 1 through 17 involve an incident in which Plaintiff alleges that several named Defendants created and furthered a rumor that he would cheat on a Qualifying Exam, and other Defendants failed to properly investigate the rumor. Of those claims, Claims 1 through 15 were previously asserted in the First Amended Complaint. Claims 18 through 25 involve a Bar Complaint that Defendant Pieruschka filed against Plaintiff, which Plaintiff claims was done in retaliation for his filing the instant suit. Claims 26 through 31 are allegedly "subsequent actions" taken by Defendant UNLV following the incident asserted in Claims 1 through 17.

III. LEGAL STANDARD

An initial pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The court may dismiss a complaint for failing to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In ruling on a motion to dismiss, "[a]ll well-pleaded allegations of material fact in the complaint are accepted as true and are construed in the light most favorable to the non-moving party." Faulkner v. ADT Sec. Servs. Inc., 706 F.3d 1017, 1019 (9th Cir. 2013) (citations omitted). In addition, documents

filed by a plaintiff who is proceeding without counsel (as is the case here) must be liberally construed, and a pro se complaint must be "held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89 (2007) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)) (citations and internal quotation marks omitted); see also Butler v. Long, 752 F.3d 1177, 1180 (9th Cir. 2014).

To survive a motion to dismiss, a complaint need not contain "detailed factual allegations," but merely asserting "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" is not sufficient. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). In other words, a claim will not be dismissed if it contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," meaning that the court can reasonably infer "that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 (citation and quotation marks omitted). In elaborating on the pleading standard described in Twombly and Iqbal, the Ninth Circuit has held that for a complaint to survive dismissal, the plaintiff must allege non-conclusory facts that, together with reasonable inferences from those facts, are "plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009).

"As a general rule, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001) (citation and internal quotation marks omitted). In deciding

a motion to dismiss under Rule 12(b)(6), the district court's review is limited to the complaint itself; the court does not decide at this stage whether the plaintiff will ultimately prevail on her claims, but rather whether he or she may offer evidence to support those claims. Cervantes v. City of San Diego, 5 F.3d 1273, 1274 (9th Cir. 1993) (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

If the district court relies on materials outside the pleadings submitted by either party to the motion to dismiss, the motion must be treated as a Rule 56 motion for summary judgment. Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir. 1996). However, two exceptions to this rule exist. First, the court may consider extrinsic material "properly submitted as part of the complaint," meaning documents either attached to the complaint or upon which the plaintiff's complaint necessarily relies and for which authenticity is not in question. Lee, 250 F.3d at 688 citation omitted). Second, the court "may take judicial notice of matters of public record." Id. (citation and internal quotation marks omitted).

IV. DISCUSSION

Because Defendants assert claims of immunity in both Motions to Dismiss, those grounds will be addressed first.

A. Discretionary Immunity

Defendant Smatresk argues that all claims against him should be dismissed because Smatresk, as an officer of UNLV during the time of the alleged events, is immune from suit under the doctrine of discretionary immunity, pursuant to

Nevada Revised Statute ("NRS") 41.032.[2] NRS 41.032 provides: "Except as provided in NRS 278.0233 no action may be brought under NRS 41.031 or against an immune contractor or an officer or employee of the State or any of its agencies or political subdivisions which is . . . (2) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused." The Nevada Supreme Court has held that "[p]ersonal deliberation, decision and judgment are requirements of a discretionary act Such a decision should not be second guessed by a court with the benefit of hindsight." Parker v. Mineral Cty., 729 P.2d 491, 493 (Nev. 1986) (citations omitted). To determine whether an action of a state officer falls within the scope of NRS Section 41.032(2), a court must consider whether the action "(1) involve[s] an element of individual judgment or choice and (2) [is] based on considerations of social, economic, or political policy." Martinez v. Maruszczak, 168 P.3d 720, 729 (Nev. 2007).

Plaintiff contends that Smatresk's role as President was operational or ministerial, based upon UNLV's Code of Conduct, and therefore discretionary immunity should not apply. Because claims 6 through 8 allege contract-related causes of action, the Court will examine the language of the Code of Conduct, attached to Smatresk's Reply Brief as Exhibit 1 . Provisions related to the role of the President include:

---

[2] The claims asserted against Defendant Smatresk are Claims 6, 7, 8, 12, 16, and 17,

- "The Nevada System of Higher Education (NSHE) Board of Regents reserves to the President of the University the authority and responsibility for matters of student discipline. This authority is delegated by the President to the Vice President for Student Affairs or his/her designee for the processing of conduct matters, hearings and appeals." (ECF No. 109-1 at 2).
- "The President of the University has the responsibility for student conduct and discipline and shall exercise this responsibility through established procedures as prescribed in the Code, which is authorized by Title 2, Chapter 6 of the NSHE Code. The President of UNLV delegates such authority to the Vice President for Student Affairs who, in turn, appoints the Office of Student Conduct to administer the Code (ECF No. 109-1 at 10).
- "Depending upon the severity of the violation, and whether a repeat or multiple violations are involved, sanctions may be imposed by [various other administrators] or the President of the University in any order or combination." (ECF No. 109-1 at 19).

Based upon the aforementioned provisions, and review of the Code of Conduct as a whole, the Court finds that Smatresk's role in enforcing the Code of Conduct was discretionary. Only when the delegated officers — namely, the Vice President of Student Affairs and members of the Office of Student Conduct — exercised their discretion to refer a case to the President for sanctions was Smatresk in the position to impose sanctions based upon his "personal deliberation, decision and judgment."

Parker, 729 P.2d at 493. In circumstances in which cases were not referred to the President, no exercise of discretion is necessary.

The Court finds that Smatresk' s characterization of University of Nevada v. Stacey is more persuasive than Plaintiffs characterization of the case. 997 P.2d 812 (Nev. 2000). In Stacey, the Nevada Supreme Court held that the University of Nevada, Reno ("UNR")' s decision not to award tenure to a professor was discretionary, despite plaintiff s arguments that the terms of his teaching agreement entitled him to tenure. 997 P.2d at 814. The court additionally examined other UNR policy documents, including several sets of bylaws and an administrative manual. Id. The Court agrees with Smatresk that the instant case is similar to Stacey, in which the court stated: "[wle see nothing ministerial . . . in a university's subjective decision to grant one of its professor's lifetime employment." Id. at 816. This Court sees nothing ministerial in a university President's subjective decisions not to impose sanctions upon students or faculty, particular when neither sanctions nor further investigation has been recommended to him by the Vice President of Student Affairs or the Office of Student Conduct.

Further, the Court finds that the two-part Martinez test is satisfied: (1) the President may exercise his judgment to impose sanctions; and (2) that judgment is based upon considerations of the social policy underlying the Code of Conduct — fostering an ethical university environment. In Martinez, the Nevada Supreme Court held that a university-employed physician could not assert discretionary immunity, finding that "while a physician's diagnostic and treatment decisions

involve judgment and choice, thus satisfying the test's first criterion, those decisions generally do not include policy considerations, as required by the test's second criterion." 168 P.3d at 729. A physician treating an individual, however, does not occupy the same role as a university president. As President, Smatresk's role in enforcing the Code of Context involved considerations of policy, and balancing of the overall disciplinary, educational, community, and health priorities of UNLV. For example, certain sanctions are imposed more harshly if a violation of the Code of Conduct is motivated by race, gender, age, disability, or a number of other personal characteristics. (ECF No. 109-1 at 19).

Therefore, the Court grants Smatresk's Motion to Dismiss claims 6, 7, 8, 12, 16, and 17 on the basis of discretionary immunity. As all claims against Smatresk can be dismissed on these grounds, the Court will not analyze in depth the other arguments made in Smatresk's Motion to Dismiss. With regard to the contractual claims, the Court does not find that Plaintiff was in a contract with the individually named parties, and agrees with Smatresk that there existed no binding agreement Plaintiff specifically to investigate alleged Code of Conduct violations in a particular fashion. With regard to the negligence and negligent hiring, training, supervision, and retention claims, the Court also agrees that the facts as pleaded do not specifically allege a breach of duty with regard to Defendant Smatresk.

B. Absolute Immunity

Defendants named in Claims 18 through 25 argue that the claims should be dismissed as grievants who file a complaint with the Nevada Bar are granted

absolute immunity from liability. Nevada Supreme Court Rule ("NSCR") 106(1) provides: "All participants in the discipline process, including grievants, bar counsel staff, members of disciplinary panels, diversion and mentoring participants, and witnesses, shall be absolutely immune from civil liability. No action may be predicated upon the filing of a disciplinary complaint or grievance or any action taken in connection with such a filing by any of the participants. Except that any disclosures made pursuant to Rule 121(16) shall not be immune under this rule." NSCR 121(16) provides: "These rules shall not prohibit any complainant, the accused attorney, or any witnesses from discussing publicly the existence of the proceedings under these rules or the underlying facts related thereto. However, disclosures made under this subsection, in whatever form or by whatever means, outside the disciplinary process shall not be covered by the civil immunity afforded in Rule 106(1)."

Plaintiff alleges that on May 20, 2015, Defendant Pieruschka filed a complaint with the State Bar of Nevada, claiming that Plaintiff was practicing Nevada law without a license. Plaintiff also alleges that on June 10, 2015, Brett Nicholls ("Nicholls"), a friend of Plaintiff's, went to UNLV to serve Pieruschka, on behalf of her clients, with copies of the First Amended Complaint. Plaintiff claims that Pieruschka told Nicholls that she was planning on filing a complaint with the Nevada Bar. Defendants contend that, as a matter of public policy, complainants to the Nevada Bar should be afforded absolute liability from civil actions.

Plaintiff counters that absolute liability should not apply to Defendants, as the Bar complaint was filed falsely and in bad faith. Plaintiff claims that he never practiced Nevada law in Nevada, and that the Bar complaint was maliciously filed, since Defendants knew that he was applying to the Nevada Bar and that his moral character would be on review. Plaintiff admits, however, that he received notification from the State Bar of Nevada indicating that no formal disciplinary file was open and the matter was closed. (ECF No. 28 at 93). Plaintiff also contends that Defendant Pieruschka told Nicholls, a disinterested third party, about a plan to file a complaint, and therefore immunity cannot be extended pursuant to NSCR 121 (16).

The Court finds that absolute immunity applies in this case. Plaintiff alleges that Pieruschka told Nicholls that "since [Mr. Nicholls] had picked up the [service] documents from [Plaintiff] at his law office in Town Square, she was going to file a Complaint against Darren with the State of Nevada Bar . (ECF No. 28 at 89). Plaintiff does not allege that Pieruschka or any other Defendant spoke to Nicholls about a complaint already filed with the Nevada Bar. The plain language of NSCR 121 (16) prevents absolute immunity only when the "existence of proceedings" or underlying facts related to an existing proceeding is publicized. Pieruschka's alleged plans to file a complaint against Plaintiff, spoken to Nicholls, did not indicate that a proceeding had in fact been initiated. Therefore, the Court finds that NSCR 106 affords Defendants immunity from civil liability based on the filing of the Bar complaint.

The Court has also reviewed the elements of the causes of action asserted in Claims 18 through 25, and agrees with Defendants that Plaintiff fails to state a claim for all such causes action. Specifically, Plaintiff fails to allege actual damage for these claims, as the State Bar of Nevada has not entered formal disciplinary proceedings against him. With regard to the defamation claim, the Court declines to find defamation per se, as the element of fault has not been sufficiently pleaded.

C. State Law Employment Discrimination Claim

The Nevada Fair Employment Practices Act, codified in Nevada Revised Statute 613.330, prohibits unlawful employment practices based on a person's sex or gender identity or expression, along with other protected characteristics. Plaintiff alleges that the individual former students, professors, and program director named as Defendants violated the statute by taking retaliatory and adverse action against Plaintiff when he was allegedly falsely accused of planning to cheat on the Qualifying Exams. Defendants argue that Plaintiff s claim under the Nevada Fair Employment Practices Act fails because Plaintiff has not exhausted administrative remedies. Defendants also argue that they were not "employers" within the meaning of the statute, and did not "personally" employ Plaintiff. Defendants also argue that the claim is time barred.

Plaintiff counters that administrative remedies under the statute are optional, not mandatory. He alternatively argues that he has filed an intake with the Equal Employment Opportunity Commission ("EEOC") and received a Notice of right to Sue. Plaintiff additionally argues that he timely reported Defendants' retaliatory

actions to the EEOC on October 7, 2015, within 180 days of Plaintiffs awareness of the first and second retaliatory actions. He also alleges that he was made aware of UNLV's unilateral expulsion in March 2016, and has filed another EEOC complaint.

The Court finds that Plaintiff does not sufficiently allege facts to support a finding that he was an employee at the time of the discriminatory acts. A charge under the Nevada Fair Employment Practices Act necessarily requires, as a matter of law, a court to find an existing employment relationship between a plaintiff and defendant. Here, Plaintiffs allegations all occurred in the context of him being a student. He argues that, at the time the alleged events took place, he did not believe he was an employee, and Defendants either did not want him to know he had rights as an employee, or alternatively that Defendants also did not believe he was an employee. Plaintiff claims in his Response that he learned that he was an employee since the action was filed; however, the Court finds this claim an unsupported legal conclusion, and therefore dismisses Claim 14. The Court declines to analyze Defendant's statute of limitations argument, but does acknowledge that the argument potentially provides further reason to dismiss the claim.

D. Title IX Statute of Limitation

Title IX of the Education Amendments of 1972 ("Title IX") prohibits any education program or activity receiving Federal financial assistance from discriminating on the basis of sex. 20 U.S.C. § 1681. The Supreme Court has held that Title IX contemplates a private right of action for claims of retaliation. Jackson

v. Birmingham Bd. of Educ., 544 U.S. 167, 171 (2005). The Court has also held that Title IX's private right of action encompasses sex discrimination from teacher to student, and harassment from teacher to student or student to student, when an institution acts with deliberate indifference to harassment complaints. Jackson, 544 U.S. at 173-74. In order to establish a claim for deliberate indifference, a plaintiff must show that the institution failed to respond to known acts of harassment "so severe, pervasive, and objectively offensive that [such harassment] effectively bars the victim's access to an educational opportunity or benefit." Davis v. Monroe Cty. Bd. Of Educ., 526 U.S. 629, 633 (1999). Even if a plaintiff alleging Title IX discrimination cannot show that an institution was deliberately indifferent to one student' s sexual harassment of another, plaintiff may still have a claim for retaliation.

Here, even construing the facts in the light most favorable to Plaintiff, neither retaliation nor deliberate indifference is sufficiently alleged. Plaintiff claims that Defendant Malek made an unwanted sexual advance toward Plaintiff while the two were graduate students at UNLV, prior to she and other Defendants spreading the rumor that Plaintiff would cheat on the Qualifying Exam. However, Plaintiff further alleges that he "thought nothing of Ms. Malek's unwanted sexual advances" at the time he discussed the cheating accusations with Defendant Burns. (ECF No. 28 at 71). Plaintiff does state that he told Burns that he believed the accusations were being perpetuated on the basis of Plaintiff's sex and/or gender — yet, he does not allege any facts that support a finding of Title IX retaliation following his

discussion with Burns. Plaintiff took and passed the Qualifying Exam, and the results were not challenged by any of the Defendants. Plaintiff has not shown that he was retaliated against for complaining about Malek's conduct, which he appears to have first done in this action, or for discussing with Burns his belief that the cheating accusations were spread with a discriminatory purpose.

With regard to Malek's unwanted conduct, the Court does not find that any Defendants acted with deliberate indifference. Again, the facts of the Second Amended Complaint do not establish that UNLV or its officials failed to act or otherwise subjected Plaintiff to further harassment after he made his initial complaint with Burns. Although Plaintiff alleges that Burns did not disclose that he was UNLV's Title IX officer, or advise Plaintiff of any rights he had pursuant to Title IX, the Court finds that such disclosures are not elements of the deliberate indifference test.

Further, based on the facts alleged, it is clear that the UNLV Defendants did not act with deliberate indifference. Plaintiff alleges that, on May 13, 2013, four days prior to the Qualifying Exam, he met with the Dean of the Ph.D. program at the Hotel College and was informed about the existence of the cheating accusations. (ECF No. 28 at 15). Plaintiff then emailed Defendant Snyder, then UNLV President, who responded the following day that the accusation would be investigated. (ECF No. 28 at 21). On May 16, 2013, the day before the scheduled Qualifying Exam, Snyder informed Plaintiff that the accusation was a "student based rumor" and was "clearly not the thinking or belief of the College or the

University." (ECF No. 28 at 21). Defendant Love was removed as a proctor for the Qualifying Exam, at Plaintiffs request. (ECF No. 28 at 22). Plaintiff was given an extension to take the Qualifying Exam, on which he received a higher than passing score. (ECF No. 28 at 22). Snyder emailed Plaintiff to inform him that the accusations would be investigated pursuant to UNLV policies and procedures, and that the matter was referred to the Office of Student Conduct. (ECF No. 28 at 23). On May 31, 2013, Plaintiff met with Burns, then Director of the Office of Student Conduct, and Burns told Plaintiff that an investigation would begin immediately. (ECF No. 28 at 24). Plaintiff and Burns exchanged emails about the investigation over the course of Summer 2013. (ECF No. 28 at 24). In September 2013, Burns met with Plaintiff and informed Plaintiff that the investigation was completed. (ECF No. 28 at 25).

In light of the above facts, the Court finds that Claim 15 must be dismissed for failure to state a claim. As no cause of action has been adequately pleaded, the Court declines to analyze Defendants' argument that the claim is time-barred.

E. Punitive Damages

Plaintiff seeks punitive damages specifically for the sex-based discrimination he alleges, and generally in his prayer for relief. Defendants argue that, under NRS 41.035, punitive damages may not be awarded against government officers in tort actions. Defendants contend that all individually named Defendants were employees of UNLV during the time of the alleged incidents. Plaintiff counters that NRS 41.035 does not apply to actions government officers take outside the scope of

their employment, and argues that the "purposeful dissemination of lies" is not within the scope of public duties. He also contends that the punitive damages bar of NRS 41.035 does not apply to any Defendants sued in their individual capacity.

The Court does not agree with Plaintiff that he alleges facts pertaining to actions taken outside the scope of Defendants' employment. His claims related to the cheating accusations and the filing of the Bar complaint appear to involve actions performed in the context of Defendants' employment. The Court does not interpret NRS 41.035 to permit requests of punitive damages when Nevada officers or employees are sued in their individual capacity acting within the scope of their employment. Because all tort actions alleged involve actions or omissions performed within the scope of Defendants' public duties or employment, the Court finds NRS 41.035 prohibits Plaintiff from requesting punitive damages on the surviving tort claims.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Defendant Smatresk's Motion to Dismiss (ECF No. 45) and Defendants' Joint Motion to Dismiss (ECF No. 47) are **GRANTED.** Claims 6, 7, 8, 12, 16, and 17 are dismissed with prejudice as to Defendant Smatresk. Claims 14, 15, 18, 19, 20, 21, 22, 23, 24, and 25 are dismissed with prejudice as to all Defendants.

DATED this 19th day of October, 2017.

/s/ RICHARD F. BOULWARE, II,
RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civ. No. 2:15-cv-01228-RFB-GWF

DARREN HEYMAN, Plaintiff

v.

THE STATE OF NEVADA EX REL. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION ON BEHALF OF THE UNIVERSITY OF NEVADA, LAS VEGAS; et al., Defendants

---

Filed: October 17, 2018

ORDER

MINUTE ORDER IN CHAMBERS of the Honorable Richard F. Boulware, II on 10/17/2018.

With good cause appearing, the Honorable Richard F. Boulware, II recuses himself in this action. IT IS ORDERED that this action is referred to the Clerk for random reassignment of this case for all further proceedings. (Copies have been distributed pursuant to the NEF - CVL)

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civ. No. 2:15–cv–01228–RFB–GWF

DARREN HEYMAN, Plaintiff

v.

THE STATE OF NEVADA EX REL. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION ON BEHALF OF THE UNIVERSITY OF NEVADA, LAS VEGAS; et al., Defendants

---

Filed: October 18, 2018

CLERK'S NOTICE

CLERK'S NOTICE that this case is randomly reassigned to Judge Andrew P. Gordon for all further proceedings. All further documents must bear the correct case number 2:15-cv-01228-APG-GWF. (no image attached) (EDS).

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civ. No. 2:15–cv–01228–RFB–GWF

DARREN HEYMAN, Plaintiff

v.

THE STATE OF NEVADA EX REL. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION ON BEHALF OF THE UNIVERSITY OF NEVADA, LAS VEGAS; et al., Defendants

---

Filed: February 28, 2019

ORDER

Plaintiff Darren Heyman objects to Magistrate Judge Foley's various orders granting defendant Rhonda Montgomery's motions for contempt and imposing attorney's fees on Heyman. Heyman also moves for leave to file a reply to Montgomery's response to one of these objections and moves for a status conference to discuss these objections and Judge Boulware's recusal.

The parties are familiar with the factual and procedural background of this case, so I do not summarize it here. For the reasons outlined below, I deny Heyman's objections, grant his motion for leave, and deny his motion for a status conference.

I. BACKGROUND OF ORDERS

On November 29, 2017, Montgomery moved to compel Heyman to provide a HIPAA authorization form in order to obtain medical records. ECF No. 243. On February 9, 2018, Magistrate Judge Foley granted that motion and ordered Heyman to provide authorization forms that would allow the defendants to access the records of mental health treatment he had received since 2013. ECF No. 309.

Two months later, Montgomery moved for contempt sanctions against Heyman for failure to comply with that order, arguing that Heyman provided authorization only for mental health records specifically relating to the alleged accusations of cheating at issue in this case. ECF No. 333. On June 18, Judge Foley granted the motion, finding that Heyman "failed to comply with the Court's order instructing him to provide a HIPAA authorization form." ECF No. 362 at 3. Judge Foley ordered Montgomery to file a memorandum establishing appropriate attorney's fees and re-ordered Heyman to provide full HIPAA authorization. *Id.* Montgomery filed her memorandum (ECF No. 373), and on August 9, Judge Foley awarded her $1,408.00 in attorney's fees. ECF No. 396.

On July 31, 2018, Montgomery again moved for contempt sanctions against Heyman for failure to comply with Judge Foley's June 18 order, arguing that Heyman inappropriately limited his HIPAA authorization to only Montgomery's counsel and law firm. ECF No. 392. On October 18, Judge Foley granted that motion in part,[1] finding that Heyman "once again has failed to follow an order of

[1] In addition to sanctions, Montgomery moved to strike Heyman's damages for intentional infliction of emotional distress. ECF No. 392. Judge Foley granted the sanctions but denied Montgomery's motion to strike. ECF No. 405.

this Court despite warnings of the consequences of doing so." ECF No. 405 at 3. Judge Foley ordered Montgomery to file another memorandum establishing additional attorney's fees and re-ordered Heyman to provide a full HIPAA authorization. *Id.* Montgomery filed another memorandum (ECF No. 410) and on November 11, Judge Foley awarded her an additional $1,148.00 in attorney's fees. ECF No. 417.

II. HEYMAN'S OBJECTIONS

Heyman objects to all four sanction orders. With regard to the June 18 order, he argues he showed a willingness to work with Montgomery, is acting pro se, had never dealt with HIPAA releases before, genuinely thought that he provided Montgomery with a release sufficient to meet the requirements of the June 6 order, and was therefore not acting in bad faith. He also argues Judge Foley repeatedly ignored bad faith on Montgomery's part and therefore abused his discretion in imposing sanctions against Heyman. He further contends there is no legal basis for requiring him to provide HIPAA authorization. ECF No. 376. Montgomery responds that Heyman had not been cooperative and that Judge Foley was within his discretion to impose discovery sanctions. ECF No. 383.

Heyman objects to the August 8 order imposing $1,408.00 in attorney's fees by arguing that the June 18 order explicitly limited Montgomery to fees related to "preparing and filing her motion for contempt," but that 7.6 of the 8.8 hours Montgomery itemized were spent on work done after that motion had been filed.[2]

[2] Examples of post-filing work include research for and drafting a reply in support of the motion

ECF Nos. 399 and 340. He also argues that the fees should not have been imposed because Montgomery's memo did not include confirmation that it was "reviewed and edited" by the moving attorney in accordance with Local Rule 54-14(c), because Judge Foley did not adequately consider Heyman's equitable considerations in accordance with the language of the June 18 order, and because a defendant who is not paying her own legal fees is not entitled to recover attorney's fees. *Id.* Montgomery responds that Judge Foley was aware of Heyman's arguments in this regard and that he understood what his own order required when he made his decision. ECF No. 402.

Heyman objects to the October 17 order granting Montgomery's second motion for sanctions, again arguing that he did his best to cooperate with Montgomery in this matter, is acting pro se, has never dealt with HIPAA releases before, and genuinely thought that he provided Montgomery with a release sufficient to meet the order's requirements. Heyman also argues that Montgomery lacks standing to move for an order requiring Heyman to provide HIPAA authorization to anyone except Montgomery and her counsel and that the issue was not ripe. ECF No. 415. Montgomery does not respond to this objection.

Heyman objects to the November 21 order imposing an additional $1,148.00 in attorney's fees, arguing that Montgomery's memo included hours spend on work done outside the scope of the October 17 order, that the memo was deficient in a number of ways, and that Montgomery's counsel was artificially inflating hours

---

and research for and drafting the memo for fees. *See* ECF No. 373-1.

spent working on the relevant materials. ECF No. 418. Montgomery does not respond to this objection.

A magistrate judge's ruling on non-dispositive matters such as those addressed in Judge Foley's orders are "not subject to *de novo* determination." *Grimes v. City & Cty. of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991) (quoting *Merrit* [*sic*] *v. Int'l Bhd. of Boilermakers*, 649 F.2d 1013, 1017 (5th Cir. 1981)). I reconsider a matter only if it "has been shown [that] the magistrate judge's order is clearly erroneous or is contrary to law." LR IB 3-1(a); Fed. R. Civ. Proc. 72(a); 28 U.S.C. § 636(b)(1).

I have reviewed Judge Foley's rulings, Heyman's objections, and the underlying papers. None of Judge Foley's orders is clearly erroneous or contrary to law. As the judge handling discovery in this case from its inception, Judge Foley was in the best position to determine if sanctions were appropriate and how they should be imposed. He considered Heyman's arguments and acted well within his broad discretion in all of the matters to which Heyman objects. I therefore overrule Heyman's objections.

III. HEYMAN'S MOTION FOR LEAVE

Heyman moves for leave to file a reply in support of his objection to Judge Foley's August 9 order. ECF No. 404. Heyman submitted his reply (ECF No. 403), and I considered it for the present ruling. I therefore grant Heyman's motion for leave.

IV. HEYMAN'S MOTION FOR STATUS CONFERENCE

Heyman also moves for a status conference to clarify his objections to prior rulings and discuss Judge Boulware's October 17, 2018 recusal. ECF No. 419. Heyman acknowledges that it is within my discretion to grant or deny his motion. There is no need for a conference at this point, so I deny this motion.

V. CONCLUSION

IT IS THEREFORE ORDERED that Magistrate Judge Foley's rulings **(ECF Nos. 362, 396, 405, and 417) are affirmed** in their entirety, and plaintiff Heyman's objections **(ECF Nos. 376, 399, 415, and 418) are overruled.**

IT IS FURTHER ORDERED that plaintiff Heyman shall pay the amounts of $1,408.00 and $1,148.00 as required by Magistrate Judge Foley's rulings **by April 1, 2019.**

IT IS FURTHER ORDERED that plaintiff Heyman's motion for leave to file a reply **(ECF No. 404) is granted.**

IT IS FURTHER ORDERED that plaintiff Heyman's motion for a status conference **(ECF No. 419) is denied.**

DATED this 28th day of February, 2019.

s/ ANDREW P. GORDON,
ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civ. No. 2:15-cv-01228-RFB-GWF

DARREN HEYMAN, Plaintiff

v.

THE STATE OF NEVADA EX REL. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION ON BEHALF OF THE UNIVERSITY OF NEVADA, LAS VEGAS; et al., Defendants

---

Filed: March 12, 2019

ORDER

Plaintiff Darren Heyman was a PhD student and graduate assistant at the University of Nevada Las Vegas's ("UNLV") College of Hotel Administration ("Hotel College"). Heyman alleges that the defendants created and spread a false rumor that he was going to cheat on his PhD qualifying exam ("Q-exam"), failed to properly investigate the rumor, erroneously removed him from his PhD program, and filed a specious bar complaint against him as retaliation for the current lawsuit. Heyman sues UNLV and the individual defendants, all of whom are or were affiliates of UNLV, for a variety of claims.

Pending are three motions for summary judgment filed by Heyman (ECF No. 377); defendant Rhonda Montgomery (ECF No. 371); and defendants UNLV, Donald Snyder, Stowe Shoemaker, Curtis Love, Sarah Tanford, Phillip Burns, Kristin

Malek, Lisa Moll-Cain, Debra Pieruschka, and Elda Sidhu ("collective defendants") (ECF No. 374).

Heyman fails to provide sufficient evidence to survive summary judgment on most of his claims. I therefore deny Heyman's motion, I grant Montgomery's motion, and I grant the collective defendants' motion as to most of Heyman's claims.

I. BACKGROUND

In 2013, Heyman was a PhD student and graduate assistant at the UNLV Hotel College. During that time period, Donald Snyder was the Dean of the Hotel College and became the President of UNLV. Stowe Shoemaker was a professor at the Hotel College and replaced Snyder as the Dean. Curtis Love, Rhonda Montgomery, and Sarah Tanford were professors at the Hotel College, and Love was also the Director of Graduate Studies for the Hotel College. Phillip Burns was the Director of Student Conduct at UNLV. Kristin Malek and Lisa Moll-Cain were doctoral students and graduate assistants at the Hotel College. Debra Pieruschka was Assistant General Counsel at UNLV and Elda Sidhu was General Counsel. ECF Nos. 371 at 5-6; 374 at 2; 377 at 4.

Sometime after their first year in the PhD program, all doctoral students at the Hotel College are required to pass a Q-exam. Heyman alleges that in May 2013, just prior to his cohort's Q-exam, Shoemaker, Montgomery, Love, Tanford, Malek, and Moll-Cain published or republished a false rumor that Heyman was planning to cheat on the exam. Heyman also alleges that Snyder, Shoemaker, and Burns failed to adequately investigate the rumor and that various combinations of the

defendants worked in concert to both have him separated from the PhD program and file a bar complaint against him as retribution for filing the current lawsuit. ECF No. 28. The defendants claim that no one accused Heyman of planning to cheat, that a proper investigation was conducted, that Heyman's separation from the program was the result of an administrative error and was corrected in a timely manner, and that the bar complaint was not part of a conspiracy or retaliation against Heyman. ECF Nos. 371 and 374.

Heyman filed his original Complaint and First Amended Complaint in state court. Because the case originally included a federal law claim, the defendants removed it to this court on June 29, 2015. ECF No. 1. Heyman filed the operative complaint, his Second Amended Complaint,[1] on April 13, 2016. ECF No. 28. This complaint included 31 causes of action. On October 19, [*sic*] 2017, Judge Richard Boulware[2] dismissed 10 claims and defendant Neal Smatresk.

The remaining causes of action are:

- 1) Defamation against UNLV, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;
- Invasion of Privacy – False Light against UNLV, Montgomery, Love, Tanford, Malek, and Moll-Cain;
- 3) Civil Conspiracy against UNLV, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;

[1] While this second amended complaint was incorrectly titled "First Amended Complaint," the parties agree that it should be referred to as the "Second Amended Complaint."

[2] Judge Boulware later recused himself from the case. ECF No. 406.

- 4) Concerts of action against UNLV, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;
- 5) Intentional Infliction of Emotional Distress against UNLV, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;
- 6) Breach of Contract against UNLV, Snyder, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;
- 7) Contractual Breach of the Implied Covenant of Good Faith and Fair Dealing against UNLV, Snyder, Shoemaker, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;
- 8) Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing against UNLV, Snyder, Shoemaker, Montgomery, Love, Tanford, and Burns;
- 9) Constructive Fraud against UNLV, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;
- 10) Deceit or Misrepresentation against UNLV, Snyder, Burns, and Shoemaker;
- 11) Detrimental Reliance against UNLV, Snyder, Shoemaker, and Burns;
- 12) Fraud in the Inducement against UNLV, Snyder, Shoemaker, and Burns;
- 13) Fraud and Intentional Misrepresentation against UNLV, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain;
- 16) Negligence against UNLV, Snyder, Shoemaker, Montgomery, Love,

Tanford, Burns, Malek, and Moll-Cain;

- 17) Negligent Hiring, Training, Supervision, and Retention against UNLV, Snyder, and Shoemaker;
- 26) Intentional Infliction of Emotional Distress against UNLV;
- 27) Negligence against UNLV;
- 28) Breach of Contract against UNLV;
- 29) Contractual Breach of the Implied Covenant of Good Faith and Fair Dealing against UNLV;
- 30) Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing against
- UNLV; and
- 31) Civil Conspiracy against UNLV, Pieruschka, Sidhu, Snyder, Shoemaker, Montgomery, Love, Tanford, and Burns. *Id.*

Claims 1-13 and 16-17 stem from the alleged rumor and failure to adequately investigate it, and Claims 26-31 stem from Heyman's separation from the PhD program and the bar complaint.

II. EVIDENCE

Much of the evidence Heyman relies on in his motion comes in the form of affidavits and deposition testimony, in which the deponent testifies about what someone else said. The defendants argue that nearly all this evidence is inadmissible hearsay. ECF Nos. 371 at 7-9; 374 at 3-4. Heyman responds that all of his evidence is admissible, either as non-hearsay or under one of the hearsay

exceptions. ECF No. 389 at 28-29. He makes three arguments: (1) that because all of the declarants at each level of hearsay could testify at trial, the evidence will be in admissible form at trial so the statements can be considered at summary judgment; (2) that testimony regarding the accusation that he was planning to cheat is not hearsay because it is not offered to prove the truth of the matter asserted (i.e., that he intended to cheat) but to prove that the accusations were made; and (3) that any remaining statements either are "opposing party statements" that are excluded from hearsay or fall under one of the other hearsay exceptions. *Id.*

Evidence considered at summary judgment does not have to be in admissible form as long as the submitting party can reasonably argue that it would be "able to proffer [the] evidence in admissible form at trial." *Romero v. Nevada Dep't of Corr.*, 673 F. App'x 641, 644 (9th Cir. 2016). If an objection to the evidence is made, the submitting party bears the burden "to show that the material is admissible as presented or to explain the admissible form that is anticipated." Fed. R. Civ. P. 56 advisory committee's note to 2010 amendment (explaining Fed. R. Civ. P. 56(c)(2)); *see also Sweet People Apparel, Inc. v. Phoenix Fibers, Inc.*, 748 F. App'x 123, 124 (9th Cir. 2019).

Heyman argues that because each individual at each level of hearsay might potentially testify at trial, all of his evidence should be considered in summary judgment. This explanation is insufficient, as it requires me to assume that each of the individuals involved in a hearsay declaration will testify at trial and that each

will testify in a manner that supports the hearsay included in the proffered statement.

With regard to Heyman's second and third arguments, I must evaluate statements nested within statements at each level to determine whether the declaration at that level is hearsay and, if so, whether an exception applies at that level. Fed. R. Evid. 805. For example, when a deponent states that "[Moll-Cain] had said that [Malek] had told her that [Heyman was] planning on cheating on the exam" (ECF No. 378-4 at 84), at least two levels of hearsay must be evaluated for admissibility.[3] And the "matter asserted" by the each is different: the matter asserted Moll- Cain is that Malek made the declaration regarding Heyman, not that Heyman was planning to cheat. The deposition and each underlying statement may be inadmissible unless it falls under one of the hearsay exclusions or exceptions. Federal Rule of Evidence 801(d)(2) excludes from hearsay statements by party opponents:

> A statement that meets the following conditions is not hearsay: . . . The statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true; (C) was made by a person whom the party authorized to make a statement on the subject; (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or (E) was made by the party's coconspirator during and in furtherance of the conspiracy.

Thus, statements made by the defendants and offered by Heyman fall within the opposing party statement exclusion and I will consider them unless there is a

[3] Here I assume either the deponent will testify at trial or the deposition testimony will be admitted under Rule 804(b)(1).

problem of hearsay within hearsay.

III. ANALYSIS

Summary judgment is appropriate if the pleadings, discovery responses, and affidavits demonstrate "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. 323. The burden then shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir. 2000). I view the evidence and reasonable inference in the light most favorable to the nonmoving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

A. Heyman's Claims of Civil Conspiracy and Concert of Action (Claims 3, 4, and 31)

Heyman alleges that Montgomery, Love, Tanford, Malek, and Moll-Cain started the rumor that Heyman was going to cheat on the Q-exam, and obstructed or intentionally failed to conduct a formal investigation into the rumor, all as part of a plan to have Heyman removed from the PhD program (Claims 3-4). ECF No. 28 at

37-38. Although Burns is not named in the headings for those claims, he is prominently featured in the supporting text, so it appears that Heyman is also alleging that Burns participated in these actions. Heyman also alleges that Snyder, Shoemaker, Montgomery, Love, Tanford, Burns, Pieruschka, and Sidhu acted in concert to separate Heyman from UNLV and submitted a bar complaint to prevent him from obtaining a law license (Claim 31). ECF No. 28 at 116-117. Heyman sues UNLV for these claims under the theory that the defendants were UNLV's agents working within their scope of employment or as students. The defendants argue that Heyman has failed to show any tortious action or agreement among the defendants related to the alleged incidents. ECF Nos. 371 at 20-23; 374 at 12.

"Actionable civil conspiracy arises where two or more persons undertake some concerted action with the intent to accomplish an unlawful objective for the purpose of harming another, and damage results." *Guilfoyle v. Olde Monmouth Stock Transfer Co.*, 335 P.3d 190, 198 (Nev. 2014). Actionable concerted action arises where two or more persons "agree to engage in an inherently dangerous activity, with a known risk of harm, that could lead to the commission of a tort. Mere joint negligence, or an agreement to act jointly, does not suffice." *GES, Inc. v. Corbitt*, 21 P.3d 11, 15 (Nev. 2001). "To prevail in a civil conspiracy action, a plaintiff must prove an agreement between the tortfeasors, whether explicit or tacit. Similarly, acting in concert with another tortfeasor requires an agreement." *Dow Chem. Co. v. Mahlum*, 970 P.2d 98, 112 (Nev. 1998), *overruled on other grounds by GES, Inc.*, 21 P.3d 11. If the plaintiff presents no evidence of an agreement among the

defendants, summary judgment in the defendants' favor is warranted. *See Consolidated Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 971 P.2d 1251, 1256 (Nev. 1998).

Heyman has not provided evidence of an agreement among any the defendants named in these claims aside from his own testimony that others had heard of such plans. *See, e.g.,* ECF No. 390-2 at 6-7 (where Heyman recalls non-party Wen Chang telling him she had heard from Malek that an unnamed group of faculty "were going to try and have [Heyman] kicked out of the program when [he] failed the Q-exam for the first time."). Even if such evidence was potentially admissible at trial (which appears doubtful), it is not sufficient to create a genuine issue of material fact regarding the existence of an agreement among some or all of the defendants in Heyman's civil conspiracy or concert of action claims. I therefore grant summary judgment to all defendants on Claims 3-4 and 31.

B. Heyman's Claims Stemming from the Rumor (Claims 1-2, 5-9, 13, and 16)

Heyman alleges that Montgomery, Love, Tanford, Malek, and Moll-Cain published or republished a false declaration that Heyman was planning to cheat on his Q-exam. He claims these publications constitute defamation (Claim 1), invasion of privacy – false light (Claim 2), intentional infliction of emotional distress (Claim 5), breach of contract (Claim 6), breach of the implied covenant of good faith and fair dealing (Claim 7), tortious breach of the implied covenant of good faith and fair dealing (Claim 8), constructive fraud (Claim 9), fraud and intentional

misrepresentation (Claim 13), and negligence (Claim 16).[4] Although neither his complaint nor his motion for summary judgment includes allegations that Burns created or spread the rumor, Heyman sues Burns for defamation (Claim 1). Heyman also accuses Shoemaker of republishing the false declaration but sues Shoemaker only for negligence (Claim 16). Heyman sues UNLV for all of these claims under the theory that the defendants were UNLV's agents working within their scope of employment or as students. ECF No. 28 at 33-37, 39-59, 65-67, and 74-82. The defendants contend they did not make statements regarding Heyman's alleged plan to cheat on the Q-exam or they merely said that Heyman said it would be easy to cheat on the exam, which they argue is not actionable. ECF Nos. 371; 374.

1. Claims Against Shoemaker, Montgomery, Tanford, and Burns for the Rumor

Heyman does not provide any admissible evidence that Shoemaker, Montgomery, Tanford, or Burns published or republished a statement that Heyman was planning to cheat. There is no evidence linking Shoemaker or Burns to the rumor. The only evidence linking Montgomery and Tanford to the rumor is a statement in non-party Merrick McKeig's (a fellow student) affidavit that non-party Toni Repetti (a UNLV professor) told him that she heard from Montgomery and Tanford that Heyman was planning to cheat on the Q-exam. This statement is

[4] It is not always clear from Heyman's complaint or the accompanying papers why each of the defendants is named in a given claim or which incidents are the basis for a given claim. For example, Claim 13 for fraud and intentional misrepresentation names UNLV, Montgomery, Love, Tanford, Burns, Malek, and Moll-Cain, but the supporting allegations do not mention Malek or Moll-Cain and only briefly reference Montgomery, Love, and Tanford. Similarly, it appears Heyman is suing some

hearsay within hearsay and is not admissible under any of the exclusions or exceptions. And Repetti denies making such a statement. ECF No. 372 at 135. I therefore grant summary judgment in favor of Montgomery and Tanford on Claims 1-2, 5-9, 13, and 16; Burns on Claim 1; to Shoemaker on Claim 16; and UNLV on those claims that are based on these defendants' alleged conduct.

2. Breach Claims Against Love, Malek, and Moll-Cain for the Rumor (Claims 6-8)

Heyman concedes he has no contract with Love, Malek, or Moll-Cain. ECF No. 389at 18. I therefore grant summary judgment in favor of Love, Malek, and Moll-Cain on Claims 6-8 and in favor of UNLV on those claims that were based on these defendants' alleged conduct.

3. Remaining Claims Against Love for The Rumor (Claims 1-2, 5, 9, 13, and 16)

To support his claims against Love, Heyman submits deposition testimony from nonparties Repetti,[5] Tony Henthorn,[6] and Jim Busser,[7] all of whom testify that they were told that Heyman was planning to cheat either directly by Love or through someone who said they heard the accusation from Love.

Repetti and Busser's testimony that Love made the statement is admissible under Rule 801(b)(2) because all three appear to be agents of the opposing party

---

of the defendants named in Claim 6 for breach of contract due to spreading the rumor, while he is suing the rest for breach of contract due to their failure to adequately investigate the rumor.

[5] "[Love] says to me something along the effects of, 'I have been told that [Heyman] is going to try to cheat on the Q exam, we need another proctor in the room.'" ECF No. 378 at 84.

[6] "[Love] came and told [Busser] . . . that [Heyman was] going to cheat. And so, [Busser] came and got me, and said look, 'We got to do something about this,' so he and I talked about it." ECF No. 378 at 206-207.

[7] "And [Love] described what he had been informed that [Heyman was] going to cheat and that he was very concerned about that, and had a number of suggestions for how to proceed. . . . He said that

UNLV (and Love is a party opponent) statement rule. However, there is no genuine dispute that Love's statements were made in the context of his role as a professor tasked with ensuring that the exam was properly conducted. Thus, his statements fall under the intercorporate communication privilege. "A qualified or conditional privilege exists where a defamatory statement is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he as a right or duty, if it is made to a person with a corresponding interest or duty." *Circus Hotels, Inc. v. Witherspoon,* 657 P.2d 101, 105 (Nev. 1983) (citations omitted). Love was responsible for preventing cheating during the Q-exam, and he made statements to other professors that reflect a genuine effort to fulfill that responsibility. Heyman provides no evidence that Love abused this privilege or had an ulterior motive in making these statements. *Id.* ("Whether a particular communication is conditionally privileged by being published on a privileged occasion is a question of law for the court; the burden then shifts to the plaintiff to prove to the jury's satisfaction that the defendant abused the privilege by publishing the communication with malice in fact."). I therefore grant summary judgment in Love's favor on Claims 1-2, 5, 9, 13, and 16 and in UNLV's favor on to those claims that were based on Love's conduct.

4. Remaining Claims Against Malek for the Rumor (Claims 1-2, 5, 9, 13, and 16)

Kristin Malek had provided that information to him and some other faculty." ECF No. 378 at 324-325.

To support his allegations against Malek, Heyman submits an email to Heyman from Snyder[8] and an email between Snyder and Burns,[9] which state that the rumor was likely started by Malek. Heyman also relies on McKeig's affidavit[10] and Repetti[11] and Busser's deposition testimony,[12] in which each testifies they were told that Heyman was planning to cheat either directly by Malek or through someone who said they heard the accusation from Malek.

The defendants rely on Malek's interrogatory answers and deposition testimony, in which she denies stating that Heyman was planning to cheat on the Q-exam but admits telling Love and Montgomery that Heyman told her "it would be easy to cheat on the Q-exam." ECF Nos. 375-1 at 179-180 and 213. The defendants also point to other witness testimony that supports Malek's version of events, including: Love's interrogatory answers[13] and deposition testimony,[14] Tanford's interrogatory answers[15] and deposition testimony[16] and Burns' deposition.[17]

---

[8] "The accusation that you had an intention to cheat on the qualifying exam was a student based rumor and clearly not the thinking or belief of the College or the University." ECF No. 378 at 4-5.

[9] "I understand that you have been involved to some extent with the matter involving a student's (presumably Kristin Malek's) accusation that another student, Darren Heyman, intended to cheat on his qualifying exams." ECF No. 390-11 at 2.

[10] "[Repetti] also told me that [Montgomery] and/or [Tanford] told her that they had been told that [Heyman] was planning to cheat on his qualifying exam by Kristen Malek." ECF No. 378 at 178.

[11] "[Moll-Cain] had said that [Malek] had told her that [Heyman was] planning on cheating on the exam." *Id.* at 95.

[12] "Q: Okay. In your opinion, who started the accusation? A: Kristin Malek. Q: You seem very certain of that. Why are you so comfortable saying that? A: Curtis Love directly told me that. I believe later even [Malek] acknowledged that that she had this conversation with you and that she did what she thought was right to bring it forward." *Id.* at 355.

[13] "[Love] is not aware of any rumor or accusation that [Heyman] cheated, or planned to cheat, on the Q-exam. Rather, . . . Malek informed [Love] that [Heyman] had told her it would be easy to cheat . . . ." ECF No. 375-2 at 15-16.

[14] "What [Malek] told me was that [Heyman] had said that it would be very easy to cheat on the Q exam by using a thumb drive." *Id.* at 128. "Q: Did you hear that [Heyman] had been accused of planning to cheat on his Q exam? . . . [Love]: No. What I heard from [Malek] was that [Heyman] said

Viewing the evidence in the light most favorable to Heyman on the defendants' motion for summary judgment, there are issues of fact regarding whether and with what intention Malek started the rumor that Heyman was planning to cheat on the Q-exam. There are also issues of fact regarding Malek's alleged statements when viewing the evidence in the light most favorable to the defendants on Heyman's motion for summary judgment because Malek and others deny she said Heyman was going to cheat. Given that these alleged statements are the basis for Heyman's claims against Malek for defamation, invasion of privacy – false light, intentional infliction of emotional distress, negligence, constructive fraud, and intentional misrepresentation, I deny both parties' motions for summary judgment on Claims 1-2, 5, 9, 13, and 16 as to Malek.

5. Remaining Claims Against Moll-Cain for the Rumor (Claims 1-2, 5, 9, 13, and 16)

To support his claims against Moll-Cain, Heyman submits the email from Snyder, in which he states that "the accusation that you had an intention to cheat

---

it would be easy to cheat. . . Didn't say that he was going to; it was preemptive. It would be easy." *Id.* at 179-180.

[15] "[Tanford] is not aware of any rumor or accusation that [Heyman] cheated, or planned to cheat, on the Q-exam. Rather, . . . [Tanford] went to Dr. Curtis Love's office and learned about Kristin Malek's conversation with [Heyman] where [Heyman] told her that it would be easy to cheat on the Q-exam without detection. [Tanford] does not recall if she was in the office when Kristin Malek shared the information or whether she arrived afterwards while Dr. Love communicated the information . . . ." ECF No. 375-3 at 49-50.

[16] "Q: How would you define what Ms. Malek said? [Tanford]: It was a statement that she said you had made regarding that it would be easy to cheat on the exam . . . ." ECF No. 375-2 at 250.

[17] "[L]ooking at the information, there was never an accusation against [Heyman] of planning to cheat or to cheat." ECF No. 375-3 at 80-81.

on the qualifying exam was a student based rumor,"[18] and Repetti's deposition testimony.[19]

None of this evidence sufficiently establishes that Moll-Cain published or re-published the rumor that Heyman was going to cheat. Snyder's email does not identify Moll-Cain as the source of the rumor but simply posits that it was a "student" who started it. Separate emails between Snyder and Burns suggest that the student that Snyder had in mind was Malek.[20] And while Heyman relies on Repetti's testimony as evidence that Moll-Cain helped spread the rumor, Repetti's statement actually referred to a conversation with Moll-Cain that took place years after the alleged incident for which Heyman is suing. Statements occurring this long after the initial alleged incidents were not covered in Heyman's second amended complaint, so the defendants were not given fair notice for claims arising from them. ECF No. 378 at 94-95. I therefore grant summary judgment in favor of Moll-Cain on Claims 1-2, 5, 9, 13, and 16 and in favor of UNLV on those claims that are based on Moll-Cain's conduct.

6. Remaining Claims Against UNLV for the Rumor

Heyman sues UNLV for Claims 1-2, 5-9, 13, and 16 under the theory that the defendants were UNLV's agents working within the scope of their employment or as students. Of the defendants Heyman names in those claims, only Malek remains.

---

[18] ECF No. 378 at 4-5.

[19] "[Moll-Cain] had said that [Malek] had told her that [Heyman was] planning on cheating on the exam." ECF No. 378 at 95.

Neither party sufficiently addresses the issue of *respondeat superior* in regard to UNLV and Malek. Thus, there are remaining issues of fact regarding whether Malek's alleged statements were made as an agent or employee of UNLV. I therefore deny both parties' motions for summary judgment on Claims 1-2, 5, 9, 13, and 16 asserted against UNLV that arise from Malek's conduct.

C. Heyman's Claims Stemming from The Investigation

Heyman alleges that Snyder, Shoemaker, and Burns failed to adequately investigate the source and veracity of the rumor that Heyman was planning to cheat on the Q-exam and subsequently failed to discipline the individuals who published or republished those allegations. Additionally, he alleges that Snyder knew that Shoemaker and Burns were not impartial investigators but allowed them to proceed in the investigation regardless, and that Burns misrepresented his relationship with Montgomery. Heyman claims that these failures and the subsequent promises made to him in regard to the investigation constitute breach of contract (Claim 6), breach of the implied covenant of good faith and fair dealing (Claim 7), tortious breach of the implied covenant of good faith and fair dealing (Claim 8), constructive fraud (Claim 9), deceit or misrepresentation (Claim 10), detrimental reliance (Claim 11), fraud in the inducement (Claim 12), intentional misrepresentation (Claim 13), and negligence (Claim 16).[21] Heyman sues UNLV for all these claims under the theory that the defendants were UNLV's agents working

[20] "I understand that you have been involved to some extent with the matter involving a student's (presumably Kristin Malek's) accusation that another student, Darren Heyman, intended to cheat on his qualifying exams." ECF No. 390-11 at 2.

within the scope of their employment or as students. ECF No. 28 at 41-82.

In support of his claims, Heyman submits (1) an email from Snyder stating his office will investigate the rumor;[22] (2) deposition testimony of Wen Chang (a fellow student), who is the only non-defendant Burns claims to have interviewed and who does not recall being asked any questions relating to Heyman or the accusations made against him;[23] (3) Burns' deposition testimony, in which he admits that there are no notes or a final report regarding the investigation[24] and that he did not begin interviewing the relevant persons until nearly three months after Heyman provided him with an account of the alleged incident, and (4) evidence that Burns had a working relationship with Montgomery, despite allegedly telling Heyman that they were merely familiar with each other.[25]

The defendants claim that they did not misrepresent or deceive Heyman in

---

[21] Shoemaker is not included in Claim 6 for breach of contract and only included in Claim 16 for negligence related to the alleged republication of the rumor.

[22] "My office will take appropriate action to address this matter under applicable UNLV policies and procedures, which includes an investigation into the origins of the rumor, a determination of whether a violation of UNLV's policies and procedures occurred, and if so, appropriate disciplinary proceedings. These disciplinary proceedings, however, are a confidential student matter, the results of which cannot be shared with you." ECF No. 378 at 5.

[23] "Q. . . . So did Phillip Burns ever bring you into a formal situation to question you about Darren? [Chang]: I don't think so. I don't – I don't recall such thing. Q: Did Phillip Burns ever call you to his office to ask you about Kristin Malek? [Chang]: I don't remember such thing either." ECF No. 390-16 at 83-84.

[24] "Q: Did you review your notes of the investigation, regarding this case? [Burns]: There are no notes of the investigation of the case to review those notes were destroyed years ago. Q: Do you remember when? [Burns]: It would have been pretty much immediately after you left my office the last time we met in September of 2013. Q: And is that standard practice? [Burns]: It is for cases that are dismissed, yes. Q: Did you read your final report of the investigation regarding this case in preparation? [Burns]: There was no final report made." ECF No. 378 at 647.

[25] Heyman alleges that Burns said that he and Montgomery were not close. He submits Burns' deposition testimony, in which he admited [*sic*] that he has presented in her class on behalf of the office of student conduct (ECF No. 390-3 at 79-80), and Montgomery's interrogatory answers, in which she states that she has lunch with Burns once a year (ECF No. 390-22 at 13-14).

any way and that they conducted an adequate investigation into the rumor but found no wrongdoing. They rely on Burns' deposition testimony, in which he details his recollections of the investigation (ECF No 375-2 at 570-595), the individuals he allegedly interviewed (ECF No. 390-3 at 55), and how it is normal protocol for him to destroy notes from investigations that have been dismissed and to not write a final report if the investigation does not proceed past the initial stages (ECF No. *Id.* at 20).

1. Fraud and Deceit Claims Arising from the Investigation (9-10, 12-13)

Claims 9 and 13 against Burns and UNLV and Claims 10 and 12 against Snyder, Shoemaker, Burns, and UNLV all require that Heyman show by clear and convincing evidence that the defendants falsely represented a material fact. *See Long v. Towne*, 639 P.2d 528, 530 (Nev. 1982) (holding the plaintiffs' constructive fraud claim was properly dismissed because the defendants had not "misrepresented or concealed any material fact"); *Epperson v. Roloff*,, 719 P.2d 799, 802 (Nev. 1986) (same for deceit or misrepresentation); *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.*, 290, 89 P.3d 1009, 1018 (Nev. 2004) (same for fraud in the inducement); *Blanchard v. Blanchard*, 839 P.2d 1320, 1322 (Nev. 1992) (same for intentional misrepresentation). "The mere failure to fulfill a promise or perform in the future . . . will not give rise to a fraud claim absent evidence that the promisor had no intention to perform at the time the promise was made." *Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588, 592 (Nev. 1992).

Heyman offers no evidence to dispute that an investigation was performed or supervised by Snyder, Shoemaker, and Burns. Although the investigation may not have been as thorough or as expeditious as Heyman would have liked, Heyman does not offer sufficient evidence to show that these defendants made material misrepresentations to him in connection with the investigation. I therefore grant summary judgment in favor of Burns on Claims 9 and 13, in favor of Snyder, Shoemaker, and Burns on Claims 10 and 12, and in favor of UNLV on those claims that were based on the conduct of these defendants.

2. Contractual Claims Arising from the Investigation (6, 7, 8, and 11)

Heyman concedes that he has no contract with Snyder, Shoemaker, or Burns. ECF No. 389 at 18. I therefore grant summary judgment in their favor on Claims 6, 7, 8, and 11.

In regard to the contract claims against UNLV, Heyman submits that both the UNLV Code of the Hotel College and the UNLV Codes and Bylaws constitute contracts and that the actions of UNLV's agents breached those contracts. ECF No. 389 at 18. The defendants argue that Heyman has presented no evidence that either of the codes constitutes a contract between him and UNLV. They further argue that even if a contract exists, Heyman provides no evidence of a breach. ECF No. 394 at 6-8. They posit that I should take a deferential view to UNLV's disciplinary procedures, consistent with previous decisions in this court. *See Lucey v. Nevada ex rel. Bd. of Regents of Nevada Sys. of Higher Educ.*, No. 207-cv-00658-RLH-RJJ, 2009 WL 971667, at *6 (D. Nev. Apr. 9, 2009), *aff'd*, 380 F. App'x 608 (9th

Cir. 2010) ("A court's review under a breach of contract theory for violations of a university's established disciplinary procedures is limited to whether the procedures used were arbitrary, capricious, or in bad faith.").

Even if the codes are enforceable contracts, Heyman does not identify any specific language in them that the defendants' actions would plausibly have breached. So, there is no genuine issue of fact concerning the contractual claims against UNLV, and UNLV is entitled to judgment as a matter of law. I therefore grant summary judgment in favor of UNLV on Claims 6, 7, 8, and 11 as they relate to the investigation into the rumor.

3. Negligence Claim Arising from the Investigation (Claim 16)

"To prevail on a negligence theory, the plaintiff generally must show that (1) the defendant had a duty to exercise due care towards the plaintiff; (2) the defendant breached the duty; (3) the breach was an actual cause of the plaintiff's injury; (4) the breach was the proximate cause of the injury; and (5) the plaintiff suffered damage." *Perez v. Las Vegas Med. Ctr.*, 805 P.2d 589, 591 (Nev. 1991). The Supreme Court of Nevada has "indicated [its] hesitance to affirm the granting of summary judgment in negligence cases, because such claims generally present jury issues." *Sims v. Gen. Tel. & Elecs.*, 815 P.2d 151, 154 (Nev. 1991) (overruled on other grounds) (quotation omitted). "[I]f the respondent can show that one of the elements is clearly lacking as a matter of law, however, then summary judgment is proper." *Id.*

As with the contractual claims discussed above, Heyman does not establish that any of the actions or inactions by Snyder, Burns, or UNLV constitutes a breach of their duty to exercise due care towards Heyman. The evidence shows that an investigation did occur. And although the investigation may not have been as thorough or as expeditious as Heyman would have liked, Heyman presents no evidence sufficient to create a genuine issue of fact as to whether a breach of duty occurred. I therefore grant summary judgment in favor of Snyder, Burns, and UNLV on Claim 16 as it relates to the investigation into the rumor.

D. Heyman's Claims Stemming from His Separation from UNLV (Claims 26-30)

On March 25, 2015, Heyman was granted a leave of absence from his PhD program starting in Spring 2015 and ending in Fall 2015. ECF No. 390-26 at 2. On September 8, 2015, Heyman applied to extend his leave through Fall 2017 but was granted leave only through Fall 2016. *Id.* at 3. On March 10, 2016, UNLV sent a letter to Heyman informing him that he was being separated from his PhD program for "failure to return as scheduled or to secure an extension of a prior leave of absence." ECF No. 390-4 at 2. Heyman received this letter on March 17, contacted UNLV about the separation on March 18, and was reinstated to his program on March 21. ECF No. 375-4 at 23.

Heyman alleges that UNLV, through its agents working within their scope of employment, intentionally separated him from his PhD program as retribution for the present lawsuit or was negligent in allowing the separation to occur. ECF No. 377 at 15-16. He claims that due to the five days between when he learned that he

had been separated and was reinstated, he suffered damages in the form of emotional stress, which physically manifests through stomach cramps. ECF No. 390-14 at 2-3. He sues UNLV for intentional infliction of emotional distress (Claim 26), negligence (Claim 27), breach of contract (Claim 28), contractual breach of the implied covenant of good faith and fair dealing (Claim 29), and tortious breach of the implied covenant of good faith and fair dealing (Claim 30).[26]

As evidence for these claims, Heyman offers the deposition testimony of Kara Wada, UNLV Director of Admissions and Records. Ms. Wada testified that Heyman's separation should not have happened,[27] that mistaken separations such as Heyman's occur only about once per year,[28] and that it is protocol for the student's department to contact the student before a separation occurs to correct any mistakes or apply for a retroactive leave of absence,[29] which Heyman alleges never occurred. Heyman notes that Love was the Hotel College Graduate Coordinator at the time of the separation. ECF No. 377 at 7-8.

The defendants argue that Heyman's separation was a mistake due to a clerical error and that there is no evidence that Heyman was intentionally targeted

---

[26] Heyman also sues a number of defendants for civil conspiracy relating to his separation (Claim 31). I addressed this claim above.

[27] "Q: The fact that the separation letter was sent to [Heyman] in March of 2016 was a mistake? [Wada]: Yes. Q: Okay. It never should have happened? [Wada]: Correct." ECF No. 390-24 at 66.

[28] "Q: From 2007 to 2016, you would say about ten people other than Darren [were mistakenly separated]? [Wada]: That would be fair to say." *Id.* at 53.

[29] "Q: . . . So, it is the responsibility of the individual colleges to contact the students being separated, as far as you know? [Wada]: It is the responsibility of the department to let us know if the student should not be separated and contact the student about doing a leave of absence, if that's necessary." *Id.* at 57.

"Q: Again, [Heyman] should have been contacted to be given the opportunity to do a retroactive [leave of absence]? [Wada]: Right." *Id.* at 68.

as retribution for his lawsuit or that there was any coordinated effort to have him removed from his PhD program. ECF Nos. 374 at 5 and 12; 371 at 32-33.

1. Intentional Infliction of Emotional Distress Arising from the Separation (Claim 26)

To establish a claim for intentional infliction of emotional distress, the plaintiff must show "(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress and (3) actual or proximate causation." *Dillard Dep't Stores, Inc. v. Beckwith*, 989 P.2d 882, 886 (Nev. 1999). "[E]xtreme and outrageous conduct is that which is outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community." *Maduike v. Agency Rent-A-Car*, 953 P.2d 24, 26 (Nev. 1998) (citations omitted). "Liability for emotional distress generally does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Burns v. Mayer*, 175 F.Supp. 2d 1259, 1268 (D. Nev. 2001) (internal quotation omitted).

No reasonable jury could find that the actions Heyman relies on for this claim are "outside all possible bounds of decency and . . . utterly intolerable in a civilized community." *Maduike*, 953 P.2d at 26. And he offers insufficient evidence of intentional or reckless disregard for causing emotional distress by any of the UNLV employees involved in his separation. He argues that mistaken separations are so uncommon that a reasonable jury could determine that UNLV intentionally separated him based on probability alone. I disagree. Heyman has failed to support

his claim of intentional infliction of emotional distress, so I grant summary judgment in favor of UNLV on Claim 26.

2. Negligence Claim Arising from the Separation (Claim 27)

UNLV appears to move for summary judgment on Heyman's negligence claim but only through a brief reference to Claim 27. ECF No. 374 at 12. UNLV provides no substantive argument or legal or factual basis to support its motion on this claim other than to assert that the mistake was a clerical error. UNLV has not met its initial burden in moving for summary judgment, so I deny its motion as to Claim 27.

In his motion, Heyman argues that, as a public university, UNLV and its faculty have a duty to protect students, and that UNLV breached that duty both by mistakenly concluding that Heyman had not been approved for leave through Fall 2016 and by failing to notify him of his impending separation. He claims that due to the five days between when he learned that he had been separated and was reinstated, he suffered damages in the form of additional emotional stress, which physically manifests through stomach cramps. ECF No. 377 at 15-16.

Like UNLV, Heyman does not meet his initial burden in moving for summary judgement on Claim 27. Heyman nakedly asserts that each legal element of the claim has been met without providing any support for those assertions. He provides no authority for the proposition that a university and its employees have a duty to protect students from separations such as his. And courts in this district have previously rejected similar claims that a university owes a general duty of care to

its students. *See Salus v. Nevada ex rel. Bd. of Regents of Nevada Sys. of Higher Educ.*, No. 2:10-cv-01734-GMN, 2011 WL 4828821, at *5 (D. Nev. Oct. 10, 2011); *Lucey*, 2007 WL 4563466, at *6. I therefore deny Heyman's motion for summary judgment on Claim 27.

Given that both parties have failed to adequately address the legal basis for Claim 27, I order Heyman and UNLV to provide supplemental motions for summary judgment regarding negligence, particularly as it applies to Heyman's temporary separation.

3. Breach Claims Arising from the Separation (Claims 28, 29, 30)

Neither UNLV nor Heyman's summary judgment briefings offers any relevant arguments about Heyman's claims for breach of contract (Claim 28) and breach of the implied covenant of good faith and fair dealing (Claims 29 and 30). *See* ECF No. 374 at 5 and 12; ECF No. 387 at 6 and 13; ECF No. 394 at 3 and 8-9; ECF No. 377 at 7-8; ECF No. 389 at 26-27; ECF No. 395 at 7. Thus, I deny both parties' motions for summary judgment on Claims 28-30. As with the negligence claim, I order Heyman and UNLV to provide supplemental motions regarding these claims arising from Heyman's separation. In that supplement, Heyman must identify the document or verbal statement he contends forms the contract he entered into with UNLV that gives rise to these claims. *See* ECF No. 28 at ¶ 1058.

E. Negligent Hiring, Training, Supervision, and Retention (Claim 17)

Heyman claims that Snyder, Shoemaker, and UNLV were negligent in hiring, training, supervising, and retaining Montgomery, Burns, and Malek (Claim

17). He argues that but for the fact that each of these individuals was employed by UNLV, the rumor would never have started, the rumor would have been stopped immediately, or Heyman would have been publicly vindicated. ECF No. 28 at 82-86.

Most of Heyman's allegations in Claim 17 relate to material that Magistrate Judge Foley excluded. ECF No. 188 at 10-17. Heyman provides no evidence in support of the remaining allegations, including the accusations that Montgomery was abusive and discriminatory to students, that Montgomery misappropriated University funds to buy alcohol, and that Malek had a reputation for spreading falsehoods at her previous university. And as I outlined above, Heyman presents no evidence that the defendants did not investigate the rumor. Heyman has not sustained his burden of defending against the defendants' motion on this claim. I therefore grant summary judgment in favor of Snyder, Shoemaker, and UNLV on Claim 17.

IV. CONCLUSION

IT IS THEREFORE ORDERED that the plaintiff's motion for summary judgment **(ECF No. 377) is DENIED**.

IT IS FURTHER ORDERED that Montgomery's motion for summary judgment **(ECF No. 371) is GRANTED**.

IT IS FURTHER ORDERED that the collective defendants' motion for summary judgement **(ECF No. 374) is GRANTED IN PART.** Claims 3-4, 6-8, 10-12, and 17 are dismissed as against all defendants; Claims 1-2, 5, 9, 13, and 16 are dismissed against Snyder, Shoemaker, Love, Tanford, Burns, and Moll-Cain; and

Claim 26 is dismissed against UNLV. Heyman's only remaining claims are Claims 1-2, 5, 9, 13, and 16 against Malek and UNLV and Claims 27-30 against UNLV.

IT IS FURTHER ORDERED that Heyman and UNLV may submit supplemental motions for summary judgment on Claims 27-30 by **March 26, 2019**. Each side may submit a response by **April 9, 2019**. No replies shall be filed. Each motion and response is limited to 10 pages.

DATED this 12th day of March, 2018.

/s/ ANDREW P. GORDON
ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civ. No. 2:15–cv–01228–RFB–GWF

DARREN HEYMAN, Plaintiff

v.

STATE OF NEVADA, ex rel. on behalf of Board of Regents of the Nevada System of Higher Education on behalf of University of Nevada, Las Vegas; et al., Defendants

---

Filed: July 11, 2019

ORDER

Plaintiff Darren Heyman filed this lawsuit against t the University of Nevada Las Vegas and several individual defendants. This case was originally randomly assigned to District Judge Boulware and Magistrate Judge Foley, but was randomly reassigned to me after Judge Boulware recused himself. ECF Nos. 1; 406. Magistrate Judge Foley remains assigned to this case.

Heyman moves for (1) my recusal, (2) a change in venue, (3) a stay in the proceedings until a new judge and venue are assigned, and (4) reconsideration by the new judge of all previous orders. ECF Nos. 448; 449; 450; 451.

I. RECUSAL

Heyman contends I have ties to the William S. Boyd School of Law at UNLV

(UNLV Law School) that render me unable to be fair and impartial or that my impartiality might be reasonably questioned. Thus, I should recuse myself in accordance with 28 U.S.C. §§ 455(a) and 455(b)(1). Heyman alleges that Judge Boulware and I have volunteered together at the Nevada Bar's Annual Meeting (ECF No. 448-1 at 8-9); that I actively volunteer for UNLV Law School (*Id.* at 10-14); that I have hired from and currently employ a graduate of UNLV Law School (*Id.* at 15-17); that I have supervised judicial externs who were students at UNLV Law School (*Id.* at 18-24); and that I may have been an employee of UNLV Law School (*Id.* at 25-26).[1] He posits that because these alleged ties were discovered through internet research, they are only "a fraction of the reality that exists." *Id.* at 7. Heyman also argues that the fact that I did not disclose these alleged relationships, did not address Judge Boulware's recusal in a status conference (ECF No 424), and ruled against him in multiple orders (ECF Nos. 424; 425; 427) also shows bias or produces the appearance of bias.

The defendants respond that Ninth Circuit precedent does not support the conclusion that my alleged ties to UNLV Law School are sufficient grounds for recusal. ECF No. 454. They also argue that prior rulings are almost never a proper basis for recusal.

Recusal in federal court is governed by 28 U.S.C. § 455. Subsection 455(b) provides a list of circumstances in which a judge is required to recuse himself, including when "he has a personal bias or prejudice concerning a party . . . ."

[1] Heyman also makes similar allegations regarding Judge Boulware. *See* ECF Nos. 448 at 9-10; 448-

Subsection 455(a) requires recusal when "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986). "The reasonable person is not someone who is hypersensitive or unduly suspicious." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008) (quotations omitted).

A relationship between a federal judge and a law school does not constitute grounds for recusal in cases in which the affiliated university is a party, particularly when the case does not involve the law school itself. *See*, *In re Complaint of Judicial Misconduct*, 816 F.3d 1266, 1267(9th Cir. 2016) ("It is well established that the law 'does not require recusal for . . . minimal alumni contacts . . . [including] when [a] judge was [an] alumnus of defendant-university, served as unpaid adjunct professor who offered internships for the university's law students, gave the university a yearly donation for football tickets,' or served as a 'member of [a] school alumni social organization.'" (quoting *U.S. ex rel. Hochman v. Nackman*, 145 F.3d 1069, 1076 (9th Cir. 1998)). Prior "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion," unless they "display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Likety [sic] v. U.S.*, 510 U.S. 540, 555 (1994). Even "judicial remarks . . . that are critical or disapproving of . . . the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Id.*

---

1 at 1-9.

There is no basis for my recusal in this case. My prior rulings and decisions do not reflect any deep-seated bias against Heyman or his case. While I have and will continue to engage with UNLV Law School through service, teaching, and hiring students,[2] this relationship does not create a personal bias or an appearance of bias such that recusal is appropriate under § 455(b)(1) or § 455(a). Similarly, the non-disclosure of these relationships does not warrant recusal. I therefore deny Heyman's motion for recusal.

II. VENUE, STAY, AND RECONSIDERATION

Heyman moves for a change of venue under 28 U.S.C. §1404. ECF No. 449. He relies on the same arguments he made for my recusal and additionally asserts that (1) the same relationship between UNLV and me likely exists for all judges in the United States District Court for the District of Nevada's unofficial southern division (Las Vegas); (2) any Las Vegas judge to whom the case is reassigned will have discussed the case with either Judge Boulware or me; and (3) any jury selected from the Las Vegas area will be biased in favor of the defendants. He suggests that Nevada's unofficial northern division (Reno) would be more appropriate, despite the added inconvenience for both parties. The defendants respond that a change of venue is unnecessary and burdensome.

Heyman's concerns regarding bias and impropriety are misguided. Merely having a relationship with UNLV Law School is not a basis for changing the venue

[2] I am not and have never been an employee of or been paid by UNLV Law School.

of a case that is now over four years old and has had nearly 500 entries on the docket. I therefore deny Heyman's motion to change venue.

Heyman also moves for reconsideration of all previous motions by the judge who is reassigned to this case and for a stay in the case until the reassignment is made. ECF Nos. 450; 451. I dismiss as moot Heyman's motions for reconsideration and to stay.

III. CONCLUSION

IT IS THEREFORE ORDERED that Heyman's motions for recusal **(ECF No. 448)**, to change venue **(ECF No. 449)**, to stay the case **(ECF No. 450)**, and for reconsideration **(ECF No. 451) are DENIED**.

DATED this 11th day of July, 2019.

/s/ ANDREW P. GORDON
ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civ. No. 2:15–cv–01228–RFB–GWF

DARREN HEYMAN, Plaintiff

v.

STATE OF NEVADA, ex rel. on behalf of Board of Regents of the Nevada System of Higher Education on behalf of University of Nevada, Las Vegas; et al., Defendants

---

Filed: January 27, 2020

ORDER

Plaintiff Darren Heyman sues the University of Nevada, Las Vegas and several affiliated individuals for spreading a false rumor about him, failing to investigate the rumor, mistakenly separating him from his PhD program, and filing a bar complaint against him in retaliation for the current lawsuit. In a prior order, I granted defendant Rhoda Montgomery's motion for summary judgment, granted in part the motion for summary judgment filed by the University and some individual defendants (collectively, UNLV), and ordered supplemental motions for summary judgment on Heyman's claims relating to his separation from the University. ECF No. 427. Heyman and UNLV each filed supplemental summary judgment motions on these claims. ECF Nos. 436, 438. Montgomery moves for an award of attorney's

fees, and Heyman moves for re-taxation of Montgomery's costs assessed by the clerk's office. ECF Nos. 435, 458. Heyman also moves for re-consideration of all prior orders issued by Judge Boulware before he recused himself from this case. ECF No. 466.

The parties are familiar with the facts so I do not repeat them here except where necessary.[1] I grant UNLV's supplemental motion and deny Heyman's supplemental motion because UNLV owes no duty of care to Heyman and Heyman has not identified contract terms that he alleges UNLV breached. I deny Montgomery's motion for attorney's fees because I do not find that Heyman acted in bad faith in pursuing his claims. I deny Heyman's motion for re-taxation of costs because he fails to offer an appropriate reason to deny costs. And I deny Heyman's motion for reconsideration of Judge Boulware's prior orders because Heyman fails to analyze the appropriate standard and fails to offer a valid reason for reconsideration.

I. Supplemental Motions for Summary Judgment [ECF Nos. 436, 438]

In my prior order, I denied UNLV and Heyman's motions for summary judgment on Claims 27-30, which assert negligence, breach of contract, breach of the implied covenant of good faith and fair dealing, and tortious breach of the implied covenant of good faith and fair dealing. ECF No. 427 at 21-22. I ordered supplemental motions because both parties failed to develop their arguments for

[1] The facts are detailed in my previous orders in this case. ECF Nos. 427, 465.

summary judgment. *Id.* at 22.2.[2] I also ordered Heyman to identify which document or verbal statement forms the contract giving rise to his claims. *Id.*

Summary judgment is appropriate if the movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), (c). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir. 2000); *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018) ("To defeat summary judgment, the nonmoving party must produce evidence of a genuine dispute of material fact that could satisfy its burden at trial."). I view the evidence and reasonable inferences in the light most favorable to the non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

---

[2] Under the heading "additional issues," Heyman requests reconsideration of my denial of his motion for summary judgment and my allowing the defendants to file a supplemental motion. ECF No. 436 at 9-10. I deny Heyman's request because: (1) he fails to comply with the local rules by filing a separate document for each type of relief requested, L.R. IC 2-2(b); (2) he points to an order issued by Judge Boulware in this case as a reason for reconsideration, but that order applied the dismissal

A. Negligence Claim

The parties dispute whether UNLV owes a duty of care to Heyman. ECF Nos. 436 at 5, 438 at 5-7, 444 at 5-7. Heyman argues that a duty arises from the constitution, the student code of conduct, the UNLV graduate catalog, and the internal processes used to expel a student for enrollment violations. ECF Nos. 438 at 5-7, 444 at 5-7.

"To prevail on a negligence theory, the plaintiff generally must show that (1) the defendant had a duty to exercise due care towards the plaintiff; (2) the defendant breached the duty; (3) the breach was an actual cause of the plaintiff's injury; (4) the breach was the proximate cause of the injury; and (5) the plaintiff suffered damage." *Perez v. Las Vegas Med. Ctr.*, 805 P2P 589, 591 (Nev. 1991). Judges in this district have previously held that UNLV does not owe students a general duty of care. *See Salus v. Nev. ex rel. Bd. of Regents of Nev. Sys. of Higher Educ.*, No. 2:10-CV-01734-GMN, 2011 WL 4828821, at *5 (D. Nev. Oct. 10, 2011); *Lucey v. Nev. ex rel. Bd. of Regents of Nev. Sys. of Higher Educ.*, No. 2:07–cv–00658–RLH–RJJ, 2007 WL 4563466, at *6, (D. Nev., Dec. 18, 2007).

Heyman does not attempt to distinguish *Salus* or *Lucey*. I have reviewed those decision and searched in vain for other authority supporting a duty. I agree that UNLV does not owe its students a general duty of care to protect against unintentional separations like the one at issue here. I will not infer such a duty from the internal processes UNLV employs when expelling a student because the

---

standard; and (3) I allowed both parties the opportunity to file supplemental motions because both

facts here are distinct from an expulsion. And because Heyman brings a tort claim under Nevada law, not a constitutional claim, I will not infer such a duty from the Eleventh Circuit's holding in *Barnes v. Zaccari* that continued enrollment in a state school is protected by the Due Process Clause of the Fourteenth Amendment. 669 F.3d 1295, 1305 (11th Cir. 2012). Even assuming that the UNLV Code of Conduct could create a duty, Heyman points only to a provision ambiguously recognizing that students have "rights and responsibilities of membership in the University's academic and social community," which does not create a duty to protect students against unintentional separations like this one.[3] ECF No. 438 at 6. Because UNLV owes no duty to protect against unintentional separations like this one, I grant summary judgment in favor of UNLV on Claim 27.

B. Contract-related Claims

UNLV argues that Heyman fails to identify an existing contract, that an agreement to allow Heyman a leave of absence lacks consideration, and that because Heyman's breach of contract claim fails, so must his claim for breach of the implied covenant of good faith and fair dealing. ECF No. 436 at 6-7. Heyman argues that the UNLV Student Code of Conduct, UNLV Graduate Catalog, and his signed

---

parties failed to address key issues in the first round of briefing.

[3] Heyman also points to a provision in the UNLV Graduate Catalog disclaiming that "it does not constitute a contractual commitment that the university will offer all the courses or programs described," arguing that this specific limitation creates a contractual commitment to all other aspects of the catalog under the canon of *expressio unius est exclusio alterius.* ECF No. 444 at 6. Heyman does not offer any authority for this expansive application of the cannon and does not identify which other aspects of the catalog create a duty of care. I will not infer a duty from the catalog either.

leave of absence form comprise contracts between Heyman and UNLV. ECF Nos. 438 at 7, 444 at 7-9.

Under Nevada law, "the plaintiff in a breach of contract action [must] show (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach." *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006). "Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration." *May v. Anderson,* 119 P.3d 1254, 1257 (Nev. 2005). A claim for breach of the implied covenant of good faith and fair dealing requires the existence of a valid contract. *JPMorgan Chase Bank, N.A. v. KB Home*, 632 F. Supp. 2d 1013, 1023 (D. Nev. 2009).

Assuming without deciding that the Code of Conduct and Graduate Catalog[4] form valid contracts, Heyman does not identify any terms governing unintentional separations like that at issue here, or any terms that he alleges UNLV breached. And because Heyman has not shown that additional consideration is required in exchange for a leave of absence, he has not shown that the leave of absence form is a valid contract. Because Heyman has not shown the existence of a valid contract governing his separation from UNLV, he cannot make out claims for breach of contract or breach of the implied covenant. So I grant summary judgment in favor of UNLV on those claims.

C. Tortious Breach of Implied Covenant of Good Faith and Fair Dealing Claim

[4] As discussed above, I do not accept Heyman's interpretation of the Graduate Catalog as a contractual commitment to all aspects not mentioned in a specific disclaimer.

A claim for tortious breach of the covenant of good faith and fair dealing arises only in rare and exceptional cases where there is "a special element of reliance or fiduciary duty, and is limited to rare and exceptional cases." *Great Am. Ins. Co. v. Gen. Builders, Inc.*, 934 P.2d 257, 263 (Nev. 1997) (quotations and citations omitted). "Tort liability for breach of the good faith covenant is appropriate where "the party in the superior or entrusted position" has engaged in "grievous and perfidious misconduct." *Id.* Heyman offers a conclusory argument for the existence of a special relationship between him and UNLV, but he has not identified and I have not found any authority supporting the existence of a special relationship between a university and its students. ECF Nos. 438 at 8, 444 at 10. In any event, an unintentional separation that was fixed in a matter of weeks does not amount to grievous and perfidious misconduct. *Cf. George v. Morton*, No. 2:06-CV-1112- PMP-GEF, 2007 WL 680788, at *9 (D. Nev. Mar. 1, 2007) (making misrepresentations and refusing to compensate plaintiff for services rendered may be viewed as grievous and perfidious). I grant summary judgment in favor of UNLV on Heyman's tortious breach of the implied covenant of good faith and fair dealing claim.

II. Motion for Attorney's Fees [ECF No. 435]

Montgomery argues that an award of attorney's fees is appropriate under 28 U.S.C. § 1927 and Nevada Revised Statutes § 18.010(2) because Heyman knew he had no claims against Montgomery. ECF No. 435. Heyman responds that (1) the issue is unripe, (2) Montgomery is not entitled to recover fees that she is not

obligated to pay because she was found to be acting with the scope of her employment, (3) 28 U.S.C. § 1927 and Nevada Revised Statutes § 18.010 do not apply in this case, and (4) Heyman has conducted the litigation in good faith. ECF No. 442.

A. 28 U.S.C. § 1927

Under 28 U.S.C. § 1927, "[a]ny attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. "The purpose of § 1927 may be to deter attorney misconduct, or to compensate the victims of an attorney's malfeasance, or to both compensate and deter." *Haynes v. City & Cty. of San Francisco*, 688 F.3d 984, 987 (9th Cir. 2012). "Section 1927 sanctions may be imposed upon a pro se plaintiff." *Wages v. I.R.S.*, 915 F.2d 1230, 1235-36 (9th Cir. 1990).

To be awarded, § 1927 sanctions "must be supported by a finding of subjective bad faith." *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989). "Bad faith is present when an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent." *Estate of Bias v. Winkler*, 792 F.2d 858, 860 (9th Cir. 1986) (citations omitted). Frivolousness by itself does not establish bad faith. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 638 (9th Cir. 1987) (internal quotations and citations omitted). Determining whether and what sanctions are

appropriate is within the court's discretion. *See Trulis v. Barton*, 107 F.3d 685, 694 (9th Cir. 1995). Nevertheless, "[d]iscretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Id.* (internal quotations omitted).

Judge Boulware allowed some of Heyman's claims against Montgomery to proceed to summary judgment, and I ruled that Heyman raised genuine issues of material fact on claims against other defendants. ECF Nos. 27; 225; 427. Heyman also points to an affidavit from a third party supporting his defamation and defamation-related claims against Montgomery. Although the affidavit did not create a genuine issue of fact, it provides some basis for Heyman's defamation claim against Montgomery. ECF No. 427 at 9. I do not find that Heyman pursued the defamation claim against Montgomery in bad faith. Although the defendants may be correct that Heyman pursued other claims against Montgomery in bad faith, they fail to identify what fees are directly attributable to these claims. The purpose of § 1927 is to deter misconduct and compensate the victims of malfeasance, so the fees awarded, if any, should relate directly to the misconduct. I will not parse Montgomery's billing statements to determine which fees are attributable to the misconduct. Consequently, I deny Montgomery's motion for attorney's fees under § 1927.[5]

B. Nevada Revised Statutes § 18.010(2)

[5] Montgomery was previously awarded sanctions for other misconduct in this case. ECF Nos. 396, 426.

Under Nevada Revised Statutes § 18.010(2), a party may recover attorney's fees where (a) "the prevailing party has not recovered more than $20,000" or (b) the court finds that a claim or defense "was brought or maintained without reasonable ground or to harass the prevailing party." Nev. Rev. Stat. §§ 18.010(2)(a)-(b). "A party to an action cannot be considered a prevailing party within the contemplation of [N.R.S. §] 18.010, where the action has not proceeded to judgment." *N. Nevada Homes, LLC v. GL Constr., Inc.*, 422 P.3d 1234, 1237 (Nev. 2018). And Nevada law does not apply to a request for attorney's fees in federal court "based upon misconduct by an attorney or party in the litigation itself, rather than upon a matter of [state] substantive law . . . ." *In re Larry's Apartment, L.L.C.*, 249 F.3d 832, 838 (9th Cir. 2001); *see also Oliva v. Nat'l City Mortg. Co.*, 490 Fed. Appx. 904, 906 (9th Cir. 2012) ("Defendants were not entitled to attorney's fees under Nev. Rev. Stat. §§ 7.085 and 18.010 because plaintiffs' alleged misconduct was procedural in nature and, thus, is governed by federal law."); *Taylor v. Beckett*, No. 13-CV-02199-APG-VCF, 2017 WL 3367091, at *3 (D. Nev. Aug. 4, 2017) (denying motion for attorney's fees under § 18.010(2)(b) for filing or maintaining groundless claims).

Montgomery requests fees under both parts of § 18.010(2). I deny her request under subsection (a) because Montgomery is not a prevailing party under the statute until I enter final judgment. Montgomery's request under subsection (b) is premised on Heyman's filing and maintenance of claims without a reasonable basis. ECF No. 435 at 10-11. Because this alleged misconduct is procedural in nature, it is

governed by federal law. So, I deny Montgomery's request under subsection (b) as well.

III. Motion for Re-taxation of Costs [ECF No. 458]

Heyman moves for re-taxation of $1,271.95 in costs taxed by the clerk's office. ECF Nos. 453, 458. Heyman contends that (1) Montgomery's counsel acted in bad faith; (2) Montgomery failed to attach an affidavit as required by the local rules; (3) Montgomery was indemnified by the state of Nevada for her fees and costs; (4) he has limited resources and imposing costs could have a chilling effect; (5) Montgomery failed to provide evidence that checks for some costs were cashed; and (6) final judgment has not been entered. *Id.*

"An award of standard costs in federal district court is normally governed by Federal Rule of Civil Procedure 54(d), even in diversity cases." *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1022 (9th Cir. 2003). Rule 54(d)(1) provides that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorneys' fees—should be allowed to the prevailing party." The court may deny costs for any appropriate reason, including "(1) the substantial public importance of the case, (2) the closeness and difficulty of the issues in the case, (3) the chilling effect on future similar actions, (4) the plaintiff's limited financial resources, and (5) the economic disparity between the parties." *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1247 (9th Cir. 2014). Local Rule 54-1 requires that a bill of costs must be filed "no later than 14 days after the judgment or decree," but does not specifically require entry of judgment prior to

filing a bill of costs. Instead, the Ninth Circuit has held that "each case should be analyzed individually to determine whether there is a prevailing party" under Rule 54(d)(1). *Pedrina v. Chun,* 182 F.3d 927 at *1 (9th Cir. 1999) (table decision).

Having reviewed Montgomery's bill of costs, Heyman's objections, the clerk's memorandum, and Heyman's motion, I deny Heyman's motion for re-taxation. Montgomery is a prevailing party because I have entered summary judgment in her favor on all of Heyman's claims. ECF No. 427. Although this may seem to conflict with my finding that Montgomery is not a prevailing party under Nevada Revised Statutes § 18.010(2)(a), the federal standard is more flexible than Nevada's. I do not find that Montgomery's request was made in bad faith. The amount of costs is modest and Heyman has not submitted an affidavit to support his claimed lack of resources. Montgomery's bill of costs complies with Local Rule 54-14(c). *See* 28 U.S.C. § 1746. Heyman has not identified and I have not found any controlling authority requiring the denial of costs when those costs are indemnified by a third party.[6] There is also no requirement that a party provide evidence that checks have been cashed. I deny Heyman's motion for re-taxation of costs.

IV. Motion for Reconsideration [ECF No. 466]

Heyman previously moved for reconsideration of all orders issued by Judge Boulware prior to his recusal. ECF No. 451. I denied the motion as moot. ECF No. 465 at 4. Heyman moves for reconsideration on grounds that newly-discovered evidence shows that Judge Boulware was paid as an adjunct professor at UNLV's

law school during the time this case was assigned to him. ECF No. 466. UNLV responds that Heyman's motion for reconsideration is improper and fails to identify any authority requiring reconsideration of Judge Boulware's prior orders. ECF No. 468.

A district court "possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient," so long as it has jurisdiction. *City of L.A., Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001) (quotation and emphasis omitted); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983) (citing Fed. R. Civ. P. 54(b)). "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

The disqualification statute "neither prescribes nor prohibits any particular remedy for a violation," and "[t]here need not be a draconian remedy for every violation of [28 U.S.C.] § 455(a)." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 862, 864 (1988). In determining whether an order should be vacated, "it is appropriate to consider the risk of injustice to the particular parties, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Id.* (vacating judgment by district

---

[6] Heyman points to a state court decision, but the award of costs in federal courts is governed by the

court under Rule 60(b)(6)); *see also United States v. Bulger*, 928 F. Supp. 2d 305, 315 (D. Mass. 2013) (*Liljeberg* factors apply to determine whether to allow prior orders to stand).

Assuming without deciding that Heyman's evidence that Judge Boulware was a paid adjunct professor is newly discovered and would have disqualified Judge Boulware under 28 U.S.C. § 455, Heyman fails to apply the *Liljeberg* factors or otherwise explain why Judge Boulware's orders should be reconsidered. There is no risk of injustice here because many of Heyman's claims survived Judge Boulware's rulings and Heyman does not identify any orders that were wrongly decided or the product of bias. I also do not find that denial of relief will produce injustice in other cases. The risk to the public's confidence in the judicial process is insubstantial because: (1) Judge Boulware was a paid adjunct professor at UNLV's law school, while this case is focused on UNLV's hospitality school; (2) Judge Boulware was paid a modest amount for his teaching; and (3) federal judges play an important in legal education. *See* Code of Conduct for United States Judges Canon 4(A)(1) ("A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice[.]"). So I deny Heyman's motion for reconsideration.

V. Conclusion

I THEREFORE ORDER that Heyman's supplemental motion for summary judgment **[ECF No. 438] is DENIED** and UNLV's supplemental motion for

---

Federal Rules of Civil Procedure.

summary judgment **[ECF No. 436] is GRANTED.** Claims 27-30 are dismissed against all defendants.

I FURTHER ORDER that Montgomery's motion for attorney's fees **[ECF No. 435] is DENIED.**

I FURTHER ORDER that Heyman's motion for re-taxation of costs **[ECF No. 458] is DENIED.**

I FURTHER ORDER that Heyman's motion for re-reconsideration **[ECF No. 466] is DENIED.**

DATED this 27th day of January, 2020.

/s/ ANDREW P. GORDON
ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civ. No. 2:15–cv–01228–RFB–GWF

DARREN HEYMAN, Plaintiff

v.

STATE OF NEVADA, ex rel. on behalf of Board of Regents of the Nevada System of Higher Education on behalf of University of Nevada, Las Vegas; et al., Defendants

---

Filed: February 18, 2020

ORDER

MINUTE ORDER IN CHAMBERS of the Honorable Magistrate Judge Elayna J. Youchah on 2/18/2020. With good cause appearing, the Honorable Magistrate Judge Elayna J. Youchah recuses herself in this action. IT IS ORDERED that this action is referred to the Clerk for random reassignment of this case for all further proceedings. (no image attached) (Copies have been distributed pursuant to the NEF - AF)

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civ. No. 2:15–cv–01228–RFB–GWF

DARREN HEYMAN, Plaintiff

v.

STATE OF NEVADA, ex rel. on behalf of Board of Regents of the Nevada System of Higher Education on behalf of University of Nevada, Las Vegas; et al., Defendants

---

Filed: February 20, 2020

ORDER

Plaintiff Darren Heyman has filed two emergency motions. ECF Nos. 475, 476. He wants me to certify some of my prior orders so he can file an interlocutory appeal with the 9th Circuit. In the alternative, he wants me to stay this case so he can seek a writ of mandamus from the 9th Circuit. Mr. Heyman does not offer convincing arguments or facts to justify granting his requested relief.

I THEREFORE ORDER that Heyman ' s motion to certify orders **[ECF No. 475]** and his motion to stay these proceedings **[ECF No. 476] are DENIED.**

DATED this 20th day of February, 2020.

/s/ ANDREW P. GORDON
ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civ. No. 2:15–cv–01228–RFB–GWF

DARREN HEYMAN, Plaintiff

v.

STATE OF NEVADA, ex rel. on behalf of Board of Regents of the Nevada System of Higher Education on behalf of University of Nevada, Las Vegas; et al., Defendants

---

Filed: June 4, 2020

ORDER

The parties have been unable to agree on a proposed Joint Pretrial Order. Plaintiff Darren Heyman has ignored my prior admonition not to engage in *ad hominem* attacks and to narrow the proposed Pretrial Order by excluding irrelevant and inadmissible facts and evidence. *Compare* ECF No. 501 *with* ECF No. 515. It is obvious that further engagement about the proposed Pretrial Order will create more frustration for the parties and me and result in more unnecessary motions. No one benefits from that. Instead, I will set this matter for trial and a settlement conference. Given the court's backlog because of the Covid-19 pandemic, I am unable to schedule this trial in 2020.

I THEREFORE ORDER as follows:

1. All pending motions **(ECF Nos. 505, 508, 510) are DENIED**.

2. This case is set for jury trial on the stacked calendar on **January 25, 2021** at 9:00 a.m. in Courtroom 6C. Calendar call will be held on **January 19, 2021** at 8:45 a.m. in Courtroom 6C. The trial will last no more than five days. The parties are to streamline their presentations accordingly. If needed, I will allocate the time between the parties.

3. The parties will be referred to a settlement conference with a Magistrate Judge. Separate orders about that settlement conference will follow. The failure to participate in that settlement conference in good faith will result in sanctions on the recommendation of the Magistrate Judge.

4. If the case does not settle, the parties will thereafter confer about the documents, witnesses, and depositions to be presented at trial. The parties shall submit a proposed joint pretrial order containing only the items listed in Local Rule 16-3(b)(8-12) by **October 22, 2020**. Motions in limine, if any, must be filed by **November 6, 2020**.

DATED this 4th day of June, 2020.

/s/ ANDREW P. GORDON
ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

APPENDIX M

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civ. No. 2:15–cv–01228–RFB–GWF

DARREN HEYMAN, Plaintiff

v.

STATE OF NEVADA, ex rel. on behalf of Board of Regents of the Nevada System of Higher Education on behalf of University of Nevada, Las Vegas; et al., Defendants

---

Filed: July 24, 2020

ORDER

This matter has been referred to the undersigned for a mandatory settlement conference (ECF No. 517). A settlement conference is hereby set for **Tuesday, September 22, 2020 at 10:00 a.m.** In light of recent health events, the Settlement Conference will be conducted remotely via Zoom video, with an email containing a link to the conference being provided to the attending parties the morning of the conference.

NOTE: SIGNIFICANT CHANGES TO THE COURT'S SCHEDULING ORDER ARE LISTED BELOW.

The following requirements for the SC apply:

1. Attendance

- An attorney of record who will be participating in the trial of this case, all parties appearing pro se, if any, and all individual parties must be present.
- In the case of non-individual parties, counsel must arrange for a representative with binding authority to settle this matter up to the full amount of the claim to be present for the duration of the SC.
- If any party is subject to coverage by an insurance carrier, then a representative of the insurance carrier with authority to settle this matter up to the full amount of the claim must also be present for the duration of the SC.
- The Court **will impose sanctions** to the extent a representative with binding authority to settle this matter up to the full amount of the claim is not present.
- A request for an exception to the above attendance requirements must be filed and served on all parties **at least 14 days** before the SC.
- An attorney of record, individual parties, a fully-authorized representative, and a fully-authorized insurance representative must appear unless the court enters an order granting a request for exception.

2. Time Limit

- The SC will be limited to three (3) hours.

3. Request to Reschedule

- Any requests to reschedule the SC must be submitted at least ten (10) days in advance of the scheduled date and provide a detailed reason for the

request. Such requests must include at least five alternative dates on which all required participants are available to attend the SC. The parties must meet and confer on such dates prior to the filing of the request. If the request is not filed as a stipulation, any response must be filed three days after service of the request.

4. Settlement Conference Statement

• In preparation for the SC, the attorneys for each party, and the parties appearing pro se, if any, must submit a confidential written evaluation statement for the court's *in camera* review.

• The evaluation statement must comply with **Local Rule 16-6(f)**.

• In addition to the information required by LR 16-6, **the following information must be contained in the SC Statement**:

o The first paragraph must contain the names, titles and **email addresses** of ALL attendees along with a statement of their limit(s), if any, to settle.

o The entire SC Statement **must not exceed 50 pages – including exhibits**. The more concise the writing and more focused the exhibits, the better the undersigned will be served in understanding the case.

o The exhibits should not include any items available on the docket – citation to the ECF No. will suffice.

- o If the exhibits include deposition transcripts, then they should only be excerpts with highlights on the specific statements you seek to underscore.
- o History of settlement negotiations, if any, prior to the SC.
- o The final paragraph must contain the opening offer or demand you will make at the SC with supporting explanation.

• The written settlement statements must be submitted by email to Kimberly_LaPointe@nvd.uscourts.gov by **noon** on **Tuesday, September 15, 2020**. Do not deliver or mail them to the clerk's office. Do not serve a copy on opposing counsel.

• The purpose of the settlement statement is to assist the undersigned in preparing for and conducting the SC. To facilitate a meaningful session, your utmost candor in providing the requested information is required.

• The written settlement statements will not be seen by or shared with the district judge or magistrate judge to whom this case is assigned. The settlement statements will be seen by no one except the undersigned and his staff.

• Each statement will be securely maintained in my chambers and will be destroyed following the closure of the case.

5. Sanctions

- Failure to comply with the requirements set forth in this order will subject the noncompliant party to sanctions under Local Rule IA 11-8 or Federal Rule of Civil Procedure 16(f).

6. Electronic Devices

- RECORDING THE SC PROCEEDINGS IS EXPRESSLY PROHIBITED. Electronic devices are permitted and may be viewed while the Court is caucusing with the other parties.

7. Pre-SC Conference Call

- The Court is willing to conduct a joint conference call with counsel for the parties prior to the SC if the parties feel issues should be addressed/discussed prior to convening. The parties should submit a joint written request to chambers if a conference call is requested.

DATED: July 24, 2020

/s/ DANIEL ALBREGTS
UNITED STATES MAGISTRATE JUDGE

APPENDIX N

LOCAL RULES OF PRACTICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

APRIL 17, 2020

LR 16-6. EARLY NEUTRAL EVALUATION

(a) All employment-discrimination actions filed in this court must undergo early neutral evaluation as defined by this rule. The purpose of the early neutral evaluation session is for the evaluating magistrate judge to give the parties a candid evaluation of the merits of their claims and defenses. For purposes of this rule, "employment-discrimination action" includes actions filed under the following statutes: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*; Title I of the Americans With Disabilities Act, as amended, 42 U.S.C. § 12101, *et seq.*; prohibition of employment discrimination under 42 U.S.C. § 1981; Age Discrimination in Employment Act, 29 U.S.C. § 626, *et seq.*; Equal Pay Act, 29 U.S.C. § 206; Genetic Information Non- Discrimination Act of 2008, 42 U.S.C. § 2000ff, *et seq.*; Vocational Rehabilitation Act of 1973, 29 U.S.C. § 794; and under 42 U.S.C. § 1983, if the complaint alleges discrimination in employment on the basis of race, color, gender, national origin, or religion.

(b) If an action is not initially assigned to the Early Neutral Evaluation Program, an action must be assigned to the program upon the filing by any party of a notice stating that action falls under one or more of the statutes listed in LR 16-6(a).

(c) A motion for exemption from the Early Neutral Evaluation Program must be filed no later than seven days after entry of an order scheduling the early neutral evaluation session. A response to the motion for exemption must be filed within 14 days after service of the original motion. A reply will not be allowed. The evaluating magistrate judge has final authority to grant or deny any motion requesting exemption from the program and may exempt any case from early neutral evaluation on the judge's own motion. These orders are not appealable.

(d) Unless good cause is shown, the early neutral evaluation session must be held by the court not later than 90 days after the first responding party appears in the case.

(e) Unless excused by the evaluating magistrate judge, the parties with authority to settle the case and their attorneys must attend the early neutral session in person.

(f) Parties must submit their written evaluation statements to the chambers of the evaluating magistrate judge by 4:00 p.m. seven days before the session. The written evaluation statement must not be filed with the clerk or served on the opposing parties.

(1) Evaluation statements must be concise and must:

(A) Identify by name or status the person(s) with decision-making authority who, in addition to the attorney, will attend the early neutral evaluation session as representative(s) of the party, and persons connected with a party opponent (including an insurer representative) whose presence might substantially improve the utility of the early neutral evaluation session or the prospects of settlement;

(B) Describe briefly the substance of the suit, addressing the party's views on the key liability and damages issues;

(C) Address whether there are legal or factual issues whose early resolution would reduce significantly the scope of the dispute or contribute to settlement negotiations;

(D) Include copies of documents, pictures, recordings, etc. out of which the suit arose, or whose availability would materially advance the purposes of the evaluation session (e.g., medical reports, documents by which special damages might be determined);

(E) Discuss the strongest and weakest points of your case, both factual and legal, including a candid evaluation of the merits of your case;

(F) Estimate the costs (including attorney's fees and costs) of taking this case through trial;

(G) Describe the history of any settlement discussions and detail the demands and offers that have been made and the reason settlement discussions have been unsuccessful; and

(H) Certify that the party has made initial disclosures under Fed. R. Civ. P. 26(a)(1) and that the plaintiff has provided a computation of damages to the defendant under Fed. R. Civ. P. 26(a)(1)(A)(iii).

(2) Each evaluation statement must remain confidential unless a party gives the court permission to reveal some or all of the information in the statement during the session. The parties should consider whether it would be beneficial to exchange non-confidential portions of the evaluation statement.

(g) Each evaluating magistrate judge must:

(1) Permit each party (through an attorney or otherwise), orally and through documents or other media, to present its claims or defenses and to describe the principal evidence on which they are based;

(2) Assist the parties to identify areas of agreement and, where feasible, enter stipulations;

(3) Assess the relative strengths and weaknesses of the parties' contentions and evidence, and carefully explain the reasoning that supports them;

(4) When appropriate, assist the parties through private caucusing or otherwise to explore the possibility of settling the case;

(5) Estimate, where feasible, the likelihood of liability and the range of damages;

(6) Assist the parties to devise a plan for expediting discovery, both formal and informal, to enter into meaningful settlement discussions or to position the case for disposition by other means;

(7) Assist the parties to realistically assess litigation costs; and

(8) Determine whether some form of follow-up to the session would contribute to the case-development process or promote settlement.

(h) The early neutral evaluation process is subject to the confidentiality provision of LR 16-5.

APPENDIX O

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civ. No. 2:15–cv–01228–RFB–GWF

DARREN HEYMAN, Plaintiff

v.

THE STATE OF NEVADA EX REL. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION ON BEHALF OF THE UNIVERSITY OF NEVADA, LAS VEGAS; NEAL SMATRESK; DONALD SNYDER; STOWE SHOEMAKER; RHONDA MONTGOMERY; CURTIS LOVE; SARAH TANFORD; PHILLIP BURNS; KRISTIN MALEK; LISA MOLL-CAIN; DEBRA PIERUSCHKA; ELSA SIDHU AND DOES I- X INCLUSIVE, Defendants

---

Filed: September 3, 2020

STIPULATION AND ORDER

IT IS HEREBY STIPULATED between Plaintiff Darren Heyman and Defendants State of Nevada ex rel. Board of Regents of the Nevada System of Higher Education on behalf of the University of Nevada Las Vegas and Kristin Malek (collectively "Defendants"), by and through their undersigned counsel, as follows:

1. The Court noticed September 22, 2020 as the date to hold the settlement conference. *See* Order (ECF No. 518). The Order requires, in relevant part, the attendance "in person" of a "representative with binding authority to settle this matter up to the full amount of the claim." *Id.* at 1, ll. 24-28.

2. Defendants' tort claim manager is unavailable to remotely attend the settlement conference on September 22.

3. The parties jointly propose the following alternative dates and times so that all the parties and their representatives can attend:

a. Monday, October 12, 2020, after 11:00 a.m.;

b. Wednesday, October 14, 2020, between 11:00 a.m. and 3:00 p.m.;

c. Monday October 19, 2020, after 11:00 a.m.;

d. Wednesday, October 21, 2020, between 11:00 a.m. and 3:00 p.m.; and

e. Monday, October 26, 2020, after 11:00 a.m.

4. The parties further stipulate that the confidential settlement statements will not be due until seven days before the rescheduled date set by the Magistrate Judge.

DATED this 1st day of September, 2020.

AARON D. FORD
Attorney General

By: /s/ *Akke Levin*
Akke Levin (Bar. No. 9102)
Senior Deputy Attorney General
Steve Shevorski (Bar No. 8256)
Chief Litigation Counsel
Attorneys for Defendants

By: /s/ *Darren Heyman*
Darren Heyman
6671 Las Vegas Blvd., S., #D-210
Las Vegas, NV 89119
Plaintiff Pro Se

IT IS SO ORDERED. The Settlement Conference is hereby continued and reset for **Thursday, October 29, 2020 at 10:00 a.m.** via video conference. The confidential briefs are due by **noon** on Thursday, October 22, 2020. All other provisions of the

Court's Order (ECF No. 518) remain in effect.

/s/ DANIEL ALBREGTS
UNITED STATES MAGISTRATE JUDGE
DATED: September 3, 2020