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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ERWINE, Plaintiff-Appellant, v. COUNTY OF CHURCHILL; BENJAMIN TROTTER, Churchill County Sheriff, Defendants-Appellees.	No. 22-15358 D.C. No. 3:18-cv-00461-RCJ-CSD MEMORANDUM* (Filed Mar. 7, 2023)

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Argued and Submitted February 14, 2023
San Francisco, California

Before: WARDLAW, NGUYEN, and KOH, Circuit Judges.

Michael Erwine appeals the district court's grant of summary judgment in favor of the County of Churchill and Sheriff Benjamin Trotter ("Defendants"). Erwine, who was formerly employed as a Deputy Sheriff for Churchill County, alleges that Defendants violated his procedural due process rights under the Fourteenth Amendment by forcing him to

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

resign and placing an allegedly stigmatizing memorandum in his personnel file ("the Trotter Memorandum") in response to Erwine's allegations of misconduct against his co-employees.

We review the denial of a motion for summary judgment de novo. *See Jones v. Royal Admin. Servs., Inc.*, 887 F.3d 443, 447 (9th Cir. 2018). Exercising our jurisdiction under 28 U.S.C. § 1291, we affirm. Erwine has failed to show a causal relationship between his inability to secure a job and the Trotter Memorandum.

1. In the public employment context, a plaintiff may prove a deprivation of a liberty interest, among other things, by showing that he was terminated from his employment in conjunction with a stigmatizing statement. *See Llamas v. Butte Cmty. Coll. Dist.*, 238 F.3d 1123, 1129 (9th Cir. 2001). The Supreme Court has clarified that "'stigma' to one's reputation" alone without "more tangible interests such as employment" is insufficient "to invoke the procedural protection of the Due Process Clause." *Paul v. Davis*, 424 U.S. 693, 701 (1976). Therefore, to state a viable "stigma-plus" due process claim, Erwine must show that the allegedly stigmatizing statements in the Trotter Memorandum were the cause of his loss of employment opportunities in his chosen profession as a law enforcement officer.

The district court properly concluded that Erwine does not have a viable stigma-plus due process claim against Sheriff Trotter as a matter of law. Erwine has failed to put forth evidence showing that the Trotter

Memorandum was the cause of his inability to find employment as a police officer in the State of Nevada—outside of the tribal police force—after his resignation. Of the six state police departments that rejected Erwine's application, Erwine put forth evidence that only one, the Washoe County Sheriff's Office, had knowledge of the Trotter Memorandum when it rejected Erwine's application. As the district court noted, "there is no evidence that any other agency for which [Erwine] applied reviewed the memorandum." However, Erwine's background investigation file from the Las Vegas Metropolitan Police Department indicates that an investigator from the department had a telephone conversation with Sheriff Trotter regarding Erwine's employment with Churchill County.

Therefore, as the district court found, Erwine "cannot show that he was denied employment at [the] other four agencies because of any stigmatizing statement from Defendants." Indeed, Erwine applied for and was rejected from five agencies, including the Washoe County Sheriff's Office, *prior* to his employment with Defendants. As Erwine acknowledges, his difficulties securing employment may have been due to his prior arrest for driving under the influence. There is no evidence in the record that it was the Trotter Memorandum, rather than Erwine's criminal record, lack of experience, or any other aspect that potential employers would consider, that caused four of the six agencies to deny his application. And "[s]tigmatizing statements that merely cause 'reduced economic returns and diminished prestige . . .' do not constitute a

deprivation of liberty." *Blantz v. Cal. Dep't of Corr. & Rehab.*, 727 F.3d 917, 925 (9th Cir. 2013) (quoting *Stretten v. Wadsworth Veterans Hospital*, 537 F.3d 361, 366 (9th Cir. 1976)).

2. Likewise, the district court did not abuse its discretion in disregarding the opinion of Erwine's expert, Ron Dreher. Erwine contends that Dreher's testimony created a triable issue of fact as to whether the state police agencies to which he applied reviewed the Trotter Memorandum. The district court properly analyzed Dreher's conclusions under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Its ruling that Dreher's "grand conclusions" were "not reliable" because he "fail[ed] to provide any specific methodology from which he was able to reach [his] judgments" was not "illogical, implausible, or without support in inferences that may be drawn from the record." *Murray v. S. Route Mar. SA*, 870 F.3d 915, 922 (9th Cir. 2017) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)). Because Dreher's statements were conclusory and ran contrary to the evidence adduced in discovery, the district court did not abuse its discretion in disregarding Dreher's opinion in reaching its conclusion.

3. Nor did the district court err by dismissing Erwine's associated claim against Churchill County. Because Erwine's claim under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), against Churchill County is indistinguishable from his claim against Sheriff Trotter, the same legal grounds

support affirmance of the district court's order granting summary judgment in Churchill County's favor.

AFFIRMED.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MICHAEL ERWINE, Plaintiff, vs. CHURCHILL COUNTY, a political subdivision of the State of Nevada, et al., Defendants.	3:18-cv-00461-RCJ-WGC **ORDER** (Filed Mar. 9, 2022)

Defendants move for summary judgment in this case on Plaintiff's sole remaining federal-law claim that Defendants violated Plaintiff's right to due process by terminating his employment and allegedly issuing a stigmatizing statement that hampered his ability to work in his chosen profession[1] and to dismiss the pendent state-law claims under 28 U.S.C. § 1367(c)(3). The Court grants this motion in its entirety and closes the case.[2]

[1] While the Court treats this claim as one, Plaintiff breaks it down into two: an individual claim against Defendant Trotter and a *Monell* claim against Defendant Churchill County based upon Defendant Trotter's actions as an alleged final policy-maker. As the Court finds that the underlying merits are subject to summary judgment, it declines to address the additional requirements of *Monell*.

[2] There are two further motions that can be handled summarily. Plaintiff moves to allow for testimony at trial via televideo. (ECF No. 174.) This motion is denied as moot. Plaintiff also moves to seal an exhibit. (ECF No. 177.) This Court has previously allowed for this specific exhibit to be sealed. (ECF No. 126.) This Court grants this request for the same reasons.

FACTUAL BACKGROUND

From December 9, 2015 until October 10, 2016, Plaintiff was employed as a Deputy Sheriff for the Churchill County Sheriff's Office (CCSO). This employment came after Plaintiff had previously, and unsuccessfully, applied with several law enforcement agencies for work. Plaintiff applied for positions with the Washoe Tribal Police in 2011, Washoe County Sheriff's Office in October of 2015, Sparks Police Department in June of 2015, Lyon County Sheriff's Office in April of 2015, and Fallon Tribal Police in April of 2015. (ECF No. 120 Ex. 1 at 72, 75-80, 87.) All of these applications were denied. (*Id.*) As one of Plaintiff's letters of recommendation states and Plaintiff acknowledges, this difficulty in securing employment may have been due to a prior arrest for driving under the influence in 2011. (*Id.* at 86-87, 106-07; ECF No. 120 Ex. 2.) At the time of this arrest, Plaintiff was a part-time volunteer deputy with the Carson City Sheriff's Office. (ECF No. 120 Ex. 1 at 86-87.) He resigned shortly after the arrest, while the criminal case was proceeding. (*Id.*)

When the CCSO hires deputy sheriffs, they are hired on a probationary status for one year, wherein employees are at-will. (ECF No. 98 Ex. 12 at 9.) As Plaintiff's employment ended approximately ten months after its start, he never completed his probationary period.

During his employment with the CCSO, Plaintiff acknowledges that his supervisors had noted that he had issues with accountability and taking

responsibility. (ECF No. 120 Ex. 1 at 118.) A former captain of the CCSO (Michael Matheson) stated in a memo dated August 11, 2016, that "[Plaintiff] needs to focus on and master his duties and functions in the detention center before being distracted by other opportunities," and "I told [Plaintiff] that to this time he had earned a reputation with his coworkers as an unmotivated and underperforming deputy. I strongly encouraged him to refocus and motivate himself to perform at a higher level. . . ." (ECF No. 93 Ex. 3.)

In July 2016, Plaintiff claims that he and another police officer, Officer Jessica Zamora, witnessed inmate Samuel Davis being mistreated by Sergeant Summers. Plaintiff states the following: Officer Zamora transported Mr. Davis to the jail. Plaintiff and Sergeant Summers went outside to assist her in bringing Mr. Davis into the jail. While Mr. Davis was in the patrol car, he began to yell obscenities to the three officers standing by the car. At which point, Sergeant Summers grabbed Mr. Davis by the throat and slammed him against the side of the car. Later, after booking Mr. Davis into the jail, Sergeant Summers told Plaintiff to write his use of force report for him and be sure to include that it was because of the inmate's "physically aggressive nature" that he used the force he did. A few days later, Sergeant Summers called Plaintiff into his office to discuss Mr. Davis's booking. He also told Plaintiff to "watch out for that bitch" (referencing Officer Zamora) because she reported him for excessive force. Just a few days later, Captain Matheson talked to Plaintiff about Sergeant Summers in relation to Mr.

Davis's booking. Shortly after talking to Captain Matheson, Sergeant Summers yelled, "Did you rat me out?" while walking past Plaintiff in the hallway.

In October of 2016, two events occurred that culminated in the termination of the Plaintiff's employment with the CCSO. First, on October 8, Plaintiff went into work for the day shift. When he came in there was an inmate, Mr. Andrew Beaulieu, who was complaining about not receiving water. He was in a security cell and waiting to be booked into the jail.

Regarding this incident, Plaintiff claims the following: When Plaintiff arrived at Mr. Beaulieu's security cell, he noticed blood on the walls and asked the grave shift deputy what the blood was from. The grave shift deputy informed Plaintiff that Mr. Beaulieu had come in with a cut on his hand and that it ripped open while in the cell. After investigating the circumstances, Plaintiff discovered Mr. Beaulieu had been requesting water for about two hours. Mr. Beaulieu informed Plaintiff that every time he had requested water, the grave shift deputy would flush the drain in Mr. Beaulieu's cell making Mr. Beaulieu's request inaudible over the flushing noise. This was later confirmed during review of surveillance footage. Plaintiff provided Mr. Beaulieu with water pursuant to his essential job functions to provide inmates with food and explained to Mr. Beaulieu what the rest of the booking process would look like. During this time, Mr. Beaulieu expressed to Plaintiff that the grave shift deputies were "assholes," and he would be filing a lawsuit against them. Plaintiff continued to conduct his rounds in the

jail. While Plaintiff was conducting his rounds, other inmates asked Plaintiff what had happened to the "guy in the security cell" the previous night and opined that what the grave shift did "was messed up." Another inmate filed a grievance request to Captain Matheson regarding the treatment of Mr. Beaulieu. Plaintiff reviewed surveillance footage of the grave shift's interaction with Mr. Beaulieu before he removed him for booking, mainly to be aware of any safety concerns with Mr. Beaulieu before removing him from the security cell. Plaintiff did not note any alarming actions by Mr. Beaulieu wherein Plaintiff would need to be concerned. However, he did note acts of the grave shift deputy that he considered inappropriate and concerning and that he believed needed to be brought to his sergeant's attention. Since the concerns were not an immediate threat, and the sergeant did not work on weekends, Plaintiff chose to log the events on his computer (ECF No. 115 Ex. 1 Attachment A) so he could follow up with his sergeant on Monday, October 10, 2016, when his sergeant returned to work.

Another deputy that was working during this incident, Deputy Thompson, drafted a memorandum that he sent to Defendant Benjamin Trotter, who was the sheriff at the time. In this memorandum, he largely agrees with Plaintiff's version of events with a few key differences. He adds that the deputies had not given Mr. Beaulieu water for the two-hour period because he was drunk and being verbally aggressive. Whenever a deputy approached him, he would tell him, "Go fuck yourself." He claims that he heard Mr. Beaulieu

whisper to Plaintiff that he would like to speak with him privately, and Plaintiff then took him to the kitchen alone to speak with him for several moments.

Second, on October 9, 2016, there was an incident with Plaintiff involving an inmate, Mr. Michael Maes, and another deputy, Deputy Jolie Jabines. Regarding this incident, Plaintiff avers to the following: During Plaintiff's dayshift, Deputy Jabines dropped a container of miscellaneous tools and other items inside of a booking cage. Included in these items were screwdrivers and other sharp instruments. Deputy Jabines did not want to pick up the items herself, so she asked an inmate to come into the booking cage and pick them up for her. Plaintiff did not feel it was appropriate for Deputy Jabines to have Mr. Maes come into the booking cage to pick up items which could be used as weapons. Plaintiff questioned Deputy Jabines about this but her only response was "Senior Deputy," which Plaintiff understood as meaning that he did not have a say in the matter. Mr. Maes then came into the cage in response to Deputy Jabines' order. Plaintiff positioned himself between Mr. Maes and the control panel of the facility. Plaintiff was in an uncomfortable position with Mr. Maes being only a few feet away from Plaintiff and backed into a corner. Plaintiff removed his taser from its holster and held it in his hand with the taser pointed to the ground. Plaintiff removed the cartridge from the taser due to the close proximity of Mr. Maes to both Plaintiff and Deputy Jabines. Mr. Maes cleaned up the items and left the cage without incident.

Deputy Jabines also drafted a memorandum addressed to Defendant Trotter regarding the Maes incident. In it, she expressed concerns over how Plaintiff handled himself in this situation. She contends there was never a need for the taser, and his use of it distracted her from attending to Mr. Maes as well as endangered her and Mr. Maes from being accidently tased. She says that Mr. Maes never showed any signs that he would pose a threat to them, and he crouched on the ground while Plaintiff was aiming the taser near him. Further, she says that Plaintiff "snickered," when he had his taser out. She lastly claims Plaintiff "turned off the [taser], removed the cartridge, reactivated the [taser], and pulled the trigger making a loud noise while sparking all while still aiming the [taser] at Inmate Maes."

On October 10, 2016, Defendant Trotter met with Plaintiff and gave him the choice to resign or the CCSO would terminate his employment effective immediately. Plaintiff chose to resign. On that same day, Defendant Trotter placed a memorandum in Plaintiff's personnel file (the Trotter Memo). (ECF No. 115 Ex. 3.) This memorandum summarizes the information Defendant Trotter had been presented through the memoranda from other deputies and concludes there are a number of "items of concern." (*Id.*) These items led him to conclude that it would be best to "terminate [Plaintiff's employment] today for failing to satisfactorily complete his probation." (*Id.*)

The memo contains a number of statements, which Plaintiff claims are defamatory and stigmatizing:

Plaintiff "fail[ed] to follow proper chain of command;" Plaintiff engaged in "conduct unbecoming a deputy and unjustifiable use of force;" Plaintiff created "liability" for the agency; Plaintiff was "unprofessional;" and Plaintiff violated the "taser and use of force" policy as well as "behavioral standards."

After his resignation, Plaintiff again attempted to find employment as a police officer. (ECF No. 115 Ex. 12.) On January 17, 2017, Plaintiff received a letter from the Washoe County Sheriff's Office informing him that "the Sheriff's Office has determined that you do not meet the established standards for a position as Deputy Sheriff and therefore you have not been selected at this time." On February 7, 2017, Plaintiff received an email from the Las Vegas Metropolitan Police Department (LVMPD) in response to his application for employment informing him that "based on review of your background history, you will no longer be considered for the position(s) of Police Recruit C 16-001 November with the Las Vegas Metropolitan Police Department. Candidate does not meet the LVMPD hiring standards based on Employment History" and "You are not eligible to apply with the LVMPD for any position indefinitely." On September 8, 2017, Plaintiff received a letter from the Carson City Department of Alternative Sentencing informing him that he is "no longer being considered in the current recruitment due to failing on one or more portions of the selection process" which included the Background Investigation and Chief's Review, and "Based on our recruitment standards you are precluded from reapplying with our

agency in the future." On September 12, 2017, Plaintiff received from Douglas County Sheriff's Office a letter informing him that he "did not successfully complete the background evaluation/testing and therefore are no longer considered an eligible applicant for employment." On November 14, 2017, Plaintiff received a letter from North Las Vegas Police Department informing him he was "ineligible to continue in the employment process for the position of Police Officer . . . for character issues and his employment history," and "You are disqualified indefinitely." On March 1, 2018, Plaintiff received a letter from Reno Police Department informing him that his "application for employment with the Reno Police Department for [Police Recruit] was rejected, based on your preemployment background investigation."

The parties stipulate to the fact the CCSO provided the Washoe County Sheriff's Office a copy of the Trotter Memo. Defendants, however, contend they did not provide the memo to any other agency. Plaintiff disputes this fact by pointing to Nevada statutes that dictate that a public safety agency may compel the disclosure of personnel files for their applicants for prior service as a peace officer. Nev. Rev. Stat. 239B.020. Plaintiff also hired an expert witness, Mr. Ron Dreher. He opines that the Nevada departments likely saw this memo through that procedure due to the fact that they uniformly denied his applications and the fact that the some of the law enforcement agencies denied his applications indefinitely. (ECF No. 115 Ex. 13.) He avers to the following:

> Detective Olson [of the LVMPD] most likely obtained or had already obtained Sheriff's Trotter's October 10, 2016 memorandum stating his reasons for terminating Mr. Erwine. Sheriff Trotter's memorandum tainted Mr. Erwine's background by labeling him a "liability". It is abnormal for a Nevada Law Enforcement department to indefinitely ban an applicant for any employment. In today's law enforcement world being labeled a "liability" and being terminated for that reason is a law enforcement career killer in my opinion.

(*Id.* at 13.)

In addition, Plaintiff produces the report generated by LVPMD, which details Detective Olson spoke with Defendant Trotter in a phone interview but does not mention the Trotter Memo. (ECF No. 116 Ex. 9.) As noted in the exhibit, Defendant Trotter spoke about the Beaulieu incident, as why Plaintiff was forced to resign. (*Id.*) This led Detective Olson to conclude Plaintiff would be "unsuitable for employment with LVMPD." (*Id.*)

Reno Police Department and North Las Vegas Police Department were issued subpoenas duces tecum each asking for the following: "The complete employment history file of Michael Erwine as it was provided to your office by Churchill County Sheriff's Office. This includes any and all information and documentation regarding preemployment background investigations, employment information and any information regarding reprimands." (ECF No. 171 Exs. 1, 2.) Reno Police

Department and North Las Vegas Police Department both responded that they had no responsive records to these requests. (*Id.*)

In his deposition, Plaintiff admitted that he told each of these agencies to which he applied that he was previously arrested for driving under the influence in 2011. (ECF No. 120 Ex. 1 at 77.) He also admitted that he "told every . . . background person . . . I resigned [from the CCSO] in lieu of termination because I witnessed some unethical things taking place in which . . . the sheriff told me I was not part of the team or a good team player." (*Id.* at 33-34.)

On January 8, 2018, a little over a year after resigning from the CCSO, Plaintiff secured employment as a police officer with the Pyramid Lake Paiute Tribe.[3] (ECF No. 120 Ex. 1 at 53.) This department terminated Plaintiff's employment on April 4, 2018. Plaintiff claims that the reason given for this termination was vague but included failing to "complete the training process successfully" and "not [being] at the level that they expected [Plaintiff] to be at." (*Id.*)

Now, Plaintiff is gainfully employed by the Washoe Tribe of Nevada and California as a full-time police officer. (*Id.* at 18.) He was offered this position on July

[3] Unlike Nevada state and local law enforcement agencies, the tribal police departments are not able to acquire Plaintiff's personnel files under Nev. Rev. Stat. § 239B.020 as they are not a Nevada "public safety agency" under the statute.

10, 2019.[4] He has successfully completed this department's one-year probationary period. (*Id.*) Plaintiff was able to secure this position despite having been forced to resign from CCSO. He states, "I basically provided them with my story of the events that took place during my employment [with the CCSO], what I was accused of in the memorandum and then the affidavits and the story of the people involved in that." (*Id.* at 21-22.)

LEGAL STANDARD

A court should grant summary judgment when "the movant shows that 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 factual dispute is genuine when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Only facts that affect the outcome are material. *Id.*

To determine when summary judgment is appropriate, courts use a burden-shifting analysis. On the one hand, if the party seeking summary judgment would bear the burden of proof at trial, then he can only satisfy his burden by presenting evidence that proves every element of his claim such that no

[4] During each stint of unemployment as a police officer, after being forced to resign from CCSO, Plaintiff was gainfully employed as a security guard or officer. (ECF No. 171 Ex. 1 at 65; ECF No. 142 at 3.)

reasonable juror could find otherwise assuming the evidence went uncontroverted. *Id.* at 252. On the other hand, when the party seeking summary judgment would not bear the burden of proof at trial, he satisfies his burden by demonstrating that the other party failed to establish an essential element of the claim or by presenting evidence that negates such an element. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (Brennan J., concurring). A court should deny summary judgement if either the moving party fails to meet his initial burden or, if after he meets that burden, the other party establishes a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

ANALYSIS

Under the uncontested facts of this case, summary judgment is proper on Plaintiff's federal due process claim. As this is the sole remaining federal-law claim, the Court dismisses the remaining state-law claims without prejudice under 28 U.S.C. § 1367(c).

I. Plaintiff fails to establish a prima facie stigma-plus claim.

For this claim, Plaintiff needs to prove Defendant Trotter deprived Plaintiff of a constitutionally protected property or liberty interest without adequate process. Plaintiff relies only upon a claimed liberty interest. (*See* ECF No. 113.) In the public employment context, a plaintiff may prove a deprivation of a liberty

interest by showing that he was terminated from his employment in conjunction with a stigmatizing statement. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). One without the other is insufficient. *Id.*

There is some discord in caselaw regarding the required criteria that constitute a sufficiently stigmatizing statement. There is a line of cases in which statements that "impair[ ] a reputation for honesty or morality" are found to be sufficient in themselves. *E.g.*, *Tibbetts v. Kulongoski*, 567 F.3d 529, 535-36 (9th Cir. 2009) (quoting *Brady v. Gebbie*, 859 F.2d 1543, 1552 (9th Cir. 1988)). However, in *Blantz v. California Dep't of Corr. & Rehab., Div. of Corr. Health Care Servs.*, 727 F.3d 917, 925 (9th Cir. 2013), the Circuit stated:

> [T]he liberty interests protected by the Fourteenth Amendment are implicated *only* when the government's stigmatizing statements effectively exclude the employee completely from her chosen profession. Stigmatizing statements that merely cause "reduced economic returns and diminished prestige, but not permanent exclusion from, or protracted interruption of, gainful employment within the trade or profession" do not constitute a deprivation of liberty.

(emphasis added) (quoting *Stretten v. Wadsworth Veterans Hosp.*, 537 F.2d 361, 366 (9th Cir. 1976)). In *Blantz*, the Ninth Circuit was considering an appeal from the dismissal of a complaint for failure to state a claim. *Id.* at 920. It noted that the plaintiff alleged statements from the employer that included

"'unwarranted and false information concerning her reputation for honesty and/or morality,' which [the Circuit] accept[ed] as true." *Id.* at 925 n.6. The Circuit nonetheless affirmed dismissal because the plaintiff did not allege facts sufficient to show that she was unable to work in her chosen profession. *Id.* at 926. Following this case, both the element that a stigmatizing statement regards one's honesty or morality and the element that the statement effectively excludes one from his chosen profession are mandatory.

The Court adopts the legal standard as stated in *Blantz* and finds that Plaintiff needs to show that he was effectively excluded from his chosen profession, even if he shows the statement impugned his character for honesty or morality. The Court does so because of the stark similarities between this case and *Blantz*. Both cases involve government employment and public safety employment. The Court also holds this standard to be appropriate, in part, because of the great powers that the government places upon police officers. Law enforcement agencies must ensure that they employ only qualified and morally upstanding citizens, which is undoubtedly why Nevada has put into law the mandatory disclosure requirements for personnel files of police officer applicants. Nev. Rev. Stat. § 239B.020.

Additionally, a plaintiff must show four more elements to satisfy his burden. If a plaintiff can prove a sufficiently stigmatizing statement, he must also show (1) that the accuracy of the charge is contested, (2) that there is some public disclosure of the false, stigmatizing charge, (3) that the charge is made in connection

with termination of employment, and (4) that the employer failed to allow him an opportunity to refute the veracity of the charges. *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1179 (9th Cir. 1998).

Initially, the Court notes Plaintiff argues his employment with the police officer positions with the Indian Tribes should not be considered employment in his chosen profession. In his deposition, he admitted that his duties are that of a regular police officer. (ECF. No. 120 Ex. 1 at 18.)[5] Plaintiff's expert witness, Mr. Ron Dreher, nonetheless posits the following as grounds for his contention this is not the same profession:

> If [Plaintiff] was hired by a state or local law enforcement agency he would be entitled to the compensation and benefits each sheriff's office or police agency has in [Nevada Revised Statutes] or in their collective bargaining agreement or both. He would be entitled to our [Public Employees' Retirement System of Nevada]. His ability to learn the many facets of policing is enhanced. His ability to promote is enhanced. His ability to transfer from one agency to the next through lateral transfers is

[5] The Court notes that Plaintiff applied to two tribal police agencies before working for the CCSO, evincing that working for tribal police is part of his chosen profession. The Court further notes that Plaintiff is actually making more money now than he was with the CCSO. As of December 2020, Plaintiff was making $25.85 hourly with the Washoe Tribe of Nevada and California, where he is still working; with the CCSO, he was only making $21.44 hourly. (ECF No. 171 Ex. 1 at 19, 112.)

> enhanced. Tribal police agencies do not offer these benefits.

(ECF No. 115 Ex. 13 as 14.) However, assuming the accuracy of the expert's assertions, the Court concludes Plaintiff has shown, at most, that being a police officer for a tribal police agency causes only "reduced economic returns," which the Ninth Circuit has said is insufficient to constitute a liberty interest. *Blantz*, 727 F.3d at 925. While this Court is unaware of a specific case where a police officer was allegedly relegated to working for a tribal police agency as opposed to a county sheriff's office, even large steps down within the same profession are commonly found to be insufficient to survive summary judgment for a stigma-plus claim. For example, the Ninth Circuit affirmed the conclusion at summary judgment that a judge who lost a judicial appointment and had to return to private practice, was still able to work in his chosen profession of attorney. *Santana v. Cty. of Yuba*, No. 2:15-CV-00794-KJM-EFB, 2019 WL 4734928, at *28 (E.D. Cal. Sept. 27, 2019), *aff'd*, 856 F. App'x 65 (9th Cir. 2021). As such, this effectively narrows Plaintiff's claim to the roughly sixteen-month period between his employment with the CCSO and the Pyramid Lake Paiute Tribe and the roughly fifteen-month period between his employment with the Pyramid Lake Paiute Tribe and the Washoe Tribe of Nevada and California.[6]

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[6] He testifies that his application to the Pyramid Lake Paiute Tribe occurred six to eight months before he was finally hired and that this was the general rule for law enforcement applications. (ECF No. 171 Ex. 1 at 31-32.) As such, roughly half of the time he

Even though these may be "protracted interruptions" of employment in Plaintiff's chosen profession, *Blantz*, 727 F.3d at 925, Plaintiff failed to meet his burden of proffering evidence raising a triable issue of fact that the interruptions were caused by statements from Defendants. Plaintiff and his expert merely speculate that other agencies reviewed the Trotter Memo because Plaintiff was denied employment by six agencies (Washoe County Sheriff's Office, LVMPD, Carson City Department of Alternative Sentencing, Douglas County Sherriff's Office, North Las Vegas Police Department, and Reno Police Department) before acquiring the position with the Pyramid Lake Paiute Tribe.[7] While the parties stipulate that Defendants provided Washoe County Sheriff's Office with a copy of the Trotter Memo, there is no evidence that any other agency for which Plaintiff applied reviewed the memorandum.

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spent outside of a law enforcement agency was while a successful employment application was pending.

[7] Plaintiff speculates that the CCSO disclosed the Trotter Memo to all of the law enforcement agencies of Nevada for which he applied because such disclosure would be mandatory under Nev. Rev. Stat. § 239B.020 if requested. This statute dictates that "[u]pon the request of a public safety agency, an employer shall provide to the public safety agency information" of a "former employee of the employer who is an applicant for the position of . . . peace officer," which may include "[a] record of disciplinary action taken against the applicant." As the disclosure is required by law, it is not the disclosure itself that is potentially actionable but rather the creation of the allegedly defamatory statement without adequate due process for which disclosure is mandatory. Nonetheless, whether they disclosed the Trotter Memo to the other law enforcement agencies is essential to the element of causation, and just because they could request this information does not mean that they did.

Additionally, the parties agree that Defendant Trotter relayed some facts regarding the Beaulieu Incident to the LVMPD. (ECF No. 116 Ex. 1.) There is no evidence that the remaining four agencies received any statement from Defendants. Reno Police Department and North Las Vegas Police Department affirmatively stated they had no documents regarding any discipline Plaintiff received from the CCSO. (ECF No. 171 Exs. 2-3.) Because of this lack of causation, Plaintiff cannot show that he was denied employment at these other four agencies because of any stigmatizing statement from Defendants.

Even more, Plaintiff needs to show that it was the alleged stigmatizing statements from Defendants that caused his difficulties in acquiring other employment in his chosen profession—not being forced to resign from the CCSO, not his criminal record, not lack of experience, or any other aspect that potential employers would consider. He experienced a similar period of underemployment before he was hired by CCSO. Plaintiff was job searching for at least eight months before his employment with the CCSO (he applied for Lyon County Sheriff's Office in April of 2015 and was not hired by the CCSO until December of that year). Plaintiff and the author of a letter of recommendation that he submitted to law enforcement agencies note that Plaintiff had struggles with finding a police officer position, possibly related to his prior arrest for driving under the influence. (ECF No. 120 Ex. 2.) Plaintiff's argument that all of the six agencies that denied his applications because of Defendants' statements ignores

the fact that five agencies denied his application before the CCSO took him: Washoe Tribal Police, Washoe County Sheriff's Office, Sparks Police Department, Lyon County Sheriff's Office, and Fallon Tribal Police.

Most critically, Plaintiff failed to provide any evidence that shows he could not have applied for the police officer jobs that he acquired with the Pyramid Lake Paiute Tribe and the Washoe Tribe of Nevada and California shortly after being terminated from the CCSO and the Pyramid Lake Paiute Tribe respectively. While Plaintiff did wait approximately a half-year to apply for each position and waited approximately another half-year for the application process to complete, (ECF No. 171 Ex. 1 at 31-32), nothing in the record indicates that either part of the delay was caused by Defendants' statements. For this reason, no juror could reasonably find that the Trotter Memo or any other statement from defendants caused the "protracted interruptions" to employment in Plaintiff's chosen profession. *Blantz*, 727 F.3d at 925.

In light of the facts that Plaintiff had similar struggles before working with the CCSO and that he was able to file successful applications with two tribal police agencies, the Court concludes that no reasonable juror could find that Defendants deprived Plaintiff of a protected liberty interest by effectively excluding him from his chosen profession. Plaintiff's evidence that two agencies received a statement from Defendants that allegedly stigmatized Plaintiff fails to create a triable issue of fact that would depart from this conclusion. For this reason, Defendants are entitled to

summary judgment for Plaintiff's federal stigma-plus due process claim.

Plaintiff seeks to rebut this holding of the Court by relying upon expert testimony from Mr. Dreher for the opinion that the state agencies more likely than not reviewed the Trotter Memo, which caused Plaintiff's employment troubles. The Court finds this testimony is unreliable for these conclusions and therefore does not rely upon it. Rule 702 of the Federal Rules of Evidence provides that expert opinion evidence is admissible if: (1) the witness is sufficiently qualified as an expert by knowledge, skill, experience, training, or education; (2) the scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (3) the testimony is based on sufficient facts or data; (4) the testimony is the product of reliable principles and methods; and (5) the expert has reliably applied the relevant principles and methods to the facts of the case.

Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, Rule 702 tasks district judges with "ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." 509 U.S. 579, 597 (1993). "Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th

Cir. 2013).[8] To evaluate reliability, the district court "must assess the expert's reasoning or methodology, using as appropriate criteria such as testability, publication in peer-reviewed literature, known or potential error rate, and general acceptance." *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014). These factors are nonexclusive, and "the trial court has discretion to decide how to test an expert's reliability . . . based on the particular circumstances of the particular case." *Id.*

In his report, Mr. Dreher opines to the following: "If Washoe County [Sheriff's Office] had the memorandum(s) from Sheriff Trotter there is no doubt in my mind that the other law enforcement agencies that Mr. Erwine applied for either had the same copies of those memorandums or had been verbally advised of those memorandums by Sheriff Trotter or his representatives." (ECF No. 176 Ex. 16 at 10.) Plaintiff "has been labeled as a liability by Sheriff Trotter. Accordingly, the chances of him being employed by a state or local government Nevada peace officer agency is almost zero." (*Id.*) "Given the fact that Mr. Erwine was rejected by the local and state law enforcement agencies in Nevada where he applied, there is evidence that Churchill County [Sheriff's Office] and Churchill County released any and all documents regarding Mr.

[8] The Court is inclined to agree with legal experts that caselaw has strayed from the Supreme Court precedents of *Daubert* and its progeny by relaxing the district courts' gatekeeping function under Rule 702. *See*, *e.g.*, David E. Bernstein & Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57 Wm. & Mary L. Rev. 1, 26-29 (2015).

Erwine's employment to the requesting agencies either verbally or in writing." (*Id.* at 12.) "The comments by Las Vegas Metro Police Department (LVMPD) and North Law Vegas Police Department (NLVPD), stating in writing that Mr. Erwine can never again (indefinitely) apply for those departments, substantiate the fact that Mr. Erwine has been branded and labeled as being unfit to be a peace officer in Nevada." (*Id.*) "Mr. Erwine's background prior to his constructive discharge from Churchill County [Sheriff's Office], he would have passed the background investigation and been hired by LVMPD contingent on his passing the polygraph examination." (*Id.* at 13.) "It is abnormal for a Nevada Law Enforcement department to indefinitely ban an applicant for any employment. In today's law enforcement world being labeled a 'liability' and being terminated for that reason is a law enforcement career killer in my opinion." (*Id.*)

Mr. Dreher summarily derives these grand conclusions from his "extensive experience in law enforcement and in representing police unions in negotiations and before the Nevada Legislature." (ECF No. 176 at 12.) Mr. Dreher fails to provide any specific methodology from which he was able to reach these judgments. As such, the Court finds that these conclusions in regard to whether the other law enforcement agencies reviewed the Trotter Memo or other statements from Defendants and whether these such statements caused Plaintiff's troubles in finding employment are not reliable and therefore not helpful.

The Court further concludes that even if it were to adopt Plaintiff's proposed standard—i.e., Plaintiff need not show effective exclusion from his chosen profession if he can show the published statement impaired his character for honesty or morality. According to the standard advocated by Plaintiff, a statement falls into one of three tiers: (1) the statement impugns the employee's character for honesty or morality in which case it is always sufficiently stigmatizing; (2) the statement merely impugns the employee's competence and ability in which case it is never sufficiently stigmatizing; and (3) the statement impugns the employee not for his character for honesty and morality but also more than mere incompetence in which case the statement is only sufficiently stigmatizing if it causes effective exclusion from his chosen profession.

Plaintiff argues that both his character for honesty and morality were attacked in the Trotter Memo. The Court disagrees.[9] As discussed above, the Trotter Memo summarizes Defendants' position about two incidents that occurred, which resulted in Defendants forcing Plaintiff to resign. The first of these two

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[9] In its prior order, the Court operated under the premise there were only two categories, those that impugned one's character for honesty or morality and those that merely claimed incompetence or inability. (ECF No. 115.) When presented with these limited categories, the Court held that the Trotter Memo rose above mere statements of incompetence and inability and was forced to hold the memorandum impugned Plaintiff's character for morality. If Plaintiff is correct that there is a middle ground, the Court holds the Trotter Memo's statements most squarely falls into it.

incidents involved Plaintiff allegedly helping Mr. Beaulieu to investigate the CCSO for misconduct perpetrated against him and encouraged him to sue the CCSO. At best, this amounts to a breach of fiduciary duty as it is never alleged that Plaintiff lied but merely put the interests of a potentially adverse party above those of his employer. The Ninth Circuit recently reversed the denial of qualified immunity under identical grounds, finding there was no example of law finding that alleging a breach of a fiduciary duty amounts to alleging dishonesty or immorality. *Kramer v. Cullinan*, 878 F.3d 1156, 1164 (9th Cir. 2018). As such, the allegations regarding this incident are insufficient.

The Trotter Memo also discusses the incident in which Defendants allege that Plaintiff inappropriately pointed a taser at an inmate, Mr. Maes. It further alleges that he removed the cartridge from the taser and pulled the trigger to make a loud noise and spark. The memo indicates that this was inappropriate "play" as Plaintiff "snickered." Defendant Trotter called it "conduct unbecoming of an officer" and "perceived use of excessive force." These allegations speak nothing of dishonesty and do not impugn Plaintiff's character for morality. Rather, these allegations merely question Plaintiff's professionalism and maturity by engaging in a reckless prank as opposed to moral turpitude. *See*, *e.g.*, *Roth v. Veteran's Admin. of Gov't of U.S.*, 856 F.2d 1401, 1411 (9th Cir. 1988) (allegations of difficulty getting along with others and poor management were not stigmatizing); *Stretten v. Wadsworth Veterans Hosp.*,

537 F.2d 361, 366 (9th Cir. 1976) (statements of unsatisfactory work and unwillingness and inability to deal with coworkers were not stigmatizing); *Gray v. Union County Intermediate Educ. Dist.*, 520 F.2d 803, 806 (9th Cir. 1975) (statements of deliberate undermining of social agencies, insubordination, incompetence, hostility toward authority and aggressive behavior were not stigmatizing).

If it adopted Plaintiff's three-tiered analysis, the Court would hold that the Trotter Memo falls into the middle ground whereby a statement is only sufficiently stigmatizing if it were to effectively exclude one from his chosen profession. Plaintiff cannot prove the required exclusion as discussed above. Summary judgment would still be proper therefore even if Plaintiff is correct regarding the legal standard.

In sum, the Court holds that *Blantz* is the appropriate standard for this case and that no reasonable juror could find that Plaintiff was effectively excluded from employment in his chosen profession. Thus, summary judgment is proper. And, even if this Court were to adopt Plaintiff's more lenient standard, the Court still holds summary judgment proper because no reasonable juror could conclude that the statements of Defendants impugned Plaintiff's character for honesty and morality.

II. The Court dismisses the pendent state-law claims under 28 U.S.C. § 1367(c)(3).

In cases where, as here, "the district court has dismissed all claims over which it has original jurisdiction" before resolving pendent state-law claims, the court "may decline to exercise supplemental jurisdiction." 28 U.S.C. § 1367(c)(3). Before dismissing such claims, the court should consider four factors: (1) judicial economy, (2) convenience to the parties, (3) fairness to the plaintiff, and (4) comity. *O'Connor v. State of Nev.*, 27 F.3d 357, 363 (9th Cir. 1994), *as amended* (July 1, 1994), *as amended* (July 12, 1994). "[I]n the usual case in which federal-law claims are eliminated before trial, the balance of [the factors of economy, convenience, fairness, and comity] will point toward declining to exercise jurisdiction over the remaining state-law claims." *Id.* (quoting *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1309 (9th Cir. 1992)); *see also Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 205 (9th Cir. 1991) ("[I]t is generally preferable for a district court to remand remaining pendent claims to state court. . . ."). Dismissal under 28 U.S.C. § 1367(c) is without prejudice. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 348 (1988).

Applying these factors here, the Court finds this case fails to stray from the usual one. The economy and convenience factors favor keeping the case in this Court instead of having Plaintiff refile in state court and causing another judge to take up this case. These factors are only slight as there are no great hurdles to either party from litigating this case in state court,

where the litigants can pick up where this Court leaves off. Fairness does not favor either way as the parties can reach a fair verdict in state court. Lastly, comity greatly favors dismissal as the remaining claims are state-law ones alleged against a political subdivision and its agent.

CONCLUSION

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment (ECF No. 171) is GRANTED. Summary judgment is GRANTED in favor of Defendants for Plaintiff's federal-law causes of action. The pendent state-law claims are dismissed without prejudice under 28 U.S.C. § 1367(c)(3).

IT IS FURTHER ORDERED that Plaintiff's Motion to Allow for Tele-video Testimony at Trial is DENIED AS MOOT.

IT IS FURTHER ORDERED that Plaintiff's Motion to Seal (ECF No. 177) is GRANTED.

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

IT IS SO ORDERED.

Dated March 9, 2022.

/s/ R. Jones
ROBERT C. JONES
United States District Judge

AO450 (NVD Rev. 2/18) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MICHAEL ERWINE, Plaintiff, v. CHURCHILL COUNTY, a political subdivision of the State of Nevada, *et al.*, Defendants.	JUDGMENT Case Number: 3:18-cv-00461-RCJ-WGC

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

_X_ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment (ECF No. 171) is **GRANTED**. Summary judgment is **GRANTED** in favor of Defendants for Plaintiff's federal-law causes of action. The pendent state-law claims are dismissed without prejudice under 28 U.S.C. § 1367(c)(3).

IT IS FURTHER ORDERED that judgment is hereby entered accordingly and this case is closed.

Date: March 9, 2022

[SEAL] *CLERK OF COURT*

/s/ [Illegible]
Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MICHAEL ERWINE, Plaintiff, vs. CHURCHILL COUNTY, a political subdivision of the State of Nevada, *et al.* Defendants.	3:18-cv-00461-RCJ-WGC **ORDER** (Filed Sep. 7, 2021)

Plaintiff twice moves for sanctions for alleged spoliation of evidence and moves for summary judgment on three of his seven remaining claims. (ECF Nos. 84, 98, 115.) These motions are ripe and ready for this Court's review. For the reasons stated herein, the Court denies these three motions.[1]

FACTUAL BACKGROUND

From December 9, 2015 until October 10, 2016, Plaintiff was employed as a Deputy Sheriff for the

[1] There are two other issues for this Court to address, which can be handled quickly. First, the parties have stipulated for an extension of time to respond to one of the above motions. (ECF No. 104.) The Court grants this request. Second, Plaintiff twice moves to file an exhibit under seal. (ECF Nos. 101, 116.) The exhibit is a document generated by the Las Vegas Metropolitan Police Department (LVMPD) from a background check into Plaintiff. It was produced by the department on the condition that it remain confidential as these documents are to be kept as such pursuant to Nev. Rev. Stat. § 239B.020. These motions are unopposed. The Court will therefore grant them.

Churchill County Sheriff's Office (CCSO). This employment came after Plaintiff ran into some trouble finding a job as a police officer. Plaintiff applied for positions with the Washoe Tribal Police in 2011, Washoe County Sheriff's Office in October of 2015, Sparks Police Department in June of 2015, Lyon County Sheriff's Office in April of 2015, and Fallon Tribal Police in April of 2015. (ECF No. 120 Ex. 1 at 72, 75-80, 87.) All of these applications were denied. (*Id.*) As one of Plaintiff's letters of recommendation states and Plaintiff acknowledges, this difficulty in securing employment may have been due to a prior arrest for driving under the influence in 2011. (*Id.* at 86-87, 106-07; ECF No. 120 Ex. 2.) At the time of this arrest, Plaintiff was a part-time volunteer deputy with the Carson City Sheriff's Office. (ECF No. 120 Ex. 1 at 86-87.) He resigned shortly after the arrest, while the criminal case was proceeding. (*Id.*)

When CCSO hires deputy sheriffs, they are hired on a probationary status for one year. (ECF No. 98 Ex. 12 at 9.) As Plaintiff's employment ended approximately ten months after its start, he never completed his probationary period.

During his employment with CCSO, Plaintiff acknowledges that his supervisors had noted that he had issues with accountability and taking responsibility. (ECF No. 120 Ex. 1 at 118.) Former CCSO captain, Captain Michael Matheson in a memo dated August 11, 2016, stated, "[Plaintiff] needs to focus on and master his duties and functions in the detention center before being distracted by other opportunities," and "I

told [Plaintiff] that to this time he had earned a reputation with his coworkers as an unmotivated and underperforming deputy. I strongly encouraged him to refocus and motivate himself to perform at a higher level. . . ." (ECF No. 93 Ex. 3.) Plaintiff however claims that he received a favorable nine-month evaluation, which is required by the CCSO Administration Policy 1.200. (ECF No. 98 Ex. 10 ¶¶ 7-8; Ex. 12 at 9.) Defendants contend that, while this was in their written procedures, it was not actually performed on any of the new hire probationary employees, including Plaintiff. (ECF No. 110 Ex. 2 at 26.)

In July 2016, Plaintiff claims that he and another police officer, Officer Jessica Zamora, witnessed an inmate, Mr. Samuel Davis, be mistreated by a sergeant, Sergeant Summers. Plaintiff states the following: Officer Zamora transported Mr. Davis to the jail. Plaintiff and Sergeant Summers went outside to assist her in bringing Mr. Davis into the jail. While Mr. Davis was in the patrol car, he began to yell obscenities to the three officers standing by the car. At which point, Sergeant Summers grabbed Mr. Davis by the throat and slammed him against the side of the car. Later, after booking Mr. Davis into the jail, Sergeant Summers told Plaintiff to write his use of force report for him and be sure to include that it was because of the inmate's "physically aggressive nature" that he used the force he did. A few days later, Sergeant Summers called Plaintiff into his office to discuss Mr. Davis's booking. He also told Plaintiff to "watch out for that bitch" (referencing Officer Zamora) because she reported him for

excessive force. Just a few days later, Captain Matheson talked to Plaintiff about Sergeant Summers in relation to Mr. Davis's booking. Shortly after talking to Captain Matheson, Sergeant Summers yelled, "Did you rat me out?" while walking past Plaintiff in the hallway.

Plaintiff requested CCSO produce the investigative file of Mr. Davis. CCSO admits that it did not produce any file for this request. It contends that there was nothing to produce. Captain Matheson of CCSO swore in his deposition that he did investigate the Mr. Davis incident but did not create a written report. (ECF No. 110 Ex. 1 at 40-41.)

In October of 2016, two events occurred that culminated in the termination of the Plaintiff's employment with CCSO. First, on October 8, Plaintiff went into work for the day shift. When he came in there was an inmate who was complaining about not receiving water, Mr. Andrew Beaulieu. He was in a security cell and waiting to be booked into the jail.

Regarding this incident, Plaintiff claims the following: When Plaintiff arrived at Mr. Beaulieu's security cell, he noticed blood on the walls and asked the grave shift deputy what the blood was from. The grave shift deputy informed Plaintiff that Mr. Beaulieu had come in with a cut on his hand and that it ripped open while in the cell. After investigating the circumstances, Plaintiff discovered Mr. Beaulieu had been requesting water for about two hours. Plaintiff was informed by the inmate and later confirmed during review of

surveillance footage that every time Plaintiff would request water, the grave shift deputy would flush the drain in Mr. Beaulieu's cell making Mr. Beaulieu's request inaudible over the flushing noise. Plaintiff provided Mr. Beaulieu with water pursuant to his essential job functions to provide inmates with food and explained to Mr. Beaulieu what the rest of the booking process would look like. During this time, Mr. Beaulieu expressed to Plaintiff that the grave shift deputies were "assholes," and he would be filing a lawsuit against them. Plaintiff continued to conduct his rounds in the jail. While Plaintiff was conducting his rounds, other inmates asked Plaintiff what had happened to the "guy in the security cell" the previous night and explained what the grave shift did "was messed up." Another inmate filed a grievance request to Captain Matheson regarding the treatment of Mr. Beaulieu. Plaintiff reviewed surveillance footage of the grave shift's interaction with Mr. Beaulieu before he removed him for booking, mainly to be aware of any safety concerns with Mr. Beaulieu before removing him from the security cell. Plaintiff did not note any alarming actions by Mr. Beaulieu wherein Plaintiff would need to be concerned, however, he did note concerning inappropriate acts of the grave shift deputy that he believed needed to be brought to his sergeant's attention. Since the concerns were not an immediate threat, and the sergeant did not work on weekends, Plaintiff chose to log the events on his computer (ECF No. 115 Ex. 1 Attachment A) so he could follow up with his sergeant on Monday, October 10, 2016, when his sergeant returned to work.

Another deputy that was working during this incident, Deputy Thompson, drafted a memo that he sent to Defendant Benjamin Trotter, who was the sheriff at the time. In this memo, he largely agrees with Plaintiff's version of events with a few key differences. He adds that the deputies had not given Mr. Beaulieu water for the two-hour period because he was drunk and being verbally aggressive. Whenever a deputy approached him, he would tell him, "Go fuck yourself." He claims that he heard Mr. Beaulieu whisper to Plaintiff that he would like to speak with him privately, and Plaintiff then took him to the kitchen alone to speak with him for several moments.

Second, on October 9, 2016, there was an incident with Plaintiff involving an inmate, Mr. Michael Maes, and another deputy, Deputy Jolie Jabines. Regarding this incident, Plaintiff avers to the following: During Plaintiff's dayshift, Deputy Jabines had dropped a container of miscellaneous tools and other items inside of a booking cage. Included in these items were screwdrivers and other sharp instruments. Deputy Jabines did not want to pick up the items herself, so she asked an inmate to come into the booking cage and pick them up for her. Plaintiff did not feel it was appropriate for Deputy Jabines to have Mr. Maes, come into the booking cage to pick up items which could be used as weapons. Plaintiff questioned Deputy Jabines about this but her only response was "Senior Deputy" which Plaintiff understood as to mean he did not have a say in the matter. When Mr. Maes came into the cage, Plaintiff positioned himself between Mr. Maes and the control

panel of the facility. Plaintiff was in an uncomfortable position with Mr. Maes being only a few feet away from Plaintiff and backed into a corner. Plaintiff removed his taser from its holster and held it in his hand with the taser pointed to the ground. Plaintiff removed the cartridge from the taser due to the close proximity of Mr. Maes to both Plaintiff and Deputy Jabines. Mr. Maes cleaned up the items and left the cage without incident.

Deputy Jabines also drafted a memo addressed to Defendant Trotter regarding the Maes incident. In it, she expressed concerns over how Plaintiff handled himself in this situation. She contends there was never a need for the taser, and his use of it distracted her from attending to Mr. Maes as well as endangered her and Mr. Maes from being accidently tased. She says that Mr. Maes never showed any signs that he would pose a threat to them, and he crouched on the ground while Plaintiff was aiming the taser near him. Further, she says that Plaintiff "snickered," when he had his taser out. She lastly claims Plaintiff "turned off the [taser], removed the cartridge, reactivated the [taser], and pulled the trigger making a loud noise while sparking all while still aiming the [taser] at Inmate Maes."

While many, if not all, of these events would have been captured by the CCSO detention center's video surveillance system, Defendants admit that these electronic video recordings were not preserved. They aver that the old system only saves recordings for thirty days before being overwritten with new video

recordings. They also state that they acquired a new recording system in December 2017, when they changed locations of the detention center.

On October 10, 2016, Defendant Trotter met with Plaintiff and gave him the choice to resign or the CCSO would terminate his employment effective immediately. Plaintiff chose to resign. On that same day, Defendant Trotter placed a memorandum in Plaintiff's personnel file (the Trotter Memo). (ECF No. 115 Ex. 3.) This memo summarizes the information Defendant Trotter had been presented through the memos from other deputies and concludes there are a number of "items of concern." (*Id.*) These items led him to conclude that it would be best to "terminate[Plaintiff's employment] today for failing to satisfactorily complete his probation." (*Id.*)

The memo contains a number of statements, which Plaintiff claims are defamatory and stigmatizing: Plaintiff "fail[ed] to follow proper chain of command," Plaintiff engaged in "conduct unbecoming a deputy and unjustifiable use of force," Plaintiff created "liability" for the agency, Plaintiff was "unprofessional," and Plaintiff violated the "taser and use of force" policy as well as "behavioral standards."

After his resignation, Plaintiff again struggled to find employment as a police officer. (ECF No. 115 Ex. 12.) On January 17, 2017, Plaintiff received a letter from the Washoe County Sheriff informing him that "the Sheriff's Office has determined that you do not meet the established standards for a position as

Deputy Sheriff and therefore you have not been selected at this time." On February 7, 2017, Plaintiff received an email from Las Vegas Metropolitan Police in response to his application for employment informing him that "based on review of your background history, you will no longer be considered for the position(s) of Police Recruit C 16-001 November with the Las Vegas Metropolitan Police Department. Candidate does not meet LVMPD hiring standards based on Employment History" and "You are not eligible to apply with LVMPD for any position indefinitely." On September 8, 2017, Plaintiff received a letter from the Carson City Department of Alternative Sentencing informing him that he is "no longer being considered in the current recruitment due to failing on one or more portions of the selection process" which included the Background Investigation and Chief's Review, and "Based on our recruitment standards you are precluded from reapplying with our agency in the future." On September 12, 2017, Plaintiff received from Douglas County Sheriff a letter informing him that he "did not successfully complete the background evaluation/testing and therefore are no longer considered an eligible applicant for employment." On November 14, 2017, Plaintiff received a letter from North Las Vegas Police informing him he was "ineligible to continue in the employment process for the position of Police Officer . . . for character issues and his employment history," and "You are disqualified indefinitely." On March 1, 2018, Plaintiff received a letter from Reno Police Department informing him that his "application for employment with the Reno Police Department for [Police Recruit] was

rejected, based on your preemployment background investigation."

The parties stipulate to the fact CCSO provided the Washoe County Sheriff's Office a copy of the Trotter Memo. Defendants, however, contend they did not provide the memo to any other agency. Plaintiff disputes this fact by pointing to Nevada statutes that dictate that a public safety agency may compel the disclosure of personnel files for their applicants for prior service as a peace officer. Nev. Rev. Stat. 239B.020. Plaintiff also hired an expert witness, Mr. Ron Dreher. He opines that the Nevada departments likely saw this memo through that procedure due to the fact that they uniformly denied his applications and the fact that the some of the police departments denied his applications indefinitely. (ECF No. 115 Ex. 13.) He avers to the following:

> Detective Olson [of the LVMPD] most likely obtained or had already obtained Sheriff's Trotter's October 10, 2016 memorandum stating his reasons for terminating Mr. Erwine. Sheriff Trotter's memorandum tainted Mr. Erwine's background by labeling him a "liability". It is abnormal for a Nevada Law Enforcement department to indefinitely ban an applicant for any employment. In today's law enforcement world being labeled a "liability" and being terminated for that reason is a law enforcement career killer in my opinion.

(*Id.* at 13.)

In addition, Plaintiff produces the report generated by LVPMD, which details Detective Olson spoke with Defendant Trotter in a phone interview but does not mention the Trotter Memo. (ECF No. 116 Ex. 9.) As noted in the exhibit, Defendant Trotter spoke about the Beaulieu incident, as why Plaintiff was forced to resign. (*Id.*) This led Detective Olson to conclude Plaintiff would be "unsuitable for employment with LVMPD." (*Id.*)

In his deposition, Plaintiff admitted that he told each of these agencies that he applied to that he was previously arrested for driving under the influence in 2011. (ECF No. 120 Ex. 1 at 77.) He also admitted that he "told every . . . background person . . . I resigned [from CCSO] in lieu of termination because I witnessed some unethical things taking place in which . . . the sheriff told me I was not part of the team or a good team player." (*Id.* at 33-34.)

Plaintiff was eventually able to secure employment as a police officer with the Pyramid Lake Paiute Tribe on January 8, 2018.[2] (ECF No. 120 Ex. 1 at 53.) This department terminated Plaintiff's employment on April 4, 2018. Plaintiff claims that the reason given for this termination was vague but included failing to "complete the training process successfully" and "not

[2] The tribal police departments are not able to acquire Plaintiff's personnel files under Nev. Rev. Stat. 239B.020 like the Nevada state and local agencies are as they are not a Nevada "public safety agency" under the statute.

[being] at the level that they expected [Plaintiff] to be at." (*Id.*)

Now, Plaintiff is gainfully employed by the Washoe Tribe of Nevada and California as a full-time police officer. (*Id.* at 18.) He was offered this position on July 10, 2019. He has successfully completed this department's one-year probationary period. (*Id.*) Plaintiff was able to secure this position despite the Trotter Memo. He states, "I basically provided them with my story of the events that took place during my employment [with CCSO], what I was accused of in the memorandum and then the affidavits and the story of the people involved in that." (*Id.* at 21-22.)

LEGAL STANDARD

I. Spoliation of Electronically Stored Information (ESI)

As of December 2015, Federal Rule of Civil Procedure 37(e) provides the specific—and only[3]—basis for sanctions for spoliation of ESI, which was substantially amended to accommodate advances in technology and provide uniformity among the circuits. To succeed on this motion, the moving party must prove the following three elements:

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[3] Plaintiff also moves for sanctions for spoliation of ESI under the Court's inherent authority. But, the Advisory Committee Notes make clear that the 2015 amendment forecloses a court from imposing sanctions on that basis. *Newberry v. Cty. of San Bernardino*, 750 F. App'x 534, 537 (9th Cir. 2018) (quoting Fed. R. Civ. P. 37 Advisory Committee Notes to the 2015 Amendment).

1. The nonmoving party should have preserved the ESI in the anticipation or conduct of litigation.

2. The nonmoving party lost the ESI because it failed to take reasonable steps to preserve it.

3. Additional discovery cannot restore or replace the ESI.

Fed. R. Civ. P. 37(e). The first element incorporates the common-law rule that imposes a duty to preserve evidence in litigation and when litigation is reasonably foreseeable. Fed. R. Civ. P. 37 Advisory Committee Notes to the 2015 Amendment; *see Millenkamp v. Davisco Foods Int'l, Inc.*, 562 F.3d 971, 981 (9th Cir. 2009). Second, the rule requires the party takes reasonable steps to preserve the ESI—not perfection. Fed. R. Civ. P. 37 Advisory Committee Notes to the 2015 Amendment. Third, the rule acknowledges that ESI is often stored in many formats on many systems contemporaneously, so the deletion of ESI on one medium may result in no loss of information, when the ESI is producible by other means. *Id.*

When a moving party satisfies these three prerequisites, two kinds of sanctions are available, but each requires proof of an additional element. Fed. R. Civ. P. 37(e). On the one hand, if the spoliation prejudiced the moving party, then the Court may order measures no greater than necessary to cure the prejudice. *Id.* On the other hand, harsher sanctions are available if the moving party shows that the nonmoving party acted with

the intent to deprive the moving party of the information's use in the litigation, then the Court may (1) presume that the lost information was unfavorable to the party, (2) instruct the jury that it may or must presume the information was unfavorable to the party, or (3) dismiss the action or enter a default judgment. *Id.*

II. Spoliation of Other Evidence

The Ninth Circuit "has not set forth a precise standard for determining when spoliation sanctions are appropriate," but "the majority of trial courts have adopted the following test: (1) the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the [evidence] w[as] destroyed with a culpable state of mind; and (3) the evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *State Farm Fire & Cas. Co. v. Gen. Motors, LLC*, No. 1:20-CV-00040-BLW, 2021 WL 2269972, at *2 (D. Idaho June 3, 2021) (alterations in original) (quoting *Bell v. City of Boise*, No. 1:09-cv-540-REB, 2015 WL 13778741, at *2 (D. Idaho Aug. 23, 2015)). The party seeking spoliation sanctions has the burden of establishing the elements. *Id.*

III. Summary Judgment

A court should grant summary judgment when "the movant shows that 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 factual dispute is genuine when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Only facts that affect the outcome are material. *Id.*

To determine when summary judgment is appropriate, courts use a burden-shifting analysis. On the one hand, if the party seeking summary judgment would bear the burden of proof at trial, then he can only satisfy his burden by presenting evidence that proves every element of his claim such that no reasonable juror could find otherwise assuming the evidence went uncontroverted. *Id.* at 252. On the other hand, when the party seeking summary judgment would not bear the burden of proof at trial, he satisfies his burden by demonstrating that the other party failed to establish an essential element of the claim or by presenting evidence that negates such an element. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (Brennan J., concurring). A court should deny summary judgement if either the moving party fails to meet his initial burden or, if after he meets that burden, the other party establishes a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

ANALYSIS

I. First Motion for Sanctions (ECF No. 84)

Plaintiff argues the Court should impose sanctions against Defendants for failing to preserve video footage of the Beaulieu and Maes incidents. Defendants contend they had no reasonable basis to anticipate Plaintiff would file this case against them when the video recordings were deleted. The Court agrees with Defendants and denies this motion.

The Court finds Defendants did not have sufficient notice that Plaintiff intended to bring this case against them at the time they deleted the video recordings. Sufficient notice must be of future litigation that is "probable," meaning "more than a possibility." *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1068 (N.D. Cal. 2006). At the time, there is no indication that Defendants should have suspected that Plaintiff—an at-will, probationary employee—would bring a case based on his termination, especially when he not a member of a suspect class.

Plaintiff attempts to rely on notice of potential litigation from Mr. Beaulieu and Mr. Maes (which in fact never did occur). He, however, provides no case where a party can rely on a duty to preserve evidence potentially relevant to *another's* litigation. In fact, many courts have rejected such a duty. *In re Disposable Contact Lens Antitrust*, 329 F.R.D. 336, 432 (M.D. Fla. 2018) (collecting cases).

II. Second Motion for Sanctions (ECF No. 98)

Plaintiff also moves for sanctions on alleged spoliation of investigatory files for the Beaulieu and Davis incidents and Plaintiff's nine-month evaluation. The Court finds that Plaintiff has not proven the first element, that the alleged documents were destroyed while in Defendants' possession, as he has not carried his burden that they ever existed.

As to the Beaulieu incident, Defendants provided Plaintiff with the Trotter Memo and the deputy memoranda from Deputy Thompson and Sergeant Summers. Defendants claim this is the entirety of their records they currently and ever had. Defendant Trotter and Captain Matheson both testified that they did not conduct any further investigation into this incident—Plaintiff has no evidence to the contrary besides his speculation that there should be more. Speculation is not enough to carry his burden.

Turning to the Davis incident, the same is true. Defendant Trotter testified that a "fact check" was conducted, however, he never stated that he created a written record of this event. Further, Captain Matheson did investigate this incident and swore that he did not recall reducing anything into writing. Plaintiff again merely speculates that they must have been some record, which CCSO destroyed out of fear of litigation. And again, this does not satisfy his burden.

Lastly, Plaintiff complains that Defendants did not produce a nine-month review of his work. Plaintiff does attest in an affidavit dated February 6, 2021 that

he remembers receiving a satisfactory nine-month evaluation in September 2016. Defendants dispute this contention and swear, while it was part of their written procedures, it was never done for Plaintiff or any other probationary employees. Based on these competing testimonies, the Court is not persuaded that Plaintiff has carried his burden that the Defendants ever actually created a nine-month evaluation. This motion is therefore denied.

III. Motion for Partial Summary Judgment (ECF No. 115)

Plaintiff moves for summary judgment on some but not all of his claims. He moves on the following counts:

- deprivation of a liberty interest without adequate due process in violation of the Fourteenth Amendment against Defendant Trotter pursuant to 42 U.S.C. § 1983
- deprivation of a liberty interest without adequate due process in violation of the Fourteenth Amendment against Defendant Churchill County pursuant to 42 U.S.C. § 1983 and *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978)
- deprivation of a liberty interest without adequate due process in violation of the Nevada Constitution against Defendants Trotter and Churchill County.

The Court will address each in turn.

A. Fourteenth Amendment Claim Against Defendant Trotter

For this claim, Plaintiff needs to prove Defendant Trotter deprived Plaintiff of a constitutionally protected property or liberty interest without adequate process. Plaintiff concedes he did not have a protected property interest. (ECF No. 113.) In the public employment context, a plaintiff may prove a deprivation of a liberty interest by showing that he was terminated from his employment in conjunction with a stigmatizing statement. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). One without the other is insufficient. *Id.* To be sufficiently stigmatizing, it must "impair[ ] a reputation for honesty or morality." *Tibbetts v. Kulongoski*, 567 F.3d 529, 535-36 (9th Cir. 2009) (quoting *Brady v. Gebbie*, 859 F.2d 1543, 1552 (9th Cir. 1988)). The statements must also be so severe as to "effectively exclude the employee completely from [his] chosen profession." *Blantz v. California Dep't of Corr. & Rehab., Div. of Corr. Health Care Servs.*, 727 F.3d 917, 925 (9th Cir. 2013). Stigmatizing statements that merely cause "reduced economic returns and diminished prestige, but not permanent exclusion from, or protracted interruption of, gainful employment within the trade or profession" do not constitute a deprivation of liberty. *Id.* If a plaintiff can prove such a stigmatizing statement, he must also show (1) that the accuracy of the charge is contested, (2) that there is some public disclosure of the false, stigmatizing charge, (3) that the charge is made

in connection with termination of employment, and (4) that the employer failed to allow him an opportunity to refute the veracity of the charges. *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1179 (9th Cir. 1998).

Defendants argue the Trotter Memo was not sufficiently stigmatizing and not sufficiently publicized. Defendants first argue that the statements in the Trotter Memo do not implicate Plaintiff's honesty and morality, and as such, cannot be stigmatizing. This initial argument is incorrect. At least some of the statements in the memo are more than mere accusations of incompetence and go towards morality. For example, the Trotter Memo describes Plaintiff as "unprofessional" and a "liability" and a "discredit" to the agency and appears to side with Deputy Jabines's version of the Mae's Incident that Plaintiff "snickered" as if he were engaging in reckless behavior with the taser in some sort of "play" in violation of "behavior standards."

Defendants next posit that a reasonable juror could conclude that the statements were not so severe as to permanently exclude Plaintiff from his chosen profession of law enforcement. A reasonable juror could conclude that the Trotter Memo was insufficient to infringe upon Plaintiff's liberty interest. While Plaintiff did struggle to find another police officer position, he did find a job with Pyramid Lake Paiute Tribe about sixteen months after his discharge from CCSO. He was also discharged from this position after three months. He was then again able to find a position with the Washoe Tribe of Nevada and California after

about fifteen months. He has been able to maintain this position for the past two years.

Even though these may be protracted periods of unemployment, a juror could reasonably conclude that they were not caused by the Trotter Memo. While Plaintiff did have two stretches of unemployment that were a little over a year each, it is not clear they were due to the memo. Indeed, Plaintiff was job searching for at least eight months before his employment with CCSO (he applied for Lyon County Sheriff's Office in April of 2015 and was not hired by CCSO until December of that year)—before the memo was created. This is in conjunction with his struggles as noted in his letter of recommendation from Mr. Gibson, noting his prior driving under the influence arrest. (ECF No. 120 Ex. 2.) Plaintiff's conclusion that these Nevada state agencies denied his application based on the Trotter Memo is minimally subject to a genuine dispute of fact for the jury to decide, especially in light of the fact that he had similar trouble in acquiring employment before his job with CCSO and retaining employment with another agency.

Even more, Plaintiff has not proven all of the Nevada state agencies that denied his application actually reviewed the Trotter Memo such that a juror could reasonably disagree. He only has proof that the memo was provided to the Washoe County Sheriff's Office—and no one else. Plaintiff and his expert witness opine that the memo must have reached other police departments based on his numerous rejections and the fact some of them denied him from reapplying indefinitely,

which they claim is "abnormal." (ECF No. 115 Ex. 13 at 13.) They point to Nevada statutes that dictate personnel files of peace officers must be made available to public safety agencies upon request. Nev. Rev. Stat. § 239B.020. However, just because they could request this information does not mean that they did.[4] This is an additional ground by which this Court must deny Plaintiff's motion for summary judgment.

Lastly, the Court notes Plaintiff argues his employment with the Indian Tribes should not be considered employment in his chosen profession. In his deposition, he admitted that his duties are that of a regular police officer. (ECF. No. 120 Ex. 1 at 18.) Plaintiff's expert witness nonetheless posits the following as grounds for his contention:

> If [Plaintiff] was hired by a state or local law enforcement agency he would be entitled to the compensation and benefits each sheriff's office or police agency has in NRS or in their

---

[4] Plaintiff does have the report from LVMPD, showing Detective Olson had a conversion with Defendant Trotter regarding Plaintiff's application to LVMPD. (ECF No. 116 Ex. 1.) In the conversation, Defendant Trotter noted facts surrounding the Beaulieu incident, noting that Plaintiff was sympathetic to the inmate and assisted the inmate by conducting an unauthorized investigation, which is why Defendant Trotter forced Plaintiff to resign. Defendants claim this evidence is hearsay. While it is unexcepted hearsay in its present form, courts may consider evidence that may be attested to at trial in a hearsay form for summary judgment. *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003). Even though, the Court will consider the exhibit, it only shows one other agency received any information from CCSO regarding Plaintiff.

> collective bargaining agreement or both. He would be entitled to our Nevada PERS retirement. His ability to learn the many facets of policing is enhanced. His ability to promote is enhanced. His ability to transfer from one agency to the next through lateral transfers is enhanced. Tribal police agencies do not offer these benefits.

(ECF No. 115 Ex. 13 as 14.) However, the Court finds these distinctions consist of "reduced economic returns and diminished prestige," which the Ninth Circuit has said are insufficient to be a liberty interest. *Blantz*, 727 F.3d at 925.

B. Fourteenth Amendment Claim Against Defendant Churchill County

Plaintiff's next claim is that the county is responsible for Defendant Trotter's actions under *Monell* for the same conduct disputed in the prior claim. As the sole basis for Plaintiff's claim is the same conduct, which this Court finds summary judgment is precluded by genuine disputes of material facts, the Court denies summary judgment for this claim as well.

C. Nevada Constitutional Claim Against Both Defendants

Plaintiff lastly moves for summary judgment on his claim the Defendants violated the due process clause of the Nevada Constitution. Initially, the Court notes Nevada due process clause is identical that in

the U.S. Constitution, and the Nevada Supreme Court frequently looks to federal precedent in interpretation of the state clause. *See*, *e.g.*, *Rodriguez v. Dist. Ct.*, 102 P.3d 41, 48 n.22 (2004). The Nevada Supreme Court therefore held that the Nevada due process clause gives rise to liability under the *Roth* stigma-plus test. *State v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 42 P.3d 233, 242 (2002). Inasmuch, as Plaintiff's claim is based upon the stigma-plus test, the motion for summary judgment on this claim is denied for the same reasons discussed above.

Plaintiff, however, also claims that rights identified in Nevada statutes were violated by Defendants. He claims the violations of these rights also deprived him of a liberty interest protected by the Nevada Constitution. He points to Nev. Rev. Stat. §§ 289.020-120, which provide "Rights of Peace Officers." He does correctly conclude that the undisputed facts do show violations of these rights. For example:

> [A] law enforcement agency shall not place any unfavorable comment or document in any administrative file of a peace officer maintained by the law enforcement agency unless:
>
> (a) The peace officer has read and initialed the comment or document; or
>
> (b) If the peace officer refuses to initial the comment or document, a notation to that effect is noted on or attached to the comment or document.

Nev. Rev. Stat. § 289.040. Defendants admit they did not disclose the Trotter Memo to Plaintiff until over a year after the memo was placed in his file. The statutes, however, do provide for a mechanism by which an aggrieved peace officer may raise violations of these rights:

> Any peace officer aggrieved by an action of the employer of the peace officer in violation of this chapter may, after exhausting any applicable internal grievance procedures, grievance procedures negotiated pursuant to chapter 288 of NRS and other administrative remedies, apply to the district court for judicial relief. If the court determines that the employer has violated a provision of this chapter, the court shall order appropriate injunctive or other extraordinary relief to prevent the further occurrence of the violation and the taking of any reprisal or retaliatory action by the employer against the peace officer.

Nev. Rev. Stat. § 289.120.

Plaintiff argues that since the statutes provide for these procedural rights to peace officers, they create a liberty interest such that the due process clause is implicated. Plaintiff correctly quotes the substantive liberty at play as "The liberty interest protected by the due process clause encompasses an individual's freedom to work and earn a living." *Eighth Judicial Dist. Court*, 42 P.3d at 236. While Nev. Rev. Stat. §§ 289.020-120 provide for added procedural protections to peace officers of this liberty interest, such as the right to

either review or sign disciplinary documents before they are placed into a peace officer's file pursuant to Nev. Rev. Stat. § 289.040; the right to review their file after an investigation pursuant to Nev. Rev. Stat. § 289.060; and the right to have representatives at an investigatory or disciplinary hearing pursuant to Nev. Rev. Stat. § 289.080. However, these procedural rights are not ends in themselves protected by the due process clauses. *See Olim v. Wakinekona*, 461 U.S. 238, 251 (1983); *see also Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 771 (2005) (holding that due process interests "cannot be defined by the procedures provided for [their] deprivation." (Souter, J., concurring)).

Under the federal due process clause, the Ninth Circuit analyzed the following requirements before a prisoner may be put into segregation: "a sufficiently senior officer [must] make the segregation decision, . . . the decision [must] be documented, . . . the prisoner [must] receive assistance, if needed, in presenting his case, and . . . the prisoner [must] be informed of the reason for his segregation." *Toussaint v. McCarthy*, 801 F.2d 1080, 1098 (9th Cir. 1986), *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S. 472, 482-83 (1995). There, the circuit held, "Such procedural requirements, even if mandatory, do not raise a constitutionally cognizable liberty interest." *Id.* (citing *Olim*, 461 U.S. at 250).

The Court finds that Plaintiff's cited rights are highly analogous to the rights in *Toussaint*, so the Court is convinced the outcome is the same—these procedural rights do not create a liberty interest in

themselves protected by the due process clause. Plaintiff has failed to point to any case law from Nevada that would indicate that its state constitutional due process clause would vary from that of the federal one. Rather, the parties agree that the Nevada Supreme Court frequently turns to federal law in interpreting its due process clause, so the Court finds that the Nevada Supreme Court would adopt this clear federal precedent. As such, summary judgment is also denied on this claim as well.

CONCLUSION

IT IS HEREBY ORDERED that First Motion for Sanctions (ECF No. 84) is DENIED.

IT IS FURTHER ORDERED that Second Motion for Sanctions (ECF No. 98) is DENIED.

IT IS FURTHER ORDERED that Motion to Seal (ECF No. 101) is GRANTED.

IT IS FURTHER ORDERED that Stipulation for Extension of Time (ECF No. 104) is GRANTED.

IT IS FURTHER ORDERED that Motion for Partial Summary Judgment (ECF No. 115) is DENIED.

IT IS FURTHER ORDERED that Motion to Seal (ECF No. 116) is GRANTED.

IT IS SO ORDERED.

Dated September 7, 2021.

/s/ R. Jones
ROBERT C. JONES
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL ERWINE, Plaintiff-Appellant, v. COUNTY OF CHURCHILL; BENJAMIN TROTTER, Churchill County Sheriff, Defendants-Appellees.	No. 22-15358 D.C. No. 3:18-cv-00461-RCJ-CSD District of Nevada, Reno ORDER (Filed Apr. 25, 2023)

Before: WARDLAW, NGUYEN, and KOH, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing and rehearing en banc. The full court has been advised of the petition, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc is **DENIED**.

Exhibit 3

MEMORANDUM

(Filed Mar. 4, 2022)

DATE: October 10, 2016

TO: Personnel File

FROM: Benjamin D. Trotter, Sheriff

REF: Deputy Michael Erwine

Failure to Follow Proper Chain of Command

On October 7, 2016 I met with Deputy Michael Erwine to counsel him. (See Administrative Note in Spillman)

At 1420 hours on October 8, 2016 I received the following text from Sgt. Shawn Summers (not verbatim):

Intoxicated male in security cell beating on walls and screaming obscenities at deputies. Was placed there by grave shift with an incident report. I was told today that Dep Erwine went over all the video footage of the inmate and started his own hidden Word document on the incident. Erwine appeared to be upset that the inmate was not given a drink of water. Thompson checked this same inmate at 0515 when he came on shift and was told to go fuck himself by the inmate.

The inmate was Andrew Beaulieu and he had been book into our facility by Fallon Police Department at 0332 hours on October 8th. His security cell watch sheet was started at 0340 hours and it is attached.

I texted Sgt. Summers back after we had a short telephone conversation that we needed Thompson to write what he saw Erwine doing. Deputy Thompson's incident is attached as is Sgt. Summers's incident report.

I had Sgt. Jesse Nuckolls, who performs IT details for our agency, come into work on his day off and attempt to find this "hidden Word document" on the jail desktop computers. He was able to locate a document which appears to be the document in question. He had to log into Erwine's passworded system (each member of the agency has a unique password that allows them into the system) to find the document. The document is attached.

In reviewing this document, I note that the author, presumed to be Erwine, notes that the inmate had asked for water at 0350 hours but had not received water until Erwine gave it to him at 0551 hours. Erwine's document does not once detail the actions and behavior of the inmate but solely focuses on the fact that the inmate was not given water for two hours after he asked for it.

In Dep. Thompson's incident report he states that even Erwine contact the inmate and asked if he wanted water and was told by the inmate to "fuck off" several times. Erwine seemed to develop some rapport with the inmate. Thompson then indicates that Erwine spent 30-40 minutes reviewing the video tape. He allegedly told Thompson that if the inmate had been given water when he asked for it he would not have been an issue and his rights would not have been violated. Thompson

told Erwine that if an inmate in the security cell is not compliant we do not open the cell and offer them items but wait until they become compliant. Thompson then indicates that around 1016 Erwine brought out the inmate for booking. The inmate whispered that he wanted to talk to Erwine so Erwine took the inmate to the kitchen area and they talked for several moments. Erwine also fingerprints the inmate during which they were alone and able to communicate secretly. At 1158 the inmate was released from custody after posting bail. When Sgt. Summers came on shift around 1400 hours, Thompson told him about Erwine's actions.

Sgt. Summer's incident report echoes Thompsons for a portion but then Summers mentions a phone call. At 1715 hours Summers took a call from the Mr. Beaulieu. Mr. Beaulieu told Summers he was upset at how he was treated. Per Summers, his primary complaint was not being offered water when in the security cell. Eventually, Beaulieu told Summers that Erwine had reviewed all the video and had spoken to him several times and indicated a lawsuit was winnable. "He said I'm not going to tell you that he told me; but I was told by his facial expressions that I have a good case against the jail."

Items of Concern:

- Beaulieu first asked for water at 0350, ten minutes after he was placed in the security cell for being uncooperative. According to the observation sheet he was checked on visually or verbally within the expectations of the 15-30 minute check requirement. He remained

uncooperative and, therefore, was not given water.

- Deputy Erwine is a probationary employee and does not have the authority to conduct his own personnel investigations. As of the time of my writing this (October 10, 2016 at 1122 hours), Deputy Erwine has never brought his concerns to a supervisor or attempted to present his "investigative findings".
- His "investigative report" mentions nothing about the behavior of Beaulieu, even that which was initially directed toward him. It is as if Erwine is siding with the inmate against his own agency or, possibly, encouraging civil action against his own agency.
- I also find substantial concern that Deputy Erwine's investigation seems to have found and confirmed what Beaulieu alleged – that grave shift would flush the floor toilet and laugh when Beaulieu would yell for water. This will be investigated further and separately from this topic.

The proper thing for Erwine to have done would have been to report his concerns to a supervisor and, if this did not seem right or a valid avenue, to report these concerns to an administrator.

Conduct Unbecoming a Deputy and Unjustifiable Use of Force

On October 9, 2016 at about 0939 I received a text from Sgt. Summers (not verbatim):

Received a call from the jail, Roat (Deputy Julie Jabines) dropped some crap on the cage floor and called trustee in to pick up the stuff that slid under the counter; Erwine pulled his Taser and pointed it at inmate, pulled cartridge off, pointed it again at inmate and discharged it while laughing. Can I go into work and just send him home over this incident. Don't want him accidentally blinding our trustee.

I asked when this happened and he indicated just before he texted me. I requested an incident from Deputy J. Jabines. I inquired about possible video showing this. I called Dispatcher Jerilyn Whitaker and asked if she had heard a Taser being deployed in the cage. She had not.

At 1613 hours, Summers texted me:

Had Dep. (Mike) Davis check camera footage; he said at 0904 it showed Erwine light up his Taser with the trustee in the cage. Could not tell on the video if it was discharged; just see the red aiming light (laser).

On 10/10/2016 I requested our senior Taser instructor, Sgt. Lee Orozco, pull the Tasers at the jail and download their recent usage. He did so and the Taser assigned to the jail bearing serial #X00298141 showed a "Fire" for one second at 09:04:06 hours. The other two Tasers currently at the jail did not show a test fire anytime near this time.

I read an incident report that J. Jabines had completed on the incident. She indicates Inmate Maes, who is acting as the kitchen trustee, complied with her request

to come into the cage and help her reach some items she had dropped. Erwine was standing at the north end of the cage, leaning on the counter. Erwin “without notice, verbal command or need: drew his ECD (Electronic Control Device a.k.a. Taser) and aimed it at Inmate Maes who was, at the time kneeling on the floor. J. Jabines indicates she noticed the red laser light on the floor and looked up at Erwine who “snickered”. The laser indicated the Taser was activated and J. Jabines indicates the cartridge was still attached. Erwine was still leaning against the counter so, evidently, not feeling threatened. J. Jabines states that Erwine turned off the ECD, removed the cartridge, reactivated the ECD and pulled the trigger “making a loud noise while sparking". The ECD was still aimed at Inmate Maes who was still on the floor. Erwine then deactivated the ECD, replaced the cartridge and reholstered it.

J. Jabines rightly indicates great concern about this incident. Tasers have been known, on occasion, to spontaneously discharge the cartridge when in an activated position. This could have injured both the inmate and J. Jabines. She also rightly notes the liability that this simple action creates for our agency as either real or perceived unnecessary and/or excessive force.

Items of Concern:

- This is unprofessional behavior.
- This creates liability for this agency now or for some time into the future should Inmate Maes elect to pursue civil action.
- This discredits our agency and our profession.

- In a time when scrutiny is high on all of us in law enforcement, this type of play is inexcusable.
- Deputy Erwine clearly violated our policies on Tasers and Use of Force, as well as, behavior standards.

Following my recent positive and encouraging counseling session with Deputy Erwine, this short series of behaviors from him is extremely disturbing and disappointing. The totality of concerns, of which these actions are only a part, lead me to believe that the cohesion of our Detention Division is being jeopardized by Deputy Erwine's continued employment here. It also appears that Deputy's Erwine's voiced concerns about "getting through probation" are as much a warning to me as a relief; I can only anticipate that his behavior, once he is not longer in an "at will" status, will continue to decline.

Deputy Michael Erwine will be terminated today for failing to satisfactorily complete his probation.
