UNITED STATES DISTRICT COURT

LARS JENSEN, an individual, Plaintiff, v. NATALIE BROWN, in her individual and official capacities as Administrative Officer at Truckee Meadows Community College; JULIE ELLSWORTH, in her individual and official capacities as Dean of Science at Truckee Meadows Community College; ANNE FLESHER, in her individual and official capacities as Dean of Math and Physical Sciences at Truckee Meadows Community College; KARIher individual and official of the Nevada System of Higher Education, Defendants.	Case No. 3:22-cv-00045-LRH-CLB ORDER capacities as Chancellor

Before the Court is Defendants Natalie Brown, Julie Ellsworth, Anne Flesher, Karin Hilgersom, Marie Murgolo, and Melody Rose's (collectively, "the Administrators") Motion to Dismiss Plaintiff Lars Jensen's ("Dr. Jensen") First Amended Complaint. ECF No. 21. Dr. Jensen filed a response in opposition to the motion, in which he requested oral argument (ECF No. 33), and the Administrators replied (ECF No. 34). Also before the Court is Dr. Jensen's Motion to Amend Response in Opposition to the Administrators' motion to dismiss. ECF No. 44. The

Administrators filed a response in opposition (ECF No. 45) and Dr. Jensen replied (ECF No. 46). In both his motion to amend and reply in support of the motion to amend, Dr. Jensen requested oral argument. ECF Nos. 44, 46. The Court denies Dr. Jensen's requests for oral argument. For the reasons articulated below, the Court denies Dr. Jensen's motion to amend and grants the Administrators' motion to dismiss.

I. BACKGROUND

This matter primarily involves alleged violations of civil rights concerning higher education employment at Truckee Meadows Community College ("TMCC") and, by extension, the Nevada System of Higher Education ("NSHE"). Dr. Jensen is a Community College Professor in the Math and Physical Sciences Division of TMCC's Mathematics Department. ECF No. 1 at 4. Natalie Brown is the Executive Director of the Advisement and Transfer Center at TMCC ("Dr. Brown"); Julie Ellsworth was the Dean of Sciences at TMCC at all relevant times to this action ("Dr. Ellsworth"); Anne Flesher is the Dean of Math and Physical Sciences at TMCC ("Dean Flesher"); Karin Hilgerson is the President of TMCC ("President Hilgersom"); Marie Murgolo was the Vice President of Academic Affairs at TMCC at all relevant times to this action ("Dr. Murgolo"); and Melody Rose is the Chancellor of NSHE ("Chancellor Rose"). . at 4–6.

Generally, the First Amended Complaint alleges that the Administrators sought to discipline, retaliate, and punish Dr. Jensen after he voiced concerns about the lowering of curriculum standards and the deterioration of shared governance at TMCC. ECF . at 2–6. TMCC hired Dr. Jensen on January 16, 1996, and he tenured on July 1, 1999. . at 6. Dr. Jensen has taught varying levels of mathematic courses during this time which range from algebra to calculus to statistics to college physics. . Dr. Jensen contends that throughout his employment, TMCC has continually altered its standards to make it easier for students to complete math courses and ignored internal procedures relating to shared governance. . at 6, 7. Dr. Jesen admits he has consistently voiced his concerns to TMCC on these two issues in different ways which include various email communications and a handout he distributed at a function. . at 7–9.

grievances in response to the incidents with Dr. Ellsworth, but on November 24, 2020, Chancellor Rose denied Dr. Jensen's grievances. . at 12.

Along similar lines, Dr. Jensen alleges that Dean Flesher cited minor issues as her justification for changing Dr. Jensen's annual performance review from a recommended "Excellent" to "Unsatisfactory." . at 12. Dr. Jensen also claims that Dean Flesher applied criteria to his annual performance review that was not equally applied to other annual performance reviews. . Dr. Jensen filed one grievance related to the incident with Dean Flesher and on July 27, 2021, Chancellor Rose denied the grievance. . at 12, 13.

On June 2, 2021, Dean Flesher wrote a letter to President Hilgersom notifying her that Dr. Jensen had received two consecutive "Unsatisfactory" annual performance evaluations. . at 13. Around June 16, 2021, President Hilgersom appointed Dr. Brown to investigate Dr. Jensen for a disciplinary hearing.[3] . at 13. Dr. Brown's investigation took place over the summer with faculty and included interviews with Dr. Ellsworth and Dean Flesher. . Dr. Jensen claims that the investigation was unfair

Dr. Jensen argues that the pattern of actions taken by the Administrators demonstrates a concerted effort to punish and retaliate against him for his handout distribution at the Math Summit, and his criticism of the deterioration of shared governance at TMCC. . at 15. Dr. Jensen further claims that the Administrators' actions caused a deprivation of his rights and proximately caused economic and emotional damages. . at 16. Dr. Jensen's First Amended Complaint alleges seven causes of action: (1) First Amendment Retaliation under 42 U.S.C. § 1983, against all the Administrators in their official capacities; (2) First Amendment Retaliation under 42 U.S.C. § 1983, against all the Administrators in their individual capacities; (3) Violation of the Nevada Constitution, Article I § 9, against all the Administrators; (4) Violation of Procedural Due Process Rights under 42 U.S.C. § 1983, against Dr. Brown, President Hilgersom, and Dean Flesher; (5) Violation of the Nevada Constitution, Article I § 8, against Dr. Brown, President Hilgersom, and Dean Flesher; (6) Violation of the Fourteenth Amendment Equal Protection Clause under 42 U.S.C. § 1983, against all the Administrators; and (7) Declaratory Relief under 28 U.S.C. §§ 2201, ., against all the Administrators. . at 19–24. The Administrators filed a motion to dismiss Dr. Jensen's First Amended Complaint. ECF No. 21. The motion is addressed below.

To sufficiently allege a claim under Rule 8(a)(2), viewed within the context of a Rule 12(b)(6) motion to dismiss, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting , 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference, based on the court's judicial experience and common sense, that the defendant is liable for the alleged misconduct. at 678–79 (stating that "[t]he plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." (internal quotations and citations omitted)). Further, in reviewing a motion to dismiss, the court accepts the factual allegations in the complaint as true. However, bare assertions in a complaint amounting "to nothing more than a formulaic recitation of the elements of a . . . claim . . . are not entitled to an assumption of truth." , 572 F.3d 962, 969 (9th Cir. 2009) (quoting , 556 U.S. at 698) (internal quotation marks omitted). The court discounts these allegations because "they do nothing more than state a legal conclusion—even if that conclusion is cast in the form of a factual allegation." "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." .

"Although generally the scope of review on a motion to dismiss for failure to state a claim is limited to the [c]

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III. DISCUSSION

A. Eleventh Amendment Immunity

The Eleventh Amendment "bars suits against the s.Csenthev. (t)-6 (h)-4 BT6IC -0ev. (t)-6 (h)-4 BT

constitutional or statutory rights.” , 616 F.3d at 967–68 (citation omitted) (emphasis original). Here, Dr. Jensen argues that the exception should apply because he seeks “prospective relief” from the Administrators in their official capacities. EC1 0 ,89.689.64 12aausEC1 0 ,89.689.64 12

The only relief specifically labeled as "prospective" by Dr. Jensen in the First Amended Complaint is some of the relief he seeks from the Administrators in their official capacities in conjunction with his first cause of action. ECF No. 8 at 19. Dr. Jensen describes this relief as "relief from defendants for prospective compensation from the date of judgment for salary adjustments he would have received had he not received the unlawful performance reviews" and "prospective relief against the defendants acting in their official capacities for full expungement of all negative personal files, return of his 2019-2020 annual performance evaluation to 'excellent', and return of his 2020-2021 annual performance evaluation to 'excellent.'" ECF No. 8 at 19. Although Dr. Jensen claims to seek "prospective relief" as to trigger the exception, the specifics of his two requests reveal that he seeks retrospective relief to remedy a past violation of federal law. Essentially, Dr. Jensen requests (1) monetary compensation for lost salary, and (2) retroactive expungement and restoration of past performance reviews. Such requests more closely resemble recovery of lost wages than true prospective relief addressing ongoing violations. Just because relief is characterized as "prospective" does not render true. , 902 F.2d 1395, 1399 (9th Cir. 1990) ("[s]imply asking for injunctive relief and not damages does not clear the path for a suit.").

Because the Ninth Circuit has expressly held that the Eleventh Amendment "bars suits against state officials in their official capacities when the relief sought is retrospective or compensatory in nature," ., 45 F.3d 333, 338 (9th Cir. 1995), the Court finds that the narrow exception to Eleventh Amendment immunity does not apply here.

, 478 U.S. at 280 (concluding plaintiff's request for prospective relief was "essentially equivalent" to a one-time restoration of lost trust corpus);

For these reasons, the Court finds that the Administrators are immune from suit in their official capacities under the Eleventh Amendment. The Court also finds the narrow "prospective

F.3d at 968. More specifically, whether qualified immunity applies depends on two distinct inquiries: "(1) whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right; and (2) if so, whether the right was clearly established in light of the specific context of the case." . (citation omitted). "Courts may begin with either prong of the analysis." , 976 F.3d 972, 978 (9th Cir. 2020).

reasonable official would understand that what he is doing violates that right.'"

, 69 F.4th 1110, 1122–23 (9th Cir. 2023) (quoting , 536 U.S. 730, 739 (2002)). While caselaw does not require the plaintiff to point to "a case directly on point for a right to be clearly established," it does require the plaintiff to point to "existing precedent" that "place[s] the statutory or constitutional question beyond debate." , 580 U.S. 73, 79 (2017) (quotations and citations omitteed(.)]TJ0 Tw BT/P/MCID 0 ƀ1C 0 g04 Tc 0.044 Tw62.66 3d[

., 44 F.4th 867, 888 (9th Cir. 2022) (concluding that plaintiff failed to clearly establish the relevant constitutional right because it was described "at too high a level of generality" and, as such, "avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." (citation omitted)).

Dr. Jensen "must point to prior case law that articulates a constitutional rule specific enough to alert" the officials alleged of misconduct "that their particular conduct was unlawful." 23 F.4th 863, 869 (9th Cir. 2022) (quotation and citation omitted). The Court is unpersuaded by Dr. Jensen's argument that citing clearly established the right at issue. In , the Ninth Circuit applied the general rule established in , 547 U.S. 410 (2006), to speech as academic teaching and writing for the first time.[8] , 746 F.3d at 417. concluded that a professor's academic teaching and writing may be an exception to 's general rule, but ultimately held that the defendants were entitled to qualified immunity because the plaintiff had not shown that "the contours of the right" were so "sufficiently clear" that "every reasonable official would have understood" their conduct violated that right. . at 417–18. In other words, the only case Dr Jensen cites to clearly establish and particularize the alleged right at issue in the present case is a case in which the Ninth Circuit concluded that right was not clearly established. . Any argument Dr. Jensen poses that he included to invoke the academic writing and teaching exception is unavailing. Not once does Dr. Jensen reference the exception in the First Amended Complaint. As pled, Dr. Jensen's First Amended Complaint fails to make the contours of the right sufficiently clear so that every reasonable official under these circumstances would understand their conduct violated the right.

For these reasons, the Court finds that Dr. Jensen has failed to clearly establish the alleged right at issue; he defines the right too generally and fails to provide case law that clearly establishes the contours of the specific right particularized to this case. , 583 U.S. 48, 63 (2018) ("[i]t is not enough that the [right] is suggested by then-existing precedent."). The f ()s)-5

Administrators, as individuals, are afforded qualified immunity as to Dr. Jensen's second cause of action. Accordingly, the Court dismisses this cause of action.

2. The Court dismisses Dr. Jensen's fourth cause of action against Dr. Brown, President Hilgersom, and Dean Flesher as individuals on the basis of qualified immunity because the alleged facts do not show their conduct violated the Due Process Clause.

Listed as the fourth cause of action in the First Amended Complaint, Dr. Jensen alleges that Dr. Brown, President Hilgersom, and Dean Flesher violated his procedural due process rights under 42 U.S.C. § 1983. ECF No. 8 at 16. In their motion to dismiss, Dr. Brown, President Hilgersom, and Dean Flesher argue that this claim should be dismissed based on qualified immunity because Dr. Jensen fails to provide facts that show their conduct violated a constitutional right. ECF No. 21 at 21, 22. In response, Dr. Jensen argues that he adequately pled the Administrators denied him procedural due process. ECF No. 33 at 17–19.

The parties agree that a "section 1983 claim based upon procedural due process ... has three elements: (1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; (3) lack of process." , 22 F.4th 1058, 1066 (9th Cir. 2022) (quoting , 995 F.2d 898, 904 (9th Cir. 1993)). Combining the first two elements, the "procedural due process rights of the Fourteenth Amendment apply only when there is a deprivation of a constitutionally protected liberty or property interest." , 197 F.3d 367, 373 (9th Cir. 1999) (citing , 408 U.S. 564, 569–70 (1972)). Dr. Jensen expressly claims three protected liberty interests

As to a protected liberty interest in avoiding termination, a government employee generally has a constitutionally protected property interest in continued employment. , 995 F.2d at 904. Here, the only inference that can be made from the facts alleged is that Dr. Jensen avoided termination and that he was never dismissed by TMCC. In fact, Dr. Jensen admits he is still, and was at all relevant times, employed as a professor by TMCC. ECF No. 8 at 4. There is no light in which the Court may view the First Amended Complaint as plausibly alleging a deprivation of his protected liberty interest in employment as a government employee because he remains a government employee. Any argument that Dr. Brown, President Hilgersom, and Dean Flesher deprived him of an employment related interest protected by the Due Process Clause is plainly unsupported.

As to protected liberty interests in his good name, reputation, honor, and integrity, harm to one's reputation alone is not considered a liberty or property interest guaranteed against state deprivation without due process of law. , 424 U.S. 693, 712 (1976). In , the plaintiff claimed when officials disseminated flyers to merchants identifying him as an "active shoplifter" with a photo, the police deprived him of protected interests in his reputation. . at 695–97. The Supreme Court reversed the court of appeals and held that the plaintiff did not state a claim for violation of his procedural due process rights because, without more, reputational damage does not deprive a person of any liberty or property interests protected by the Due Process Clause. . at 711–12. Again, Dr. Jensen was not terminated so there is nothing more here than reputational damage. Without more, these are not damages that implicate the type of liberty or property interests protected by the Due Process Clause.

As to a protected liberty interest in future employment opportunities, there is a protected liberty interest that "encompasses an individual's freedom to work and earn a living." , 995 F.2d at 907. "[W]hen the government dismisses an individual for reasons that might seriously damage his standing in the community, he is entitled to notice and a hearing to clear his name." . (quotation omitted). "To implicate constitutional liberty interests, however, the reasons for dismissal must be sufficiently serious to 'stigmatize' or otherwise burden the individual so that he is not able to take advantage of other employment opportunities." . (quoting

, 650 F.2d 1093, 1101 (9th Cir.1981), cert. denied, 455 U.S. 948 (1982). "Charges that carry the stigma of moral turpitude such as dishonesty or immorality may implicate a liberty interest, but charges of incompetence or inability to get along with others do not." , 995 F.2d at 907.

The Court finds that the First Amended Complaint alleges no facts that make a deprivation of "future employment opportunities" plausible. First, and of utmost importance in this case, the charges underlying the disciplinary investigation and hearing did not result in a termination or dismissal from employment. Second, even if the charges resulted in dismissal—something the Court does not find—they are not the type of charges that carry the stigma of moral turpitude such as dishonesty or immorality that implicate a protected liberty interest under the Due Process Clause. Dr. Jensen alleges that "insubordination" formed the basis of his letter of reprimand and eventual disciplinary investigation and hearing. The actual letter of reprimand describes Dr. Jensen's "insubordination" as unprofessional, disrespectful, and disruptive conduct. ECF No. 21-2 at 2. The Ninth Circuit has concluded that insubordination charges are not charges of moral turpitude that deprive a person of their protected liberty.

., 520 F.2d 803, 805–06 (9th Cir. 1975) (holding that, amongst other things, a letter charging the appellant with insubordination and hostility towards others did not deprive the appellant of a protected liberty because such charges do not import serious character defects like dishonesty or immorality). Moreover, any argument that Dr. Jensen's protected liberty interest in "future employment opportunities" has been deprived here is harshly undermined by the fact that (1) he provides no instances in which he was denied employment, and (2) he remains employed by TMCC.

For these reasons, the Court finds that Dr. Brown, President Hilgersom, and Dean Flesher are afforded qualified immunity because Dr. Jensen has failed to establish a constitutional violation with regard to his claim for a procedural due process violation. Accordingly, the Court dismisses this claim with prejudice.[10] , 616 F.3d at 971 (affirming the district court's dismissal

The preliminary step in an equal protection analysis is for the plaintiff "to identify the [defendant's asserted] classification of groups.'" , 425 F.3d 1158, 1166–67 (9th Cir. 2005) (quoting and citing , 68 F.3d 1180, 1187 (9th Cir.1995) (citation omitted)). "An equal protection claim will not lie by conflating all persons not injured into a preferred class receiving better treatment than the plaintiff." , 425 F.3d at 1167 (quotation and citation omitted).

In the First Amended Complaint, Dr. Jensen makes no outright reference to the protected class of which he purports to be a member. Instead, Dr. Jensen offers a scarce number of conclusory statements that he was "treated differently than similarly situated Professors" and that he was "evaluated differently from other faculty."[11] ECF No. 8 at 24, 12. Two sweeping and

In ( ), the Supreme Court held that

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., Case No. 14-CV-1428-WQH-DHB, 2015 WL 9473641, at *10 (S.D. Cal. Dec. 28, 2015) (citing ., Case No. 14-CV-03757, 2015 WL 179541, at *5 (N.D. Cal. Jan. 14, 2015) ("The Court also agrees that, because Plaintiff's complaint will be dismissed in its entirety, no viable cause of action remains to support Plaintiff's request for declaratory relief. Plaintiff's declaratory relief claim must be dismissed.")). Because the Court dismisses all Dr. Jensen's substantive claims, the Court finds that no viable causes of action remain to support his declaratory relief requests. Accordingly, the Court dismisses this claim.

IV. CONCLUSION