

JUN 05 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>LLOYD SHAW,</p> <p style="text-align: center;">Plaintiff - Appellant,</p> <p>v.</p> <p>STATE OF NEVADA; SCOTT KENNEDY,</p> <p style="text-align: center;">Defendants - Appellees.</p>
--

No. 08-15119

D.C. No. CV-06-00183-
LRH/RAM

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Submitted June 3, 2009**
Las Vegas, Nevada

Before: RAWLINSON and BYBEE, Circuit Judges, and BURNS***, District
Judge.

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without
oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Larry Burns, U.S. District Judge for the Southern
District of California, sitting by designation.

Appellant Lloyd Shaw (Shaw) was terminated from employment with the State of Nevada. A Nevada Personnel Commission hearing officer upheld his termination, but Shaw did not appeal this ruling. He then filed a federal action alleging that he was terminated in retaliation for his speech and because of his disability. The district court denied Shaw's motion for partial summary judgment, concluding that his claim was precluded.

1. Here, as in *Dias v. Elique*, 436 F.3d 1125, 1127-28 (9th Cir. 2006), the hearing officer found that substantial evidence supported the State's decision to terminate Shaw. The district court correctly determined that issue preclusion does not bar Shaw's 42 U.S.C. § 1983 action because the hearing officer based his decision on a finding of substantial evidence, and § 1983 claims require a different standard of proof—preponderance of the evidence. *See Littlejohn v. United States*, 321 F.3d 915, 924 (9th Cir. 2003) (explaining that differences in the burden of proof prevent application of issue preclusion).

2. Shaw's § 1983 claim is barred by claim preclusion because it raised the same issue as his termination appeal, and the termination appeal was a final judgment on the merits to which he was a party. *See Holcombe v. Hosmer*, 477

F.3d 1094, 1099 (9th Cir. 2007). Shaw could have raised his First Amendment rights before the hearing officer or in state court. *See id.*; *see also* Nev. Rev. Stat. § 233B.135(3)(a). Claim preclusion bars litigation of those claims in a different forum. *See Olson v. Morris*, 188 F.3d 1083, 1086-87 (9th Cir. 1999), *as amended* (concluding that appellant was precluded from relitigating his constitutional defenses in a federal action challenging a state administrative determination).

AFFIRMED.