IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIC ROCKWELL, AN INDIVIDUAL,
Appellant,
vs.
RICHARD KIRKLAND, INDIVIDUALLY; DENNIS BALAAM, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF WASHOE COUNTY; AND WASHOE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,
Respondents.

No. 43570

FILED

FEB 16 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting, on remand,[1] a motion for summary judgment in a civil rights action. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

This court reviews an order granting summary judgment de novo, without deference to the lower court's findings.[2] Summary judgment will be upheld on appeal only when, after reviewing the record in a light most favorable to the appellant, there remain no issues of material fact and respondent is entitled to judgment as a matter of law.[3]

Appellant Eric Rockwell argues that the district court erred in finding that fellow officer Strahan's civil rights action did not touch on a

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[1]Rockwell v. Kirkland, Docket No. 37453 (Order Affirming in Part, Reversing in Part and Remanding, July 10, 2002).

[2]Wood v. Safeway, Inc., 121 Nev. ___, ___, 121 P.3d 1026, 1029 (2005).

[3]Id.

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matter of public concern. Alternatively, Rockwell suggests that First Amendment retaliation actions under the association clause may not require a showing that the association concerned a matter of public concern. Rockwell further argues that he did in fact participate in Strahan's lawsuit, through both his statements to department investigators and his listing as a witness for Strahan.

The respondents contend that the district court correctly found that Rockwell was not entitled to protection under the First Amendment since no such violation was found in Strahan's underlying case. Further, respondents claim that Rockwell did not participate in Strahan's lawsuit, but only in the internal department investigation of Strahan, and was therefore not entitled to First Amendment protection.

42 U.S.C. section 1983 permits redress by any citizen of the United States for a deprivation of Constitutional rights. The First Amendment protects a public employee who seeks such redress through litigation against his public employer, assuming that the litigation touches on a matter of public concern.[4] This same protection applies to an employee who aids another's litigation against a public employer.[5]

An employee seeking such protection must show that (1) the expressive conduct touched on a matter of public concern, (2) the employer took an adverse action against the employee, and (3) the expressive

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[4]Rendish v. City of Tacoma, 123 F.3d 1216, 1220-21 (9th Cir. 1997); Connick v. Myers, 461 U.S. 138, 142-45 (1983).

[5]Alpha Energy Savers, Inc. v. Hansen, 381 F.3d 917, 923-26 (9th Cir. 2004).

conduct was a substantial or motivating factor for the employer's adverse action.[6]

The public employer can escape liability if it demonstrates either that legitimate administrative interests in efficiency and avoiding workplace disruptions outweigh the employee's protected interests,[7] or that the same adverse action would have been taken regardless of the employee's expressive conduct.[8]

Here, although Strahan did not prevail on his claim of a violation of his expressive rights under the First Amendment, the United States District Court for the District of Nevada expressly found that Strahan's lawsuit touched on a matter of public concern. The court also found that Strahan did not prove the requirement that his protected associations played a substantial or motivating factor in the adverse actions taken against him, and thus found no violation of Strahan's constitutional right of association. Those findings were affirmed by the Ninth Circuit Court of Appeals.[9] We conclude, therefore, that the district court erred in presuming that the finding of no constitutional violation equated to a finding that Strahan's action was just a dispute between an employee and his employer.

We further conclude that since Strahan's action was determined, as a matter of law, to touch on a matter of public concern,

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[6]Id. at 923.

[7]Id. (citing Pickering v. Bd. of Educ., 391 U.S. 274 (1968)).

[8]Id. (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

[9]Strahan v. Kirkland, 287 F.3d 821, 825-27 (9th Cir. 2002).

Rockwell's participation in and support of Strahan's position is protected expressive conduct. Although Rockwell's participation in Strahan's action was limited to several statements made to department investigators, we conclude that this, along with Rockwell's knowledge that he might have been called as a witness in Strahan's action, was sufficient to invoke the protections of the First Amendment.

The district court made no further inquiry into the other required findings for determining a violation of Rockwell's constitutional rights. Additionally, the respondents did not present any evidence to show that administrative efficiency outweighed Rockwell's rights, or that they would have taken the same adverse actions regardless of Rockwell's participation in Strahan's case. Therefore, summary judgment is inappropriate here, unless the respondents are entitled to qualified immunity.

Rockwell cites no law, but contends that since the Ninth Circuit mentioned in a footnote that Strahan's right not to be disciplined for protected associations was clearly established before any investigation was begun by the department,[10] that finding applies to Rockwell as well, and that therefore the respondents deserve no qualified immunity.

The respondents contend that Rockwell's admission in his deposition that he knew very little about Strahan's lawsuit, taken with the Ninth Circuit's affirmance in the Strahan case, shows that the respondents did not violate Rockwell's constitutional associational rights in connection with his alleged assistance in Strahan's lawsuit. Thus, the

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[10]Id. at 827 n.2.

respondents argue, they are entitled to qualified immunity, since no constitutional violation occurred.

In determining qualified immunity in such cases, the pertinent inquiry is whether the public employer's conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known."[11]

The district court here simply declared that the respondents' "conduct did not violate clearly established statutory or constitutional rights," and thus held that qualified immunity applied. The district court apparently based this on its finding that Rockwell failed to show that Strahan's litigation touched on a matter of public concern.

Based on our earlier conclusion that the district court erred in finding that Strahan's litigation did not touch on matters of public concern, we conclude that the district court similarly erred in granting qualified immunity to respondents. The litigation of Strahan, which Rockwell supported and at least minimally participated in, did touch a matter of public concern, as a matter of law determined by the federal courts. The district court, prior to granting qualified immunity, must determine if the constitutional rights implicated by Rockwell's claim of retaliation were clearly established, and if a reasonable employer would have known of those rights, before any of the allegedly adverse actions were taken against Rockwell.

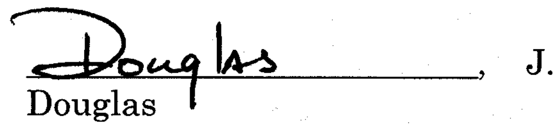
At the time the events of this action were taking place, the Ninth Circuit Court of Appeals had not yet extended First Amendment

[11]Ortega v. Reyna, 114 Nev. 55, 59, 953 P.2d 18, 21 (1998) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

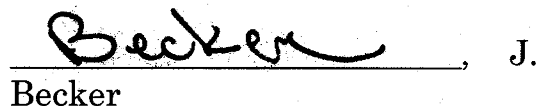
protections under Connick to employees for their assistance in the litigation of a co-worker against a public employer. In 2004, the Ninth Circuit joined several other circuits in holding that "witnesses are treated the same as parties for the purposes of the public concern analysis."[12] Therefore, the respondents in this case could not have reasonably been expected to know at the time that Rockwell's support for Strahan's lawsuit was protected expressive conduct.

Therefore, we conclude that summary judgment is appropriate here, since the respondents are entitled to qualified immunity. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_______________, J.
Douglas



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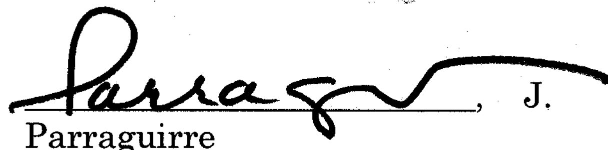

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Parraguirre

cc: Hon. Steven R. Kosach, District Judge
Jeffrey A. Dickerson
Washoe County District Attorney Richard A. Gammick /Civil Division
Washoe District Court Clerk

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[12]Alpha Energy Savers, 381 F.3d at 927 n.6.