

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. 37453

FILED

JUL 10 2002

[Signature]
JANET W. BLUM
CLERK OF SUPREME COURT
PROPERTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

Appellant Eric Rockwell appeals from an order dismissing his complaint for failure to state a claim. Rockwell filed a complaint against respondents Richard Kirkland, Dennis Balaam, and Washoe County, alleging two claims for relief, a civil rights claim and a breach of contract claim.

Shortly thereafter, respondents filed a motion to dismiss the complaint under NRCP 12(b)(5). The district court granted respondents' motion, concluding that Rockwell's exclusive remedy was in the grievance/arbitration procedure established by the collective bargaining agreement between the Washoe County Sheriff's Deputies Association, Rockwell's bargaining unit, and Washoe County. On appeal, Rockwell challenges the district court's dismissal, arguing that he stated a cognizable claim under 42 U.S.C. § 1983 for violation of the Due Process Clause of the Fourteenth Amendment and for violation of the First Amendment. We conclude that Rockwell's contentions on appeal lack

merit, except one—Rockwell states a cognizable claim under section 1983 for violation of the First Amendment, where he alleges that respondents violated his right to freedom of association.

First, Rockwell contends that the district court misinterpreted his claim as one of procedural due process. Rockwell asserts that he has stated a claim under section 1983 for violation of his substantive due process rights, rather than procedural due process rights. We disagree. Rockwell's substantive due process claim, although advanced under a different rubric, really raises a procedural due process claim, if any claim is to be recognized, because the thrust of his complaint is that the respondents' actions against him were wrongful.¹

On that note, we conclude that Rockwell has failed to state a cognizable claim under section 1983 for violation of his property and liberty interest in his job without due process. Even assuming that respondents deprived Rockwell of his property and liberty interest, we

¹See Harrah Independent School Dist. v. Martin, 440 U.S. 194, 198 (1979) (noting that substantive due process denotes freedom of choice with respect to certain matters of procreation, marriage, and family life); see also McKinney v. Pate, 20 F.3d 1550, 1556-61 (11th Cir. 1994) (holding that employees may state a cause of action under § 1983 premised only on procedural due process); Charles v. Baesler, 910 F.2d 1349, 1354 (6th Cir. 1990) (holding that most state-created contractual employment rights do not rise to the level of "fundamental" rights protected by substantive due process); Reich v. Beharry, 883 F.2d 239, 243-44 (3d Cir. 1989) (noting that what constitutes a property interest in the procedural context might not constitute one in that of substantive due process); Brown v. Brienen, 722 F.2d 360, 367 (7th Cir. 1987) (recognizing that contractual rights receive only procedural due process protection).

conclude that the grievance/arbitration procedure is an adequate procedural protection, and thus consistent with due process.²

Rockwell next contends that has stated a claim under section 1983 for violation of the First Amendment. Under this claim, Rockwell first alleges that respondents retaliated against him after he submitted a grievance regarding his letter of reprimand. Notably though, "speech focused solely on internal policy and personnel grievance does not implicate the First Amendment."³ Based on this, we conclude that Rockwell's personal grievance does not implicate the protections of the First Amendment.

Rockwell also alleges that respondents violated his right to freedom of association. In particular, Rockwell alleges that respondents retaliated against him because he was listed as a witness in John Strahan's civil rights lawsuit. The First Amendment protects an employee who seeks redress through litigation against his public employer, assuming the litigation touches on a matter of public concern.⁴ This same protection applies to an employee who aids the litigation against his public employer.⁵ We conclude that Rockwell's aiding of Strahan in his civil

²See Hufford v. McEnaney, 249 F.3d 1142, 1150 (9th Cir. 2001) (noting that in a procedural due process claim the plaintiff must establish that he was denied adequate procedural protections).

³Hyland v. Wonder, 972 F.2d 1129, 1137 (9th Cir. 1992).

⁴See Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989).

⁵See, e.g., Bates v. Hunt, 3 F.3d 374, 378 (11th Cir. 1993) (noting that the First Amendment protects an employee, under some circumstances, when an employee sues or aids in litigation against his
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rights lawsuit, assuming that this lawsuit is not just a dispute between one employee and his employer about internal office matters, may touch a matter of public concern.

If a matter of public concern is recognized, it will be necessary to balance it against the employer's interest in administrative efficiency.⁶ It is improper to resolve the balancing inquiry at such an early stage in the proceedings; and thus, we remand this case to the district court for resolution of this issue.⁷ Accordingly, we conclude that Rockwell states a cognizable claim under section 1983 for violation of his First Amendment right of association.

. . . continued

public employer); Langley v. Adams County, Colo., 987 F.2d 1473, 1479 (10th Cir. 1993) (noting that the First Amendment protects the right to testify truthfully at trial); Marshall v. Allen, 984 F.2d 787, 795-96 (7th Cir. 1993) (concluding that First Amendment protections apply when aiding plaintiffs in a lawsuit that involves a matter of public concern); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1576-78 (5th Cir. 1989) (upholding the district court's conclusion that the employer retaliated against the employee who testified at a co-employee's EEO hearing).

⁶See Pickering v. Board of Education, 391 U.S. 563, 568 (1968) (stating that if the employee's speech involves a matter of public concern then the court must apply a balancing test to determine whether the interests of the employee in commenting on matters of public concern outweigh the interests of the employer "in promoting the efficiency of the public services it performs through its employees").

⁷See Hyland, 972 F.2d at 1140 (balancing inquiry premature where the district court dismissed complaint for failure to state a claim).

In their answering brief, respondents argue that they are immune from suit in state court under section 1983.⁸ Respondents base their argument both on state immunity and on qualified immunity grounds. Regarding their state sovereign immunity argument, we have previously stated that immunity afforded under NRS 41.032 is a defense to claims made under state law, but is not a defense to federal civil rights claims under section 1983.⁹ On the other hand, qualified immunity is a defense under section 1983.¹⁰ However, we conclude that this inquiry is not appropriate on a motion to dismiss.¹¹

In summary, we conclude that Rockwell fails to state a claim under section 1983 for violation of his due process rights and for violation of his First Amendment right to grieve. However, we conclude that Rockwell has stated a cognizable claim under section 1983 for violation of his First Amendment right of association. Accordingly we,

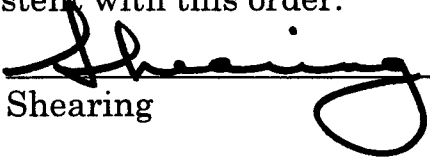
⁸Respondents also allege that Rockwell failed to allege personal participation by the respondents. We conclude that respondents' contention lacks merit.

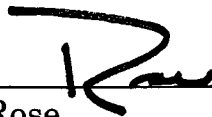
⁹See Ortega v. Reyna, 114 Nev. 55, 62, 953 P.2d 18, 23 (1998).

¹⁰See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (providing that public officers "performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

¹¹See Ortega, 114 Nev. at 60, 953 P.2d at 21 (noting that the court must determine whether respondents could have believed that their conduct was unlawful in light of clearly established law and the totality of the circumstances).

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

 _____, J.
Shearing

 _____, J.
Rose

 _____, J.
Becker

cc: Hon. Steven R. Kosach, District Judge
Jeffrey A. Dickerson
Washoe County District Attorney
Washoe District Court Clerk