



1 internal complaint with NDOT and was allegedly told that she had “no case” and there was no  
2 problem with Peacock’s conduct. Plaintiff was told by another NDOT supervisor that Peacock  
3 was trying to get Plaintiff terminated and that Taylor had reassigned Plaintiff as retaliation for  
4 complaining about Peacock’s behavior.

5 Plaintiff filed a complaint with her union, the AFSCME Local Union No. 4041 (“Union”)  
6 and her claims were investigated by the Director of NDOT, Defendant Martinovich, who found  
7 no wrongdoing. Plaintiff asserts that, after making her complaints, she has “been without the  
8 proper job duties and her ability to continue her employment and be eligible for promotions  
9 is in jeopardy.” Plaintiff believes Defendants’ actions were in retaliation for her “exercising her  
10 First Amendment rights to freedom of association of being a union member.”

11 Plaintiff initiated this lawsuit on October 2, 2009, seeking damages for gender  
12 discrimination and hostile work environment under Title VII of the Civil Rights Act of 1964 and  
13 First Amendment retaliation under 28 U.S.C. § 1983. Defendants move to dismiss Plaintiff’s  
14 claims pursuant to Federal Rule of Civil Procedure 12(b)(6).

## 15 II. ANALYSIS

### 16 A. Standard of Review

17 The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency  
18 of the complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal under Rule  
19 12(b)(6) is proper when a complaint exhibits either a “lack of a cognizable legal theory or the  
20 absence of sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica  
21 Police Dept., 901 F.2d 696, 699 (9th Cir. 1988). The Court must accept as true all material  
22 allegations in the complaint as well as all reasonable inferences that may be drawn from such  
23 allegations. LSO, Ltd. v. Stroh, 205 F.3d 1146, 1150 (9th Cir. 2000). The Court must also  
24 construe the allegations of the complaint in the light most favorable to the nonmoving party.  
25 Shwarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000). Accordingly, the Court may only  
26 grant a motion to dismiss under Rule 12(b)(6) if it is certain that the plaintiff will not be entitled  
27 to relief under any set of facts that could be proven under the allegations of the complaint.  
28 Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 338 (9th Cir. 1996).

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1 **B. Plaintiff's Title VII Claim**

2 Plaintiff alleges that she was subjected to conduct by the individual defendants that  
3 supports her Title VII claim of gender discrimination and hostile work environment. Title VII  
4 imposes liability only on employers, not on individual employees. See Miller v. Maxwell's Int'l  
5 Inc., 991 F.2d 583, 587-88 (9th Cir. 1993); see also Craig v. M & O Agencies, Inc., 496 F.3d  
6 1047, 1053 (9th Cir. 2007) (noting that the Ninth Circuit has "long held that Title VII does not  
7 provide a separate cause of action against supervisors or co-workers"). Consequently,  
8 individual employees, even if they are managers or supervisors, cannot be held personally  
9 liable under Title VII. Miller, 991 F.2d at 588. Accordingly, to the extent Plaintiff's Title VII  
10 claim is asserted against the individual defendants, the claim must be dismissed for failure to  
11 state a claim.

12 Defendants argue that the facts alleged in Plaintiff's complaint are insufficient to  
13 support her gender discrimination/hostile work environment claim against NDOT. A hostile  
14 environment sexual harassment claim has three elements: (1) the plaintiff must show "he or  
15 she was subjected to sexual advances, requests for sexual favors or other verbal or physical  
16 conduct of a sexual nature, (2) that this conduct was unwelcome, and (3) that the conduct was  
17 sufficiently severe or pervasive to alter the conditions of the victim's employment and create  
18 an abusive working environment." Fox v. Sierra Development Co., 876 F.Supp. 1169, 1172  
19 (D.Nev. 1995) (quoting Ellison v. Brady, 924 F.2d 872, 875 (9th Cir. 1991)).

20 The facts alleged in support of Plaintiff's Title VII claim are insufficient to survive a  
21 motion to dismiss. Plaintiff maintains that her claim is viable because she provided "detailed  
22 facts of what went wrong, of how Plaintiff complained about Defendant Peacock's sexual  
23 harassment and hostile treatment of women, and how she was retaliated against." (Opp. (#8),  
24 p. 3). However, the only relevant allegation contained in the complaint is a the general claim  
25 that Defendant Peacock was "verbally abusive and aggressive toward female employees."  
26 Plaintiff's vague allegations are insufficient to support a finding that the alleged conduct was  
27 sufficiently severe or pervasive to have altered the conditions of Plaintiff's employment and  
28 to have created an abusive working environment. As currently alleged, Plaintiff's Title VII

1 claim against NDOT must be dismissed. However, because amendment could cure the  
2 deficiencies of the claim, the Court grants Plaintiff leave to amend it.

3 **C. Plaintiff's First Amendment Retaliation Claim Under 42 U.S.C. § 1983**

4 Plaintiff alleges a claim under 42 U.S.C. § 1983 against all Defendants. The essence  
5 of Plaintiff's section 1983 claim is that she was retaliated against for exercising her First  
6 Amendment rights of free speech and association based on her union affiliation. The  
7 constitutional right to association extends to unions as well as its members and organizers.  
8 Allen v. Medrano, 416 U.S. 802, 819 n.13 (1974). In a First Amendment retaliation claim, a  
9 plaintiff must show that (1) she engaged in protected association; (2) Defendants took an  
10 adverse employment action against her; and (3) her association was a substantial or  
11 motivating factor for the adverse employment action. Hudson V. Craven, 403 F.3d 691, 695  
12 (9th Cir. 2005).

13 1. Eleventh Amendment Immunity

14 As a threshold matter, Plaintiff's section 1983 claim against NDOT is barred by the  
15 Eleventh Amendment of the United States Constitution.<sup>1</sup> The Eleventh Amendment bars suits  
16 against the State or its agencies for all types of relief, absent unequivocal consent by the  
17 state. Romano v. Bible, 169 F.3d 1182, 1185 (9th Cir. 1999). Nevada has not consented to  
18 suit by expressly waiving its Eleventh Amendment immunity. NRS § 41.031(3). NDOT, as a  
19 state agency, is therefore shielded from section 1983 liability under the Eleventh Amendment.  
20 See Stivers v. Pierce, 71 F.3d 732, 749 (9th Cir. 1995) (section 1983 does not abrogate  
21 Eleventh Amendment immunity against a state). The Eleventh Amendment also bars  
22 Plaintiff's section 1983 claim against the individual defendants in their official capacities. See  
23 Aholelei v. Dep't of Public Safety, 488 F.3d 1144, 1147 (9th Cir. 2007) ("The Eleventh  
24 Amendment bars suits for money damages in federal court against a state, its agencies, and  
25 state officials acting in their official capacities."); Romano, 169 F.3d at 1185. Accordingly,

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28 <sup>1</sup> It is not clear that Defendants' Eleventh Amendment argument is confined to Plaintiff's First Amendment claim. However, to the extent Defendants challenge Plaintiff's Title VII claim, this claim is not barred by sovereign immunity. See Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 973 (9th Cir. 2004) (noting that Congress has abrogated Eleventh Amendment immunity with respect to Title VII claims).

1 Defendants' motion to dismiss is granted with respect to Plaintiff's section 1983 claim for  
2 damages against NDOT and against the individual defendants in their official capacities.

3 2. Liability of Individual Defendants Under § 1983

4 The caption to this action indicates that Plaintiff has brought suit against the individual  
5 defendants in their individual capacities as well. The Eleventh Amendment does not bar suits  
6 against state officials in their individual capacities. Stivers, 71 F.3d at 749. Section 1983  
7 liability attaches to a public officer in his individual capacity if the plaintiff is able to show that  
8 the official acted under color of state law in deprivation of a federal right. Romano, 169 F.3d  
9 at 1185-86. In order to survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege facts  
10 suggesting that the defendants were acting under color of state law at the time of the alleged  
11 constitutional violation. See Gritchen v. Collier, 254 F.3d 807, 812 (9th Cir. 2001).

12 Plaintiff alleges she was "subject to disparate and discriminatory treatment" by  
13 Defendants and "said actions by Defendants were in retaliation for her exercising her First  
14 Amendment rights to freedom of association of being a Union member." These general  
15 allegations are insufficient to state a claim under Section 1983 because Plaintiff has failed to  
16 allege facts showing how Defendants individually deprived Plaintiff of her First Amendment  
17 rights, while acting under color of state law or authority. The complaint does not even contain  
18 the conclusory statement indicating that the individual Defendants were acting under "color  
19 of state law." Accordingly, Plaintiff's First Amendment retaliation claim against the individual  
20 Defendants is insufficiently pled. Defendants' motion to dismiss on this ground will be granted  
21 with leave to amend.

22 3. Qualified Immunity

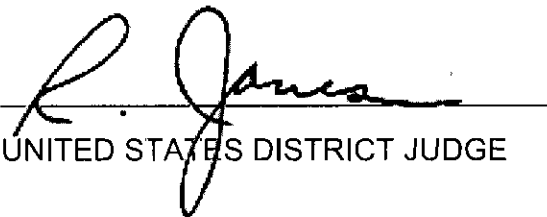
23 Defendants Martinovich, Taylor and Peacock argue that they are entitled to qualified  
24 immunity. Qualified immunity protects "government officials . . . from liability for civil damages  
25 insofar as their conduct does not violate clearly established statutory or constitutional rights  
26 of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818  
27 (1982). However, at this stage, a motion to dismiss on qualified immunity grounds places the  
28 Court in the difficult position of deciding "far-reaching constitutional questions on a non-

1 existent factual record.” See Kwai Fun Wong v. United States, 373 F.3d 952, 957 (9th Cir.  
2 2004). Although government officials have the right to raise qualified immunity on a motion to  
3 dismiss, it is not necessarily advisable in every case. Id.; Morley v. Walker, 175 F.3d 756, 761  
4 (9th Cir. 1999) (holding that, “in light of the fact that all allegations in the complaint must be  
5 regarded as true on a motion to dismiss, dismissal on qualified immunity grounds for failure to  
6 state a claim under 12(b)(6) is inappropriate.”). As such, Defendants’ motion to dismiss on the  
7 basis of qualified immunity is denied, without prejudice to renew the motion on this basis at a  
8 later time.

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10 **III. CONCLUSION**

11 For the foregoing reasons, IT IS HEREBY ORDERED that the Motion to Dismiss (#6)  
12 is GRANTED IN PART and DENIED IN PART. Plaintiff’s Title VII claim against the individual  
13 Defendants and First Amendment retaliation claim against NDOT are dismissed without leave  
14 to amend. Plaintiff’s Title VII claim against NDOT and First Amendment claim against the  
15 individual Defendants are dismissed without prejudice, with leave to file an amended complaint  
16 within 15 days of the date this Order is filed.

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20 DATED: This 15<sup>th</sup> day of July, 2010.

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UNITED STATES DISTRICT JUDGE