UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

ALBERT J. TURK, M.D. and SHELLEY TURK, R.N.	§	
Plaintiffs,	§	
	§	**C.A. No. 6:15-cv-231-RP**
v.	§	
	§	
SOMERVELL COUNTY HOSPITAL DISTRICT and RAY REYNOLDS, INDIVIDUALLY, AND IN HIS CAPACITY AS CHIEF EXECUTIVE OFFICER OF GLEN ROSE MEDICAL CENTER-SOMERVELL COUNTY HOSPITAL DISTRICT	§	
Defendants.	§	

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE ROBERT PITMAN, UNITED STATES DISTRICT JUDGE

This Report and Recommendation is submitted to the Court pursuant to 28 U.S.C. § 636(b)(1)(c) and Rules 1(d) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. This Court has jurisdiction to review the Plaintiff's claims pursuant to 23 U.S.C. § 1331.

Pending before the Court is Somervell County Hospital District's and Ray Reynold's ("Defendants") Motion for Summary Judgment as to Plaintiff Albert Turk's claims. ECF No. 87. Defendants' Motion seeks to dismiss all three of the claims in Albert Turk's Third Amended Complaint, hereinafter "Pl.'s Compl." Pursuant to Federal Rule of Civil Procedure 56, the undersigned **RECOMMENDS** that Defendants' Motion for Summary Judgment (ECF No. 87)

be **DENIED** as to Albert Turk's claims against Somervell County Hospital District and Ray Reynolds.

I. FACTUAL and PROCEDURAL BACKGROUND

The instant action is a civil rights suit filed pursuant to 42 U.S.C. § 1983. Albert Turk and Shelly Turk allege that the defendants violated their First Amendment right to free speech and to petition the government for redress of grievances, as well as violations of the Texas Constitution. Albert Turk also alleges that the defendants violated his Fourteenth Amendment right to due process. Defendants have filed separate motions for summary judgment as to Albert Turk's and Shelly Turk's claims. As such, the Court will address Albert Turk's claims in the instant Report and Recommendation, and Shelly Turk's in another.

Plaintiff Albert J. Turk is a physician who worked at the Glen Rose Medical Center, a hospital in Glen Rose, Texas. The hospital is owned and operated by Defendant Somervell County Hospital District ("SCHD"), a statutorily-authorized local government entity created to generate tax revenue and provide health care services to county residents. Dr. Turk entered into an employment contract with Glen Rose Healthcare, Inc., a Texas non-profit corporation and an apparent subsidiary of SCHD that employs and supplies doctors to SCHD's hospital. This employment arrangement is common in Texas due to statutory restrictions on corporate employment of licensed physicians. It is helpful to note that neither plaintiff has sued the non-profit entity, and the non-profit is not a party to this action. Plaintiffs have instead sued SCHD and Ray Reynolds, the CEO of SCHD and Glen Rose Medical Center. The Court will address those claims in greater detail below.

During their employment, Dr. Albert Turk and his wife, nurse Shelley Turk, publically and privately spoke out about management and patient-care problems they perceived at Glen

Rose Medical Center. Pl.'s Compl. ¶ 10. Plaintiffs submitted written and oral complaints to: the board of trustees of the Somervell County Hospital District, the Glen Rose Medical Center Hospital Staff Committee, the Texas Department of State Health Services, and a local personal blog. *Id.* at ¶ 10. Defendants filed complaints concerning Shelley and Albert Turk's professional conduct with the Texas Board of Nursing and the Texas Medical Board, respectively. *Id.* at ¶ 16; Ex. A; Ex. B. Plaintiffs submitted three complaints to SCHD: (1) a complaint concerning alleged retaliatory treatment against Shelley Turk on September 5, 2014, (2) a complaint concerning Dr. Turk's removal from the Medical Executive Committee at Glen Rose Medical Center on January 6, 2015, and (3) a complaint addressing the Texas Board of Nursing complaint filed by Somervell County on January 18, 2015. *Id.* at ¶ 22. Dr. Turk also presented a grievance to Defendant Ray Reynolds on September 10, 2015, concerning how his practice was moved across the street to a suite without a treatment room. *Id.* On May 28, 2015, a meeting of the board of trustees of Somervell County Hospital District convened with an agenda item labeled "Executive Closed Session- Physician Employment Agreement." *Id.* at ¶ 13. The notice for the executive session read:

> The Somervell County Hospital District will convene in Executive Session pursuant to Section 551.074 of the Texas Government Code to discuss personnel matters related to the possible termination of an employment agreement under Glen Rose Healthcare, Inc. and pursuant to Section 551.071 of the Texas Government Code to discuss with its attorney, either in person or by telephone, the same matters and pursuant to Section 161.032 of the Texas Health and Safety Code to discuss quality of care related issues.

Id. at ¶ 13.

Plaintiff alleges that Defendants' counsel informed Dr. Turk that he was the subject of this meeting, but Defendants deny this. *Id.* at ¶ 14; Def.'s Answer at ¶ 14. The board announced on the same day that they would take "no action" on the agenda item. Pl.'s Compl. at ¶ 16. The

Texas Medical Board dismissed the aforementioned investigation filed by Defendants into Dr. Turk due to lack of evidence on August 28, 2015, and the Texas Board of Nursing dismissed its aforementioned investigation into Shelley Turk on August 24, 2015. *Id.* Plaintiffs allege that Defendants either dismissed, or did not address, the three aforementioned grievances submitted by Plaintiffs in 2014 and 2015. *Id.* at ¶ 22. Non-profit Glen Rose Health Care, Inc. notified Plaintiff Dr. Turk that it would not renew his employment contract effective September 1, 2016. Dr. Turk claims that the non-renewal was retaliation for his and his wife's criticism of hospital mismanagement. *Id.* at ¶ 4. Defendant SCHD, which directly employed Plaintiff Shelley Turk, terminated her employment in June of 2015. *Id.* at ¶ 9. She, too, claims that her termination was retaliatory.

Dr. Turk and Shelley Turk bring three claims pursuant to the U.S. Constitution and Article I, Sections 19 and 27 of the Texas Constitution: (1) Defendants violated Plaintiffs' protected speech rights by allegedly suppressing complaints about the hospital's management by taking action to terminate both Plaintiffs, (2) that Defendants did not afford Dr. Turk due process in violation of the Fourteenth Amendment by excluding him from a hospital board of directors executive session allegedly concerning his employment contract, and (3) that Defendants systematically denied Plaintiffs the right to petition the government for redress of grievances. Pl.'s Compl. ¶¶ 25, 26, 28.

Plaintiffs filed their original complaint on August 6, 2015. ECF No. 1. They filed their First Amended Complaint on November 13, 2015. ECF No. 18. Plaintiffs filed a Second Amended Complaint on January 20, 2016. ECF No. 34. On May 4, 2016, the Court partially granted Defendants' Motion to Dismiss.[1] ECF Nos. 21, 47. Plaintiffs filed their Third Amended

[1] The Court dismissed Plaintiff's claim that the defendants violated the Texas Open Meetings Act. Plaintiff's § 1983 claims survived because in determining whether Plaintiff's complaints satisfied *Twombly* and *Iqbal* pleading

Complaint ("Pl.'s Compl.") on September 2, 2016. ECF No. 61. Defendants filed separate Motions for Summary Judgment as to Albert Turk's and Shelly Turk's claims on August 31, 2017. ECF Nos. 87, 88. Plaintiffs responded to the Motions on October 9, 2017. ECF Nos. 94, 95. Defendants replied November 2, 2017. ECF Nos. 100, 101. Again, because Shelley Turk's claims differ from those of Dr. Turk, Defendants' Motion for Summary Judgment as to Plaintiff Shelley Turk's claims will be discussed in a separate Report and Recommendation.

II. RELEVANT LAW

A. Federal Rule of Civil Procedure 56

Summary judgment is appropriate only if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). The party seeking summary judgment bears an exacting burden of demonstrating that there is no actual dispute as to any material fact in the case. *Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982).

In determining whether the movant has met his burden, the court must view the evidence presented and all factual inferences from the evidence in the light most favorable to the party opposing summary judgment. *See id.* at 1031. All reasonable doubts as to the existence of a genuine issue of material fact must be resolved against the movant. *Id.*; *Jones v. Western Geophysical Co.*, 669 F.2d 280, 283 (5th Cir. 1982). When determining whether to grant summary judgment, the court is merely determining whether a factual dispute exists and is not required to resolve those disputes. *See id.* at 283. The fact that it appears to the court that the

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standards, the Court had to "accept as true the factual allegations contained in the complaint." ECF No. 47 at 11. However, in evaluating Defendants' Motion for Summary Judgment, this Court must look beyond procedural pleading standards and to the substance of non-movant's "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex,* 477 U.S. 317.

non-movant party is unlikely to prevail at trial or that the movants statement of facts appears more plausible is not a reason to grant summary judgment. *See id.*

Once the movant has shown the absence of material fact issues, the opposing party has a duty to respond with any factual assertion that would preclude summary judgment. *See Cleckner v. Republic Van & Storage Co.*, 556 F.2d 766, 771 (5th Cir. 1977). Rule 56(e) of the Federal Rules of Civil Procedure provides that if a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

> (1) give an opportunity to properly support or address the fact;
> (2) consider the fact undisputed for purposes of the motion;
> (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
> (4) issue any other appropriate order.

FED. R. CIV. P. 56(e).

In this respect, the burden on the non-moving party is not especially heavy; however, he must show specific facts that present a genuine dispute as to any material fact worthy of trial rather than showing mere general allegations. *See Gossett v. Du-Ra-Kel Corp.*, 569 F.2d 869, 872 (5th Cir. 1978).

B. 42 U.S.C. § 1983

Title 42 U.S.C. § 1983 creates a cause of action against any person who, under color of law, causes another to be deprived of a federally protected constitutional right. 42 U.S.C. § 1983 (2012). Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress . . . .

Id.

Section 1983 was promulgated to prevent a government official's "[m]isuse of power, possessed by virtue of state law and made possible only because the [official] is clothed with the authority of state law." *Johnston v. Lucas*, 786 F.2d 1254, 1257 (5th Cir. 1986); *Whitley v. Albers*, 475 U.S. 312 (1986) (Eighth Amendment); *Davidson v. Cannon*, 474 U.S. 344 (1986) (Fourteenth Amendment); *Daniels v. Williams*, 474 U.S. 327 (1986) (Fourteenth Amendment). However, § 1983 does not grant a cause of action for every action taken by a state official. *Whitley*, 475 U.S. at 319.

Two allegations are required in order to state a cause of action under 42 U.S.C. § 1983. "First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Manax v. McNamara*, 842 F.2d 808, 812 (5th Cir. 1988).

III. DISCUSSION

A. State action

Plaintiff alleges that nonprofit Glen Rose Health Care, Inc. did not renew his employment contract because Defendants SCHD and Ray Reynolds "took steps to terminate his employment" for speaking out about patient care problems at the hospital. Pl.'s Compl. ¶ 25-26. Again, Plaintiff did not sue Glen Rose Health Care, Inc. in this action. Defendants' Motion for Summary Judgment asserts that Dr. Turk's First and Fourteenth Amendment claims fail as a matter of law because there was no employment relationship between Dr. Turk and the defendants.

Defendants argue that Glen Rose Health Care, Inc. is a private, non-profit corporation[2] and SCHD is a governmental entity. ECF No. 87 at 9. They cite a well-established line of Fifth Circuit authority that disfavors various theories of joint employment, under which employees of private businesses attempt to sue a government entity that conducts business with their employer. ECF No. 87 at 8-10; *see, e.g., Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 344 (5th Cir. 2007). The court noted that the National Labor Relations Board created these theories of joint employment to aid the enforcement of the National Labor Relations Act ("NLRA") against separate, private corporations. *Trevino v. Celanese*, 701 F.2d 397, 404 n.10 (5th Cir. 1983).

These cases provide important guidance to defining employment relationships in Title VII cases, because (unlike 42 U.S.C. § 1983) Title VII generally limits liability to employers. *See Oden v. Oktibbeha Cnty*, 246 F.3d 458, 462 (5th Cir. 2001). Dr. Turk's action, however, is not a Title VII or an NLRA suit—he brings this action pursuant to 42 U.S.C. § 1983. In their motion, Defendants contend that there was no contractual employment relationship between the defendants and Dr. Turk under the above-mentioned theories of joint employment. Defendants conclude, therefore, the decision to not renew Dr. Turk's contract involved no state action, and summary judgment is appropriate. This is not the correct analysis for a case brought pursuant to 42 U.S.C. § 1983.

The Supreme Court addressed several of the correct guiding principles for § 1983 actions such as Dr. Turk's in *Rendell–Baker v. Kohn*, 457 U.S. 830 (1982). In that case, state law permitted a city and a state agency to refer delinquent high school students to a privately operated high school that specialized in educating such students. The school received extensive

[2] In the argument section of their Motion, Defendants characterize Glen Rose Healthcare, Inc. as a private, non-profit corporation. Defendants' Motion for Summary Judgment offers evidence, however, as to the character, structure, funding, and leadership of that entity. No corporate charter is offered in the summary judgment evidence, nor is a deposition or affidavit from a corporate representative offered to support Defendants' assertion as to the corporate character of Glen Rose Healthcare, Inc.

state funding and operated under state regulation. Counselors and teachers from the school privately and publically criticized the school's leadership and policies. In response to their criticism, the director of the school fired the plaintiffs. The terminated employees sued the director under 42 U.S.C. § 1983, alleging violations of their First and Fourteenth Amendment rights. Just as the plaintiffs in the instant action, the plaintiffs in *Rendell-Baker* did not claim discrimination in violation of Title VII or that their discharges were unfair under the National Labor Relations Act. Instead, they alleged that the defendants fired them (1) because they exercised their First Amendment right to free speech and (2) without their Fourteenth Amendment right to due process. *Id.* at 837. The defendants moved for summary judgment, arguing that there was an insufficient nexus between the school and the state to establish the requisite state action under § 1983.

The Court held that "The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?'" *Id.* at 838, citing *Lugar v. Edmondson Oil*, 457 U.S. 922, 937 (1982). "The core issue presented in this case is not whether petitioners were discharged because of their speech or without adequate procedural protections, but whether the school's action in discharging them can fairly be seen as state action. If the action of the respondent school is not state action, our inquiry ends." *Id.* at 838. The Court went on to apply various factors to the summary judgment evidence presented in that case, ultimately determining that the firings did not constitute state action under the facts of that case. *Id.* at 843.

The Supreme Court has created at least seven tests to determine when the conduct of a nominally private entity or person constitutes state action: (1) the Public Function Test, (2) the State Compulsion Test, (3) the Nexus Test, (4) the State Agency Test, (5) the Entwinement Test,

(6) the Joint Action / Symbiotic Relationship Test, and (7) the Joint Participation Test. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295-96 (2001); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (citing *Flagg Bros. v. Brooks*, 436 U.S. 149, 166 (1978); *Am. Mfrs. Mut. Ins. v. Sullivan*, 526 U.S. 40 (1999); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Jackson v. Metro. Edison*, 419 U.S. 345 (1974). By "sifting facts and weighing circumstances" in each case, a court deciding the state action question must distinguish the exercise of governmental power from benign or tangential government involvement. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

Notably absent from Defendants' Motion, however, is any discussion or application of the various tests promulgated by the Supreme Court. The Motion instead applies an incorrect legal standard, focusing narrowly on the existence of an employment relationship. As indicated above, the state action inquiry is a fact-sensitive and extraordinarily complex exercise. Defendants' Motion completely misses the broader inquiry mandated by the Supreme Court.

Moreover, Dr. Turk's response to the Motion points out that that the summary judgment evidence includes: (1) a deposition exhibit of an organizational chart showing non-profit Glen Rose Healthcare, Inc. as a subsidiary of Glen Rose Medical Center with Ray Reynolds as CEO of both, (2) deposition testimony of Ray Reynolds that money earned by physicians appears on the balance sheets of both Glen Rose Healthcare's financial statements and those of the hospital, (3) Reynolds' testimony that "money transfers back and forth" between the hospital and Glen Rose Healthcare, and (4) Dr. Turk's employment contract, signed by Ray Reynolds and Dr. Turk. Pl's Resp. at ¶¶ 16-19; Reynolds Dep. Ex. 1 SCHD 440; Reynolds Dep. 171:16-22, 172:11-19, 174:12-175:8; SCHD 251-264. Plaintiff's Response sufficiently identifies material questions of fact as to the existence of state action on the part of the defendants. Defendants'

burden in this Motion is to conclusively demonstrate the lack of state action on their part, not the lack of a Title VII employment relationship between Dr. Turk and the defendants. Because Defendants have failed to carry their burden under Rule 56, the Court should deny the Motion.

B. Statutory authority

Defendants also argue that SCHD did not employ Dr. Turk because SCHD is legally prohibited from employing physicians, pursuant to the Texas Administrative Code, Title 22 § 177.17. ECF No. 87 at 8; ECF No. 100 at 12-14. The code section at issue names hospital districts that are specifically authorized to employ physicians. *Id.* at § 177.17 (b)(3)-(19). Somervell County is not included in that list. *Id.* First, Defendants offer little discussion of the code provision and cite no summary judgment facts to support their argument, as required by FRCP 56 (c)(1)(A)-(B). Second, Defendants' argument begs the question by assuming that SCHD could not employ Dr. Turk because it was forbidden to do so by state law. Applying the same reasoning, Defendants could similarly conclude that they did not violate Dr. Turk's constitutional rights because they were forbidden from doing so by the U.S. Constitution.

Last, as required by Rule 56, Dr. Turk's response cites deposition testimony from Ray Richardson and former SCHD trustee Paul Harper that SCHD could directly hire physicians. ECF No. 93 at 10-11; citing Appx. 0023a-23b, Reynolds Dep. p. 40:19-41:4; Appx. 0055, Harper Dep. p. 26:7-9. Defendants' Motion fails to carry their burden under Rule 56(c)(1), and summary judgment is inappropriate.

C. Right to petition

As discussed on page 3 above, Plaintiffs claim that they publically and privately aired a number of complaints about the hospital and its management. The First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances." U. S. Const.

amend. I. The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression. In *United States v. Cruikshank*, 2 Otto 542, 92 U.S. 542 (1876), the Court declared that this right is implicit in "[t]he very idea of government, republican in form." *Id.* at 552.

Defendants' Motion for Summary Judgment asserts that the plaintiffs freely aired their complaints and that the defendants did nothing to infringe on Dr. Turk's constitutional right to petition. ECF No. 11-14. "The First Amendment right to associate and to advocate "provides no guarantee that a speech will persuade or that advocacy will be effective." *Smith v. Ark. Highway Emp. Local 1315*, 441 U.S. 463, 465 (1979) citing *Hanover Federation of Teachers v. Hanover Community School*, 457 F.2d 456 (1972). The First Amendment guarantees citizens the right to petition, but it does not create any "affirmative obligation" upon the government to acknowledge or respond to those petitions. *Smith v. Ark. Highway Emp. Local 1315*, 441 U.S. at 465.

When the government creates procedural requirements for processing grievances, however, it creates a procedural due process right that the government must obey. *Prof'l Assoc. of Coll. Educators v. El Paso Cmty. Coll. Dist.*, 730 F.2d 258, 263 (5th Cir. 1984). Where a government employer is required to process grievances, the refusal to process a grievance violates the First Amendment when the refusal is motivated by an intention to quash the speech. *Id.*

In the instant case, Plaintiff's Response to Defendants' Motion for Summary Judgment offers summary judgment evidence to support the following assertions: (1) The SCHD board of trustees required all grievances were to be handled by the board on a quarterly basis; (2) Plaintiff submitted grievances; (3) Defendant Reynolds repeatedly told board president Harrison "There were never any grievances filed at Glen Rose Medical Center."; (4) during the 24 months

Harrison served as president, no grievances were presented to the board; (5) board member Paul Harper also testified that the board did not consider any grievances while he served and attended meetings; (6) Paul Harper requested that Defendant Reynolds to produce "complaints by the Turks." On August 21, 2015, Reynolds responded and produced nothing. Chip Harrison Dep. p. 86:11-87:3; p. 88:21-89:3; Paul Harper Dep. p. 106:10-17; ; Paul Harper Dep. at Exh. 22.

Again, Rule 56 requires a non-movant to respond with any factual assertion that would preclude summary judgment. *See Cleckner v. Republic Van & Storage Co.*, 556 F.2d 766, 771 (5th Cir. 1977). Plaintiff's response identifies material questions of fact as to the defendants' conduct and motivation with regard to the processing of Plaintiff's grievances at the hospital. As such, summary judgment is inappropriate.

IV. CONCLUSION AND RECOMMENDATIONS

For the foregoing reasons, the undersigned **RECOMMENDS** that Defendants' Motion for Summary Judgement pursuant to Federal Rules of Civil Procedure Rule 56 (ECF No. 87) be **DENIED.**

The parties may wish to file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by

the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn,* 474 U.S. 140, 150-53 (1985); *Douglas v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc). To the extent that a party has not been electronically served by the Clerk with this Report and Recommendation pursuant to the CM/ECF procedures of this district, the Clerk is directed to send such a party a copy of this Report and Recommendation by a national overnight delivery service having confirmation of pickup and delivery.

SIGNED this 8th day of January, 2018.

JEFFREY C. MANSKE
UNITED STATES MAGISTRATE JUDGE