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**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
AS TO PLAINTIFF ALBERT J. TURK'S CLAIMS**

COME NOW Defendants Somervell County Hospital District (hereinafter "Somervell County") and Ray Reynolds, individually and in his capacity as Chief Executive Officer of Glen Rose Medical Center, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, submit their Motion for Summary Judgment as to Plaintiff Albert J. Turk's claims as follows:

I. SUMMARY

This is a wrongful termination and retaliation case. Plaintiff Albert J. Turk, M.D.'s ("Dr. Turk") claims center on the alleged violation of his constitutional rights. Specifically, Dr. Turk alleges Defendants violated the First Amendment and 42 U.S.C. § 1983 by not renewing his contract in retaliation for speaking out about what he perceived to be patient care issues. Dr. Turk also claims Defendants systematically denied his right to petition the government for redress of his grievances. More, Dr. Turk alleges his due course of law and due process rights were violated because Defendants "took steps to terminate [his] employment" and "provided him none of the fundamental elements of due process, in violation of the Fourteenth Amendment."

Importantly, Dr. Turk claims can only be brought against his *actual employer* that is a governmental entity. Dr. Turk is not employed by Somervell County or any governmental entity. Pursuant to his employment contract, Dr. Turk is employed by Glen Rose Healthcare, Inc., a Texas nonprofit corporation. More, it is well settled that a *governmental entity cannot be (or deemed to be) a joint employer with a non-public entity*. Thus, under no circumstances can Dr. Turk be considered an employee of Somervell County Hospital District ("Somervell County"). Since Dr. Turk is not an employee of a governmental entity, he is not entitled to due process or due course of law, nor are his First Amendment claims valid.

More, in order to find that Dr. Turk was an employee of Somervell County, this Court would have to find Somervell County violated the law by employing Dr. Turk, violated the Corporate Practice of Medicine Doctrine, and specifically acted contrary to Texas law.

Accordingly, for the reasons set forth below, Defendants are entitled to summary judgment.

II. FACTUAL BACKGROUND¹

A. **Dr. Turk is Employed by Glen Rose Healthcare, Inc.**

Dr. Turk is employed by Glen Rose Healthcare, Inc. Complaint at ¶ Exhibit B - 2011 Contract at p. 1; Exhibit C - 2014 Contract, at p. 1. Specifically, Dr. Turk's employment agreement states "This Physician Employment Agreement ("the Agreement") is made and entered into by and between Glen Rose Healthcare, Inc. a Texas nonprofit corporation (the "Employer") and Albert J. Turk, M.D. (the "Physician") to be effective on the Employment Commencement Date (defined below)." *Id.* At all times, Dr. Turk was an employee of Glen Rose Healthcare, Inc. *Id.* Indeed, Dr. Turk testified his employment agreement is with Glen Rose Healthcare, Inc. and it is his employer. Exhibit D - Albert J. Turk Deposition Excerpts, at 67:21-68:1. Dr. Turk admitted he did not have a contract with Somervell County. Exhibit D at 71:18-20.

B. **Plaintiffs' Complaints and Grievances.**

Dr. Turk pled and testified that he filed several grievances, complaints and the instant lawsuit. Complaint at ¶ 10, 11, 22, 28; *see e.g.*, Exhibit D at 137:13-138:2, 184:25-5, 220:10-15, 225:10-13. He addressed his complaints with various individuals and agencies, including, but not limited to: Chip Harrison, Ray Reynolds, Ron Hankins, Somervell County Hospital Board, Dr. Peters, Dr. Davis, Dr. Surrat, Dr. Hutchison, Dr. Krzeminski, Dr. Krone, Dr. Vanden, Texas Department of State Health Services, Texas Ranger Stoner, Joint Commission, Texas Representative J. D. Sheffield, and Somervell County Sheriff's Office (Deputies). *See e.g.*, Exhibit D at 177:2-3, 177:11-178:5, 178:10-13, 205:3-6, 205:22, 225:18-19, 231:6-7, 231:14, 16-17, 19-21, 24. More, Dr. Turk acknowledges that no one prevented him from filing grievances

¹ Exhibits A through E are submitted through the appendix for the Court's convenience. Exhibit A authenticates Exhibits B and C.

(Exhibit D at 205:9-12, 206:2-6, 207:1-2), and no one prevented Plaintiffs from filing the instant lawsuit (Exhibit E – Shelley Turk Deposition Excerpts at 220:6-13, 17-20).

III. ARGUMENT AND AUTHORITIES

A. Standard of Review

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56. In determining whether the movant is entitled to summary judgment, the court views the facts in the light most favorable to the non-movant and draws all reasonable inferences in his favor. The party seeking summary judgment bears the burden of demonstrating an absence of evidence to support the non-movant’s case. If the movant correctly points to an absence of evidence to support the plaintiff’s claim on an issue as to which the plaintiff would bear the burden of proof at trial, then summary judgment should be granted to the movant, unless the non-movant can produce summary-judgment evidence sufficient to sustain a finding in plaintiff’s favor on that issue. *Kovacik v. Villareal*, 628 F. 3d 209, 212 (5th Cir. 2010). Thus, summary judgment is appropriate if the non-movant “fails to make a showing sufficient to establish the existence of an element essential to that party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

B. Dr. Turk’s First Amendment Claims (First and Fourth Claims for Relief) and Due Process and Court of Law (Second Claim for relief) Against Defendants Fail as a Matter of Law.

1. Glen Rose Healthcare, Inc. is Dr. Turk’s Employer, Not Somervell County.

Defendant Somervell County is not Dr. Turk’s employer. *See* Exhibit B. Dr. Turk is an employee of Glen Rose Healthcare, Inc. *Id.* Specifically, Dr. Turk entered into a physician

Employment Agreement with Glen Rose Healthcare, Inc. whereby Glen Rose Healthcare, Inc. “hereby employs the physician, and the physician hereby accepts employment with the employer...” *Id* at p. 1; Exhibit D at 67:21-68:1. Pursuant to this employment agreement, Dr. Turk is an employee of Glen Rose Healthcare, Inc., a Texas nonprofit corporation. *Id.* More, Dr. Turk admits he does not have a contract or employment agreement with Somervell County. Exhibit D at 71:18-20.

Importantly, Somervell County is prohibited by law from employing physicians, including Dr. Turk as it violates Texas’s prohibition on the corporate practice of medicine. *See Flynn Brothers, Inc. v. First Medical Associates*, 715 S.W.2d 782 (Tex. App 1986). Recently, the Texas Legislature acknowledged that there are some exceptions to this rule and specifically named hospital districts that are authorized to employ physicians – **Somervell County cannot employ physicians.** 22 TAC § 177.17.

2. Somervell County Cannot be a Joint Employer with Glen Rose Healthcare, Inc. Under Well-Established Law.

Dr. Turk entered into a Physician Employment Agreement with Glen Rose Healthcare, Inc., whereby Glen Rose Healthcare, Inc. “hereby employs the physician, and the Physician hereby accepts employment with the Employer...” *See* Exhibit B at p. 1; Exhibit D at 67:21-68:1.

Dr. Turk sued Somervell County for allegedly violating his constitutional rights and stated Somervell County is a joint employer with Glen Rose Healthcare, Inc. Complaint at ¶ 2. Regardless of any facts pled or testified to by Dr. Turk, the law does not permit Dr. Turk’s claims to proceed. First, as discussed above, Somervell County is prohibited by law from employing Dr. Turk. *See infra* III.B.i. Second, the Fifth Circuit has continuously held, since 1980, that the single employer, joint employer, and the integrated enterprise tests cannot be

applied to governmental entities like Somervell County. *See, e.g., Dumas v. Town of Mt. Vernon*, 612 F.2d 974, 979 n. 9 (5th Cir. 1980) (holding the joint employer test does not apply to municipal, county, and state defendants); *Trevino v. Celanese Corp.*, 701 F.2d at 403-04 (stating that the integrated enterprise or single employer test “is not readily applicable to governmental subdivisions”); *Karagounis v. University of Texas Health Science Center at San Antonio*, 168 F.3d 485, *2 (5th Cir. 1999) (holding that the joint employer theory, in addition to the single employer theory (as discussed in *Trevino*), cannot be applied to governmental subdivisions); *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 344 (5th Cir. 2007) (holding that “a government employer . . . may not be considered part of an integrated enterprise under the *Trevino* framework”); *Garrett–Woodberry v. Miss. Bd. of Pharmacy*, 300 Fed. Appx. 289, 291 (5th Cir. 2008) (stating, based on *Dumas*, *Trevino*, *Karagounis* and *Turner*, that “it seems clear that the ‘single employer’ test should not be applied here, as the Board is a state agency and is thus a governmental subdivision”).

District Courts have followed the guidance of the Fifth Circuit and held a governmental entity cannot be consolidated with a private entity as a joint employer because the entities do not relate in a manner similar to the private corporation in which the ‘joint employer’ standard was originally meant to apply.” *Gogreve v. Downtown Dev. Dist.*, 426 F.Supp.2d 383, 389-90 (E.D. La. 2006) (holding that under Fifth Circuit authority, the “joint employer” test is not appropriate to analyze the relationship between governmental subdivisions); *see also Canon v. Board of Trustees of State Institutions of Higher Learning of Mississippi*, 2015 WL 5577222, at *3-6 (S.D.Miss. Sept. 22, 2015); *Epie v. Owens*, 2010 WL 5620959, at *4 n. 1 (N. D. Tex. Dec. 21, 2010); *Myers v. Miss. Office of Capital Post–Conviction Counsel*, 720 F.Supp.2d 773, 778 (S.D. Miss. 2010); *Ridha v. Texas A & M Univ. Sys.*, Civ. Action No. 4:08–CV–2814, 2009 WL

1406355, at *4 (S.D.Tex. May 15, 2009); *Murdock v. City of Houston*, 2011 WL 7109286 (S.D.Tex. Sept. 21, 2011).

Somervell County cannot be considered a joint employer with Glen Rose Healthcare, Inc.—Dr. Turk’s employer—under established and longstanding Fifth Circuit law. *See id.* Dr. Turk’s claims do not state a claim under the law and, thus, must be dismissed.

3. Dr. Turk’s Constitutional Claims are Regarding his Employment and Can Only be Asserted Against His Employer—Glen Rose Healthcare, Inc.

All of Dr. Turk’s claims emanate from his employment. *See* Complaint. Dr. Turk alleges Defendants “took steps to terminate his employment,” are “intent on terminating his employment,” and have imposed “adverse personal and employment actions.” Complaint at ¶ 25-26. Likewise, in his Third Claim for Relief (Systematically Denying Plaintiffs the Right to Petition the Government Redress for Grievances), Dr. Turk pleads that Defendants, as his employer, failed to address his concerns and retaliated against him in personnel actions, like scheduling over the holidays, failure to renew contract, and his “removal from the medical executive committee.” Complaint at ¶ 22, 24, 28; Exhibit D at 220:10-15, 234:21-236:12. Additionally, Dr. Turk alleges Defendants held a meeting “involving consideration of his termination.” Complaint at ¶ 14; *id.* Dr. Turk’s First, Second and Third Claims for relief are grounded in Dr. Turk’s employee/employer relationship. Complaint at ¶ 25, 28; *see also, e.g.*, Exhibit D at 220:10-15, 234:21-236:12. Accordingly, Defendants are entitled to summary judgment on all of Dr. Turk’s claims.

4. Dr. Turk’s Due Process Claim Also Fails as a Matter of Law As Dr. Turk is Not an Employee of Somervell County.

In the Fifth Circuit, in order “[t]o state a § 1983 claim based on termination of employment without affording procedural due process,” a plaintiff must first allege that he “has a property interest in [his] employment sufficient to entitle [him] to due process protection.”

LeBeouf v. Manning, 575 Fed. Appx. 374, 376 (5th Cir. 2014) (unpublished) (citing *McDonald v. City of Corinth, Tex.* 102 F.3d 152, 155-56 (5th Cir. 1996)). Second, the plaintiff must show that “[he] was terminated without receiv[ing] the due process protections to which [he] was entitled.” *Id.*

Once again, this claim centers on a plaintiff’s employment. Because Dr. Turk was not employed by Defendants, as discussed *infra*, he cannot bring an employment related claim against Defendants. Accordingly, Defendants are entitled to summary judgment on Dr. Turk’s Due Process claim.

C. Even Dr. Turk is Considered an Employee of Somervell County, which is Not Supportable in Law, Dr. Turk’s First Amendment Petitions Clause Claim Fails as a Matter of Law.

The First Amendment provides, in relevant part, that “Congress shall make no law . . . abridging . . . the right of the people to petition the Government for redress of grievances.” U.S. Const. amend. I, cl. 3. This clause “protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.” *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011). Similar to a court’s obligations when analyzing issues arising under the Speech Clause, its “[i]nterpretation of the Petition Clause must be guided by the objectives and aspirations that underline the right.” *Id.* at 388.

A lawsuit is a petition within the meaning of the First Amendment. *See Wetherbe v. Texas Tech Univ. Sys.*, No. 5:15-CV-119Y, 2016 WL 1273471 at *7 (N.D. Tex. Mar. 31, 2016). Importantly, the text of the First Amendment does not “speak in terms of successful petitioning—it speaks simply of ‘the right of the people . . . to petition the Government for a redress of grievances.’” *See, e.g., BE & K Const. Co. v. NLRB*, 536 U.S. 516, 532 (2002). “While [a] citizen ‘can associate and speak freely and petition openly . . . the First Amendment does not impose any affirmative obligation on the government to listen, [or] to respond [to],’ that

petition.” *Barnes v. Texas Ethics Com’n*, No. A-13-CA-916 LY, 2015 WL 3409195 at *5, W.D. Tex. May 18, 2015, adopted on Jun. 19, 2015 citing *Smith v. Arkansas State Highway Emp., Local 1315*, 441 U.S. 463, 465 (1979). “Accordingly, citizens ‘have no constitutional right as members of the public to a government audience for their policy views.’” *Id.* citing *Minnesota State Bd. For Community Colleges v. Knight*, 465 U.S. 271, 286 (1984).

The Western District has recognized where a plaintiff has pled and demonstrated he or she has exercised their right to petition the government—e.g., file grievances, file a lawsuit—they do not state a claim upon which relief can be granted and such claim must be dismissed. *See, e.g., Barnes*, 2015 WL 3409195 at *5-7. In *Barnes v. Texas Ethics Commission*, Judge Yeakel adopted the Magistrate’s report and recommendation. Specifically, the report and recommendation acknowledged a party’s allegations demonstrating the party exercised petitioning the government sufficed to grant a motion to dismiss.

Barnes’ own allegations show that he was able to exercise his First Amendment rights in this case. Barnes sent numerous complaints to the Commission complaining about the Blanco ISD school board election. The fact that he was unhappy with the Commission’s response to his complaints does not demonstrate that his First Amendment Right to petition was violated.² Barnes has failed to allege a violation of his First Amendment rights.

Barnes, 2015 WL 3409195 at *5.

The Petitions Clause protects an individual’s right to seek redress for grievances; it does not, however, guarantee petitioners will like the outcome or that they will be successful. *See e.g., BE & K Const. Co. v. NLRB*, 536 U.S. 516, 532 (2002).

² *See Smith*, 441 U.S. at 465-66 (holding that State Highway Commission’s refusal to consider a grievance did not violate the First Amendment); *We the People Foundation, Inc. v. United States*, 485 F.3d 140, 143-44 (D.C. Cir. 2007) (relying on *Smith* to reject citizen group’s argument that the First Amendment guarantees a citizen’s right to receive a government response to or official consideration of a petition for redress of grievances), *cert. denied*, 552 U.S. 112 (2008); *Taylor v. Cockrell*, 92 F. App’x 77, 78 (5th Cir. 2004) (holding that plaintiff’s claims “that defendant violated his constitutional rights by failing to investigate his grievances fall short of establishing a federal constitutional claim.”)

Similarly, Dr. Turk's claim is unsupportable and, thus, must be dismissed. Dr. Turk complains "every effort of the Plaintiffs to obtain redress of their written grievances was ignored or simply rejected by Defendants." Dr. Turk also alleges "[t]his calculated frustration of Plaintiffs' efforts to present grievances violates the First Amendment...."

Like *Barnes*, it is undisputed that Dr. Turk filed several grievances with Somervell County. Complaint at ¶ 10, 11, 22, 28; *see e.g.*, Exhibit D at 177:2-3, 177:11-178:5, 178:10-13, 205:3-6, 205:22, 225:18-19, 231:6-7, 231:14, 16-17, 19-21, 24. It is not contradicted he filed complaints with other state agencies—namely, Texas Department of State Health Services, the Joint Commission, Texas Rangers, Texas Representative J.D. Sheffield, and Somervell County Sheriff's Office (Deputies). Complaint at ¶ 10, 11; Exhibit D at 208:12-211:14, 231:6-7, 231:14, 16-17, 19-21, 240:7-13. Dr. Turk filed the instant lawsuit. *See* Complaint. Just as in *Barnes*, Dr. Turk has ***thoroughly and repeatedly*** exercised his Petitions Clause rights.

Dr. Turk has repeatedly filed grievances, but does not believe Defendants handled them appropriately. Complaint at ¶ 28; *see e.g.*, Exhibit D at 259:17-23, 260:8-15. Dr. Turk argues his rights were frustrated because he did not obtain "redress" and he believed Defendants "ignored or simply rejected" his grievances or complaints. Complaint ¶ 28. However, courts have consistently and repeatedly found that failure to obtain redress or complaints being ignored does not state a claim under the Petitions Clause as a matter of law. *See e.g.*, *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 532 (2002); *Barnes*, 2015 WL 3409195 at *5-7; *Smith v. Arkansas St. Hwy. Employees Local*, 441 U.S. 463 (1979) (holding that State Highway Commission's refusal to consider a grievance did not violate the First Amendment); *We the People Foundation, Inc. v. United States*, 485 F.3d 140, 143-44 (D.C. Cir. 2007) (relying on *Smith* to reject citizen group's argument that the First Amendment guarantees a citizen's right to receive a government response

to or official consideration of a petition for redress of grievances), *cert. denied*, 552 U.S. 112 (2008); *Taylor v. Cockrell*, 92 F. App'x 77, 78 (5th Cir. 2004) (holding that plaintiff's claims "that defendant violated his constitutional rights by failing to investigate his grievances fall short of establishing a federal constitutional claim."). Accordingly, Dr. Turk's First Amendment Petitions Clause claim must be dismissed and summary judgment is proper.

IV. CONCLUSION

For the foregoing reasons, there are no material questions of fact remaining for trial and Defendants' motion for summary judgment should be granted in all things.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2017, I electronically submitted the foregoing document, Defendants' Motion for Summary Judgment as to Plaintiff Dr. Turk's Claims, with the Clerk of the Court for the U.S. District Court, Western District of Texas, using the electronic case files system of the court. The electronic case files system sent a "Notice of Electronic Filing" to the following CM/ECF participants:

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