

Moore's Federal Practice (Matthew Bender Company 2015) § 12.34 (1)[b]. Failure to do so would be an error. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996).

Facts the Court Must Accept as True

As noted above, the Court must accept the factual allegations of Albert J. Turk, M.D. as true including all of the following from the First Amended Complaint:

- a) "Plaintiff Albert J. Turk is a medical doctor licensed in the State of Texas. *At all pertinent times he has been employed by Defendant Somervell County Hospital District and by an affiliated corporation, Glen Rose Healthcare, Inc.*" Plaintiff's First Amended Complaint, p. 2 (emphasis added).
- b) "Plaintiff Albert J. Turk, M.D. is a physician working at the Glen Rose Medical Center. *He is employed by Defendant Somervell County Hospital District and an affiliated corporation, Glen Rose Healthcare, Inc.*" Plaintiff's First Amended Complaint, p. 8 (emphasis added).
- c) "Prior to the May 28, 2015 meeting of the Board of Trustees of the Defendant Somervell County Hospital District, an agenda item was posted as follows:

'Executive Closed Session- Physician Employment Agreement

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"
Plaintiff's First Amended Complaint, p. 13 (emphasis added).

- d) "No Defendant notified Plaintiff Jay Turk, M.D., that the posted personnel matter related to him. Despite the stealthy nature of the posting, Dr. Turk learned of the matter, and inquired through counsel if the personnel item posted for consideration by the Somervell County Hospital District Board of Trustees was a proposal to terminate his employment. *Defendants, through their counsel, ultimately admitted that the subject matter of the posted personnel item was the potential termination of Dr. Turk from his practice at Glen Rose Medical Center and loss of his job.* Dr. Turk responded through his counsel specifically pursuant to Section 551.074 of the Texas Government Code, that a closed meeting was not allowed by this public Board of

- Trustees, if the subject of deliberation (in this case Dr. Turk) requested a public hearing. He also advised that he wanted any and all deliberations about personnel matters involving himself, to be held only in open session, and further asserted that the agenda item involving consideration of his termination, in executive session must be reposted as an open session, in accordance with Texas law and Dr. Turk's election in favor of a public hearing" Plaintiff's First Amended Complaint, p. 14 (emphasis added).
- e) "Further, Dr. Turk insisted that *if his termination was to be considered by the highest policymaking officials of Defendant Somervell County Hospital District, as posted*, he was entitled to constitutionally required fundamentals of due process and due course of law, pursuant to Texas due course of law and federal due process, those protections included access to any alleged evidence against him with regard to the purported 'quality of care' issues involving himself, an opportunity to respond to any such evidence, neutral decision-makers, an opportunity to cross-examine witnesses, and, in this case, a public proceeding" Plaintiff's First Amended Complaint, p. 15 (emphasis added).
- f) "Despite Dr. Turk's insistence, the Board of Trustees of the Somervell County Hospital District convened in executive session on May 28, 2015, to consider the posted personnel item, now under the pretense that the matter was not a personnel matter, as posted, but instead was only a "medical peer review." In the executive session, the Board of Trustees of the Somervell County Hospital District, only one of whom was a physician-peer, entertained statements from several physicians practicing at Glen Rose Medical Center who were known to be hostile to Dr. Turk because of his above-alleged history of patient advocacy and advocacy against unsafe and dangerous conditions at Glen Rose Medical Center. Ultimately, when the Board of Trustees of the Somervell County Hospital District returned to open session on the evening of May 28, 2015, the public announcement, based upon no public debate at all, was that the Board of Trustees would take 'no action' on this item. This decision had obviously already been made in the executive session. *Since that meeting, Defendant Ray Reynolds has announced in open session to the Board of Trustees of the Defendant Somervell County Hospital District, words to the effect that Dr. Turk will be leaving medical practice at Glen Rose Medical Center in the near future. For example, Defendant Reynolds said in an open Board session specifically on June 23, 2015, that Dr. Turk is 'not a long-term player' "* Plaintiff's First Amended Complaint, p. 16 (emphasis added).

Argument with Regard to Constitutional Claims

The heart of Defendants' argument with regard to all of Dr. Turk's constitutional claims is Defendants' *factual assertion* that Dr. Turk has only one employer, Glen Rose Healthcare, Inc. Dr. Turk has himself alleged that Glen Rose Healthcare, Inc. is one of his employers. At this

stage of the litigation, the Court is obligated accept Dr. Turk's unequivocal and repeated allegations that he has more than one employer. The Court may not indulge the conclusory and opposite factual assertion from the Motion to Dismiss that Dr. Turk has only one employer. To do so, would be an error, J. Moore, *Moore's Federal Practice* (Matthew Bender Company 2015) § 12.34 (1)[b]. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996).

Dr. Turk's detailed factual allegations discussed above support the proposition that he has more than one employer. It is hard to imagine allegations that better describe the actions of an "employer"¹ than calling a meeting to decide upon employment termination.

Defendants assert in their pending Motion that a court may consider documents attached, either to a Motion to Dismiss, or to an Opposition to the same, and attached for this Court's review, a contract between Dr. Turk and Glen Rose Healthcare, Inc. That attachment is not inconsistent with Dr. Turk's allegations that he has more than one employer, one of which is Glen Rose Healthcare, Inc. In reliance upon that same proposition, Plaintiff Jay Turk, M.D., now attaches for the Court's consideration, another document consistent with his allegations that he has more than one employer. Dr. Turk alleged in his First Amended Complaint that he filed a

¹ The concept of a joint or multiple employer of a single employee is well recognized in federal employment law. For example, the Americans with Disabilities Act, codified at 42 U.S.C.A. §§ 12101 et seq., includes within the definition of "employer" persons who are agents of an employer. Similarly, the joint employer or integrated enterprise test is applied to hold two or more employers liable in Title VII claims. (*EEOC v. Skanska USA Bldg., Inc.*, 2013 BL 341867, 6th Cir., No. 12-5967, *unpublished opinion* 12/10/13). General contractor on a hospital construction site in Memphis, Tenn., is joint employer of a group of black workers hired by a subcontractor. The Fifth Circuit has applied both the "integrated enterprise" test, which asks whether two entities represent an integrated enterprise by examining four factors: "(1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control." and the "joint employer" test, as well as the "existence of a joint employer relationship which depends upon on the control that one employer exercises, or potentially exercises, over the labor relations policy of the other." *EEOC v. Valero Texas Refining – Texas*, March 13, 2013 WL 1168620.

The same concept is recognized in the Family Medical Leave Act, under circumstances where a) two or more business entities exercise some control over the work or working conditions, b) there is an arrangement between the entities to share an employee's services, one employer acts directly or indirectly in the interest of the other employer in relation to the employee. See Code of Federal Regulations at § 825.106. Likewise, the Fair Labor Standards Act of 1938, provides that an employee may be considered as an employee of two or more employers at the same time. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case.

grievance on or about September 10, 2015, addressing pressure on Dr. Turk to move his practice across the street to a medical suite which lacks a treatment room. On or about November 23, 2015, Defendant Ray Reynolds, forwarded a copy of a grievance procedure which Dr. Turk was directed to follow if he chose to pursue his grievance. Notably, that procedure *was not promulgated by* Glen Rose Healthcare, Inc. (the sole employer according to Defendants' factual allegation). The attached grievance procedure was promulgated by Glen Rose Medical Center, the hospital at which Dr. Turk works, which is operated by Defendant Somervell County Hospital District. Providing Dr. Turk with that grievance procedure, strongly suggests that Defendant Somervell County Hospital District is one of Dr. Turk's employers.

Defendants' Motion also is premised upon the incorrect assumption that an employment relationship is required for Dr. Turk to pursue his constitutional claims, Federal jurisprudence provides many examples of non-employees asserting federal constitutional claims. A recent example is *Gibbons v. McBride*, 2015 W.L. 5017021 (S.D. Georgia, August 21, 2015) [Arrestee properly stated a First Amendment Retaliation Claim]. Another example is *Holzmer v. City of Memphis*, 621 F.3d 512 (6th Cir. 2010) (Affirming denial of qualified immunity in a buggy operator's claim for alleged violation of First, Fifth, Eighth and Fourteenth Amendments, as well as a conspiracy claim under 42 U.S.C. § 1985).

Similarly, in *Bennett v. Hendrix*, 439 F.3d 1247 (11th Cir. 2011) the Eleventh Circuit affirmed that citizen supporters should not be retaliated against for exercising free speech rights. In that case, the Eleventh Circuit affirmed denial of summary judgment and also affirmed denial of qualified immunity. Another example is *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1966), where the Supreme Court of the United States recognized that a towing service

independent contractor could assert a claim based upon the First Amendment right not to be discharged for refusing to support a political party or its candidates.

Argument with regard to The Texas Open Meetings Act

With regard to this issue, the Court must accept as true Dr. Turk's allegations discussed above that the Board of Trustees posted a personnel item without identifying Dr. Turk and without telling him of it. Dr. Turk alleges that the subject matter of the personnel item was his loss of employment and loss of his medical practice at Glen Rose Medical Center. The Court must also accept as true Dr. Turk's allegation that subsequent to that meeting, Defendant Reynolds announced in open session of that Board, that Dr. Turk will soon be leaving his employment and "is not a long-term player." Similarly, the Court must accept as true the testimony of Justus Peters, M.D. in his Sworn Declaration incorporated into the First Amended Complaint as follows:

"As Doctor and Mrs. Turk's actions, speaking out about these issues, moved from internal efforts, which were being largely ignored, to external efforts, the administration responded hostilely, and the attitude of much of the medical staff changed. For example, a series of meetings were set up in 2015 by the Clinic Administrator² to talk about Jay Turk and the problems he was causing. When I found out about the subject matter for discussion, I refused to attend the meetings. By 2015 it was clear that the administration and the majority of the medical staff wanted Doctor Turk to be gone."

All of these allegations reasonably suggest that another violation of the Texas Open Meetings Act is a likely possibility, with regard to which Dr. Turk seeks *injunctive relief*.

Defendant cites Section 551.143 of the Texas Government Code for the proposition that the Texas Open Meetings Act (TOMA) does not provide for general relief through a private cause of action and for the proposition that TOMA "only provides for criminal and civil penalties."

² The Clinic Administrator is an employee of Glen Rose Medical Center the hospital operated by Defendant Somervell County Hospital District. She is not an employee of Glen Rose Healthcare, Inc.

It is important to note that, Defendants do not cite or discuss Section 551.142 of the Act, (Mandamus, Injunction or Declaratory Judgment), Section 551.142(a) which specifically reads as follows:

“An interested person, including a member of the news media, may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body”

(emphasis added).

See also, 2014 Open Meetings Handbook (2014), Office of the Attorney General Section XI discussing civil remedies *including injunctions*. There at page 58, the Attorney General notes that standing to seek an injunction is conferred on members of the general public.

The heart of Defendants' argument about this matter is the proposition that the only remedy a court may grant for violation of the Texas Open Meetings Act is voiding an illegal government action. Despite the above described clear statutory language, according to Defendants, no injunctive relief may be provided in an action under TOMA. Defendants suggest that the 1975 opinion of the Texas Supreme Court in *Lower Colorado River Authority v. City of San Marcos*, 523 S.W. 2d 641, 646, stands for this proposition. The Texas Supreme Court did hold in that decision, that judicial voiding is a remedy. However, the Texas Supreme Court *did not* say in that decision that injunctive relief is improper or may not be granted. Nor does *Aleman v. Edcouch Elsa Independent School District*, 982 F.Supp. 2d 729 (S.D. Texas, 1973), also cited for the same proposition, hold that voiding an illegal act is the only remedy for a violation of TOMA. The *Aleman* case stands for the proposition that Plaintiff's allegations must identify either a voidable action taken by the governmental entity or a TOMA provision that was violated. As discussed above, Dr. Turk has presented numerous detailed allegations describing

TOMA violations (posting his termination behind his back, failure to repost as an open session when requested to do so, and proceeding into an illegal executive session).

There are a number of cases not cited or discussed by Defendants which stand for the proposition that injunctive relief can be granted in a TOMA case. For example, in *Kessling v. Friendswood Independent School District*, 302 S.W. 3d 373 (Tex. App.-Houston, [14th Dist.], 2009, no pet.), the Fourteenth District Court held that a claim seeking future full compliance with TOMA by injunction was actionable. That same court held in *Harris County Emergency Service District Number One v. Harris County Emergency Corps*, 999 S.W. 163 (Tex. App.-Houston, [14th Dist.], 1999, no pet.) that a pattern of improperly posting notice of emergency meetings could be enjoined.

In *City of Farmers Branch v. Ramos*, 235 S.W.3d 462 (Tex. App.-Dallas 2007, no pet.) the Dallas Court of Appeals analyzed a Petition seeking an injunction and declaratory relief with regard to alleged TOMA violations, including alleged improper posting and an alleged closed session to discuss an ordinance. The Court of Appeals affirmed the trial court's denial of a plea to the jurisdiction and the injunctive action proceeded.

In *Toyah Independent School District v. Pecos-Barstow Consolidated Independent School District, et al*, 466 S.W.2d 377 (Tex. App.-San Antonio 1971), the Toyah Independent School District sued to enjoin enforcement of an annexation order approved by the Reeves Trustees in a closed meeting. This was the original case setting forth the judicial invalidation remedy for an illegal meeting under TOMA. It *does not* stand for the proposition that judicial invalidation is the only remedy available under TOMA.

Judicial invalidation was codified by the Texas Legislature in 1993 in Section 551.141 of the Texas Open Meetings Act. Notably, as discussed above, the very next Section is 551.142

which is not cited or discussed in Defendants' Motion. Section 551.142 specifically provides that a citizen may sue seeking mandamus or an *injunction* under TOMA.

This case is pending at the very earliest stage. Dr. Turk has had no opportunity to conduct discovery about any TOMA issues, including how often Defendant Somervell County Hospital District has engaged in a pattern of improperly posting meetings or entering into unlawful executive sessions. The Court should not assume summarily, as a matter of law, that no such pattern exists or that Dr. Turk is not in danger of another effort by Defendant Somervell County Hospital District to terminate his employment and medical practice behind his back and out of the public's sight.

CONCLUSION

Plaintiff Jay Turk, M.D. respectfully submits that the pending Partial Motion to Dismiss as to All Dr. Albert Turk's Claims in the First Amended Complaint should be denied for the reasons articulated above.

Respectfully submitted,

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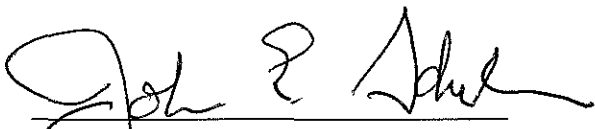
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all counsel of record in accordance with F.R.C.P. 5(b) on the 18th day of December, 2015, as follows:

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