

ORIGINAL

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
**FILED**  
MAR 30 2001  
CLERK, U.S. DISTRICT COURT  
By Deputy

BRADY D. FAULKNER,  
Plaintiff,

v.

JOHNSON COUNTY SHERIFF'S  
DEPARTMENT, et al.,  
Defendants.

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Civil Action No. 3:00-CV-0254-L

ENTERED ON DOCKET  
APR 2 2001  
U.S.D.C.  
U.S. DISTRICT CLERK'S OFFICE

**MEMORANDUM OPINION AND ORDER**

Before the court are Defendant Jim Bob Simmons's Motion to Dismiss, filed May 26, 2000; Defendant Johnson County Sheriff Bob Alford's Motion for Rule 7(a) Reply, filed June 2, 2000; Defendant Captain Tom Craig's Motion for Rule 7(a) Reply, filed June 2, 2000; Defendant Zoe Guthrie's Motion for Rule 7(a) Reply, filed June 2, 2000; and Defendants Gary Leonard and Drew Harris's Motion for Rule 7(a) Reply, filed June 2, 2000. For the reasons stated herein, the court **denies** Defendant Simmons's Motion to Dismiss; **grants** Defendants Alford, Craig and Harris's respective motions for Rule 7(a) reply; and **denies** Defendants Guthrie and Leonard's respective motions for Rule 7(a) reply.

**I. Background**

Plaintiff Brady Faulkner ("Plaintiff") brought this lawsuit against Defendants Bob Alford ("Alford"), Tom Craig ("Craig"), Zoe Guthrie ("Guthrie"), Drew Harris ("Harris"), Gary Leonard ("Leonard") (collectively the "County Defendants"), Jim Bob Simmons ("Simmons") and the Johnson County Sheriff's Department (collectively "Defendants"), on February 3, 2000, pursuant to 42 U.S.C. § 1983 ("§ 1983"). Plaintiff filed his Second Amended Complaint ("Complaint") on January 24, 2001.

Plaintiff alleges that in December 1997, he was arrested in Johnson County, Texas and charged with driving while intoxicated. Plaintiff contends that while incarcerated in the Johnson County Jail, jail authorities permitted Defendant Simmons to evangelize to prisoners; that Plaintiff was forced to undergo religious indoctrination against his will; that Defendants Leonard and Guthrie condoned such conduct; and that Defendants Alford, Craig and Harris ignored Plaintiff's administrative grievances concerning the matter. Plaintiff contends that as a result of the acts of Defendants, he has been deprived of his rights, privileges and immunities under the First and Fourteenth Amendment to the United States Constitution, as well as his rights under Article I, §§ 6-7 of the Texas Constitution.

In response to Plaintiff's original complaint, Simmons filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The County Defendants, who have answered in this lawsuit, now request the court to direct Plaintiff to file a Rule 7(a) reply to their assertion of qualified immunity. The court addresses Defendants' motions in turn below.

## **II. Defendant Simmons's Motion to Dismiss<sup>1</sup>**

A motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) "is viewed with disfavor and is rarely granted." *Lowrey v. Texas A&M University System*, 117 F.3d 242, 247 (5<sup>th</sup> Cir. 1997). A district court cannot dismiss a complaint, or any part of it, for failure to state a claim upon which relief can be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts

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<sup>1</sup>Defendant Simmons's Motion to Dismiss was filed in response to Plaintiff's original complaint. As that pleading is no longer before the court, Simmons's motion is technically moot; however, the substance of his motion equally applies to Plaintiff's Second Amended Complaint. As Simmons has not sought to withdraw or amend his motion, the court will consider Simmons's motion to dismiss with respect to Plaintiff's Second Amended Complaint.

in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5<sup>th</sup> Cir. 1995). In reviewing a Rule 12(b)(6) motion, the court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5<sup>th</sup> Cir. 1996). In ruling on such a motion, the court cannot look beyond the pleadings. *Id.*; *Spivey v. Robertson*, 197 F.3d 772, 774 (5<sup>th</sup> Cir. 1999), *cert. denied*, 120 S.Ct. 2659 (2000). The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid cause of action when it is viewed in the light most favorable to the plaintiff and with every doubt resolved in favor of the plaintiff. *Lowrey*, 117 F.3d at 247. A plaintiff, however, must plead specific facts, not mere conclusory allegations, to avoid dismissal. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5<sup>th</sup> Cir. 1992).

Simmons contends that even accepting the allegations asserted in Plaintiff’s complaint as true, Plaintiff has not set forth a basis for which relief can be granted against Simmons. Simmons contends that Plaintiff alleges facts which demonstrate that Simmons engaged in conduct inherently ecclesiastical in nature. According to Simmons, conduct inherently ecclesiastical in nature is not “state action,” which is required to prevail on a claim brought pursuant to § 1983, and therefore he cannot be held liable for the relief Plaintiff requests. In support of this contention, Simmons cites *Montano v. Hedgepeth*, 120 F.3d 844, 848 (8<sup>th</sup> Cir. 1997). Plaintiff disagrees, contending that he has stated a claim for relief because there exists federal appellate decisions which confirm that volunteer preachers communicating with inmates can be held to be acting under color of state law for purposes of a § 1983 action.

Section 1983 provides legal redress to individuals who suffer violations of their federally protected rights at the hands of any person who acts under color of state law. 42 U.S.C. § 1983. To

recover under the statute, Plaintiff must prove two vital elements: (1) that he has been deprived of a right “secured by the Constitution and the laws” of the United States; and (2) that the persons depriving him of this right acted “under color of any statute” of the State of Texas. *Id.*; *Daniel v. Ferguson*, 839 F.2d 1124, 1128 (5<sup>th</sup> Cir. 1988). The threshold question raised by Simmons’s motion is whether he was a state actor or acted under color of state law. Private action may be deemed state action, for purposes of section 1983, only where the challenged conduct may be “fairly attributable to the State.” *See Bass v. Parkwood Hospital*, 180 F.3d 234, 241 (5<sup>th</sup> Cir. 1999). In determining whether seemingly private conduct may be charged to the state, the Supreme Court has applied the following tests: 1) the public function test; 2) the state compulsion test; and 3) the nexus or joint action test. *Id.* (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 2754-55 (1982)).<sup>2</sup> The inquiry into whether private conduct is fairly attributable to the state must be determined based on the circumstances of each case, irrespective of the test applied. *See Bass*, 180 F.3d at 242. The most difficult of state action cases to determine are those where a nominally private defendant is sued under § 1983, which is precisely the situation here.

Although Plaintiff has not specifically pleaded that Simmons was a state actor or acting under color of state law, he alleges that “jail authorities authorized Defendant Simmons . . . to enter the

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<sup>2</sup>Under the public function test, “a private entity may be deemed a state actor when that entity performs a function which is traditionally the exclusive province of the state.” *Bass*, 180 F. 3d at 242 (quoting *Wong v. Stripling*, 881 F.2d 200, 202 (5<sup>th</sup> Cir. 1989)). The state compulsion (or coercion) test holds that “a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.” *Id.* (quoting *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 2786, 73 L.Ed.2d 534 (1982)). Under the nexus or joint action test, state action may be found where the government has “so far insinuated itself into a position of interdependence with the [private actor] that it was a joint participant in the enterprise.” *Id.* (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 457, 42 L.Ed.2d 477 (1974)).

section of the jail that Faulkner was incarcerated in and evangelize to the prisoners.” Complaint at 3, ¶ 3. Based on the allegations contained in both his original complaint and Second Amended Complaint, the court cannot determine that Plaintiff could not prove any set of facts to establish that Defendant Simmons was a state actor. This is an issue that should be addressed in a summary judgment motion, as the court would necessarily have to go beyond the scope of the pleadings to determine whether Simmons was a state actor or acted under color of state law; however, given the present posture of the case, the court believes the more prudent course of action is to deny Simmons’s motion to dismiss, and the motion is hereby **denied**.

### **III. County Defendants’ Motions for Rule 7(a) Reply<sup>3</sup>**

#### **A. Defendants Leonard and Guthrie**

The County Defendants are correct that, in cases involving claims of qualified immunity, it is often appropriate to require a plaintiff to file a detailed reply tailored to the plea of qualified immunity. *See Schulte v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995). A plaintiff generally must be given the opportunity to reply with greater specificity in such cases before the court rule may rule on a defendant’s dispositive motion. *Todd v. Hawk*, 72 F.3d 443, 446 (5th Cir. 1996).

A reply, however, is only required when the complaint itself does not meet the required standard — “that plaintiff has supported his claim with sufficient precision and factual specificity to raise a genuine issue as to the illegality of defendant’s conduct at the time of the alleged acts.” *Schulte*, 47 F.3d at 1434. As long as “the pleadings on their face show an unreasonable violation

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<sup>3</sup>Each of the County Defendants’ Motion for Rule 7(a) Reply was filed in response to Plaintiff’s original complaint, which was filed on February 3, 2000. Since the filing of the County Defendants’ respective motions, Plaintiff has amended his complaint. *See* Plaintiff’s Second Amended Complaint, filed January 24, 2001. As the County Defendants have not withdrawn their motions, the court will consider them with respect to Plaintiff’s Second Amended Complaint.

of a clearly establish constitutional right,” assertion of qualified immunity is insufficient by itself to prevail on a motion to dismiss. *Shipp v. McMahon*, 234 F.3d 907, 912 (5th Cir. 2000). It is only necessary to provide further detail that is “*tailored* to the assertion of qualified immunity and fairly engage[s] its *allegations*,” *Schultea*, 47 F.3d at 1433 (emphasis added), when the answer *itself* provides factual allegations that are relevant to the issue of qualified immunity — that is, whether the alleged constitutional right is clearly established or the violation is objectively unreasonable. “A defendant has an incentive to plead his defense with some particularity because it has the practical effect of requiring particularity in the reply.” *Id.*

In this case, Plaintiff alleges that “[b]y forcing him to undergo religious indoctrination against his will, the Defendants violated Faulkner’s rights under the Establishment Clause of the First Amendment of the United States Constitution, which the Fourteenth Amendment confirms is applicable to officials of Johnson County.” Compl. at 5 ¶ 2. The First Amendment declares “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” U.S. Const. amend I. That neither the federal government nor states may impose religious beliefs, preferences or doctrine on anyone in our society is well established in American jurisprudence. In *Everson v. Board of Education*, 330 U.S. 1 (1947), the Supreme Court underscored this principle with unmistakable clarity when it stated:

The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state

nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'

330 U.S. at 15-16. Insofar as this case is concerned, one court has held that merely allowing religious volunteers into cell blocks does not constitute an impermissible establishment of religion by the state; however, forced or required inculcation, even by volunteer witnesses, would contravene the Free Exercise Clause of the First Amendment, and jail officials are required to insure that no inmate be subjected to forced religious indoctrination. *See Campbell v. Cauthron*, 623 F.2d 503, 509 (8<sup>th</sup> Cir. 1980).

The task of the court is to determine whether Plaintiff's Complaint alleges with requisite specificity the acts, conduct, or omissions on the part of Leonard and Guthrie that would make them liable to Plaintiff. Plaintiff alleges that while confined in a cell at the Johnson County Jail, he was subjected to forced religious proselytization. With respect to Defendants Leonard and Guthrie, Plaintiff alleges:

While Faulkner was locked in the solitary confinement cell [on March 3, 1998], the jail authorities authorized Defendant Simmons, who Faulkner believes is a Pentecostal minister, to enter the section of the jail that Faulkner was incarcerated in and evangelize to the prisoners. Simmons stood on a table located outside of the solitary confinement cells and screamed at Faulkner and the other prisoners in a 'fire and brimstone' religious style for approximately an hour. Although all of the prisoners were confined in cells with closed doors, the design of the cells allowed the sound of Simmons' voice to enter each cell. It was not possible for Faulkner or the other prisoners to prevent the sound of Simmons' voice from entering their cells.

Faulkner had not requested to speak with a minister and understands that none of the other prisoners in the solitary confinement area had either. Faulkner first attempted to bring an end to his religious inculcation by asking Defendant Simmons to stop preaching to the prisoners against their will. A number of other prisoners also asked Defendant Simmons to stop preaching in the cell block. Simmons refused and informed Faulkner that Faulkner must be 'full of the devil' to make such a request.

When Simmons continued to shout that Faulkner and the other prisoners should accept Simmons' religious beliefs, Faulkner called the guard on duty, Defendant Leonard. Faulkner informed Correctional Officer Leonard that Faulkner did not want to speak to Defendant Simmons and requested that Simmons be removed from the cell block. Defendant Leonard responded that he would have to receive instructions regarding how to handle the situation from the officer in charge of the cell block, who on information and belief was Defendant Guthrie. After Leonard spoke with Lieutenant Guthrie, Leonard returned to the cell block and informed Faulkner that the officer in charge had indicated that Simmons was authorized to preach to the prisoners and would be allowed to continue despite the objections of Faulkner and the other inmates.

Compl. at 3-4 ¶¶ 3, 4 and 5. The court believes that Plaintiff's pleadings on their face allege a violation of a clearly established constitutional right. Plaintiff also alleges that Leonard and Guthrie are not entitled to "qualified immunity from suit because no reasonable guard or other representative of Johnson County could have believed that it was lawful to lock Faulkner in a cell and subject him to religious evangelization against his will." *Id.* at 7 ¶ 2. By contrast, Leonard and Guthrie's answer merely asserts the defense of qualified immunity in a *conclusory* fashion by simply stating: "Defendants assert the defense of qualified immunity to all claims made by Plaintiff." Defs.' Sheriff Bob Alford, Captain Tom Craig, Zoe Guthrie and Gary Leonard's Answer to Plf.'s First Am. Compl. at 4. Defendants Leonard and Guthrie make no specific factual allegations relevant to the court's determination of whether there was "an unreasonable violation of a clearly established constitutional right," and identify no deficient aspect of Plaintiff's allegations. The court sees no benefit to be derived by ordering a reply "tailored" to Leonard and Guthrie's assertion of qualified immunity, because Plaintiff has already set forth specific facts which might overcome their entitlement to qualified immunity. For these reasons, the court **denies** Defendant Guthrie's Motion for Rule 7(a) Reply and **denies** Defendant Leonard's Motion for Rule 7(a) Reply.

**B. Defendants Alford, Craig and Harris**

With respect to Defendants Alford, Craig and Harris, the court finds that Plaintiff's Complaint fails to plead with particularity the conduct, acts, or omissions on the part of these Defendants that would make them liable to Plaintiff. Plaintiff's Complaint makes no allegations with specificity that Alford, Craig or Harris personally participated, acquiesced or condoned the alleged conduct of Defendant Simmons. Plaintiff must allege what Alford, Craig and Harris did to cause Plaintiff to be deprived of a constitutionally protected right and therefore be liable to Plaintiff personally. In other words, Plaintiff must state specifically how each of these Defendants deprived him of his right to be from forced religious indoctrination or inculcation. The court has read Plaintiff's Complaint several times and is not certain of the specific conduct these Defendants engaged in or action these Defendants failed to take with respect to Plaintiff's First Amendment claim. The court can guess or speculate what the factual bases are, but under existing precedent, these Defendants are entitled to more than guesswork or speculation.

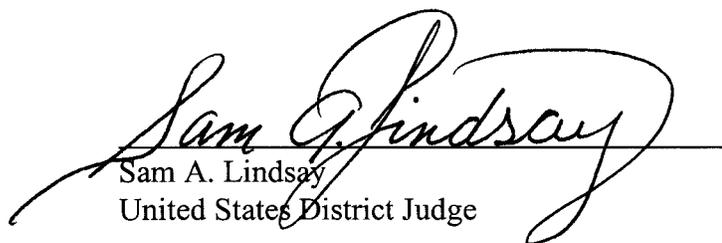
The court is not clear about Plaintiff's due process claim. Plaintiff appears to allege that he was denied due process under the Fourteenth Amendment because Defendants Craig, Alford and Harris destroyed or ignored his administrative grievances concerning the alleged actions of Defendant Simmons. The court is aware of no authority which holds that an inmate or pretrial detainee is constitutionally entitled to be heard on a grievance, or that the failure to respond to or address a grievance is constitutionally protected. Such a claim does not appear to be actionable. Accepting what Plaintiff alleges as true, Alford, Craig and Harris's failure to address or respond to his grievance did not compromise his underlying First Amendment claim. Plaintiff's Complaint on its face does not allege the violation of a clearly established right. Under these circumstances, a Rule

7(a) reply is necessary, and if the required detail is not set forth therein, the court is to dismiss the complaint. *Reyes v. Sazan*, 168 F.3d 158, 161 (5<sup>th</sup> Cir. 1999). Accordingly, Plaintiff is hereby ordered to file a reply pursuant to Rule 7, Fed. R. Civ. P., in accordance with the terms of this order by **April 30, 2001**. In addition, Plaintiff must state the legal theory upon which relief may be granted concerning these Defendants' alleged failure to process his administrative grievances. If Plaintiff fails to file a reply in accordance to this order by April 30, 2001, the court may dismiss this action against Defendants Alford, Craig and Harris.

#### **IV. Conclusion**

For the reasons previously stated, Defendant Simmons's Motion to Dismiss is **denied**; Defendant Zoe Guthrie's Motion for Rule 7(a) Reply is **denied**; Defendant Gary Leonard's Motion for Rule 7(a) Reply is **denied**; Defendant Johnson County Sheriff Bob Alford's Motion for Rule 7(a) Reply is **granted**; Defendant Captain Tom Craig's Motion for Rule 7(a) Reply is **granted**; and Defendant Drew Harris's Motion for Rule 7(a) Reply is **granted**. Plaintiff shall file a reply pursuant to Rule 7 with respect to Defendants Alford, Craig and Harris's assertion of qualified immunity in accordance with the terms of this order by **April 30, 2001**.

It is so ordered this 30<sup>th</sup> day of March, 2001.

  
Sam A. Lindsay  
United States District Judge