IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

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| TEDDY NORRIS DAVIS, ET AL., Plaintiffs, | § | |
| v. | § | CAUSE NO. 2:12-cv-166 |
| RICK THALER, ET AL., Defendants. | § | |

**MEMORANDUM AND RECOMMENDATION ON ON DEFENDANT MORRIS' MOTION TO DISMISS**

Pending is defendant Clint Morris' motion to dismiss plaintiffs' claims against him pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, and alternatively for an order to file a Rule 7(a) Reply (D.E. 51). Plaintiffs have filed a response in opposition. (D.E. 57). For the reasons stated herein, it is respectfully recommended that defendant Morris' motion to dismiss be granted in part, and denied in part, as set forth herein.

## I. Background

In this prisoner civil rights action filed pursuant to 42 U.S.C. § 1983, plaintiffs Teddy Norris Davis and Robbie Dow Goodman allege that defendants have violated, and continue to violate, their right to practice their Native American religion, in violation of provisions of the Religious Land Use and Institutionalized Persons Act ("RLUPIA"), 42 U.S.C. § 2000cc, and the First Amendment. Plaintiffs seek injunctive and declaratory relief from the Texas Department of Criminal Justice, Criminal Institutions Division ("TDCJ-CID") to: (1) hire more Native American chaplains; (2) have security personnel available to supervise the Native American religious ceremonies until such time that more Native American chaplains

can be hired; (3) allow plaintiffs to grow their hair or allow them to grow a kouplock; (4) smoke the ceremonial pipe at pipe ceremonies; and (5) wear their medicine bags at all times. Plaintiffs seek damages against certain individual defendants, including Clint Morris, for alleged violations of their First Amendment rights. (D.E. 1, 16).

Plaintiffs have sued Clint Morris in both his individual and official capacities. (D.E. 16 at 2). Plaintiffs identify Mr. Morris as the Program Analyst for Designated Units and claim that he is responsible for: (1) monitoring and evaluating Native American programs at designated units; (2) recruiting volunteers and contracting with chaplains to conduct Native American ceremonies; and (3) developing policies and procedures that govern and promote the success and accessibility of Native American programs at designated units. (D.E. 57 at 5). Plaintiff contend that Clint Morris failed to perform his job, and in so failing, violated both RLUIPA and the First Amendment, because, under his watch, pipe ceremonies that had been authorized by TDCJ-CID policy in 2008 were not conducted at the McConnell Unit,[1] and that he failed to use his position to assist inmates in the practice of their faith. Plaintiffs note that they last participated in a traditional pipe ceremony in 2008.

On August 27, 2012, Clint Morris filed his answer and raised the defense of qualified immunity. (D.E. 30).

On October 10, 2012, Mr. Morris filed the instant motion to dismiss. (D.E. 51).

[1] Effective July 2012, the TDCJ-CID now prohibits pipe ceremonies.

On November 5, 2012, plaintiffs filed their response in opposition to the dismissal. (D.E. 57).

## II. Motion to Dismiss

In support of his motion to dismiss, Mr. Morris has offered as evidence:

Ex. A: Affidavit of Clint Morris;

Ex. B: TDCJ Job Description for Program Analyst;

Ex. C: September 8, 2011 TDCJ Memorandum Regarding Native American Issues; and

Ex. D: Relevant portions of the 2012 TDCJ Chaplaincy Policy regarding Native American Religious Services.[2]

In his affidavit, Clint Morris states that he has been employed by the TDCJ since May, 2009, and his current position title is "Program Supervisor III – Rehabilitation Programs Analyst in the Rehabilitation Programs Division (RPD) – of the Texas Department of Criminal Justice." (RMD, Ex. A, Morris Aff't at ¶ 1, ¶ 2). He relates that his general responsibilities include: monitor and evaluate Native American and Jewish programs at designated units; recruitment of volunteers and contract chaplains for Native American and Jewish programs; confer with RPD staff on program issues and to identify and implement solutions; and to develop and draft policies and procedures under the direction of the RPD Manager III – Services. Id., Morris Aff't at ¶ 2. He points out that he does not have the

[2] Reference to Morris' motion to dismiss (D.E. 51), is to "DMD," followed by an exhibit letter. Reference to plaintiffs' response, (D.E. 57), is to "PR," followed by a page number.

authority to ratify or change any TDCJ policies, procedures, or rules, and that, even if plaintiffs prevailed in their claims, he would not be able to implement the relief requested. Id., Morris Aff't at ¶ 3. That is, he has no executive function. Id., Morris Aff't at ¶ 4. (See also DMD, Ex. B, TDCJ job description for Program Supervisor III).

Defendant also offers in support of his motion to dismiss the minutes from a September 8, 2011 meeting in which Mr. Morris, defendant Bill Pierce, and others were present to discuss various issues concerning Native American ceremonies. (RMD, Ex. C). It was noted that pipe ceremonies were conducted at the Daniel Unit with a shared pipe, and a discussion followed regarding medical and sanitation issues, and liability releases. Id. at 1 - 2. Security issues were discussed, and it was noted that tobacco distributed for the pipe ceremony at the Daniels Unit "kept disappearing." Id. at 2. The group discussed personal pipes for Native American offenders, but concluded personal pipes would create too great of a security concern and burden, and the cost was great. Id. at 3. It was noted that the Cherokee Nation of Texas, the Lakota Nation and the Apache Nation were not interested in assisting with the cost or donation of personal pipes as they believed the offenders had "lost the right to take of the pipe." The group reached a consensus that there be: (1) no communal offender pipes; (2) no offender-owned or possessed pipes allowed; (3) no storage of offender-possessed pipes or pipe herbs by the TDCJ; and (4) Native Americans be provided with one pipe ceremony per month, with smoking to be done only by the volunteer/chaplain. Id. at 4.

In July 2012, the Chaplaincy Manual was revised to reflect changes concerning religious devotional items. (DMD Ex. D). In summary, the policy, 05.01, provides that an offender is permitted to possess only approved religious devotional items. (RMD, Ex. D at 1, Procedures, ¶ I.A). Concerning medicine bags or pouches in particular, the policy provides that an offender may possess one medicine bag or pouch, and that wearing of the item "is limited to the offender's cell or immediate bunk area in a dorm setting, and at religious services." Id. at 4, ¶ I.D.

## III. Discussion

Defendant Morris moves for dismissal of plaintiffs' claims against him pursuant to Rule 12(b)(1), and Rule 12(b)(6) of the Federal Rules of Civil Procedure. He argues that a Rule 12(b)(1) dismissal is appropriate regarding plaintiff's claims against him in his official capacity for monetary relief as such claims are barred by the Eleventh Amendment. He contends further that plaintiffs claims against him for injunctive relief are not available because, in his capacity as a program analyst, he does not have the authority to "act." As to plaintiffs' claims against him in his individual capacity, Morris argues that he is entitled to dismissal for failure to state a claim because he is entitled to qualified immunity.

### A. Eleventh Amendment.

#### 1. Monetary damages and official capacity.

A suit against a state actor in his or her official capacity for monetary damages is, for all intensive purposes, a suit against the state itself. Howlett v. Rose, 496 U.S. 356, 365-66 (1990). The Eleventh Amendment is a jurisdictional bar to a suit for money damages against

a state. Pennhurst State Hosp. v. Halderman, 465 U.S. 89, 100 (1984). Indeed, the Fifth Circuit has repeatedly held that the Eleventh Amendment bars claims for money damages against TDCJ officers in their official capacities. See e.g., Oliver v. Scott, 276 F.3d 736, 742 (5th Cir. 2002). Accordingly, to the extent plaintiffs are suing Clint Morris in his official capacity for money damages, those claims are barred by the Eleventh Amendment, and therefore, they are properly dismissed.

**2. Injunctive relief and official capacity.**

It is well established that the Eleventh Amendment does not bar a plaintiff's claim for prospective injunctive relief. Ex parte Young, 209 U.S. 123, 159 (1908); Edelman v. Jordan, 415 U.S. 651, 666-68 (1974) ; Green v. Mansour, 474 U.S. 64, 68 (1985). However, for the Ex parte Young exception to apply, the court must examine: (1) the ability of the official to enforce the statute at issue under his statutory or constitutional power, and (2) the demonstrated willingness of the official to enforce the statute. Okpalobi v. Foster, 244 F.3d 405, 425-27 (5th Cir. 2001). That is, "the necessary fiction of Young requires that the defendant state official be acting, threatening to act, or at least have the ability to act." Okpalobi, 244 F.3d at 405. The Fifth Circuit has noted that a state official cannot be enjoined to act in any way that is beyond his authority to act in the first place. Id. at 427.

Mr. Morris' authority in his official capacity is limited to the responsibilities set forth in his job description. (See DMD, Ex. A, Morris Aff't at ¶ 3; Ex. B). His responsibilities do not include amending or ratifying TDCJ policy. That is, even should plaintiffs prevail under RLUIPA and establish that the TDCJ must provide monthly ceremonial pipe ceremonies,

or allow offenders to wear a kouplock, or any other requested injunctive relief, the proper official to implement this change will be Rick Thaler, as TDCJ Executive Director. Indeed, it was specifically discussed at the evidentiary hearing that Rick Thaler was the necessary defendant to enforce any prospective injunctive relief. Thus, it is respectfully recommended that plaintiffs' claims for injunctive relief against defendant Morris be dismissed.

**B. First Amendment claims against Morris in his individual capacity.**

Plaintiffs are suing Mr. Morris in his individual capacity for monetary damages for alleged violations of their First Amendment rights. Plaintiffs argue that Mr. Morris arrived at the McConnell Unit in May 2009, and at that time, pipe ceremonies were in fact authorized by TDCJ policy. Plaintiffs contend that Mr. Morris failed to perform or authorize the very responsibilities he was hired by the TDCJ to perform, effectively denying plaintiffs their right to practice their religion as provided by the First Amendment. Defendant Morris seeks to dismiss plaintiffs' claims on the grounds that they have failed to raise a constitutional violation and argues that his actions were objectively reasonable, such that he is entitled to qualified immunity.

Although Rule 12(b)(6) authorizes a defendant to move to dismiss a complaint for "failure to state a claim upon which relief may be granted," the district court must construe the complaint in a light most favorable to the plaintiff, and the allegations contained therein must be taken as true. Erickson v. Pardus, 551 U.S. 89, 93-94 (2007). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009),

citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In the context of a defendant's motion to dismiss, the district court's review is limited to the allegations in the complaint and to those documents attached to a defendant's motion to dismiss to the extent that those documents are referred to in the complaint and are central to the claims. Causey v. Sewell Cadillac-Chevrolet, Inc., 394 F.3d 285, 288 (5th Cir.2004). "If, based on the facts pleaded and judicially noticed, a successful affirmative defense appears, then dismissal under Rule 12(b)(6) is proper." Hall v. Hodgkins, No. 08-40516, 2008 WL 5352000, *3 (5th Cir. 2008).

Plaintiffs have alleged sufficient facts that, if true, state a First Amendment claim for denial of their right to practice their Native American religion against defendant Mr. Morris. Plaintiffs have alleged that Mr. Morris was in charge of volunteers and chaplains, yet they have not had a pipe ceremony since 2008. Although the July 2012 policy may now prohibit such pipe ceremonies, the prohibition was not in effect in May 2009 when Mr. Morris assumed his responsibilities as program analyst, and ceremonies could have been conducted until July 2012. Moreover, by his own admission, Morris participated in the discussion which led to a change in TDCJ policy.[3] Plaintiffs argue that Mr. Morris should be an advocate for their rights, but has failed to do so. Although additional information may establish that Mr. Morris' actions are objectively reasonable and that he is entitled to

[3]It does not appear that plaintiffs were aware of the July 2012 change in policy. Should plaintiffs wish to amend their complaint to add a claim that the new policy is unconstitutional and violates RLUIPA, it would make sense and would conserve judicial resources to litigate such claims in this lawsuit.

qualified immunity, a Rule12(b)(6) motion is not the proper vehicle to address that defense. Thus, it is respectfully recommended that defendant Morris' motion to dismiss plaintiff's First Amendment claims against him in his individual capacity be denied.

**IV. Motion for Rule 7(a) Reply**

Alternatively defendant Morris moves for the court to order a Rule 7(a) Reply. Rule 7(a) of the Federal Rules of Civil Procedure authorizes the district court to "order a reply to an answer." The Fifth Circuit has held *en banc* that an individual defendant who pleads immunity to a federal civil action is entitled to have the plaintiff ordered to reply under Rule 7. Schultea v. Wood, 47 F.3d 1427, 1433 (5th Cir. 1995) (*en banc*). The Schultea Court stated:

> Such an order will require the Plaintiff to reply to that [immunity] defense in detail. By definition, the reply must be tailored to the assertion of qualified immunity and fairly engage its allegations... . [The] Plaintiff [must] support his claim with sufficient precision and factual specificity to raise a genuine issue as to the illegality of the defendant's conduct at the time of the alleged acts.

Id., 47 F.3d at 1434. "A plaintiff cannot overcome a qualified immunity defense with mere conclusory allegations [but] must plead specific facts with sufficient particularity ... to negate the defense of qualified immunity." Burns-Toole v. Byrne, 11 F.3d 1270, 1274, cert. denied, 512 U.S. 1207 (1994) (citing Elliott v. Perez, 751 F.2d 1472, 1479, 1482 (5th Cir. 1985)). As set forth above, plaintiffs have plead sufficient facts to pursue their constitutional claims and to overcome the qualified immunity defense at this stage of the

litigation. Defendant Morris may seek discovery from plaintiffs, if necessary, to pursue his summary judgment motion on qualified immunity.

## V. Recommendation

For the reasons stated above, it is respectfully recommended that the Court grant in part, and deny in part, defendant Morris' motion to dismiss (D.E. 51), as follows:

(1) Plaintiffs' claims for monetary damages against Mr. Morris in his official capacity be dismissed as barred by the Eleventh Amendment;

(2) Plaintiffs' claims for injunctive relief against Mr. Morris in his individual capacity be dismissed because he has no authority to grant the relief requested; and

(3) Plaintiffs' claims for money damages against Mr. Morris in his individual capacity alleging that he violated their First Amendment rights be retained.

It is further recommended that defendant's alternative motion for a Rule 7(a) reply be denied because plaintiffs have provided sufficient detail for defendant Morris to understand and defend the claims against him.

Respectfully submitted this 16th day of November, 2012.

B. JANICE ELLINGTON
UNITED STATES MAGISTRATE JUDGE

**NOTICE TO PARTIES**

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within **FOURTEEN (14) DAYS** after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to Fed. R. Civ. P. 72(b), 28 U.S.C. § 636(b)(1), General Order No. 2002-13, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within FOURTEEN (14) DAYS after being served with a copy shall bar that party, except upon grounds of *plain error*, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. Douglass v. United Servs. Auto Ass'n, 79 F.3d 1415 (5th Cir. 1996) (en banc).