IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge S. Kato Crews

Civil Action No. 1:16-cv-002840-SKC

MARK JANNY,

Plaintiff,

v.

JOHN GAMEZ,
LORRAINE DIAZ DE LEON,
JIM CARMACK,
TOM KONSTANTY,

Defendants.

ORDER ON DEFENDANTS' MOTIONS TO DISMISS [ECF. #97 & ECF. #99]

Magistrate Judge S. Kato Crews

This matter is before the Court on Defendant Carmack and Defendant Konstanty's Motion to Dismiss Plaintiff's Fourth Amended Complaint [ECF. #97], filed on December 7, 2017. Also before the Court is Defendants Gamez and Diaz de Leon's Fourth Motion to Dismiss in Part [ECF. #99], filed on December 7, 2017. Pursuant to the Order of Reference dated April 4, 2017, this civil action was referred to the Magistrate Judge "for all purposes" pursuant to D.C.COLO.LCivR 72.2(d) and 28 U.S.C. § 636(c). [ECF. #36.] The Court has reviewed the Motions and related briefing, and the applicable law. Now being fully informed, the Court GRANTS both Motions.

FACTUAL & PROCEDURAL BACKGROUND

Plaintiff Mark Janny, a *pro se* prisoner, filed this lawsuit pursuant to 42 U.S.C. § 1983 claiming that Defendants John Gamez and Lorraine Diaz de Leon (the "State

Defendants"), and Jim Carmack and Tom Konstanty (the "Rescue Mission Defendants") violated his Fourth Amendment right against false imprisonment, his Fourteenth Amendment right to equal protection, and his First Amendment religious rights. [*See generally* ECF. #95.] Plaintiff seeks declaratory relief and monetary damages in an unspecified amount. [*Id*. at p.23.]

In his Fourth Amended Prisoner Complaint ("Fourth Complaint"), Plaintiff alleges the following, which the Court takes as true for purposes of deciding the Motions: in December 2014, Plaintiff was released from the Colorado Department of Corrections and placed on parole. [*Id*. at ¶2.] On December 30, 2014, Plaintiff was arrested for a parole violation; however, the complaint was ultimately dismissed because Plaintiff was held in custody for more than 30 days. [*Id*. at ¶¶3-4.] According to Plaintiff, the parole board ordered that Plaintiff be released back to his parole "as it was prior to [his] arrest." [*Id*. at ¶4.]

Despite this order, Defendant Gamez, with Defendant Diaz de Leon's permission, gave Plaintiff a parole directive requiring him to stay at The Denver Rescue Mission in Fort Collins ("Rescue Mission"), and wear an electronic monitoring device. [*Id*. at ¶¶7-11.] Defendant Gamez told Plaintiff that Plaintiff would be placed at the Rescue Mission (as opposed to a friend's home) because Plaintiff "needed more supervision and could not be trusted." [*Id*. at ¶7.] Defendant Gamez also directed Plaintiff to follow all of the Rescue Mission's "house rules." [*Id*.] Plaintiff alleges the "house rules" applied only to The Program, a "Christian faith based community placement." [*Id*.] The house rules allegedly included twice-weekly bible studies, daily prayer, daily chapel, church, and one-on-one religious counseling. [*Id*. at ¶20.] Although Plaintiff is an atheist, and informed Defendant

Gamez of this fact, Defendant Gamez would not consider other non-religious placements. [*Id*. at ¶¶7, 21, 26.] Further, Defendant Gamez told Plaintiff that if he refused this placement, the only other option was jail. [*Id*. at ¶8.]

Upon his arrival at the Rescue Mission on February 3, 2015, Plaintiff told Defendant Carmack that he was an atheist. [*Id*. at ¶24.] Defendant Carmack allegedly told Plaintiff that he was not permitted to talk about those beliefs while he was at the Rescue Mission. [*Id*.] After Plaintiff told Defendant Carmack that he did not want to be in The Program, Defendant Carmack stated that perhaps Plaintiff should be in jail and called Defendant Gamez to discuss. [*Id*. at ¶¶25-26.] Defendant Carmack later informed Plaintiff that it had been decided that he would stay in The Program despite being an atheist. [*Id*. at ¶26.] Defendant Carmack also said that Defendant Gamez assured him Plaintiff would abide by all of the rules. [*Id*.] In addition, Defendant Carmack informed Plaintiff that he was a "guinea pig" and that Plaintiff had been accepted into The Program as a favor to Defendant Gamez. [*Id*. at ¶28.]

On February 4, 2015, Defendant Carmack took Plaintiff to Defendant Gamez's office for an impromptu meeting. [*Id*. at ¶29.] During the meeting, Defendant Carmack complained about Plaintiff's attitude, his being an atheist, and Defendant Carmack's concerns that Plaintiff would not participate with a good attitude. [*Id*.] Defendant Carmack had Defendant Gamez affirm that Plaintiff would follow the rules or have his parole violated. [*Id*.] In addition, Defendant Carmack had Defendant Gamez change Plaintiff's curfew, which prevented Plaintiff from getting a job. [*Id*.]

During his stay at the Rescue Mission, Plaintiff was forced to attend two Christian bible studies with Defendant Konstanty, who acknowledged that Plaintiff did not want to

be there. [*Id*. at ¶31.] In addition, Plaintiff was required to attend daily prayers, chapel, and perform forced labor. [*Id*. at ¶32.] On one occasion, Defendant Carmack tried to convert Plaintiff to Christianity. [*Id*. at ¶33.] Defendant Carmack also told Plaintiff that if he broke any more rules, he would be kicked out of The Program. [*Id*. at ¶34.]

On February 8, 2015, Plaintiff refused to attend church services or chapel and, thereafter, Defendant Carmack asked Plaintiff to leave The Program. [*Id*.] Because it was a Sunday and the parole office was not open, Plaintiff went to a friend's home. [*Id*. at ¶45.] The following day, Plaintiff went to the parole office, but Defendant Gamez had already issued a warrant for Plaintiff's arrest. [*Id*. at 46.] Thereafter, Plaintiff's parole was revoked for absconding. [*Id*. at ¶48.]

After several amendments, Plaintiff was permitted to amend his complaint a fourth (and final) time. [ECF. #93.] On December 7, 2017, the Defendants filed their Motions to Dismiss [ECF. #97; ECF. #99], which were followed by Plaintiff's Responses [ECF. #103; ECF. #104] on January 16, 2018. Defendants Carmack and Konstanty filed a Reply [ECF. #105] on January 30, 2018.

STANDARDS OF REVIEW

A. Fed. R. Civ. P. 12(b)(6)

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6). In deciding a motion under Rule 12(b)(6), the Court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124-25 (10th Cir. 2010) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). The Court is not,

however, "bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In addition, this Court may consider exhibits attached to the complaint without converting the motion into one for summary judgment pursuant to Rule 56. *See Hall v. Bellmon*, 935 F.2d 1106, 1112 (10th Cir. 1991).

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*, 556 U.S. at 678 (internal quotation marks omitted). A claim is plausible when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. This standard requires more than the sheer possibility that a defendant has acted unlawfully. *Id*. Facts that are "merely consistent" with a defendant's liability are insufficient. *Id*. "[T]o state a claim in federal court, a complaint must explain what each defendant did to him or her; when the defendant did it; how the defendant's actions harmed him or her; and what specific legal right the plaintiff believes the defendant violated." *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1163 (10th Cir. 2007).

The ultimate duty of the Court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007). "Nevertheless, the standard remains a liberal one, and 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely.'" *Morgan v. Clements*, No. 12-

cv-00936-REB-KMT, 2013 WL 1130624, at *1 (D. Colo. Mar. 18, 2013) (quoting *Dias v. City & County of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009)).

B. *Pro Se* Parties

The Court is cognizant of the fact that Plaintiff is not an attorney; consequently, his pleadings and other papers have been construed liberally and held to a less stringent standard than formal pleadings drafted by a lawyer. *See Hall*, 935 F.2d at 1110 (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)). Therefore, "if the court can reasonably read the pleadings to state a claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper authority, his confusion of legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." *Id*. However, this Court cannot act as a *pro se* litigant's advocate. *Id*. It is the responsibility of the *pro se* plaintiff to provide a simple and concise statement of his claims and the specific conduct that gives rise to each asserted claim. *See Willis v. MCI Telecomms.*, 3 F. Supp. 2d 673, 675 (E.D.N.C. 1998).

Moreover, the Court may not "supply additional factual allegations to round out a plaintiff's complaint." *Whitney v. State of New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997). Nor may a plaintiff defeat a motion to dismiss by alluding to facts that have not been alleged, or by suggesting violations that have not been pleaded. *Associated Gen. Contractors of Cal. Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). In the end, *pro se* parties must "follow the same rules of procedure that govern other litigants." *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994).

C. Qualified Immunity

The State Defendants have raised the qualified immunity defense to Plaintiff's false

imprisonment and equal protection claims. Qualified immunity shields "government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quotation omitted). Qualified immunity is "immunity from suit rather than a mere defense to liability [and] it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Whether defendants are entitled to qualified immunity is a legal question. *Wilder v. Turner*, 490 F.3d 810, 813 (10th Cir. 2007).

When the qualified immunity defense is raised, the plaintiff bears the burden of showing, with particularity, facts and law establishing the inference that the defendant violated a clearly established federal constitutional or statutory right. *Walter v. Morton*, 33 F.3d 1240, 1242 (10th Cir. 1994). If the plaintiff fails to establish either (a) a violation of a federal constitutional or statutory right, or (b) that the claimed right was clearly established, the defendant is entitled to qualified immunity. *Pearson*, 555 U.S. at 236. The court has the discretion to consider these prongs in any order it chooses. *Leverington v. City of Colorado Springs*, 643 F.3d 719, 732 (10th Cir. 2011).

Regarding the first prong, if no federal constitutional or statutory right would have been violated even assuming the truth of the plaintiff's allegations, then the court's inquiry is at an end. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Regarding the second prong, whether an alleged constitutional right was "clearly established" must be considered "in light of the specific context of the case, not as a broad general proposition." *Id*. An official's conduct "violates clearly established law when, at the time of the challenged conduct, 'the contours of a right are sufficiently clear' that every 'reasonable official would have

understood that what he is doing is violating that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). To be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *Id*.

DISCUSSION

A. Rescue Mission Defendants' Motion to Dismiss [ECF. #97]

In their Motion, Defendants Carmack and Konstanty argue that Plaintiff's claims against them should be dismissed pursuant to Rule 12(b)(6) because Plaintiff has failed to allege that they are state actors. The Court agrees.

"Under Section 1983, liability attaches only to conduct occurring 'under color of law.'" *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995). "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). "[M]erely private conduct, no matter how discriminatory or wrongful," is excluded from the reach of §1983. *Am. Mfrs. Mut. Inc. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (internal quotation marks and citations omitted).

The Tenth Circuit has recognized four tests to help determine whether state action exists:

> First, the close nexus test asks whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. Second, the symbiotic relationship test finds state action when the State has so far insinuated itself into a position of interdependence with the

> private party. Third, under the joint action test, the court will find state action if a private party is a willful participant in joint activity with the State or its Agents. Finally, the public functions test finds state action when a private entity exercises powers traditionally exclusively reserved to the State.

Anglin v. City of Aspen, Colo., 552 F. Supp.2d 1229, 1240 (D. Colo. 2008) (citing *Gallagher*, 49 F.3d at 1448 (further internal quotation marks and citations omitted)). In his Response, Plaintiff contends the Rescue Mission Defendants qualify as state actors under all four tests.

1. Close Nexus

Under the close nexus test, a plaintiff must demonstrate that "there is a sufficiently close nexus" between the government and the challenged conduct such that the conduct "may be fairly treated as that of the state itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974). A private actor can become a state actor for purposes of § 1983 "if the state exercises sufficiently coercive power over the challenged action." *Wittner v. Banner Health*, 720 F.3d 770, 775 (10th Cir. 2013) (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001)).

In his Response, Plaintiff argues that Defendant Gamez coerced Plaintiff in to following The Program's rules with threats of jail or parole revocation. He also argues that Defendant Carmack coerced Plaintiff into participating in religious activities with threats of prison. [ECF. #103.] This argument misses the mark, however, because the proper inquiry under the law is whether Defendant Gamez exercised coercive power over the *Rescue Mission Defendants'* alleged unlawful actions. *Wittner*, 720 F.3d at 775.

As the Court understands his Fourth Complaint, Plaintiff challenges: (1) being placed in The Program; (2) Defendant Carmack's attempts to force Plaintiff to abide by

the house rules; and, (3) the Rescue Mission Defendants' attempts to convert Plaintiff to Christianity. The allegations in the Fourth Complaint, however, do not demonstrate coercion by the State Defendants over the actions of Defendants Carmack or Konstanty. Rather, according to the Fourth Complaint, Defendant Carmack made the decision to accept Plaintiff into the Program and did so only as a favor to Defendant Gamez. [ECF. #95 at ¶28.] It is also clear that it was Defendant Carmack's decision to expel Plaintiff from the Program. [*Id*. at ¶34.] Further, the allegations do not indicate that the State Defendants exercised coercive power over the Rescue Mission Defendants' alleged attempts to force Plaintiff's participation in religious activities or their attempts to convert Plaintiff to Christianity. Thus, the Fourth Complaint does not establish a close nexus between the conduct of the Rescue Mission Defendant's and the State Defendants.

2. Symbiotic Relationship

In *Gallagher*, the Tenth Circuit explained that when "the state 'has so far insinuated itself into a position of interdependence' with a private party 'it must be recognized as a joint participant in the challenged activity.'" 49 F.3d at 1451 (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)). In examining whether a symbiotic relationship exists, the analysis starts by asking "whether and to what extent the state's relationship with the private actor goes beyond the "mere private [purchase] of contract services." *Wittner*, 720 F.3d at 778 (quoting *Brentwood*, 531 U.S. at 299). Although payments under government contracts are insufficient to establish a symbiotic relationship, a "public-private relationship can transcend that of mere client and contractor if the private and public actors have sufficiently commingled their responsibilities." *Id*.

In the Fourth Complaint, Plaintiff alleges that the Fort Collins parole office utilizes the Rescue Mission to "rehabilitate and house parolees." He further alleges that "[t]he Program offers free bed space and parole offers The Program free labor and referrals." [ECF. #95 at ¶13.] In his Response, Plaintiff also notes that Defendant Carmack participated in Plaintiff's parole office visit and asked Defendant Gamez to change Plaintiff's curfew. [ECF. #103 at P.4.] The Court concludes that these allegations are insufficient to demonstrate a symbiotic relationship.

Plaintiff does not allege that the State Defendants have the authority to unilaterally place parolees in the Program — indeed, as previously noted, the allegations suggest the opposite. [ECF. #95 at ¶28.] Although he suggests a *quid pro quo* arrangement, Plaintiff does not allege the State Defendants have a contract with the Denver Rescue Mission, or that the State Defendants extensively participate in running the Program or in dictating its governance. The kind of heavily interdependent relationship that typically characterizes a symbiotic relationship is not alleged here; thus, the Court concludes the Recuse Mission Defendants are not state actors under this test. *See Wittner*, 720 F.3d at 779 (citing *Milonas v. Williams,* 691 F.2d 931, 940 (10th Cir.1982), and *Brentwood* 531 U.S. at 296, as examples of qualifying symbiotic relationships).

3. Joint Action

In applying the joint action test, courts ask "whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Gallagher*, 49 F.3d at 1453. The Tenth Circuit has held that "one way to prove willful and joint action is to demonstrate that the public and private actors engaged in a conspiracy." *Sigmon v. CommunityCare HMO, Inc.*, 234 F.3d 1121, 1126 (10th Cir. 2000). When a

plaintiff seeks to establish state action based on a theory of conspiracy, "a requirement of the joint action charge . . . is that both public and private actors share a common unconstitutional goal." *Anaya v. Crossroads Managed Care Sys.*, 195 F.3d 584, 596 (10th Cir. 1999). Furthermore, "the pleadings must specifically present facts tending to show agreement and concerted action." *Hunt v. Bennett*, 17 F.3d 1263, 1268 (10th Cir. 1994).

In his Response, Plaintiff contends he alleged three separate "meeting of the minds" between the State Defendants and Rescue Mission Defendants: (1) Defendants Carmack and Gamez's agreement to place Plaintiff in The Program; (2) Defendant Carmack's call to Defendant Gamez wherein Defendant Gamez confirmed that Plaintiff would abide by the house rules; and, (3) the parole office visit when Defendant Carmack had Defendant Gamez both affirm that Plaintiff would abide by the house rules and agree to change Plaintiff's curfew. [ECF. #103 at p.8-9.] The Court is not persuaded that these alleged agreements sufficiently establish joint action.

First, Plaintiff must allege more than a general meeting of the minds. *See Gallagher*, 49 F.3d at 1453-55. His allegations must show that the Defendants shared a common unconstitutional goal. For example, in *Gallagher*, the Tenth Circuit held that a concert promoter who rented a state university's stadium and then conducted illegal pat-down searches of concert-goers did not act under the color of state law. 49 F.3d at 1455. Although the Circuit Court accepted that the private and state parties likely shared a common goal of hosting a successful event, it held that this alone was insufficient to establish a conspiracy to violate patrons' civil rights. *Id*. Instead, the plaintiffs needed to show that the concert promoter and the university shared the specific common goal to conduct the pat-downs. *Id*.

Here, although Defendants Gamez and Carmack may have had a common goal of placing Plaintiff at the Denver Rescue Mission and having him follow the house rules, the Fourth Complaint does not allege they shared a common goal to force Plaintiff to engage in religious activities and convert him to Christianity. Indeed, according to the Fourth Complaint, Defendant Gamez's intent in placing Plaintiff at the Rescue Mission (as opposed to with a friend) was to provide Plaintiff with the supervision he required. [ECF. #95 at ¶7.] And, according to Plaintiff's allegations, "Defendant Gamez did no independent investigations of what happened at The Program." [ECF. #95 at ¶46.] Thus, the allegations do not establish that Defendant Gamez had an unconstitutional goal. At best, Plaintiff's allegations indicate that Defendant Gamez acquiesced to Defendant Carmack's conduct. This, however, does not constitute state action. *Wittner*, 720 F.3d at 778-79 ("[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action.").

Plaintiff cites *Hanas v. Inner City Christian Outreach, Inc.*, 542 F. Supp. 2d 684, 693-94 (E.D. Mich. 2008), and argues that the facts there are very similar to the facts in this matter. In *Hanas*, the plaintiff was placed in a faith-based rehabilitation program after pleading guilty to drug charges. During sentencing, the judge admonished the plaintiff to follow the rules of the program and expressly stated that "the rules of Pastor Rottiers' Program are the rules of the Court. It's just the same. You screw up that, you screw up this." *Id*. at 690. On that basis, the court found that the drug court acted jointly with the private rehabilitation program. *Id*.

Although the Court acknowledges similarities between *Hanas* and this case, it concludes that *Hanas* is distinguishable from the present facts. In that case, the district

court reached its conclusion on the basis that the private rehabilitation program received the endorsement of the drug court's authority. *Id*. By contrast, Plaintiff's Fourth Complaint does not allege facts showing any similar endowing of state authority to private actors, or adopting of private rules as state mandates. Moreover, the district court in *Hanas* did not analyze whether there was a common unconstitutional goal between the state and the private defendants, as the Court analyzes here.

As discussed above, in the Tenth Circuit, the focus is on whether the parties have acted in concert in effecting a particular deprivation of constitutional rights. *Gallagher*, 49 F.3d at 1453. Furthermore, Defendant Gamez, unlike the drug court in *Hanas*, did not expressly adopt The Program's rules as rules of the state. Although Defendant Gamez allegedly told Plaintiff to abide by The Program's rules, the Fourth Complaint does not contain sufficient factual allegations to establish that Defendant Gamez either understood what these rules included, or adopted these rules as state authority. In fact, according to the Fourth Complaint, Plaintiff only became acquainted with the house rules when he arrived at the Rescue Mission. [ECF. #95 at ¶24.] Thus, the Court does not find *Hanas* applicable and concludes that the allegations in the Fourth Complaint fail to establish joint action on the part of the State Defendants and the Rescue Mission Defendants.

4. Public Function

Finally, in a single sentence, Plaintiff offers the conclusory argument that the Rescue Mission Defendants are state actors under the public functions theory because "[i]t is the exclusive public function of the state to hold pre parole revocation detainees until they are seen by the parole revocation board." [ECF. #103 at p.14.] First, it is not entirely clear what Plaintiff means by "pre parole revocation detainee." Second, to the

extent Plaintiff relies on his contention that he was unlawfully imprisoned at the Rescue Mission, as explained below, the allegations do not establish an unlawful restraint on Plaintiff's person. *See infra* Sec.C.1. Further, Plaintiff has cited no law to support his proposition, and the Court has found none. For that reason alone, the Court rejects this argument.

Even if Plaintiff had presented more than an undeveloped argument and legal conclusions, Defendants aptly observe that courts in other jurisdictions have concluded that the provision of transitional housing is not a function traditionally provided by the state. *Byng v. Delta Recovery Servs., LLC*, No. 6:13-cv-377 (MAD/ATB), 2013 WL 3897485, at *9 (N.D. N.Y. July 29, 2013) ("the provision of transitional housing to former inmates under parole supervision is not a function that has traditionally been the exclusive prerogative of the state") (collecting cases). The Court also notes that other private providers of transitional housing have not been found to be state actors. *See Allen v. Dawson*, No. 11-cv-02251-CMA-MJW, 2012 WL 2878031, at *1 (D. Colo. July 12, 2012) (rejecting plaintiff's argument that employees of private halfway houses are always state actors and noting that "[c]ourts often find that employees of private halfway houses were not acting under the color of state law."). Consequently, the Court is not persuaded that the Rescue Mission Defendants are state actors under the public functions test.

Because Plaintiff's allegations, accepted as true, do not establish that Defendant Carmack or Defendant Konstanty acted under color of state law, Plaintiff has failed to state a cognizable claim for relief against them. Consequently, the claims against the

Rescue Mission Defendants shall be dismissed with prejudice, and the Rescue Mission Defendants' Motion is GRANTED.[1]

B. State Defendants' Motion to Dismiss [ECF. #99]

The State Defendants seek to dismiss Plaintiff's false imprisonment (Claim One) and equal protection (Claim Four) claims for failure to state a claim upon which relief can be granted. They also seek to dismiss all of the claims against Defendant Diaz de Leon on the basis that Plaintiff has failed to sufficiently allege her personal participation. The Court agrees with the State Defendants.

1. False Imprisonment

"To maintain a . . . false imprisonment claim under § 1983, [Plaintiff] must demonstrate the elements of a common law claim and show that [his] Fourth Amendment right to be free from unreasonable search and seizure has been violated." *Trimble v. Park Cty. Bd. Of Com'rs*, 242 F.3d 390, *3 (10th Cir. Dec. 4, 2000) (Table). In this case, Plaintiff must establish that "an unlawful restraint" was placed upon his freedom to come and go as he pleased. *Blackman for Blackman v. Rifkin*, 759 P.2d 54, 67 (Colo. App. 1988); *see also Taylor v. Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996) (Colorado tort law provides the starting point for determining the elements of a § 1983 claim for violation of the Fourth Amendment).

Here, Plaintiff contends that he was falsely imprisoned when Defendant Gamez altered Plaintiff's conditions of parole and required him to establish residence at the Rescue Mission. [ECF. #95 at ¶¶1-15.] As the Court understands his allegations, Plaintiff

[1] The Court allowed Plaintiff to amend his complaint on four separate occasions. On November 16, 2017, the Court ordered that there would be no further amendments in this case. [ECF. #93.]

also challenges the time of his curfew and the type of electronic monitoring device he was required to wear. [*Id*. at ¶¶ 11, 27.]

These allegations do not establish that Defendant Gamez placed an unlawful restraint on Plaintiff. It is well-settled that there is no constitutional or inherent right to any particular type of parole. *Greenholtz v. Neb. Penal Inmates,* 442 U.S. 1, 7 (1979) ("[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence"). Indeed, "[t]he traditional view is that one who is on parole is granted a special privilege to be outside the wall of the institution while serving his sentence . . . . At the same time the parolee remains in the constructive custody and is subject to be returned to the enclosure at any time." *People v. Lucero*, 772 P.2d 58, 60 (Colo. 1989) (quoting *Hutchison v. Patterson*, 267 F.Supp. 433, 434 (D. Colo. 1967)).

Plaintiff — citing *Goetz v. Gunter,* 830 P.2d 1154 (Colo. App. 1992) — contends that Colorado law required Defendant Gamez to return Plaintiff to the same conditions he was in prior to his December 2014 arrest. [ECF. #95 at ¶15; *see also* ECF. #104 at pp.11-13.] The Court disagrees. Though *Goetz* discussed the parole board's duty to return the parolee to the same *status* he possessed at the time his parole was improperly revoked, the court discussed "status" in terms of the length of parole, not the conditions placed on parole. *Id.* at 1156.

Plaintiff has no constitutional right to any specific form of parole or release before the completion of his sentence. *Greenholtz,* 442 U.S. at 7. Further, Plaintiff had the option of refusing the conditions of parole. *See White v. People,* 866 P.2d 1371, 1374 (Colo. 1994) (stating that if a parolee does not want to participate in the terms of parole, he is

denied the alternative of parole and will serve his sentence). Consequently, he has not asserted a valid constitutional claim for false imprisonment and Defendants Gamez and Diaz de Leon are entitled to qualified immunity on Claim One. This claim shall be dismissed.[2]

2. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment prohibits the government from treating similarly situated individuals differently. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). To prevail on an equal protection claim, Plaintiff must make a threshold showing that he was treated differently from others who were similarly situated to him. *Taylor v. Roswell Ind. Sch. Dist*., 713 F.3d 25, 53 (10th Cir. 2013); *Brown v. Montoya*, 662 F.3d 1152, 1172-73 (10th Cir. 2011); *Templeman v. Gunter*, 16 F.3d 367, 371 (10th Cir. 1994) (prisoner asserting an equal protection violation must show he was treated differently than other prisoners who are similar to him "in every relevant respect"). Even "slight differences in [inmates'] histories" render them not "similarly situated" for purposes of an equal protection analysis. *Templeman*, 16 F.3d at 371.

Here, Plaintiff contends that he was given an earlier curfew because he is an atheist, while other Christian parolees were permitted more time in the community. [ECF.

[2] The State Defendants also argue that a common law tort claim based on false imprisonment would be barred by the statute of limitations and Plaintiff's failure to comply with the Colorado Governmental Immunity Act. However, Plaintiff's Fourth Complaint clearly asserts violations of his constitutional rights. In his Response, Plaintiff does not address any of Defendants tort arguments, but persists in his contention that the Defendants violated his constitutional rights. Further, the Court has already concluded that Plaintiff failed to allege any unlawful restraint, which would preclude a common law claim of false imprisonment. Thus, the Court need not address these arguments.

#95 at ¶¶40-41.] At the threshold, Plaintiff has not shown he was similarly situated in all material respects to others on parole at the Rescue Mission. His vague and conclusory assertions are insufficient to state a claim for relief under the Equal Protection Clause. *See Straley v. Utah Bd. Of Pardons*, 582 F.3d 1208, 1215 (10th Cir. 2009) ("[B]are equal protection claims are simply too conclusory to permit a proper legal analysis."); *Ketchum v. Cruz*, 775 F. Supp. 1399, 1403 (D. Colo. 1991) (a *pro se* litigant's vague and conclusory allegations that his federal constitutional rights have been violated do not entitle him to a day in court regardless of how liberally the court construes such pleadings), *aff'd*, 961 F.2d 916 (10th Cir. 1992). Moreover, given the inherently individualized nature of parole decisions, any "claim that there are no relevant differences between [Plaintiff] and other inmates that reasonably might account for their different treatment is not plausible or arguable." *Templeman*, 16 F.3d at 371.

The Court finds the allegations in the Fourth Complaint fail to plausibly allege that Plaintiff is similarly situated to other parolees, beyond conclusory allegations and legal conclusions [*Id*.; *see also* ECF. #104 at p.18]. Therefore, the Fourth Complaint fails to state a claim, and the State Defendants are also entitled to qualified immunity on this claim.

3. Personal Participation

Personal participation is an essential allegation in a civil rights action. *See Bennett v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976). To maintain a § 1983 claim, the plaintiff must allege facts showing the defendant was "personally involved in the decisions leading to [the plaintiff's] mistreatment." *Escobar v. Reid*, 668 F.Supp.2d 1260, 1290 (D. Colo. 2009). A plaintiff must establish an affirmative link between the alleged

constitutional violation and each defendant's participation, control, or direction. *Serna v. Colo. Dept. of Corr.*, 455 F.3d 1146, 1152-53 (10th Cir. 2006). "Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft*, 556 U.S. at 676.

"Supervisors are only liable under § 1983 for their own culpable involvement in the violation of a person's constitutional rights." *Serna*, 455 F.3d 1146 at 1151. To establish supervisor liability, a plaintiff must establish "a deliberate, intentional act by the supervisor to violate constitutional rights." *Jenkins v. Wood*, 81 F.3d 988, 994-95 (10th Cir. 1996). In demonstrating such liability, the plaintiff must show that the subordinate violated the constitution, and must also show an "affirmative link between the supervisor and the violation." *Serna*, 455 F.3d at 1151. This requires "more than a supervisor's mere knowledge of his subordinate's conduct." *Estate of Booker v. Gomez*, 745 F.3d 405, 435 (10th Cir. 2014) (citing *Schneider v. City of Grand Junction Police Dept.*, 717 F.3d 760, 767 (10th Cir. 2013)). Further, negligence is insufficient; a plaintiff must demonstrate the "supervisor acted knowingly or with deliberate indifference that a constitutional violation would occur." *Serna*, 455 F.3d 1146 at 1151.

A careful review of the allegations in the Fourth Complaint demonstrates that Plaintiff has failed to sufficiently allege personal participation on behalf of Defendant Diaz de Leon. In the Fourth Complaint, Plaintiff alleges that Defendant Diaz de Leon approved Plaintiff's placement at the Rescue Mission. [ECF. #95 at ¶¶9, 28, 36.] There are no allegations that she knew, or acted with deliberate indifference to the fact, that Plaintiff

would be forced to participate in religious activities or that the Rescue Mission Defendants would try to convert him to Christianity.

In his Response, Plaintiff repeats the allegations regarding Defendant Diaz de Leon's approval of his placement, and argues that "Defendant Diaz de Leon wouldn't speak with [him]." [ECF. #104 at p.23.] Citing *Jones v. Wilhelm*, 425 F.3d 455 (7th Cir. 2005), Plaintiff argues that Defendant Diaz de Leon "cannot create a defense based on willful ignorance." [ECF. #104 at p.23.] This argument is problematic for two reasons. First, Plaintiff's argument is inconsistent with the allegations in his Fourth Complaint. There, he alleged that Defendant Diaz de Leon was unavailable, whereas the argument in his Response insinuates that she refused to see him. Plaintiff may not amend his Fourth Complaint via arguments made in his Response. *See In re Quest Commc'ns Intern., Inc.*, 396 F.Supp.2d 1178, 1203 (D. Colo. 2004) (plaintiffs may not further amend their complaints by alleging new facts in response to a motion to dismiss).

Second, Plaintiff's citation to *Jones v. Wilhelm* is misplaced. There, in discussing the two-part qualified immunity test, the defendant officer asked the court to impute the defendant's actual knowledge to the hypothetical, reasonable officer. 396 F.3d at 461. The Seventh Circuit rejected this argument, concluding that this "would enable state agents to trample on the constitutional rights of citizens by maintaining willful ignorance of what reasonable officers should have known." *Id*. Here, the two-part qualified immunity test is not implicated; rather, the question is whether Defendant Diaz de Leon had the requisite state of mind to sufficiently garner her personal participation. The allegations In the Fourth Complaint simply do not establish that she knew a constitutional violation would occur, or acted with deliberate indifference to the same.

Plaintiff also seems to argue that Defendant Diaz de Leon must have known about the constitutional violation based on a widespread pattern of placing parolees at the Rescue Mission. [ECF. #104 at pp. 24-25.] Plaintiff relies on his allegation that "several other parolees" had been placed at the Rescue Mission by Defendants Gamez and Diaz de Leon. This threadbare allegation, however, lacks any specificity and is not sufficient to demonstrate a pattern of behavior. *Iqbal*, 556 U.S. at 678. Consequently, the Court concludes that the allegations in the Fourth Complaint do not establish personal participation on the part of Defendant Diaz de Leon and dismisses Plaintiff's claims against her.

ORDERS

For the above-reasons, Defendant Carmack and Defendant Konstanty's Motion to Dismiss [ECF. #97] pursuant to Rule 12(b)(6) is GRANTED, and the claims against these Defendants are dismissed with prejudice. It is further ORDERED that these Defendants are dismissed as parties to this action.

It is further ordered that Defendant Gamez and Defendant Diaz de Leon's Motion to Dismiss [ECF. #99] pursuant to Fed. R. Civ. P. 12(b)(6) is GRANTED and Claim One and Claim Four are dismissed with prejudice, and all claims against Defendant Diaz de Leon are dismissed with prejudice. It is further ORDERED that Defendant Diaz de Leon is dismissed as a party to this action.

This Order does not affect the remaining claims in the Fourth Complaint (Claims Two and Three) asserted against Defendant Gamez, which shall proceed to be litigated.

It is further ORDERED that a Scheduling Conference is set for October 23, 2018, at 10:00 a.m. to set discovery deadlines and discuss what discovery, if any, is needed

regarding Plaintiff's remaining claims. Plaintiff and his case manager shall arrange for his participation in this conference by calling 303.335.2124 at the scheduled time.

DATED: September 20, 2018.

BY THE COURT:

S. Kato Crews
United States Magistrate Judge
District of Colorado