IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

Civil Action No. 14-CV-0245-MSK-MJW

REVEREND MATT HALE,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS,

Defendant.

MEMORANDUM ORDER

THIS MATTER comes before the Court on the Plaintiff's Motion to Deny Costs (**# 222**), the Defendant's response (**# 231**), and the Plaintiff's reply (**# 232**); the Plaintiff's Motion for Relief From Judgment (**# 229**), the Defendant's response (**# 233**), and the Plaintiff's Reply (**# 240**); the Defendant's Motion to Restrict Access (**# 236**), the Plaintiff's response (**# 238**), and the Plaintiff's reply (**# 244**); and the Plaintiff's Motion to Strike (**# 238**). For the reasons that follow, the Plaintiff's motions are denied and the Defendant's motion is granted.

The Court assumes the reader's familiarity with the underlying facts in this litigation, thus the factual description is brief. Mr. Hale is an inmate at the Administrative Maximum facility in Florence, Colorado (ADX). Mr. Hale is/was the leader of "Creativity", which he describes as a religious group.

In this action, Mr. Hale asserted a number of claims,[1] four of which the Court determined by grant of summary judgment to the Federal Bureau of Prisons (**## 212**, **213**).

[1] Mr. Hale originally brought 11 claims, seven of which were dismissed. (**# 66**).

Those claims were: (1) that the BOP violated Mr. Hale's right to practice his religion by imposing mail bans from July 2010 to January 2011 and January 2013 to August 2013 and by refusing to provide him a special diet; (2) that the mail bans and refusal to provide a special diet violated Mr. Hale's religious-freedom rights under the Religious Freedom Restoration Act; (3) that the BOP imposed the mail ban in retaliation for Mr. Hale's exercise of his First Amendment rights; (4) that the BOP violated Mr. Hale's First Amendment right to free speech when it prohibited him from having a copy of a book. Following entry of judgment, costs were taxed against Mr. Hale (**# 226**).

A. Motion for Relief From Judgment

The Court construes this Motion as a motion for reconsideration governed by Federal Rule of Civil Procedure 60. Rule 60(b) permits the Court to reconsider an order due to, among other things, a substantive mistake or law or fact by the Court, newly discovered evidence that, with reasonable diligence, could not have been discovered earlier, or as a result of any other reason that justifies relief. *See* Fed. R. Civ. P. 60(b)(1)–(2), (6); *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999). Reconsideration under Rule 60(b) is extraordinary, and may only be granted in exceptional circumstances. *Rogers v. Andrus Transp. Servs.*, 502 F.3d 1147, 1153 (10th Cir. 2007). Reconsideration is not a tool to rehash previously-presented arguments already considered and rejected by the Court, nor is it properly used to present new arguments based upon law or facts that existed at the time of the original argument. *FDIC v. United Pac. Ins. Co.*, 152 F.3d 1266, 1272 (10th Cir. 1998); *Van Skiver v. United States*, 952 F.2d 1241, 1243–44 (10th Cir. 1991).

Mr. Hale seeks reconsideration under Rule 60(b)(3), alleging fraud, misrepresentation, or misconduct by the BOP. Specifically, Mr. Hale contends that his Creativity texts were

confiscated by prison personnel after entry of judgment in this case. From this, he contends that the BOP lied to the Court when it represented that Mr. Hale is permitted to keep such texts in his cell. The BOP responds that the texts were temporarily seized and searched in response to a security threat, and that once the search was complete, eight books (in accordance with ADX regulations) were returned to Mr. Hale. Of the eight books, Mr. Hale chose to keep only one Creativity text.

It is not clear that any misrepresentation has been made by the BOP. It represented in this action that Mr. Hale would be allowed to have Creativity texts in his cell. Indeed, he has been allowed to do so — he can have eight such books pursuant to ADX regulations, but he has chosen only to have one. Moreover, the appropriateness of the ADX regulation limiting Mr. Hale to eight books at any given time was not the subject of this lawsuit. It concerned whether Mr. Hale can have Creativity texts, not how many of them he may physically have in his cell at a given time. Indeed, at the time of entering judgment, the Court noted that the BOP would be within its discretion to confiscate such books from Mr. Hale in appropriate circumstances. Thus, the actions of the BOP do not constitute new evidence relevant to the determination in this matter. The motion is denied.

B. Motion to Deny Costs

The Defendants filed a Bill of Costs (**# 218**) seeking $5,226.35 in taxable expenses, and the Clerk of Court taxed costs (**# 226**) of the same amount in the Defendant's favor. Mr. Hale seeks denial of the award of costs for four reasons: (1) the BOP repeatedly asserted privilege to obstruct Mr. Hale's discovery requests; (2) the BOP acted in bad faith when its employees lied to the Court about Mr. Hale's address at ADX when it "accidentally" left out a sentence from his press release; (3) the question he raised — whether Creativity is a religion — was a close and

difficult question; and (4) he is indigent, so imposing costs upon him would create a chilling effect on civil-rights litigants (**# 222**).

Federal Rule of Civil Procedure 54 provides that costs are awarded to a prevailing party as a matter of course unless the Court directs otherwise. Fed. R. Civ. P. 54(d)(1). Denying costs is a severe penalty, so there must be a legitimate reason penalize the prevailing party. *Marx v. Gen. Revenue Corp*., 668 F.3d 1174, 1182 (10th Cir. 2011). The Tenth Circuit has set forth six instances when it is proper to deny costs to a prevailing party: "(1) the prevailing party is only partially successful, (2) the prevailing party was obstructive and acted in bad faith during the course of the litigation, (3) damages are only nominal, (4) the nonprevailing party is indigent, (5) costs are unreasonably high or unnecessary, or (6) the issues are close and difficult." *Debord v. Mercy Health Sys. of Kan. Inc*., 737 F.3d 642, 659–60 (10th Cir. 2013). Only the second, fourth, and sixth instances arguably apply here.

Mr. Hale's argument about the BOP's assertion of privilege falls within none of the exceptions to an award of costs. The invocation of privilege is a proper, routine, and important part of the litigation process. Mr. Hale does not show that the BOP's assertion of privilege was not authorized or was manifestly improper so as to constitute bad faith.

Mr. Hale's assertion that the BOP lied to the Court is based upon two assertions: (1) that the BOP misrepresented the Mr. Hale's address to the Court; and (2) that the BOP misrepresented the contents of a press release made by Mr. Hale when he was housed in another facility. As to the first alleged misrepresentation, the Court finds upon review of Mr. Hale's prior submissions, that no misrepresentation was made to the Court about his address — any misstatement by the BOP was to third parties, and such misstatement had no bearing on the merits of this case. The second instance also is of limited import. Mr. Hale argues that the

BOP quoted only a portion of his press release made when he was at FCI Terra Haute. The press release criticized the appointment of the attorney who had been prosecutor in Mr. Hale's his case to a federal judicial position. In the press release, Mr. Hale stated:

> I'm sure he'll do great there for the federal, Jewish tyranny that presently rules over us and help consign some more innocent people to a prison cell for decades like he did me. [He] is living proof of why people would have the silly idea that the Nazis would try to kill six million Jews, for in my particular case he prosecuted a man he knew to be innocent all along only so that a critic of the Jewish domination of our country could be silenced. He caused enormous grief to me, my family, and my church. Well, in any case, it is my hope that [he] will one day receive his comeuppance.

186 at 95.

Mr. Hale complains that the BOP failed to include language that explained his meaning of the word "comeuppance". Again, it is difficult to see a misrepresentation here. The BOP stated to the Court that Mr. Hale meant "legal comeuppance" and it is with that understanding that the Court issued its opinion. # 212 at 26. Mr. Hale fails to explain how such clarification was inadequate. Thus, even if the original quotation was inaccurate, it had no effect on the determination in this matter.

The Court appreciates that its long opinion may create the impression that this matter raised "close and difficult" issues. But that the constitutional issues raised by Mr. Hale were important and deserving of thorough consideration did not mean that they were "close and difficult". With regard to whether Creativity is a "religious" belief system, the Court noted that multiple district courts had addressed the issue between 2002 and 2011 and none had found it to be so. Applying Tenth Circuit precedent in *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996), the Court reached the same conclusion finding that four out of the five factors mentioned weighed against Creativity being considered a religion. The Court's analysis on the mail

restrictions was equally as clear. Even if the Court had determined that Creativity was a valid religion it found that the restrictions on Mr. Hale's correspondence were justified by a compelling interest and were narrowly tailored to meet that interest.

Turning to Mr. Hale's indigence, he is correct that indigence must be considered and there is no dispute that he is indigent. But, in the Tenth Circuit, indigence alone is not dispositive. *Rodriguez v. Whiting Farms Inc*., 360 F.3d 1180, 1190 (10th Cir. 2004). The Court is mindful that the Rules presume that costs will be awarded in most cases, and indeed, Congress has specifically provided that litigants proceeding *in forma pauperis* shall be liable for costs in the same manner "as in other proceedings." 28 U.S.C. § 1915(f)(1); *Sandle v. Principi*, 201 F. App'x 579, 583 (10th Cir. 2006).

Ultimately, the question of whether it is fair to assess costs against an indigent party,[2] and in this regard, the Court makes several observations. First, as noted above, Rule 54(d) and various other legislative enactments represent a general societal preference that the costs of unsuccessful litigation should be borne by the losing party, even if that party may be indigent. If Congress intended to abrogate and modify a prevailing party's presumptive entitlement to costs when the losing party was indigent, it could have done so in the *in forma pauperis* statute. The fact that Congress directed that indigent litigants will generally be liable for costs "as in other proceedings" strongly suggests that Congress does not consider indigence, alone, to be particularly strong cause for refusing to award costs.

Second, the Court notes that Mr. Hale initiated this suit with full appreciation of the

[2] Mr. Hale makes much of the difference in size between him, the indigent party, and the BOP, arguing that it is unfair to award costs to the BOP given its vast resources. The Court cannot find any authority to suggest that the *relative* resources between the parties are relevant in considering the nonprevailing party's indigence.

possibility of incurring costs. He is a law school graduate and has litigated many matters. Indeed, he has filed multiple suits in federal court not including any post-conviction review.[3] Though none of these suits has proceeded far enough to result in an award of costs, the possibility of incurring costs has not deterred Mr. Hale from asserting his rights.

Accordingly, while the Court acknowledges Mr. Hale's indigence as a circumstance weighing against awarding costs to the BOP, the Court finds that on balance, he has failed to overcome the general presumption that costs should be awarded to the prevailing party.

C. Remaining Motions

The BOP seeks Level 1 restriction on the unredacted declaration of Lieutenant Amy Kelley (**# 234**) because it quotes Mr. Hale's writings, which it says could potentially spur his followers to violence. A minimally redacted copy of the declaration exists on the docket without restriction (**# 233-1**). The public interest is adequately served by this small redaction.

Mr. Hale asks the Court to strike the BOP's response (**# 233**) to his Motion for Relief From Judgment because he never received it. As his reply brief thereto indicates (**# 240**), he did eventually receive the response. Accordingly, this motion is denied as moot.

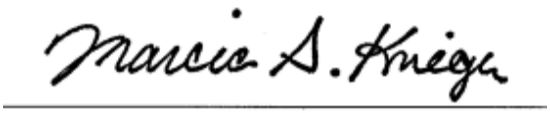
[3] *See Hale v. Ashcroft*, No. 06-CV-0541 (D. Colo.); *Hale v. Lefkow*, 239 F. Supp. 2d 842 (C.D. Ill. 2003) (02-1420); *Hale v. Cmte. on Character & Fitness for the State of Ill.*, No. 01-CV-5065, 2002 WL 398524 (N.D. Ill. Mar. 13, 2002), *aff'd* 335 F.3d 678 (7th Cir. 2003); *Hale v. Schaumburg Twp. Dist. Lib.*, No. 01-CV-2220 (N.D. Ill.).

D. Conclusion

For the foregoing reasons, the Plaintiff's Motion to Deny Costs (**# 222**) and Motion for Relief From Judgment (**# 229**) are **DENIED**. The Plaintiff's Motion to Strike (**# 238**) is **DENIED AS MOOT**. The Defendant's Motion to Restrict Access (# 236) is **GRANTED**. Docket # 234 shall remain at Level 1 Restriction.

Dated this 2nd day of October, 2018.

BY THE COURT:



Marcia S. Krieger
Chief United States District Judge