IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Gordon P. Gallagher, United States Magistrate Judge

Civil Action No. 19-cv-00752-LTB-GPG

MATTHEW HALE, J.D.,

Plaintiff,

v.

RUDY MARQUES,
AMY KELLEY,
DEBORAH PAYNE,
JAMES WIENCEK,
SUSAN PROSE,
ANDRE MATEVOUSIAN,
JAMES FOX,
PAUL KLEIN,
CHRISTOPHER SYNSVOLL,
C. PORCO,
J. OSLAND,
M. WYCHE,
L. ROBINSON,
D. HUMPHRIES,
S. HANSEN, and
FEDERAL BUREAU OF PRISONS,

Defendants.

RECOMMENDATION TO DISMISS IN PART AND TO DRAW CASE

This matter comes before the Court on Plaintiff Matthew Hale's Prisoner Complaint (ECF No. 1)[1]. The matter has been referred to this Magistrate Judge for

[1] "(ECF No. ___)" is an example of the convention I use to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). I use this convention throughout this Recommendation.

recommendation (ECF No. 7)[2]. Under 28 U.S.C. § 1915A and D.C.COLO.LCivR 8.1(b), the Court must review the Prisoner Complaint to determine whether any claims are appropriate for summary dismissal.

The Court must construe Plaintiff's filings liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520- 21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not act as an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110.

The Court has reviewed the filings to date. The Court has considered the case file and the applicable law, and is sufficiently advised in the premises. This Magistrate Judge respectfully recommends that the Prisoner Complaint (ECF No. 1) be dismissed in part and the remaining claims be drawn to Senior Judge Marcia S. Krieger. *See* D.C.COLO.LCivR 8.1(c), 40.1(d)(1); *Hale v. Federal Bureau of Prisons, et al.*, Case No. 14-cv-00245-MSK-MJW (final judgment entered March 29, 2018).

I. Factual and Procedural Background

Plaintiff is in the custody of the federal Bureau of Prisons at the U.S. Penitentiary AdMax in Florence, Colorado. On March 13, 2019, he filed *pro se* the Prisoner

[2] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive, or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

Complaint, which is the operative pleading. (ECF No. 1). He paid the filing fee. (ECF No. 5).

Plaintiff brings the Prisoner Complaint pursuant to *Bivens* and the Religious Freedom Restoration Act ("RFRA"). (ECF No. 1 at 4). Plaintiff alleges he is an "ordained minister in the non-Christian Church of the Creator", also referred to as "Creativity religious faith." (*Id.* at 7). Since his incarceration at the maximum-security prison in Florence, Colorado, he contends Defendants have violated his rights because of his religious beliefs. (*See generally* ECF No. 1).

Plaintiff sets forth twenty-two claims: 1) violation of the First Amendment Establishment Clause due to "ongoing harassment" because Plaintiff "does not adhere to the tenets of the Christian religion"; 2) violation of the freedom of speech due to "censorship" of his book; 3) violation of the First Amendment Free Exercise Clause due to a "total ban on all of Hale's religious mail"; 4) violation of RFRA due to the ban on Plaintiff's "religious correspondence"; 5) violation of the freedom of speech due to the ban on Plaintiff's "Creativity" correspondence; 6) violation of the First Amendment Free Exercise Clause due to the refusal to mail a "sermon" prepared by Plaintiff and subsequent incident report; 7) violation of RFRA due to the refusal to mail a "sermon" prepared by Plaintiff and subsequent incident report; 8) violation of the freedom of speech due to the refusal to mail a "sermon" prepared by Plaintiff and subsequent incident report; 9) retaliation in violation of the First Amendment due to the incident report and discipline resulting from Plaintiff attempting to send his "sermon"; 10) violation of the freedom of speech due to the "censorship of an article written by Hale advocating for his release from prison by President Trump"; 11) retaliation in violation of

the First Amendment by banning Plaintiff's phone calls with his mother due to his attempt "to seek the newspaper publication of documents filed with this Court"; 12) violation of due process arising from no hearing prior to the ban of Plaintiff's phone calls with his mother; 13) violation of the freedom of speech due to the refusal to mail an article Plaintiff wrote about "those who care about the future of their White Race" to his mother; 14) retaliation in violation of the First Amendment due to the charge of gang activity and subsequent discipline related to the article; 15) violation of the freedom of speech due to interference with his outgoing and incoming mail; 16) violation of the First Amendment Free Exercise Clause due to the "refusal to let Hale have a book which espouses his religious faith," the "Racial Loyalty Portfolio"; 17) violation of RFRA due to refusing to allow Plaintiff to receive the "Racial Loyalty Portfolio"; 18) violation of the freedom of speech due to refusing to allow Plaintiff to receive the "Racial Loyalty Portfolio"; 19) violation of the freedom of speech based on withholding mail that mentions the title of books authored by Plaintiff; 20) retaliation in violation of the First Amendment arising from an incident report based on Plaintiff asking his mother to sell his personal belongings for money to pay legal costs; 21) violation of the freedom of speech due to the delayed mailing of Plaintiff's letters; and 22) state law defamation arising from the characterization of Creativity advocating for "violence motivated by racial discrimination." (*See* ECF No. 1). Plaintiff requests injunctive relief and money damages. (*Id.* at 29-30).

II. Issue Preclusion

Under the doctrine of collateral estoppel, also referred to as issue preclusion, "when an issue of ultimate fact has once been determined by a valid and final judgment,

that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). "[I]ssue preclusion bars a party from relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against a different claim." *Park Lake Res. Ltd. Liab. v. U.S. Dep't of Agr.*, 378 F.3d 1132, 1136 (10th Cir. 2004). (citation omitted).

> In general, issue preclusion applies when: (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Id. (citation and quotation omitted). "[I]f a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte,* even though the defense has not been raised." *Arizona v. California*, 530 U.S. 392, 412, *suppl.*, 531 U.S. 1 (2000) (citation omitted).

In 2014, Plaintiff commenced a similar action, Case No. 14-cv-00245-MSK-MJW. On March 28, 2018, summary judgment was granted in favor of the federal Bureau of Prisons and against Plaintiff. *Hale v. Fed. Bureau of Prisons*, No. 14-cv-00245-MSK-MJW, 2018 WL 1535508, at *1 (D. Colo. Mar. 28, 2018), *aff'd,* No. 18-1141, 2019 WL 117616 (10th Cir. Jan. 7, 2019). The Tenth Circuit affirmed summary judgment on January 7, 2019. *Hale v. Fed. Bureau of Prisons*, No. 18-1141, -- F. App'x --, 2019 WL 117616, at *1 (10th Cir. Jan. 7, 2019).

In an Order and Judgment, the Tenth Circuit concluded that Plaintiff's alleged religion of Creativity does not qualify as a religion subject to protection under RFRA.

2019 WL 117616, at *5. The Tenth Circuit also determined that Creativity does not constitute "beliefs that are religious in nature" as required for the protections of the First Amendment Free Exercise Clause. *Id.* at *6. Regarding mail restrictions, the court concluded,

> the mail restrictions on Mr. Hale are rationally connected to the BOP's security interests. There is overwhelming evidence in the record that Creativity poses an institutional security risk and that Mr. Hale has sought to advance the white-supremacist goals of Creativity in ways that pose a danger both inside and outside of ADX. By limiting Mr. Hale's ability to send and receive mail communicating Creativity's message, the BOP mitigates internal and external safety risks.

Id. at *7.

Issue preclusion bars Plaintiff from relitigating the Tenth Circuit's determinations in this action. Plaintiff's RFRA and Free Exercise claims in this action rely on the allegation that Creativity is a religion. The Tenth Circuit decided this identical issue in the negative in the January 7, 2019 Order concerning Case No. 14-cv-00245-MSK-MJW. That action has been finally adjudicated on the merits, as the court entered summary judgment, which was affirmed. *Rivera v. Levitt*, 88 F. Supp. 2d 1132, 1141 (D. Colo. 2000), *aff'd sub nom.*, 44 F. App'x 934 (10th Cir. 2002) ("granting summary judgment on these claims constituted a final judgment on the merits") (collecting cases). Plaintiff was the plaintiff in that action and fully and fairly litigated the issues over nearly five years. *See* Case No. 14-cv-00245-MSK-MJW. Thus, I recommend that Plaintiff's RFRA and Free Exercise claims, specifically Claims 3, 4, 6, 7, 16, and 17, be dismissed with prejudice on the basis of issue preclusion. *See Khan v. Thorley*, 23 F. App'x 978 (10th Cir. 2001) (affirming dismissal with prejudice of claims barred by collateral estoppel).

Likewise, the claims regarding freedom of speech, mail restrictions, and alleged "censorship" of Plaintiff's writings are barred by issue preclusion. The Tenth Circuit explained,

> The BOP has designated Creativity a security threat group (STG), because inmates following its tenets have engaged in acts of violence, including murdering other inmates and instigating race riots. Accordingly, the BOP has placed restrictions on Mr. Hale impacting his participation in Creativity.
> . . .
> Mr. Hale contends that the restrictions on Creativity-based communications violate his free speech and association rights. Restrictions on STG communications are imposed for security reasons existing inside and outside the prison.
> . . .
> We conclude that the mail restrictions on Mr. Hale are rationally connected to the BOP's security interests. There is overwhelming evidence in the record that Creativity poses an institutional security risk and that Mr. Hale has sought to advance the white-supremacist goals of Creativity in ways that pose a danger both inside and outside of ADX. By limiting Mr. Hale's ability to send and receive mail communicating Creativity's message, the BOP mitigates internal and external safety risks.
> . . .
> Upon considering the *Turner* factors, we conclude that summary judgment was appropriate on Mr. Hale's free speech/association claims targeting the BOP's mail restrictions. Those restrictions are reasonably related to legitimate penological interests.

2019 WL 117616, at *1, *6-*8.

Certain of Plaintiff's freedom of speech claims in this action rely on allegations that the speech at issue is based on Creativity and Plaintiff's "philosophy." As explained above, the Tenth Circuit decided this speech correctly is subject to the BOP's restrictions in the January 7, 2019 Order concerning Case No. 14-cv-00245-MSK-MJW. That action has been finally adjudicated on the merits, as the court entered summary judgment, which was affirmed. *Rivera*, 88 F. Supp. 2d at 1141. Plaintiff was the plaintiff in that action and fully and fairly litigated the issues over nearly five years. *See*

Case No. 14-cv-00245-MSK-MJW. Thus, I recommend that certain of Plaintiff's free speech claims, specifically Claims 2, 5, 8, 13, 18, and 19, be dismissed with prejudice on the basis of issue preclusion.

III. Retaliation

"Prison officials may not retaliate against an inmate because of the inmate's exercise of First Amendment rights." 2019 WL 117616, at *8 (citation omitted). As noted above, certain of Plaintiff's First Amendment claims are barred by issue preclusion. Thus, retaliation based on these claims likewise fails. On this basis, I recommend that Claims 9 and 14 be dismissed without prejudice for failure to show that Plaintiff is entitled to relief as required by Fed. R. Civ. P. 8(a).

IV. Defamation

In Claim 22, Plaintiff alleges that Defendant Matevousian stated in a letter to a United States Senator that "Creativity 'advocates for violence motivated by racial discrimination,' meaning to imply that Hale does likewise since he is an adherent of that religion." (ECF No. 1 at 26). Plaintiff contends this statement "was false and defamatory to Hale's character, and was meant to prejudice Senator Duckworth against his person. Matevousian knew, or should have known, that the statement is untrue." (*Id.*).

The Court recommends that Claim 22 be dismissed with prejudice as legally frivolous. Title 28 U.S.C. § 1915A requires a court to dismiss *sua sponte* a prisoner' s action or claim at any time if it is frivolous. "[A] complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A legally

frivolous claim is one based on an indisputably meritless legal theory, such as the alleged infringement of a legal interest that clearly does not exist. *Neitzke*, 490 U.S. at 327. There is considerable overlap between the standards for frivolousness and failure to state a claim, and a claim that lacks an arguable basis in law is dismissible under both standards. *Id.* at 326, 328.

Colorado law governs Plaintiff's state law defamation claim. "Defamation is a communication that holds an individual up to contempt or ridicule thereby causing him to incur injury or damage." *Keohane v. Stewart*, 882 P.2d 1293, 1297 (Colo. 1994). Defamation consists of two types of communication, libel (written communication) and slander (oral communication). *See id.* at n.5. The elements of defamation are (1) a defamatory statement concerning another; (2) published to a third party; (3) with fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special damages or the existence of special damages to the plaintiff caused by the publication. *See Larson v. Stow*, 327 P.3d 340, 345 (Colo. App. 2014).

"A statement is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Bustos v. A & E Television Networks*, 646 F.3d 762, 763 (10th Cir. 2011) (citation omitted). In Colorado, a plaintiff must "show the falsity of a defamatory statement by 'clear and convincing evidence.'" *Id.* at 764 (citation omitted). "Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." *Id.* (quoting *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 517 (1991)).

As recounted by the Tenth Circuit, Plaintiff "is serving a forty-year sentence for obstructing justice and soliciting the murder of a federal judge who entered a judgment against the church's predecessor." 2019 WL 117616, at *1. The Tenth Circuit upheld the prison restrictions imposed against Plaintiff because of his adherence to Creativity, which is designated as a security threat "because inmates following its tenets have engaged in acts of violence, including murdering other inmates and instigating race riots." *Id.* The Tenth Circuit determined, "[t]here is overwhelming evidence in the record that Creativity poses an institutional security risk and that Mr. Hale has sought to advance the white-supremacist goals of Creativity in ways that pose a danger both inside and outside of ADX." *Id.* at *7. Thus, Defendant Matevousian's allegedly defamatory statement is not defamatory because, in light of the Tenth Circuit's findings, Plaintiff cannot show it is false. Because Claim 22 lacks an arguable basis in law, the Court recommends that it be dismissed with prejudice as legally frivolous.

V. Recommendation

For the reasons set forth herein, this Magistrate Judge respectfully

RECOMMENDS that Claims 2, 3, 4, 5, 6, 7, 8, 13, 16, 17, 18, and 19 be DISMISSED WITH PREJUDICE on the basis of issue preclusion. It is

FURTHER RECOMMENDED that Claims 9 and 14 be DISMISSED WITHOUT PREJUDICE for failure to comply with Fed. R. Civ. P. 8(a). It is

FURTHER RECOMMENDED that Claim 22 be DISMISSED WITH PREJUDICE as legally frivolous. It is

FURTHER RECOMMENDED that Claims 1, 10, 11, 12, 15, 20, and 21 be drawn to Senior Judge Marcia S. Krieger. *See* D.C.COLO.LCivR 8.1(c), 40.1(d)(1); *Hale v.*

Federal Bureau of Prisons, et al., Case No. 14-cv-00245-MSK-MJW (final judgment entered March 29, 2018).

DATED at Grand Junction, Colorado, this 1st day of May, 2019.

BY THE COURT:

Gordon P. Gallagher
United States Magistrate Judge