IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-00245-MSK-MJW

REVEREND MATT HALE,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS,

Defendant.

FEDERAL BUREAU OF PRISONS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO DENY COSTS (DOC. 222)

Mr. Hale fails to meet his burden to overcome the well-established presumption that he, as the losing party in this case, must pay costs incurred by the BOP, the prevailing party. The BOP prevailed on every claim Mr. Hale brought, including *Bivens* claims against twelve individual defendants which the Court dismissed on the BOP's motion to dismiss. *See* Doc. 66 at 31 (dismissing all claims against the individual defendants). As explained below, the Tenth Circuit has held that denying costs to a prevailing party is a severe penalty to the prevailing party—a penalty to be imposed only when certain circumstances are present, none of which are present here. Moreover, the costs the BOP requested and the Clerk awarded reflect a very moderate approach, and include only those costs this Court has specifically approved as recoverable costs.

I. The facts do not support the severe penalty of denying the BOP's costs.

Fed. R. Civ. P. 54(d)(1) provides that costs are awarded to a prevailing party as a matter of course, unless the Court directs otherwise. *Id.* ("Unless a federal statute, these rules, or a court

order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party."); *see also Debord v. Mercy Health System of Kansas, Inc.*, 737 F.3d 642, 659 (10th Cir. 2013) ("We presume a prevailing party is entitled to costs.").

The Tenth Circuit has emphasized that denying a prevailing party its costs is a "severe penalty," "such that there 'must be some apparent reason to penalize the prevailing party if costs are to be denied.'" *Marx v. Gen. Revenue Corp.*, 668 F.3d 1174, 1182 (10th Cir. 2011) (quoting *Klein v. Grynberg*, 44 F.3d 1497, 1507 (10th Cir. 1995)), *aff'd*, 568 U.S. 371 (2013). While a court may "withhold costs from a prevailing party, the court must provide valid reasons for doing so." *Deboard*, 737 F.3d at 559; *see also id.* (district court's discretion to deny the prevailing party costs is "not unlimited") (quoting *Cantrell v. Int'l Bd. of Electrical Workers*, 69 F.3d 456, 458 (10th Cir. 1995)).

The Tenth Circuit has identified six circumstances "in which a district court may properly 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.'" *Deboard*, 737 F.3d at 660 (quoting *Cantrell*, 69 F.3d at 459). None of these circumstances are present here.

1. The BOP was fully successful. The BOP prevailed on every claim brought by Mr. Hale, including claims he brought against a dozen individual-capacity defendants.

2. The BOP did not obstruct the proceedings or act in bad faith. There is no support for Mr. Hale's contention that the BOP was obstructive and acted in bad faith at any point during this case. *See* Doc. 222 at 18-21. Rather, the history of this litigation demonstrates

that Mr. Hale was treated in a respectful and professional manner at all times. The BOP affirmatively assisted Mr. Hale in obtaining the discovery he requested at every turn. Indeed, both the BOP and undersigned counsel made special accommodations for Mr. Hale outside the normal discovery protocols. Counsel travelled to the ADX on multiple occasions to personally deliver discovery materials to Mr. Hale, going to his housing unit to meet with him and to discuss any issues of concern to him. Mr. Hale and counsel spoke by telephone on numerous occasions, both at Mr. Hale's request and when counsel initiated the call. This courtesy continued even when Mr. Hale was housed at the United States Penitentiary in Terre Haute, Indiana. Undersigned counsel spoke with Mr. Hale by telephone during that time and worked with BOP attorneys at USP Terre Haute to ensure that Mr. Hale had access to materials produced in discovery in this case. When Mr. Hale was ready to take depositions, undersigned counsel personally contacted court reporting services in California and Colorado from which Mr. Hale could choose. Counsel located the court reporting service that Mr. Hale ultimately selected to transcribe each of the four depositions he elected to take.

Until the instant motion, Mr. Hale had never indicated to the BOP or undersigned counsel that he would not have needed to take depositions if could have obtained any of the documents listed on the BOP's privilege logs. *See* Doc. 222 at 18.[1] Mr. Hale could have brought his alleged concerns to undersigned counsel's attention for discussion and conferral during the

[1] Notably, Mr. Hale had planned from the beginning of this case to take as many as *fifteen* depositions. *See* Scheduling Order, Doc. 73 at 6 ("Plaintiff wishes to increase the number of depositions to fifteen (15)," and including the BOP's statement that the presumptive number of ten total depositions was sufficient in this case).

discovery period, and he could have filed a motion to compel if his concerns were not resolved to his satisfaction. He did none of these things, nor does he point to a single fact that would suggest he lacked any information he needed to litigate his claims. Further, as Mr. Hale acknowledges, the BOP does not have to produce privileged documents to him. *Id.* at 20 ("It didn't have to turn over the documents . . ."). His belated contentions concerning the BOP's privilege logs are not grounds to overcome the strong presumption that the BOP is entitled to costs here.

Neither does Mr. Hale provide any support for his contention that the BOP acted in bad faith at any point during this litigation. He rehashes allegations that he has made before, Doc. 222 at 20-21, which the BOP has addressed in prior filings. *See, e.g.*, Doc. 199 at 48-49; Doc. 207-1. At bottom, Mr. Hale objects to the fact that the BOP's analysis of his actions contradicts the narrative he prefers, but his disagreement does not demonstrate "bad faith" by the BOP.

3. The BOP's victory was more than "nominal." The third consideration in deciding to override the presumption in favor of awarding costs is that the damages awarded to a prevailing party were "only nominal." *Deboard*, 737 F.3d at 660. That consideration does not apply here. The BOP prevailed on all of Mr. Hale's claims.

4. Mr. Hale's "indigence" does not override the presumption in favor of awarding costs to the BOP. Mr. Hale overstates the importance of his status as an inmate who is "indigent" in overcoming the BOP's presumptive entitlement to costs. Doc. 222 at 7-10.[2] While a plaintiff's "indigence is a factor that must be considered in determining whether the

[2] As context for assessing Mr. Hale's claim of indigence, the unencumbered balance in his inmate account as of May 16, 2018, is $955.51. *See* Declaration of Julie Gilbert, Ex. 1 ¶ 4. Moreover, the BOP does not intend to collect court-imposed costs from Mr. Hale until his appeal has been heard. *Id.* ¶ 5.

Plaintiff has carried his burden of overcoming the Defendant's entitlement to costs, . . . it is by no means dispositive." *Jorgensen v. Montgomery*, No. 06-cv-00853-MSK-BNB, 2009 WL 1537958, at *1 (D. Colo. May 31, 2009). The BOP is entitled to the benefit of the presumption in favor of costs for the same reasons that supported a costs award to the prevailing governmental party in *Jorgensen*.

"[I]t is inevitable that *someone* must bear the costs associated with litigation; if the Court denies costs because of the Plaintiff's indigence, that finding necessarily entails a conclusion that it is more fair for the Defendants to be saddled with those costs." *Id.* (emphasis in original). Mr. Hale does not "point to circumstances that would suggest that, as between these two sides, it is more equitable that [the BOP] bear those costs." *Id.* The BOP has done nothing that "caused or exacerbated" Mr. Hale's indigence. The BOP is simply fulfilling its obligation to incarcerate Mr. Hale, who is housed at the ADX because he has been convicted of multiple felonies and engaged in dangerous behavior in a less-restrictive prison.

This Court emphasized that Congress "does not consider indigence, alone, to be a particularly strong cause for refusing to award costs": "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." *Id.* at *2. "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." *Id.; see also* 28 U.S.C. § 1915 ("Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings . . ."). This Court took into account the fact that it was the plaintiff "who elected to initiate this suit, and thus, was the precipitating cause of the Defendants incurring the

costs." *Jorgensen*, 2009 WL 1537958, at *2.

Moreover, in the context of inmate litigation, "the specter of a judgment for costs is one of the few mechanisms that serve to check and moderate the litigiousness of indigent parties." *Id.* This point is obviously true in Mr. Hale's case as well.

This Court's final point in *Jorgensen* is also pertinent here: awarding costs against an indigent party who is incarcerated has different implications than awarding costs against other indigent parties. Mr. Hale's incarceration in the BOP "ensures that his basic needs for food, clothing, and shelter will be provided for even if he is subject to an outstanding judgment for costs." *Id.* Mr. Hale will not "go hungry" if costs are awarded against him, as he claims. Doc. 222 at 9. He receives three meals every day; if he chooses to go hungry rather than eat them, that is a consequence entirely of his own making.

5. The BOP's costs are reasonable. The BOP costs are not "unreasonably high or unnecessary." *Deboard*, 737 F.3d at 660. As the Explanation of Costs demonstrates, Doc. 226, the BOP took a very conservative approach in the costs for which it sought reimbursement. It requested its copy costs for only the key filings in the case. *Id.* at 2-3 (citing *Smith v. Sec'y, Florida Dep't of Corr.*, 598 F. App'x 738, 739 (11th Cir. 2015)). The BOP carefully reviewed its privilege log to determine the precise number of pages copied in response to Mr. Hale's discovery requests. *Id.* at 3-4 (citing *Crandall v. City & Cty. of Denver*, 594 F. Supp. 2d 1245, 1256 (D. Colo. 2009) (holding that costs for copies of discovery sent to the opposing party are recoverable as costs under 28 U.S.C. § 1920) (C.J. Krieger)). The number of pages copied for Mr. Hale was large because his discovery requests were extensive. As the BOP noted in its Explanation of Costs, one particularly broad request for production requested "[a]ll documents

and records that the Defendant may be relying upon as a defense to the claims made by Hale in this case or which the Defendant deems supportive of such defense whether of independent legal significance or not, including, but not limited to, any internal memoranda written by the Defendant's employees, any audio or video recordings, any correspondence written by or mailed to Hale, any material written or provided by any individuals or organizations from outside ADX and the B.O.P., or any other material that the Defendant deems corroborative or supportive of its defense to Hale's claims and may choose to rely upon in its defense to this action." Hale's Request for Production No. 1. Moreover, at the ADX, it was not feasible to allow Mr. Hale to review discovery on a computer, requiring that he be provided paper copies. The Clerk was correct in determining that the copying costs the BOP requested were reasonable.

The BOP also took a conservative approach with regard to its request for recovery of deposition costs. Although the BOP incurred substantial deposition costs in defending this case—including travel expenses to prepare for and defend three out-of-state depositions—it requested only the cost of those transcripts used in the preparation of its summary judgment briefing: the transcript of Mr. Hale's deposition and the transcript of the deposition of Anthony Garrow, a BOP official designated as both a fact and expert witness. The BOP was required to use Mr. Garrow's transcript in preparing its reply brief in support of its motion for summary judgment. Mr. Hale attempted to undermine Mr. Garrow's credibility to provide expert testimony by citing to specific excerpts from Mr. Garrow's deposition, which Mr. Hale then deliberatively did not attach to his response brief. *See* Doc. 193 at 93 ("If the Defendant wishes to contradict me, let it try."). Therefore, Mr. Garrow's transcript was necessary in order for the BOP to prepare its reply to Mr. Hale's assertions concerning Mr. Garrow.

6. The issues here were not "close and difficult." The fact that Mr. Hale "believes that Creativity meets the test for a religion" under Tenth Circuit law, *see* Doc. 222 at 13, and that he speculates it is "highly doubtful" that he would have lost his case in a different Circuit, *id.* at 14, does not show that the issues here were so "close and difficult" as to overcome the presumption in favor of awarding costs to the BOP. *See Deboard*, 737 F.3d at 660. The question of whether Mr. Hale's group is a religion is guided by the long-established *Meyers* test. *See* Doc. 212 at 8-22 (analyzing the question pursuant to the five-part analysis in *United States v. Meyers*, 95 F.3d 1475, 1480 (10th Cir. 1996), and discussing other well-established case law concerning the religiosity analysis)). As the Court observed, the question of whether Creativity is a religion has been raised in other cases, which have uniformly found that Creativity is not a religion for purposes of the Free Exercise Clause and the Religious Freedom Restoration Act ("RFRA"). *Id.* at 8 n.4. Moreover, the Court concluded that, as to Mr. Hale's mail-restriction claims, summary judgment was warranted on additional grounds. *Id.* at 22-29. Mr. Hale's remaining claims were governed by similarly well-established law. *Id.* at 29-30, 31-32. On this record, there is no basis for concluding that the issues Mr. Hale raised were so "close and difficult" as to deprive the BOP of its presumptive right to recover costs.

Finally, Mr. Hale conjectures that awarding costs to the BOP here will "chill" inmates from bringing similar actions in the future, especially those who claim to adhere to "unconventional faiths." Doc. 222 at 11. Not only is the "chilling effect" standard not part of the Tenth Circuit test for overcoming a litigant's presumptive right to costs, *see Deboard*, 737 F.3d at 660, Mr. Hale's conclusory assertions are sheer speculation. Similarly, his belief that his case implicated issues of "substantial public importance," Doc. 22 at 16-17, does not support

depriving the BOP of its costs. Any plaintiff who cares passionately about his claims could say as much. And Mr. Hale overstates his case when he describes his claims as implicating "religious liberties" in the same manner as *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). *See id.* The question here was whether Mr. Hale's group was entitled to be called a religion in the first place, not whether the rights of a legitimate religious group were violated.

The Court should deny Mr. Hale's motion and uphold the award of costs taxed by the Clerk in favor of the BOP in the amount of $5,226.35.

Respectfully submitted on May 16, 2018.

ROBERT C. TROYER
United States Attorney

s/ *Susan Prose*
Susan Prose
Assistant United States Attorney
1801 California Street, Suite 1600
Denver, Colorado 80202
Telephone: (303) 454-0100
Fax: (303) 454-0404
Email: susan.prose@usdoj.gov

Counsel for the Federal Bureau of Prisons

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on May 16, 2018, I served the foregoing document, along with the unpublished case cited thereon, on the following non-CM/ECF participant by United States mail:

Matthew Hale
Reg. No. 15177-424
ADX – Florence
P.O. Box 8500
Florence, CO 81226

s/ *Susan Prose*
Susan Prose
United States Attorney's Office

Exhibit 1
Declaration of Julie Gilbert

Hale v. Fed. Bureau of Prisons,
No. 14-cv-00245-MSK-MJW

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-00245-MSK-MJW

REVEREND MATT HALE,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS,

Defendant.

DECLARATION OF JULIE GILBERT

I, Julie Gilbert, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge and information made known to me from official records reasonably relied upon by me in the course of my employment, hereby declare as follows relating to the above-captioned matter:

1. I am a Trust Fund Specialist at the United States Department of Justice, Federal Bureau of Prisons (Bureau) facility known as the Federal Correctional Complex (FCC) in Florence, Colorado. I have served in this role since January 2011, and have served in roles of increasing responsibility in the Bureau since January 2002.

2. As part of my official duties, I have access to Bureau records in the Trust Fund Accounting and Commissary System, also known as TRUFACS. This is a system by which Bureau staff track incoming monies in a federal inmate's Trust Fund account, among other things.

3. As of May 15, 2018, the Plaintiff in this action, federal inmate Matthew Hale, Register No. 15177-424, had an account balance of $1,095.01.

4. Of that $1,095.01 balance, $140.00 was subject to an encumbrance for Mr. Hale's court filing fees. Accordingly, and as of May 15, 2018, the amount available for his use was $955.51. *See id.*

5. I am aware that the Clerk of Court has imposed costs on Mr. Hale in the amount of $5,226.35. *See* Doc. 226 at 1. I am further aware that Mr. Hale is challenging whether he should have to pay any court costs at all. *See* Doc. 222. For those reasons, the Trust Fund Department at FCC Florence does not intend to collect court-imposed costs from Mr. Hale until his appeal has been heard and decided upon by this Court and any appellate court.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this 16th day of May 2018, in Florence, Colorado.

/s *Julie Gilbert*
Julie Gilbert
Trust Fund Specialist
FCC Florence, Colorado