IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-00752-WJM-SKC

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,
FEDERAL BUREAU OF PRISONS,

Defendants.

RESPONSE TO PLAINTIFF'S OBJECTION TO
MAGISTRATE JUDGE'S RECOMMENDATION (ECF NO. 89)

Defendants hereby respond to Plaintiff's Objections to Magistrate's Recommendation that Plaintiff's Motion to Alter or Amend Judgment Be Denied and that Defendant's Motion to Dismiss Be Granted. ECF No. 91. After careful and thorough review, Magistrate Judge Crews recommended that all of Plaintiff's claims be dismissed. That recommendation is correct.

I. The motion to alter or amend should be denied.

Plaintiff objects to the Magistrate Judge's recommendation that his Motion to Alter or Amend Judgment, ECF No. 23, be denied. As background, Plaintiff's complaint was originally assigned to Magistrate Judge Gallagher for screening pursuant to D.C.COLO.LCivR 8.1(b). The Magistrate Judge recommended that Plaintiff's claims 2-8, 13, and 16-19 be dismissed on the basis of issue preclusion; claims 9 and 14 be dismissed under Rule 8(a); and claim 22 be dismissed as legally frivolous. ECF No. 8 at 10. Plaintiff filed two objections to that recommendation, ECF Nos. 9 & 10, in which he argued, in relevant part, that the Magistrate Judge erred in recommending dismissal of several claims because they "have nothing to do with Creativity [Plaintiff's claimed religion] on their face." ECF No. 9 at 1. Judge Babcock overruled Plaintiff's objections and dismissed the relevant claims per the Magistrate Judge's recommendation. *See* ECF No. 11. The court specifically addressed and rejected Plaintiff's argument that some of the challenged claims did not relate to Creativity, and held that the claims did turn on "allegations that the speech at issue is based on Creativity and Plaintiff's related 'philosophy.'" *Id.* at 3-4. They thus fell within the scope of the Tenth Circuit's decision on Plaintiff's earlier claims in *Hale v. Fed. Bureau of Prisons*, 759 F. App'x 741 (10th Cir. 2019) (*Hale I*), and were barred by issue preclusion. *See* ECF No. 11 at 4.

In response, Plaintiff filed a "Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. Pro 59(e)." ECF No. 23. In relevant part, this motion argued that Judge Babcock had erred in adopting Magistrate Judge Gallagher's recommendation because he had failed to accept as true Plaintiff's allegations that various of his claims did not relate to Creativity. *Id.* at 3-5, 12-

14.[1] Magistrate Judge Crews recommends that this motion be denied because Plaintiff's Rule 59 motion simply repeated the arguments he made against adoption of Magistrate Judge Gallagher's recommendation, and thus it does not meet the standard for reconsideration under Tenth Circuit law. *See* ECF No. 89 at 4-8.

Magistrate Jude Crews is correct. In the Tenth Circuit, a motion to reconsider like Plaintiff's "is an extreme remedy to be granted in rare circumstances." *Brumark Corp. v. Samson Res. Corp.*, 57 F.3d 941, 948 (10th Cir. 1995). "A motion to reconsider should not be used to revisit issues already addressed or advance arguments that could have been raised earlier." *United States v. Christy*, 739 F.3d 534, 539 (10th Cir. 2014) (citing *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)). In his objections to Magistrate Judge Gallagher's recommendation, Plaintiff argued to Judge Babcock that Magistrate Judge Gallagher had erred in assuming that the now-dismissed claims related to Creativity. *See* ECF No. 10 at 1-2. He also argued that claim 22 (his claim for defamation) was not frivolous because he had pleaded in his complaint that Creativity does not advocate for violence. ECF No. 9 at 4-6. His Rule 59 motion simply makes the same arguments over again. *See* ECF No. 23 at 3-5, 12-14. Because his Rule 59 motion attempted only to re-argue points already raised and rejected by the Court, it should be denied.

Plaintiff tries to escape this ruling via a feat of logic. His Rule 59 motion, he asserts, argues only that Judge Babcock (i.e. not Magistrate Judge Gallagher) erred in failing to properly

[1] The motion also argued that dismissal on the basis of issue preclusion was in error, because the Supreme Court had not yet (at that time) ruled on Plaintiff's petition for certiorari seeking review of the Tenth Circuit's decision in *Hale I*. ECF No. 23 at 5-12. As Plaintiff now concedes, the Court has denied certiorari, and Plaintiff has abandoned these arguments. *See* ECF No. 91 at 4.

credit Plaintiff's factual assertions in his complaint. ECF No. 91 at 7, 8. Because this "error" occurred only when Judge Babcock entered his ruling, it had not existed at the time Plaintiff made his arguments against Magistrate Judge Gallagher's recommendation, and so Plaintiff asserts that he could not possibly have argued against that error before it was even made. But the *Servants of Paraclete* principle applies to arguments, not discrete orders. In dismissing the claims at issue, Judge Babcock was simply adopting the conclusions of Magistrate Judge Gallagher, against which Plaintiff had already made the arguments pressed in his Rule 59 motion. Simply because a new order came out rejecting those same arguments does not erase them from existence.

Because Plaintiff's Rule 59 motion simply repeated arguments already made and rejected by the Court, the Magistrate Judge's recommendation to deny the motion should be adopted.

II. The motion to dismiss should be granted.

Magistrate Judge Crews recommends that all of Plaintiff's remaining claims—claims 1, 10-12, 15, and 20-21—be dismissed for failure to state a claim.[2] The Magistrate Judge is correct, and all of Plaintiff's remaining claims should be dismissed.

[2] The Magistrate Judge did not address Defendants' argument that no remedy for Plaintiff's claimed constitutional violations exists pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which is the subject of Defendants' limited objection to the recommendation. ECF No. 90. The Magistrate Judge also recommends that the various motions to intervene or otherwise participate in this lawsuit filed by nonparties (ECF Nos. 17, 26, 28, 31, 37, 39, 53, and 78) should all be denied. ECF No. 89 at 31-38. Neither Plaintiff nor any of the nonparties has objected to this recommendation.

A. Plaintiff does not address the Magistrate Judge's conclusion regarding qualified immunity.

In addition to his conclusion that Plaintiff has failed to state a claim, the Magistrate Judge also recommended that the individual defendants be granted qualified immunity. *See* ECF No. 89 at 30-31. Plaintiff does not address this issue at all. *See generally* ECF No. 89. Regardless of the outcome of the 12(b)(6) analysis on Plaintiff's remaining claims, therefore, the Court should adopt the qualified immunity recommendation and grant judgment to the individual defendants on the claims against them on the basis of qualified immunity.

B. Plaintiff's remaining claims do not pass muster under Rule 12(b)(6).

1. Claim one – Establishment Clause

In claim one, Plaintiff challenges the restrictions on his correspondence and certain discrete actions by certain individual defendants under the Establishment Clause. *See* ECF No. 1 at 7-10. In *Hale I*, the Tenth Circuit concluded that the Bureau of Prisons (BOP) properly determined Creativity constitutes a Security Threat Group (STG), and that BOP was justified in restricting Plaintiff's communication with the outside world about Creativity. *Hale I*, 759 F. App'x at 743-44, 746-51. In claim one in this lawsuit, Plaintiff challenges the very same mail restrictions. *See* ECF No. 89 at 13 ("Although Hale attempts to cast the restrictions in the present case as new [#1 at ¶6], they are the same restrictions involved in *Hale I*.").[3] Now, though, instead of infringing on his religious rights as an adherent of Creativity (which has been conclusively determined not to be a religion by the Tenth Circuit), Plaintiff casts these

[3] While Plaintiff asserts that this conclusion was in error, he makes no argument about the content or timing of the restrictions, and addresses only, rather, the BOP's motivation in imposing or maintaining them. *See* ECF No. 91 at 14. He has thus effectively conceded that the mail restrictions he challenges in this case are the same as those he challenged in *Hale I*.

restrictions as an "establishment" of the Christian religion by Defendants, imposed on Plaintiff because of his refusal to adhere to Christianity. ECF No. 1 at 8 ¶ 8.

As the Magistrate Judge appreciated, Plaintiff has not plausibly pleaded that either the mail restrictions or the individual actions were taken against him because he is non-Christian, or to confer a privileged status on Christianity. *See Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005). The Magistrate Judge concluded that the mail restrictions had a secular purpose, namely, the BOP's compelling interest, recognized in *Hale I*, in restricting communications about Creativity to promote "safety both inside and outside the prison." ECF No. 89 at 13. In response to this, Plaintiff repeatedly points to conclusory allegations in his complaint that the mail restrictions that he once challenged as an infringement of Creativity are now motivated solely by the fact that Plaintiff is not a Christian. *See* ECF No. 91 at 15-16. But, as the Magistrate Judge correctly pointed out, when considering an Establishment Clause claim, the government's action is evaluated in light of the "history, purpose, and context of" the challenged acts. *See Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1230 (10th Cir. 2017). The Court thus cannot ignore the findings from *Hale I* with regard to the mail restrictions, and the Magistrate Judge correctly concluded that Defendants' actions have a secular purpose.[4]

[4] The Magistrate Judge also correctly concluded that the discrete acts challenged by Plaintiff—Defendant Marques allegedly wearing a Christian cross while visiting Plaintiff's cell and alleged conversations between Defendants in which they conspired to punish Plaintiff due to his non-Christian beliefs—did not suffice to show a lack of secular purpose. ECF No. 89 at 15-17. Plaintiff claims that, because he is in solitary confinement, he does not have access to the facts necessary to state a plausible claim. ECF No. 91 at 15-17. But, as the Magistrate Judge found, in light of the "history, purpose, and context" of Plaintiff's litigation against the BOP, Plaintiff's allegations simply cannot state a plausible claim of a violation of the Establishment Clause.

Second, the Magistrate Judge concluded that the Defendants' actions did not have the primary effect of advancing religion. ECF No. 89 at 18-19. He concluded that an objective observer, aware of the "history, purpose, and context" of the restrictions on Plaintiff's correspondence, could not reasonably conclude that those restrictions have the effect of endorsing Christianity. *Id.* Plaintiff does not claim that, if he were a Christian, he would be permitted to disseminate STG-related materials, and so there is no basis for concluding that the restrictions are designed to advance Christianity. *Id.* Plaintiff's response, again, asks the Court to willfully blind itself to the "history, purpose, and context" of the restrictions and consider only the abstract question of whether barring correspondence about one "religion" advances another. ECF No. 91 at 18-19. But, once again, Creativity is not a religion, it is a Security Threat Group, and BOP is entitled to restrict communications concerning it. *See Hale I*, 759 F. App'x at 746-51.

Finally, the Magistrate Judge concluded that the restrictions did not result in excessive entanglement with religion, because they "were religiously neutral and related to the prison's internal and external security concerns." ECF No. 89 at 20. Plaintiff claims that a response to this point is not "necessary," because his case on the other two prongs is overwhelming. ECF No. 91 at 20. He is wrong, the Magistrate Judge is right, and claim one should be dismissed.

In *Hale I*, Plaintiff brought a RFRA claim premised on the notion that the BOP's actions toward him interfered with his right to practice his religion, Creativity. *See Hale I*, 759 F. App'x at 746-48. The Tenth Circuit rejected that claim, and concluded that Creativity is not a religion. *Id.* Plaintiff's claim one in this case is an attempt to repackage that RFRA claim as an Establishment Clause claim premised on actions allegedly taken against Plaintiff because of his

"non-Christian beliefs." But, as before, he points to "no Christian, Jewish, or Muslim comparator who is permitted to send or receive communications about STGs, or who may possess an STG text." *Id.* at 753. The actions taken by BOP have nothing to do with Plaintiff's religion (or lack thereof), and everything to do with the security-related compelling interests affirmed in *Hale I*. Claim one should be dismissed.

B. Claims ten and eleven – Freedom of speech and retaliation

In claim ten, Plaintiff argues that Defendants wrongfully prohibited him from mailing an article he wrote to the outside world. He claims that the article was not related to Creativity, but the Magistrate Judge correctly noted that claim ten incorporated Plaintiff's Creativity-related allegations (ECF No. 89 at 21), and, taking judicial notice of the content of the article because it was filed by Plaintiff on the docket of *Hale I*, that the article refers to two of Plaintiff's books at "two of the greatest books for the future of our White people," discusses the "Racial Loyalist cause" and "Racial Loyalist movement," and calls for a "mass movement" to free him from prison. *Id.* at 21. For those reasons, the Magistrate Judge concluded that the article bore "no material difference" from the Creativity-related articles and communications addressed in claims that Judge Babcock had already held barred by the preclusive effect of *Hale I*. *Id.* at 22-23. Because the Tenth Circuit concluded that the BOP has a legitimate basis to restrict communications such as that addressed in claim ten, the claim should be dismissed. *Id.*

In response, Plaintiff argues that he carefully avoided mentioning "Creativity" by name in the article, and thus that it should escape the preclusive effect of *Hale I*. ECF No. 91 at 21-23. He also argues that the Tenth Circuit only upheld restrictions on "Creativity" itself, not on "Creativity-based speech" or any "philosophy." *Id.* at 23. But the Tenth Circuit's opinion

expressly affirmed "restrictions on Creativity-based communications." *Hale I*, 759 F. App'x at 749. The Magistrate Judge correctly concluded that the article at issue was "Creativity-based," even if it did not expressly contain the word "Creativity." Plaintiff does not meaningfully distinguish between the article (as quoted by the Magistrate Judge) and "Creativity-based communications," and the Magistrate Judge thus correctly recommended dismissal of this claim.

In claim eleven, Plaintiff asserts that Defendants retaliated against him for asking his mother to get his article published. The Magistrate Judge concluded (1) that Plaintiff could not raise a First Amendment claim for restriction of the article, so cannot raise a retaliation claim for alleged punishment for that (unprotected) speech, and (2) any speech with his mother urging her to publish the article would similarly validly be restricted by the BOP under *Hale I*. ECF No. 89 at 23-24. Plaintiff does not meaningfully challenge this conclusion, *see* ECF No. 91 at 24, other than to argue that, if the Magistrate Judge was wrong on claim ten, he was necessarily wrong on claim eleven. Neither assertion is correct, and claim eleven should be dismissed.

C. Claims fifteen and twenty-one – First Amendment mail claims

In claims fifteen and twenty-one, Plaintiff brings First Amendment challenges to the handling of his mail, claiming that some of his incoming and outgoing mail is intercepted and delayed. The Magistrate Judge concluded that (1) to the extent the mail relates to Creativity, it can be intercepted under *Hale I*, and (2) to the extent it does not, Plaintiff's allegations are too vague to plausibly state a claim. Given the existence of a valid basis for restricting *some* of Plaintiff's correspondence, it was incumbent upon Plaintiff to make specific allegations showing that the intercepted and/or delayed correspondence did *not* fall within that category, and he failed to do so. *See* ECF No. 89 at 26 (citing *Gee v. Pacheco*, 627 F.3d 1178, 1188 (10th Cir. 2010)

(noting that prisoner plaintiffs must plead sufficient facts to demonstrate the lack of a legitimate penological interest in the challenged government actions)).

In response, Plaintiff asserts that his allegations included the conclusory statement that the interception of his mail was "illegal," and thus "the BOP does not, and cannot, have a legitimate interest in breaking the law." ECF No. 91 at 25; *see also id.* at 26 (arguing that claim twenty-one alleged a delay of mail "without just cause," which similarly should preclude a finding of a legitimate penological interest). But under *Gee,* a prisoner-plaintiff is required to plead "sufficient facts to indicate the plausibility that the actions of which he complains were *not* reasonably related to legitimate penological interests." 627 F.3d at 1188 (emphasis in original). Under *Twombly* and *Iqbal*, conclusory allegations and legal labels like "illegal" or "without just cause," absent specific, plausible allegations, do not suffice. *See Khalik v. United Air Lines,* 671 F.3d 1188, 1191 (10th Cir. 2012). Plaintiff's conclusory allegations do not pass muster, and the Magistrate Judge correctly recommended that claims fifteen and twenty-one be dismissed.

D. Claim twenty – Retaliation for selling personal items

In claim twenty, Plaintiff alleges that he was retaliated against because of his First Amendment-protected speech to his mother in asking her to sell some of his personal possessions "to cover some of the costs involved with the prosecution of" *Hale I*. ECF No. 1 at 24 ¶ 88. The Magistrate Judge recommends dismissal of this claim because the First Amendment protects expressive speech, but that an order to sell property does not constitute "expressive speech" and is not protected by the First Amendment. *See* ECF No. 89 at 28 (citing *King v. Fed. Bureau of Prisons*, 415 F.3d 634, 637 (7th Cir. 2005) (an order to sell "has no connection the marketplace of ideas and opinions, whether political, scientific, aesthetic, or even commercial"). Because the

underlying conduct is not protected by the First Amendment, Plaintiff cannot make out a retaliation claim for actions taken in response to that conduct. ECF No. 89 at 28.

In response, Plaintiff asserts that his request to his mother to sell his property was akin to a request to "his family to pay his attorney," and so if the BOP could prohibit it, it could effectively prevent prisoners from having their legal bills paid and "the legal system itself would break down." ECF No. 91 at 27. Plaintiff's instruction to his mother was not, however, a request to pay his lawyer (he has no lawyer other than himself). It was an instruction to sell property which, the Seventh Circuit has held (and the Magistrate Judge agreed) "is not the kind of verbal act that the First Amendment protects." *King*, 415 F.3d at 637. Plaintiff's objection does not directly address this point. There circumstances here are far different from an inmate asking his family to pay his attorneys, and there is no reason to conclude that the narrow holding recommended by the Magistrate Judge would support or result in a bar on such (hypothetical) communication.[5] Claim twenty should be dismissed.

E. Claim twelve – Due process

Finally, in claim twelve, Plaintiff asserts that he was deprived of due process when BOP restricted his calls to his mother for six months without a hearing. The Magistrate Judge concluded that these allegations did not state a claim under the Due Process Clause because Plaintiff had not sufficiently alleged a liberty interest. ECF No. 89 at 29-30. Because a prisoner

[5] In addition, the Tenth Circuit has held that "[a] prisoner cannot maintain a retaliation claim when he is convicted of the actual behavioral violation and there is evidence to sustain the conviction." *Requena v. Roberts*, 893 F.3d 1195, 1211 (10th Cir. 2018) (quoting *O'Bryant v. Finch*, 637 F.3d 1207, 1215 (11th Cir. 2011)) (quotation marks omitted). Plaintiff admits that he was convicted of a disciplinary violation for operating a business in connection with these allegations, ECF No. 1 ¶ 89, and he does not plead that there was no evidence to support this conviction. As a result, this provides an additional basis for dismissal of the claim.

"does not derive a liberty interest in visitation and telephone privileges from the Constitution," a six-month bar (now expired) on Plaintiff's ability to telephone his mother did not infringe on a constitutionally-protected liberty interest. *Id.* (quoting *Coleman v. Long*, 772 F. App'x 647, 649 (10th Cir. 2019)).

Plaintiff acknowledges the Tenth Circuit's holding in *Coleman*, but argues that his claim should not have been dismissed because he "argues in good faith for a modification of that law and should be allowed to pursue this claim in order to obtain that." ECF No. 91 at 28 (analogizing his claim to the claim ultimately accepted by the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954)). That is not, however, an argument for why his claim should bypass dismissal and proceed to discovery. A motion to dismiss tests the "legal sufficiency of a complaint." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). To the extent Plaintiff wanted to make a *legal* argument for why the Tenth Circuit was incorrect that prisoners have no liberty interest in telephone use, or why that holding should be overturned, his response to Defendants' motion to dismiss was the place to make such an argument. To a limited extent, he did so. *See* ECF No. 57 at 30 (arguing that, if prisoners have a constitutional right to correspond with the outside world via mail, "it stands to reason that they likewise have a First Amendment right to make telephone calls") (emphasis omitted). That argument did not convince the Magistrate Judge to depart from *Coleman*, and it should not convince the Court to do so either. If Plaintiff wishes to press that argument before the Tenth Circuit, he will certainly have the opportunity to do so.

Under the law as it stands now, however, the Magistrate Judge correctly recommended dismissal of claim twelve.

CONCLUSION

The Magistrate Judge's recommendation should be adopted and all of Plaintiff's claims should be dismissed.

Dated March 5, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Clay Cook, BOP

and I hereby certify that I will mail to the following non-CM/ECF participants in the manner (mail, hand delivery, etc.) indicated by the nonparticipant's name:

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