

**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 LIMITED MOTION TO ALTER OR AMEND JUDGMENT

Defendants hereby respond to Plaintiff’s “Limited Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. Pro. Rule 59(e).” ECF No. 102. The motion merely re-raises arguments that have already been made by Plaintiff and rejected by Magistrate Judge Crews and by this Court. The motion should be denied.

I. Plaintiff provides no legitimate basis for the Court to reconsider its denial of Plaintiff's previous motion to reconsider the dismissal of claims two, thirteen, and nineteen.

Plaintiff first asks the Court to reconsider its denial of his previous motion to reconsider the dismissal of his claims two, thirteen, and nineteen. ECF No. 102 at 4-9. In the Tenth Circuit, a motion to reconsider “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)). All of the arguments in Plaintiff's instant motion have been made by Plaintiff and rejected by the Court at least once, if not multiple times before.

Claims two, thirteen, and nineteen were dismissed by Judge Babcock pursuant to Magistrate Judge Gallagher's recommendation. *See* ECF No. 8 at 4-8 & ECF No. 11 at 3-4. Plaintiff has already asked this Court to reconsider that dismissal, *see* ECF No. 23 at 3-5, and both Magistrate Judge Crews and this Court have refused to do so. *See* ECF No. 89 at 4-6 & ECF No. 100 at 7-8. In the instant motion, Plaintiff argues once again that Judge Babcock erred in dismissing these claims because he did not assume the truth of Plaintiff's assertion that the writings at issue did not address Creativity. ECF No. 102 at 4-9. This is precisely the argument Plaintiff made in his previous motion to reconsider. *Compare* ECF No. 23 at 3-4 (“Hale alleged unequivocally that the claims in question ‘have nothing whatever to do with Creativity’ (Doc. 10 at 1). Under the law that is a statement which must be taken as true, particularly as Claims 2, 13, and 19 make no reference to Creativity whatever themselves.”) *with* ECF No. 102 at 8 (“Neither

Judge Babcock nor the judge currently presiding had and have the legal power to rule that Claims 2, 13, and 19 are Creativity claims when Hale denies it.”). Because the instant motion merely restates arguments already made and rejected, Plaintiff has given the Court no basis to reconsider its prior refusal to reconsider the dismissal of these three claims. *See Christy*, 739 F.3d at 539.

II. Plaintiff provides no legitimate basis for reconsidering the dismissal of claims 10 and 11.

Next, Plaintiff argues that the Court erred in dismissing claims ten and eleven. ECF No. 102 at 9-12. These two claims revolve around restrictions placed on Plaintiff’s ability to publish an article espousing white supremacist ideology and prison discipline imposed due to his efforts to evade those restrictions. *See* ECF No. 100 at 18-20. In the instant motion, Plaintiff argues that he asserted “in his objections to Magistrate [Judge] Crews’ recommendation of dismissal” that the article had nothing to do with Creativity and in fact that it “complied with the BOP’s ban on Creativity.” ECF No. 102 at 10 (citing ECF No. 91 at 21-22, emphasis in original). Plaintiff claims that this allegation must be taken as true, and that it precludes dismissal of claims 10 and 11. *Id.* at 10.

A plaintiff “may not effectively amend [his] Complaint by alleging new facts in [his] response to a motion to dismiss.” *In re Qwest Communications Int’l, Inc.*, 396 F. Supp. 2d 1178, 1203 (D. Colo. 2004). Plaintiff does not claim that he alleged that the article in question complied with BOP Creativity restrictions in his *complaint*, but rather that he did so in his *objection* to Magistrate Judge Crews’s recommendation. There is no legal requirement that the Court take as true statements made not in a complaint, but rather in a brief. The Court did not err in not assuming the truth of Plaintiff’s assertion in his objection. In the instant motion, Plaintiff

relies entirely on his “allegation” in his objection that, he claims, should have been taken as true. ECF No. 102 at 9-11. Even if Plaintiff were to set aside that specific argument and make the broader assertion that the article at issue did not expressly address Creativity, he still would not articulate a valid basis for reconsideration, because he made that argument in his objection to the Magistrate Judge’s recommendation, and the Court has rejected it. *See* ECF No. 91 at 21-24; ECF No. 100 at 18-20. The motion to reconsider the dismissal of claims ten and eleven should be denied.¹

CONCLUSION

The motion should be denied.

Dated May 5, 2020

Respectfully Submitted,

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¹ In the conclusion of his motion, Plaintiff asks the Court to “vacate[]” the portion of its order requiring Plaintiff to file a motion for leave to file an amended complaint by April 27. ECF No. 102 at 12. Plaintiff did not separately move for an extension of the April 27 deadline, and did not file a motion for leave to amend on that date. Plaintiff does not provide a basis under Rule 59 for vacating the April 27 deadline.

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2020, 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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