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.

ORDER ON
PLAINTIFF'S EMERGENCY MOTION TO REMOVE PLAINTIFF FROM RETALIATORY SOLITARY CONFINEMENT THAT IS IN VIOLATION OF THE CONSTITUTION, RULES, AND LAWS OF THE UNITED STATES
(Docket No. 95)

Michael J. Watanabe
United States Magistrate Judge

This matter is before the Court on Plaintiff's Emergency Motion to Remove Plaintiff from Retaliatory Solitary Confinement that is in Violation of the Constitution, Rules, and Laws of the United States (Docket No. 95). Defendant filed a Response (Docket No. 101) and Plaintiff filed a Reply (Docket No. 102). Chief Judge Marcia S. Krieger referred the motion to the undersigned (Docket No. 96). The Court has reviewed the parties' filings (Docket Nos. 95, 101 & 102), taken judicial notice of the court's entire file in this case, and considered the applicable Federal Rules of Civil Procedure, statutes, and case law. Now being fully informed, the Court orders as follows.

Background

Plaintiff is an inmate housed at the Federal Correctional Institute in Terre Haute,

Indiana ("FCI Terre Haute"). Plaintiff challenges his assignment to the prison's Special Housing Unit ("SHU"), where he has resided since August 25, 2016. He has numerous complaints about his confinement, but the gravamen of his motion is that Plaintiff is being unfairly punished for emailing a "press release" to his mother. He requests an order removing him from the SHU.

Defendant maintains that Plaintiff's placement in the SHU is appropriate because his "press release" contained "racially inflammatory and blatantly hostile" language about a federal judge." Declaration of Stephen Julian (Docket No. 101-1 ¶ 7). The prison twice rejected the email containing the "press release" from being sent. (*Id.* ¶¶ 7, 9.) Plaintiff is a member of an group known as the "Creativity Movement" or "Church of the Creator" which has been identified as a Security Threat Group. (*Id.* ¶ 7.) Defendant believed that the document "was calculated to incite animosity and could be construed by people outside the prison as an attempt by Hale to incite or coordinate violence against a federal judge. (*Id*.) The document was mistakenly sent by the Defendant's computer program. (*Id.* ¶ 10.) This was especially concerning for prison officials because of Plaintiff's "background as a leader among radical white supremacists, his influence over such persons outside the prison, and his previous criminal conduct that resulted in his conviction for soliciting the murder of a federal judge." (*Id.* ¶ 7.) On August 25, 2016, Plaintiff was placed in the SHU on non-disciplinary administrative detention status because he was under investigation. (*Id.* ¶ 11.) The investigation revealed that Plaintiff attempted to persuade another inmate to send out the "press release." (*Id.* ¶ 13.) Defendant rejects Plaintiff's claims that he has been denied basic

amenities and access to legal materials. (*Id.* ¶¶ 15-18.) Defendant states that Plaintiff will remain in the SHU until a determination is made as to where he should be housed given Defendant's management concerns. (*Id.* ¶ 14.)

In his Reply, Plaintiff alleges that Defendant set him up and assigned him to the SHU in retaliation for Plaintiff pursuing this lawsuit. (Docket No. 102 at 14-15.)

Analysis

The Court first notes that Plaintiff's "press release" is not attached to any of the pleadings, as Defendant wished to "avoid compounding [its] error" in inadvertently allowing it to be sent. However, Plaintiff's mother mailed a copy of the correspondence to the Court and it was erroneously docketed (Docket No. 100). It has since been removed, but the Court had an opportunity to review the document.

Next, the Court finds that the prison warden had the authority to reject Plaintiff's "press release." Correspondence by or to an inmate can be rejected:

> if it is determined detrimental to the security, good order, or discipline of the institution, to the protection of the public, or if it might facilitate criminal activity. Correspondence which may be rejected by a Warden includes, but is not limited to, correspondence which contains any of the following:
>
> . . .
>
> (2) Matter which depicts, describes, or encourages activities which may lead to the use of physical violence or group disruption;
>
> . . .
>
> (5) Threats, extortion, obscenity, or gratuitous profanity . . .

28 C.F.R. § 540.14.

The warden's determination to reject the "press release" must be considered in light of Plaintiff's history. Plaintiff is admittedly "pro-white and anti-semitic." (Docket No. 102 at 9.) He is incarcerated for soliciting the murder of a federal judge. *See Hale v. United States*, 710 F.3d 711 (7th Cir. 2013). He had a history of attacking that judge "based on her presumed Jewishness." *TE-TA-MA Truth Foundation-Family of URI, Inc. V. World Church of the Creator*, 246 F. Supp. 2d 980, 983 (N.D. Ill. 2003). The target of Plaintiff's "press release" is a federal magistrate judge who prosecuted Plaintiff in the solicitation case. (Docket No. 102 at 9-10.) Plaintiff calls him a "Jewish crypto-homosexual communist" in the document. As Defendant notes, in the past, violent acts have been committed in Plaintiff's name. *See United States v. White*, 698 F.3d 1005, 1009 (7th Cir. 2012) (reinstating conviction of "active white supremacist" and Plaintiff's "avid supporter" for soliciting the murder of foreperson in Plaintiff's criminal case).

In this particular context, Defendant has a real and legitimate justification for restricting Plaintiff's public messages to his followers. Plaintiff's attempts to circumvent Defendant's mailing procedures warranted an investigation, sanctions, and a determination of how and where to place Plaintiff so that he cannot influence his followers to commit violent acts. This is true notwithstanding the fact that the "press release" was sent out due to a mistake on Defendant's part.

Further, Plaintiff's assignment to the SHU does not implicate constitutionally protected liberty interests. Prison regulations may create a liberty interest if they impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents

of prison life." *Sandin v. Conner*, 515 U.S. 472, 480 (1995). Plaintiff's placement in the SHU instead of general population does not impose an atypical and significant hardship on him in relation to the ordinary incidents of prison life, nor does it implicate a liberty interest that arises directly under the Constitution because prisoners are not entitled to any particular degree of liberty. *See Meachum v. Fano,* 427 U.S. 215, 225 (1976); *Templeman v. Gunter*, 16 F.3d 36, 369 (10th Cir. 1994). The Constitution does not provide a prison inmate with any liberty interest in his classification or placement. *Lindsey v. True*, No. 11-CV-02924-BNB, 2012 WL 1585902, at *3 (D. Colo. May 7, 2012). There is no evidence that Plaintiff is being mistreated or treated differently that other prisoners housed in the SHU. Defendant is vested with the discretion to "designate any available penal or correctional facility that meets minimum standards of health and habitability" that it "determines to be appropriate and suitable." 18 U.S.C.A. § 3621(b). The Court will not second-guess that decision here.

In his Reply, Plaintiff clarifies that he is not seeking a preliminary injunction as to his placement but rather a protective order under Fed. R. Civ. P. 26(c). He requests "a protective order against Defendant to stop oppression and harassment" and which orders his release from the SHU. The Court is at a loss how it can order Plaintiff's release or reclassification under Fed. R. Civ. P. 26, but it would decline to do so in any event because, despite Plaintiff's protestations, his placement in the SHU is wholly unrelated to discovery matters in this litigation. The Court is not persuaded that Defendant's actions are retaliatory in nature. Given the unique and sensitive circumstances surrounding Plaintiff's incarceration, Defendant's reaction to the

publication of his "press release" has been reasonable. Moreover, although Plaintiff vehemently contests Defendant's description of his current confinement, the Court finds that Plaintiff has access to legal materials and that he can still conduct discovery. Indeed, Defendant sought and was granted an extension of the parties' discovery deadlines due to Plaintiff's housing assignment. (Docket Nos. 97 & 99.)

Because Plaintiff's confinement to the SHU is unrelated to any discovery issues, he is not entitled to relief under Fed. R. Civ. P. 26. Moreover, in light of Plaintiff's history, he did not have a constitutional right to distribute the particular communication at issue here, and his placement in the SHU is justified by the release of the communication and Plaintiff's attempt to circumvent Defendant's monitoring procedures.

Order

It is hereby ORDERED that Plaintiff's Emergency Motion to Remove Plaintiff from Retaliatory Solitary Confinement that is in Violation of the Constitution, Rules, and Laws of the United States (Docket No. 95) is DENIED.

Dated: November 28, 2016
Denver, Colorado

/s/ Michael J. Watanabe
Michael J. Watanabe
United States Magistrate Judge