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.

Reply in Support of Plaintiff's Motion to Strike and Response (Doc. 202)

The Defendant's response in opposition to Plaintiff's motion to strike (Doc. 203) fails for several reasons.

First, as the Defendant acknowledges, full briefing on a motion consists of the motion, response, and reply (Id at 1). Therefore, the "extra briefing" here (Id) was

the Defendant's so-called "Fact Exhibit," not Plaintiff's motion to strike and response to that 282 page extra filing. Plaintiff had every right to seek to strike a voluminous extra filing that is not provided for by the rules and to respond to it in the event that the Court deigned to allow the Defendant's extra briefing to stand. It is the Defendant here who should have sought leave of the Court to file its "Fact Exhibit," not Plaintiff who merely responded to Defendant's extra-rule filing. Certainly the Defendant could have articulated its professed need for the fact exhibit before its reply was due, thus giving the Plaintiff the chance to be heard on the matter in advance. Instead it slopped on Plaintiff a 282 page so-called "Fact Exhibit" which actually contains numerous outright lies and fictions, thus warranting a response on Plaintiff's part. The cases which the Defendant cites (Doc. 203 at 1-2) are thus inapposite because it is the Defendant who filed the

extra brief, not Plaintiff. Plaintiff did not file a "surreply" since his filing responds not to Defendant's reply but to its new (and apparently unprecedented) "Fact Exhibit."

Second, Plaintiff was unaware that Judge Krieger had separate practice standards for her court until he received the Defendant's reply and "Fact Exhibit." In other words, he was unaware of the existence of any such practice standards when he wrote his response to the Defendant's motion for summary judgment, nor has he ever to this day received a copy of such practice standards from anybody. He had no idea that any such practice standards exist and to this day does not have them. It is untrue, in any case, that Plaintiff failed to follow "the Court's rules" (Doc. 203 at 2) because "the Court's rules" are the Federal Rules of Civil Procedure and the Local Rules for the District of Colorado. Practice standards are not, with all due

respect, rules. In any event, if it were so important to the Defendant that Plaintiff follow Judge Krieger's practice standards — which he would have been happy to do — it should have provided a copy of them to him for that purpose the same way that it routinely provides him with non-reported case law. Indeed, unlike unreported case law, the practice standards of Judge Krieger are not on Lexis Nexis at ADX where he can obtain them on his own, or even become aware of them for that matter. Thus it was especially important that the Defendant make Plaintiff aware of the existence of the practice standards before he filed his response to its motion for summary judgment, something the Defendant could have done by simply sending him a copy of them when it filed its summary judgment motion. Why Defendant would assume that Plaintiff would be familiar with the existence of these (separate) practice standards when he is locked in a solitary prison cell with

no ready access to them, he does not know, nor had the practice standards ever come up in this case before. Nor did the Defendant mention the practice standards anywhere in its motion for summary judgment thus alerting Plaintiff of the need to procure them before fashioning his response to that motion. The fact that the Defendant has only made Plaintiff aware of the practice standards <u>now</u> by citing them doesn't do Plaintiff much good; it should have provided them to Plaintiff when he actually could have put them to use. Plaintiff had no reason to believe that his response to the Defendant's motion for summary judgment would or should be guided by Judge Krieger's practice standards when nobody and nothing alerted him to the fact that they should be.

In sum, Plaintiff unfortunately was not aware that any such practice standards existed, didn't have them when he wrote his response to the Defendant's motion for summary judgment,

and should not be penalized for not comporting with them accordingly. Therefore his response to the Defendant's "Fact Exhibit" should be allowed in the event that that extra briefing on Defendant's part is allowed to stand. Without being aware of any unique practice standards that he should comply with, all Plaintiff could do is make sure that he followed the rules, which he did.

Third, in conjunction with the above facts, there is "good cause" for accepting Plaintiff's response to the "Fact Exhibit," and that is the case no matter how it is construed (Doc. 203 at 2). Defendant asserts that it compiled a "Fact Exhibit" because Plaintiff did not follow Judge Krieger's practice standards. As demonstrated by Plaintiff's response to the "Fact Exhibit" however (Doc. 202), the Defendant got many of its allegedly undisputed "facts" wrong; again and again the Defendant asserts that Plaintiff did not dispute various "facts" when Plaintiff actually did dispute them

in his response to its motion. To be charitable, the Defendant made these (numerous) errors regarding what is disputed and what is not in this case because of Plaintiff's apparent failure to follow Judge Krieger's practice standards. Therefore, since Plaintiff's response to the (phony) "Fact Exhibit" makes clear what is disputed in this case and what is not, it should be allowed under Fed. R. Civ. Pro. 1: in order to secure the just determination of this proceeding. Obviously the Court needs to know which facts are disputed in this case and which are not, so long as they are relevant to the issues of course. That is the purpose of Judge Krieger's practice standards regarding summary judgment filings apparently and Plaintiff's response to the "Fact Exhibit" (Doc. 202) thus nicely fulfills that purpose. In effect, Plaintiff's response to the "Fact Exhibit" is an attempt on his part to comply with Judge Krieger's practice standards and it should be accepted

accordingly. Plaintiff has already stated that he has no objection to the Defendant replying to that response (Doc. 202 at 6) and thus the Defendant can have the last word on the matter as the rules envision. What would not be just, on the other hand, would be to allow the Defendant a whopping 495 pages in support of its motion for summary judgment (138 page motion, 75 page reply, and 282 page "Fact Exhibit") while allowing Plaintiff the equivalent of only 80 pages in response. (Plaintiff knows from prior experience that his 198 page handwritten response to the Defendant's motion for summary judgment is the equivalent of no more than 80 typed pages, a fact which the Defendant does not seem to appreciate; it seems to think instead that Plaintiff gets as many words on a page via handwriting as the Defendant gets on a page with its word processor, which is untrue. Thus Plaintiff's 69 page response to the

phony "Fact Exhibit" is actually the equivalent of less than 30 typed pages, just so the Court knows, which is certainly not unreasonable.) Nor does that great disparity even take into account the fact that Plaintiff's own declaration in opposition to the Defendant's motion for summary judgment is included entirely within his response to that motion whereas the Defendant filed eight declarations in addition to its motion itself. In sum, not only do the interests of justice allow for Plaintiff's response to the "Fact Exhibit" to be considered by the Court — in the event that the "Fact Exhibit" is not stricken by the Court altogether as Plaintiff has moved — but they compel that it be. The Defendant is essentially trying to contrive a "David versus Goliath" scenario here with its ridiculously long filings, but in this case "David" is conveniently not to be afforded the usage of a slingshot if the Defendant has its way. That is not justice but bullying.

Fourth, the Defendant is incorrect in its insinuation that Plaintiff's motion to strike was made pursuant to Rule 12(f) of the Federal Rules of Civil Procedure (Doc. 203 at 3-4). That is because a filing is not a "pleading" under that rule; hence Plaintiff did not proceed under that rule. Rather, the phony "Fact Exhibit" is an extra brief plain and simple in violation of Local Rule 7.1(d) and thus Plaintiff does not need to prove the requirements of Rule 12(f). Case law makes clear that only complaints and answers to those complaints are "pleadings" thus invoking Rule 12(f); hence Defendant's arguments are inapposite.

Fifth, while Plaintiff can understand the Defendant's concern about the prospect of its phony, extra-rule "Fact Exhibit" being stricken thus causing its time, energy, and effort in its regard to have been spent for naught, the Defendant does not seem to appreciate that Plaintiff too expended considerable time, energy, and

effort on his (handwritten) response to it and that he did so in good faith. Plaintiff believed then as he believes now that Defendant's "Fact Exhibit" is not a "reply" within the meaning of the rules but rather a new filing which entitled him to a response. (Notably, the Defendant does not deny making new arguments in the Fact Exhibit as Plaintiff asserted. Doc. 202 at 5.) Nor has Defendant explained how it would be prejudiced by virtue of Plaintiff's views on its "Fact Exhibit" being brought to the attention of the Court in the form of his response to it. In sum, if there is no good reason to disregard Defendant's "Fact Exhibit," there is no good reason to disregard Plaintiff's response to it either and both filings should stand accordingly.

Lastly, this case is simply too important for the sake of religious freedom in this country for the Court to allow Plaintiff to be blindsided in the manner that the

Defendant recommends. Plaintiff dutifully followed all of the rules, and indeed practices, that were known to him. He contested all relevant "facts" alleged by the Defendant in what was really a frivolous motion in the first place, for even if all of the Defendant's facts were true it would still not be entitled to judgment as a matter of law on any of Plaintiff's claims. The Defendant has claimed in dozens of instances in its "Fact Exhibit" that this or that of its "facts" were left "undisputed" by Plaintiff when that is simply not the case. Justice thus requires that the Defendant's extra-rule "Fact Exhibit" be stricken, or that Plaintiff's response to it be considered at least if not. It does not, on the other hand, allow for neither scenario.

Respectfully submitted,

Rev. Scott Stole

January 7, 2018

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Certificate of Service

I hereby certify that on January 8, 2018 I served the foregoing Reply in Support of Plaintiff's Motion to Strike and Response upon the following by U.S. mail:

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Received
1-8

Special Mail

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Administrative Remedy
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