

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

Civil Action No. 06-cv-01245-BNB

OCT 6 - 2006

MICHAEL WHITINGTON,

GREGORY C. LANGHAM
CLERK

Plaintiff,

v.

LT. SOKOL,
JOHN DOE,
C/O STRICKLER,
C/O SPROWELS,
C/O PINEDA,
C/O CALDWELL, and
C/O JOHNSON,

Defendants.

ORDER GRANTING MOTION TO RECONSIDER

Plaintiff Michael Whittington is a prisoner in the custody of the Colorado Department of Corrections who currently is incarcerated at the Sterling, Colorado, correctional facility. On September 22, 2006, Mr. Whittington filed *pro se* a motion titled "Motion to Alter or Amend Judgment Pursuant to Rule 59(e) F.R.C.P." He also filed additional motions on September 22 and 26, 2006.

In the motion to reconsider, Mr. Whittington asks the Court to set aside the September 14, 2006, order and judgment that dismissed the complaint and the action without prejudice for failure to exhaust the Colorado Department of Corrections' (DOC) three-step, administrative-grievance procedure and for failure to prosecute. The Court must construe the motion liberally because Mr. Whittington is a *pro se* litigant. **See**

Haines v. Kerner, 404 U.S. 519, 520-21 (1972); **Hall v. Bellmon**, 935 F.2d 1106, 1110 (10th Cir. 1991).

A litigant subject to an adverse judgment, and who seeks reconsideration by the district court of that adverse judgment, may “file either a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) or a motion seeking relief from the judgment pursuant to Fed. R. Civ. P. 60(b).” **Van Skiver v. United States**, 952 F.2d 1241, 1243 (10th Cir. 1991). A postjudgment motion filed within ten days of a final judgment should be construed as a Rule 59(e) motion. *Id.*; **see also Dalton v. First Interstate Bank**, 863 F.2d 702, 703 (10th Cir. 1988). A motion to reconsider filed more than ten days after the final judgment in an action should be considered pursuant to Rule 60(b). **Van Skiver**, 952 F.2d at 1243.

Final decisions are those that end the litigation on the merits and leave nothing for the district court to do except execute the judgment. **Van Cauwenberghe v. Biard**, 486 U.S. 517, 521-22 (1988); **In re Durability, Inc.**, 893 F.2d 264, 265 (10th Cir. 1990). “It is well settled that an order dismissing the action . . . is a final judgment.” **Sherr v. Sierra Trading Corp.**, 492 F.2d 971, 978 (10th Cir. 1974). As previously stated, the September 14, 2006, order dismissed the complaint and the action without prejudice for failure to exhaust the DOC’s three-step, administrative-grievance procedure and for failure to prosecute.

The instant motion to reconsider was filed on September 22, 2006, within ten days after the dismissal order. **See** Fed. R. Civ. P. 6(a) (time periods of less than eleven days exclude intervening Saturdays, Sundays, and legal holidays). Therefore,

the motion will be construed as a motion to reconsider filed pursuant to Fed. R. Civ. P. 59(e).

In the motion, Mr. Whittington explains that he submitted a response to the order to show cause on September 5, 2006. The Court finds that he did submit a response to the show-cause order before the order and judgment of dismissal was entered on September 14, 2006. Therefore, the motion to reconsider will be granted. The September 14 dismissal will be vacated. Accordingly, it is

ORDERED that the motion to reconsider is granted. It is

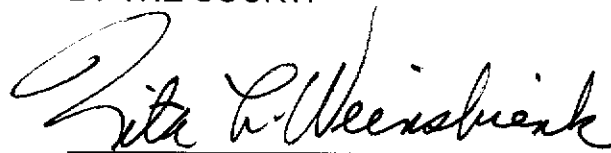
FURTHER ORDERED that the remaining motions filed on September 22 and 26, 2006, are granted. It is

FURTHER ORDERED that the September 14, 2006, order and judgment of dismissal is vacated. It is

FURTHER ORDERED that the clerk of the Court reopen the instant action.

DATED at Denver, Colorado, this 6 day of Oct., 2006.

BY THE COURT:



ZITA L. WEINSHIENK, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO


CERTIFICATE OF MAILING

Civil Action No. 06-cv-01245-BNB

Michael Whittington
Prisoner No. 98082
San Carlos Corr. Facility
1410 W. 13th Street
PO Box 3
Pueblo, CO 81002

I hereby certify that I have mailed a copy of the **ORDER** to the above-named individuals on 10.6.06

GREGORY C. LANGHAM, CLERK

By  _____
Deputy Clerk