

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-01754-ZLW

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

OSIEL RODRIGUEZ,

Plaintiff,

NOV 04 2009

GREGORY C. LANGHAM
CLERK

v.

GENERAL COUNSEL FOR THE FEDERAL BUREAU OF PRISONS,
MICHAEL K. NALLY, Regional Director for the Federal Bureau of Prisons, Central
Regional Office, and
ONE UNKNOWN NAMED EMPLOYEE OF THE FEDERAL BUREAU OF PRISONS,
USP, ADX Florence,

Defendants.

ORDER DENYING MOTION FOR RECONSIDERATION

Plaintiff Osiel Rodriguez is in the custody of the United States Bureau of Prisons and currently is incarcerated at ADX Florence. Mr. Rodriguez, acting *pro se*, filed a pleading titled, "Motion Seeking Relief From Judgement [sic] or Order Pursuant to Fed. R. of Civ. P. Rule 60(b)." The Court must construe the Motion liberally because Mr. Rodriguez 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). For the reasons stated below, the Motion will be denied.

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 motion for reconsideration filed more than ten days after the final judgment in an action should be considered pursuant to Rule 60(b). *See id.* at 1243. Mr. Rodriguez's Motion, which was filed more than ten days after the Judgment was entered, properly is filed pursuant to Fed. R. Civ. P. 60(b). Relief under Rule 60(b) is appropriate only in extraordinary circumstances. *See Massengale v. Oklahoma Bd. of Examiners in Optometry*, 30 F.3d 1325, 1330 (10th Cir. 1994).

The Court dismissed this action as legally frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i). Mr. Rodriguez states in the Motion that he has had the fraudulent August 2, 2007, disciplinary hearing expunged from his record, which was at issue in his Complaint. He further states that he, therefore, is entitled to the relief he sought in his Complaint, which is to require Defendants to pay the \$350.00 filing fee in this action. Upon review of Mr. Rodriguez's Complaint, and the Court's Order of Dismissal, the Court fails to find a sufficient basis for reversing the Order of Dismissal and granting the relief Mr. Rodriguez requests.

Mr. Rodriguez does not assert that he is innocent of the original disciplinary conviction that was entered on May 7, 2007, and that the conviction should be expunged because he is innocent. Mr. Rodriguez only asserts that the August 2, 2007, rehearing was expunged and "by-proxy, Incident Report # 1595430 – had been removed from his disciplinary record." The May 7 conviction was expunged the first time only because documentation of the incident report was lost. When the documentation subsequently was found, the incident report was reinstated.

Furthermore, the punishment Mr. Rodriguez received as a result of the disciplinary conviction did not implicate a liberty interest, and Mr. Rodriguez had sufficient opportunity to seek administrative remedies regarding the validity of his

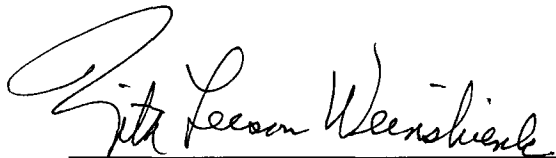
disciplinary proceeding. Nonetheless, whether or not the incident report now has been expunged does not affect this Court's findings that nothing Mr. Rodriguez asserted in his Complaint set forth a First or Fifth Amendment claim. The Complaint is legally frivolous.

Therefore, the Court finds that Mr. Rodriguez fails to demonstrate the existence of any extraordinary circumstances that would justify a decision to reconsider and vacate the order dismissing this action. Accordingly, it is

ORDERED that the Fed. R. Civ. P. 60(b) Motion (Doc. No. 37), filed on October 13, 2009, is denied.

DATED at Denver, Colorado, this 4th day of Nov., 2009.

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. 09-cv-01751-ZLW

Osiel Rodriguez
Reg No. 21136-018
US Penitentiary ADX
P.O. Box 8500
Florence, CO 81226-8500

I hereby certify that I have mailed a copy of the **ORDER** to the above-named individuals on 11/4/09

GREGORY C. LANGHAM, CLERK

By: 

Deputy Clerk