

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-03491-BNB

DAVID J. MYERS,

Plaintiff,

v.

UNKNOWN UNIDENTIFIED MAILROOM PERSONNEL OF THE BUREAU OF  
PRISONS MAILROOM STAFF AT FCI-ENGLEWOOD, (Individual Capacities)  
(Individuals Unknown and Unidentified at time of Filing),

MR. K. MORGAN, (Individual Capacity) (First Name Unknown to Plaintiff at time of  
Filing),

MRS. R. HUFNAGLE, (Individual Capacity) (First Name Unknown to Plaintiff at the time  
of Filing),

MR. RENE GARCIA, (Individual Capacity),

MR. PAUL LAIRD, (Individual Capacity), and

MR. HARRELL WATTS, (Individual Capacity)

Defendants.

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ORDER OF DISMISSAL

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Plaintiff, David J. Myers, is a prisoner in the custody of the Federal Bureau of Prisons (BOP) at the Federal Correctional Institution at Englewood, Colorado (FCI-Englewood). Mr. Myers initiated this action by filing *pro se* a complaint (ECF No. 1). On February 6, 2014, he filed on the proper form a Prisoner Complaint (ECF No. 8).

On February 10, 2014, Magistrate Judge Boyd N. Boland entered an order directing Mr. Myers to file a second amended complaint that clarifies the claims he is asserting in this action. On March 7, 2014, Mr. Myers filed an amended Prisoner Complaint (ECF No. 11) pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), claiming his rights under the United States

Constitution have been violated. Although Mr. Myers also lists 42 U.S.C. §§ 1981, 1985, and 1986 in the jurisdiction portion of the amended Prisoner Complaint (see ECF No. 11 at 4), he does not assert any claims pursuant to those statutes. He seeks damages as relief.

The Court must review the claims Mr. Myer asserts in the amended Prisoner Complaint because he is a prisoner and he is seeking redress from officers or employees of a governmental entity. See 28 U.S.C. § 1915A. Pursuant to § 1915A(b)(1), the Court is required to dismiss the amended Prisoner Complaint, or any portion of the amended Prisoner Complaint, that is frivolous. A legally frivolous claim is one in which the plaintiff asserts the violation of a legal interest that clearly does not exist or asserts facts that do not support an arguable claim. See *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). For the reasons stated below, the Court will dismiss the action as legally frivolous.

The Court must construe the amended Prisoner Complaint liberally because Mr. Myers is not represented by an attorney. See *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10<sup>th</sup> Cir. 1991). If the amended Prisoner Complaint reasonably can be read “to state a valid claim on which the plaintiff could prevail, [the Court] should do so despite the plaintiff’s failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements.” *Hall*, 935 F.2d at 1110. However, the Court should not be an advocate for a *pro se* litigant. See *id.*

Mr. Myers asserts eleven claims for relief in the amended Prisoner Complaint, each of which arises out of his efforts to utilize the BOP administrative remedy

procedure. Construing the amended Prisoner Complaint liberally, Mr. Myers contends in his first ten claims that Defendants violated his constitutional right to seek redress of grievances by misplacing, stealing, denying, or failing to respond to his administrative grievances and appeals. Mr. Myers contends in his eleventh claim for relief that Defendants violated his constitutional right to due process between August 24, 2012, and May 23, 2013, because “nothing has thus far been corrected or remedied to [his] satisfaction” with respect to his administrative grievances and appeals. (ECF No. 11 at 15.)

“Under *Bivens*, an individual has a cause of action against a federal official in his individual capacity for damages arising out of the official’s violation of the United States Constitution under color of federal law or authority.” See *Dry v. United States*, 235 F.3d 1249, 1255 (10<sup>th</sup> Cir. 2000) (emphasis in original removed). It is clear that Mr. Myers is seeking damages from federal officials in their individual capacities. However, he fails to allege facts that support an arguable constitutional violation.

The essence of the claims Mr. Myers asserts in the amended Prisoner Complaint is either that he was prevented from exhausting administrative remedies or that he was denied the administrative remedies he sought. Mr. Myers fails to demonstrate a constitutional violation with respect to these claims because “there is no constitutional right to participate in grievance proceedings.” *Adams v. Rice*, 40 F.3d 72, 75 (4<sup>th</sup> Cir. 1994); see also *Bingham v. Thomas*, 654 F.3d 1171, 1177 (11<sup>th</sup> Cir. 2011) (agreeing with “sister circuits that a prison grievance procedure does not provide an inmate with a constitutionally protected interest”); *Boyd v. Werholtz*, 443 F. App’x 331 (10<sup>th</sup> Cir. 2011) (affirming dismissal under § 1915A of inmate’s claim based on alleged denial of access

to prison grievance procedure); *Sawyer v. Green*, 316 F. App'x 715, 717 n.3 (10<sup>th</sup> Cir. 2008) (noting that lack of response to jail inmate's grievance does not constitute a constitutional violation). Even assuming Mr. Myers was attempting to exhaust administrative remedies in anticipation of filing a federal lawsuit and that prison officials prevented him from exhausting administrative remedies, he fails to demonstrate those prison officials violated his constitutional rights. Instead, the consequence of such action is that the exhaustion requirement would be excused. *See Little v. Jones*, 607 F.3d 1245, 1250 (10<sup>th</sup> Cir. 2010) ("Where prison officials prevent, thwart, or hinder a prisoner's efforts to avail himself of an administrative remedy, they render that remedy 'unavailable' and a court will excuse the prisoner's failure to exhaust."). As a result, Mr. Myers cannot state an arguable constitutional claim with respect to the alleged losses, theft, and denials of his administrative grievances and appeals.

Because the facts Mr. Myers alleges do not state an arguable claim, the amended Prisoner Complaint will be dismissed as legally frivolous. Furthermore, the Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith and therefore *in forma pauperis* status will be denied for the purpose of appeal. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Plaintiff files a notice of appeal he also must pay the full \$505 appellate filing fee or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24. Accordingly, it is

ORDERED that the complaint (ECF No. 1), the Prisoner Complaint (ECF No. 8), the amended Prisoner Complaint (ECF No. 11), and the action are dismissed as legally frivolous pursuant to 28 U.S.C. § 1915A(b)(1). It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit.

DATED at Denver, Colorado, this 18<sup>th</sup> day of March, 2014.

BY THE COURT:

s/Lewis T. Babcock  
LEWIS T. BABCOCK, Senior Judge  
United States District Court