Moles v. Lappin et al Doc. 166

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WALTER CURTIS MOLES, Plaintiff,	)	
v.	)	Case No. CIV-08-594-F
HARLEY G. LAPPIN, Director, Bureau of Prisons, *et al.*, Defendants.	)	

REPORT AND RECOMMENDATION REGARDING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION; NON-RESIDENT DEFENDANTS' MOTION TO DISMISS; PLAINTIFF'S MOTION FOR RECONSIDERATION; AND PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

Currently at issue before the Court are the following motions: (1) Plaintiff's Motion for Preliminary Injunction and Brief in Support [Doc. #120]; (2) Non-Resident Defendants' Motion to Dismiss [Doc. #135]; Plaintiff's Motion for Reconsideration [Doc. #139]; and Plaintiff's Motion for Leave to Amend Complaint [Doc. #165]. For the reasons set forth below it is recommended that each of these pending motions be denied.

I. Relevant Procedural History

Plaintiff initiated this action on June 9, 2008, with the filing of a Complaint [Doc. # 1] and later on July 2, 2008, filed an Amended Complaint [Doc. #18]. Defendants then collectively filed a Motion to Dismiss [Doc. #66] seeking dismissal of the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. This Court filed a Report and Recommendation [Doc. #93] on February 26, 2009, recommending the Defendants' Motion to Dismiss be denied and further recommending that Plaintiff be granted, in part, further leave to amend the complaint. On

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March 27, 2009, the District Judge entered an Order [Doc. #102] adopting the recommendation. In the interim, on March 25, 2009, Plaintiff filed a Second Amended Complaint [Doc. #95]. On April 7, 2009, Defendants collectively filed an Answer [Doc. #103] to the Second Amended Complaint.

Although Plaintiff initiated this action appearing *pro se*, the Court subsequently entered an Order [Doc. #125] on July 7, 2009, granting Plaintiff's unopposed Motions for Appointment of Counsel [Doc. ##106 and 115]. On October 15, 2009, attorney Richard Mann filed an Entry of Appearance [Doc. #158] on behalf of Plaintiff. On October 23, 2009, the Court held a status conference and on that same date entered an Order [Doc. #160] setting deadlines pertinent to pending motions including Defendants' Motion for Summary Judgment [Doc. #134] filed on August 17, 2009. As referenced in the Court's Order, the Court stayed ruling on Defendants' Motion for Summary Judgment pending further discovery pertinent to qualified immunity and other issues raised in Defendants' Motion. The parties have been given until February 22, 2010, to complete discovery for those limited purposes.

In the interim, the Court addresses the pending motions identified above.

II. Plaintiff's Request for a Preliminary Injunction

In the Second Amended Complaint, Plaintiff alleges he is not safe in any United States Penitentiary (USP) due to the fact that he previously provided testimony against a federal inmate who was a member of the Aryan Brotherhood gang accused of participation

in a prison drug smuggling operation. He seeks permanent injunctive relief, requesting that Defendants be enjoined from housing Plaintiff in a USP. Plaintiff requests placement in a state correctional facility (but not in the states of California or Texas) or placement in a federal correctional institution (FCI).

The incidents which serve as the basis for the claims alleged in the Second Amended Complaint arise out of Plaintiff's incarceration at FCI El Reno, Oklahoma. At the time this action was filed, however, Plaintiff was housed at USP Terre Haute, Indiana.[1] During the pendency of this lawsuit, Plaintiff was transferred from USP Terre Haute to USP Coleman II in Florida where he currently remains. The transfer to USP Coleman II was based on concerns for Plaintiff's safety. Plaintiff has been at USP Coleman II, Florida, since December 2008 without incident.

On July 2, 2009 – approximately six months after his transfer to USP Coleman II, Florida – Plaintiff filed a Motion for Preliminary Injunction [Doc. #120]. He requests an order from the Court preventing the Federal Bureau of Prisons (BOP) from housing him in a USP "until this case is adjudicated." In support, Plaintiff alleges that USP Coleman II, Florida, "has at least two inmates in general population who were in USP Leavenworth in 1995."[2] Plaintiff alleges there has been no incident with these inmates because they do not

[1]Plaintiff was not directly transferred from FCI El Reno to USP Terre Haute. He spent a brief period of time at USP Atwater, California before his transfer to USP Terre Haute.

[2]Plaintiff was incarcerated at USP Leavenworth at the time he provided testimony against the federal inmate.

recognize Plaintiff due to the fact that Plaintiff has "kept a beard." Plaintiff further alleges he advised prison officials of his concerns and was told the two inmates have "dropped out" of the Aryan Brotherhood gang and, therefore, Plaintiff should be safe there. Plaintiff further alleges while at USP Coleman II, he has been "separated" from his legal work and certain legal work has been lost. He claims "the loss of this paperwork could further expose plaintiff to danger or violence in USPs."

Defendants have responded to Plaintiff's Motion for Preliminary Injunction, and they contend Plaintiff is not entitled to preliminary injunctive relief on jurisdictional grounds, raising the issue of sovereign immunity. In the alternative, Defendants contend Plaintiff is not entitled to preliminary injunctive relief, addressing the merits of his request. *See* Defendants' Response to Plaintiff's Motion for Preliminary Injunction [Doc. #132]. Plaintiff, now represented by counsel, has filed a Reply in Support of Motion for Preliminary Injunction [Doc. #162] addressing only the merits of his request for preliminary injunctive relief. Plaintiff has not addressed the jurisdictional issue raised by Defendants.

A. Legal Basis for Injunctive Relief

As an initial matter, the Court addresses the proper legal basis for Plaintiff's request for preliminary injunctive relief and the proper parties against whom such relief may be obtained. Plaintiff has brought suit against the majority of the named defendants in their individual capacity pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court recognized "an implied

private right of action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 66 (2001). A *Bivens* claim may be brought only against a federal official in his individual capacity for the recovery of money damages. *See Malesko*, 534 U.S. at 72 ("prisoner may not bring a *Bivens* claim against the officer's employer, the United States, or the BOP"); *see also Simmat v. United States Bureau of Prisons*, 413 F.3d 1225, 1231 (10th Cir. 2005) ("a Bivens claim lies against the federal official in his individual capacity – not . . . against officials in their official capacity"). *Bivens*, therefore, cannot serve as a basis for Plaintiff's claims for injunctive relief.

In *Simmat*, however, the Tenth Circuit held that injunctive relief may be available against federal officials in their official capacity pursuant to the court's equity jurisdiction to protect a prisoner's Eighth Amendment right not to be subjected to cruel and unusual punishment. *Simmat*, 413 F.3d at 1232-1233. Plaintiff brings official capacity claims against only two Defendants, Lappin and Sauers. An official capacity claim against a federal official is, in essence, a claim against the United States. *See Simmat*, 413 F.3d at 1232 (claim for injunctive relief "[a]lthough nominally brought against the prison dentists [was] . . . in reality against the United States") (*citing Kentucky v. Graham*, 473 U.S. 159, 165 (1985)). *See also Atkinson v. O'Neill*, 867 F.2d 589, 590 (10th Cir. 1989) ("When an action is one against named individual defendants, but the acts complained of consist of actions taken by defendants in their official capacity as agents of the United States, the action is in

fact one against the United States."). Under the doctrine of sovereign immunity, the United States of America is immune from suit except to the extent that immunity has been expressly waived by statute. *See Atkinson*, 867 F.2d at 590. Where there is no express waiver, federal courts lack subject matter jurisdiction over suits against the United States. *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

The Tenth Circuit determined in *Simmat* that the prisoner's claim for injunctive relief – premised on violations of his Eighth Amendment rights – was not barred by sovereign immunity. The Tenth Circuit held the United States expressly waived sovereign immunity pursuant to the Administrative Procedures Act (APA), 5 U.S.C. § 702. *Simmat*, 413 F.3d at 1233.[3] Because this waiver is not limited to suits brought under the APA, the Tenth Circuit held the waiver applied to the prisoner's Eighth Amendment claims. *Id*.

Defendants do not address *Simmat* in raising sovereign immunity as a defense to Plaintiff's request for injunctive relief. Defendants, however, argue that the APA's waiver of sovereign immunity is limited by 5 U.S.C. § 701(a)(2) which excepts from § 702's waiver agency action "committed to agency discretion by law." Defendants contend that the

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[3]The relevant provision of the APA provides:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702.

designation of a federal prisoner's place of imprisonment is committed to the discretion of the BOP pursuant to 18 U.S.C. § 3621(b). That statute provides:

> The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau.

18 U.S.C. § 3621(b).

Were Plaintiff's claims based solely on a request to be housed in a particular penal or correctional facility, Defendants would be correct. Congress has made clear that the BOP may exercise its discretion in determining the place of a prisoner's confinement and such determinations are not subject to judicial review. Indeed, prisoners do not have a constitutional right to be housed in a particular facility. *See Olim v. Wakinekona*, 461 U.S. 238, 248 (1983); *see also Montez v. McKinna*, 208 F.3d 862, 866 (10th Cir. 2000) (noting "there is no federal constitutional right to incarceration in any particular prison").

But, Plaintiff's claims are not premised on an alleged right to be placed in a particular penal or correctional facility. Instead, Plaintiff's claims are premised on a constitutional right, founded in the Eighth Amendment, to be afforded protection from harm from attacks by other inmates. *See Farmer v. Brennan*, 511 U.S. 825, 833, 847 (1994) (affirming that prison officials have duty to protect prisoners from violence by other prisoners); *Barney v. Pulsipher*, 143 F.3d 1299, 1310 (10th Cir.1998) (same). Where an alleged constitutional violation is at issue, agency discretion is not implicated and § 702 does not operate as an exception to the APA's waiver of sovereign immunity. *See, e.g.*, *Webster v. Doe*, 486 U.S.

592, 603 (1988) (finding that APA did not exclude judicial review of constitutional claims arising out of employment termination because "policies . . . repugnant to the Constitution" are not subject to an agency's absolute discretion); *Community Action of Laramie County, Inc. v. Bowen*, 866 F.2d 347, 352 (10th Cir. 1989) ("[F]ederal courts must be prepared to insure that governmental agencies have not surpassed constitutional boundaries in selecting a course of action [f]or even where agency action has been 'committed to agency discretion by law,' judicial review of colorable constitutional claims remains available unless Congress has made its intent to preclude judicial review crystal clear."). Therefore, the exception to sovereign immunity relied upon by Defendants is inapplicable.[4]

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[4]In a recent unpublished case, *Doe v. Wooten*, No. 1:07-CV-2764-RWS, 2009 WL 900994 (N.D. Ga. March 20, 2009), the United States District Court for the Northern District of Georgia found a federal prisoner's request for injunctive relief, premised on claims similar to those made by Plaintiff, barred on grounds of sovereign immunity. There, the prisoner claimed he was being housed in a high-security BOP facility despite a substantial risk of serious harm at such facilities. According to the prisoner he had been repeatedly threatened and assaulted in these high-security BOP facilities since he had cooperated in the investigation of a BOP officer. The Court deemed the APA's waiver of sovereign immunity inapplicable pursuant to 5 U.S.C. § 701(a)(1) which provides that the APA's waiver of sovereign immunity does not apply where "statutes preclude judicial review." The Court relied on 18 U.S.C. § 3625 as the statute precluding judicial review and held that this statutory provision "proves fatal to Plaintiff's assertion that sovereign immunity is unavailable through the APA waiver under 5 U.S.C. § 702." The Court explained:

> 18 U.S.C. § 3625 specifically limits the APA waiver of sovereign immunity by stating that, "[t]he provisions of . . . 701 through 706 of title 5, United States Code, do not apply to the making of any determination, decision, or order under this subchapter [Subchapter C]." This subchapter, sections 3621-3626, includes 18 U.S.C. § 3621(b) which governs the BOP housing determinations. . . . As such, § 3625 precludes judicial review of prisoner classification and housing determinations; such BOP decisions are not subjected to the APA waiver of sovereign immunity.

Id., 2009 WL 900994 at *7. Defendants have not cited *Wooten* in support of their claim of sovereign immunity nor do they rely on § 701(a)(1)'s exception to the APA's waiver of sovereign immunity. (continued...)

B. Merits of Request for Preliminary Injunctive Relief

Having determined that Plaintiff's request for injunctive relief is not barred by sovereign immunity, the Court next considers the merits of Plaintiff's request. In order to obtain a preliminary injunction, Plaintiff must demonstrate the following: (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest. *Salt Lake Tribune Pub. Co., LLC v. AT & T Corp*., 320 F.3d 1081, 1099 (10th Cir. 2003) (*quoting Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001)). In addition, the right to relief must be "clear and unequivocal" because "a preliminary injunction is an extraordinary remedy." *Id*. Moreover, where the relief requested in a preliminary injunction would (1) disturb the status quo; (2) be mandatory as opposed to prohibitory; or (3) provide the movant with substantially all the relief he may recover after a full trial on the merits, an even heavier burden is placed upon the movant and the movant must show that the four factors listed above weigh "heavily and compellingly in the movant's favor." *Kikumura*, 242 F.3d at 955. Here, because Plaintiff's requested relief

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[4](...continued)
Even had Defendants done so, however, this Court respectfully disagrees with the analysis undertaken by the Northern District of Georgia for substantially the same reasons as those discussed in relation to any exception to the waiver of sovereign immunity under § 701(a)(2). Plaintiff's request for injunctive relief is not premised on a challenge to the BOP's designation of his place of imprisonment but on an alleged failure to protect him from attacks by other inmates in violation of his Eighth Amendment rights. As such, § 3621(b) is not implicated.

would disturb the status quo, be mandatory, and provide Plaintiff with substantially all the injunctive relief he may recover at trial, Plaintiff must demonstrate the four requirements for a preliminary injunction weigh heavily and compellingly in his favor.

Plaintiff has failed to meet his burden of proof. Plaintiff has not shown irreparable harm will result if the preliminary injunction is denied. Significantly, Plaintiff has been housed at USP Coleman II since December 2008. A year has passed without incident to Plaintiff there. This weighs heavily against finding that Plaintiff is not safe at any USP. Moreover, every time Plaintiff has been subjected to harm, actual or threatened, the BOP has promptly moved him to a different USP. On the briefing submitted to the Court in support of Plaintiff's request for preliminary injunctive relief, Plaintiff has not shown he will suffer irreparable harm if the injunction does not issue or a likelihood of success on his claim that by continuing to house him in a USP, Defendants have acted with deliberate indifference to his safety.

In addition to these considerations, Plaintiff has not met his heavy burden to show that the injunction is not adverse to the public interest, that public interest here being deference to prison officials' proper administration of prison facilities. Plaintiff requests placement in a state correctional facility. As Defendants point out, "Plaintiff fails to present any clear and unequivocal evidence that state prisons are safer than BOP facilities or devoid of persons from whom [P]laintiff must be separated." *See* Defendants' Response [Doc. #132] at 14.

To the extent Plaintiff seeks placement in a federal corrections institution (FCI), a lower security BOP facility, Plaintiff likewise has not demonstrated his suitability for such placement. Significantly, the allegations that form the basis of Plaintiff's claims arise out of incidents occurring at such a lower security BOP facility, FCI El Reno.

Having weighed these applicable factors in light of Plaintiff's heightened burden and the requirement that the right to relief be clear and unequivocal, it is recommended that Plaintiff's Motion for Preliminary Injunction be denied.

II. Personal Jurisdiction – Defendants Lappin and Sauers

Defendants Lappin and Sauers move for dismissal of Plaintiff's claims raised against them in Plaintiff's Second Amended Complaint [Doc. #95] for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2).[5] Like the First Amended Complaint [Doc. #18], the Second Amended Complaint alleges that Defendant Lappin is Director of the Federal Bureau of Prisons, located in Washington D.C. It alleges that Defendant Sauers is Branch Chief for the BOP's Designation Sentence Computation Center, located in Grand Prairie, Texas. These Defendants contend they lack the requisite minimum contacts with the State of Oklahoma as necessary for the Court's exercise of personal jurisdiction over them. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

[5]H.J. Marberry, Warden of USP Terre Haute, Indiana, also joins in moving for dismissal. As discussed *infra*, however, and as Plaintiff concedes, Marberry is not named as a defendant in the Second Amended Complaint and, therefore, it is recommended that Warden Marberry be dropped from this action.

Defendants Lappin and Sauers previously filed a Motion to Dismiss [Doc. #66] seeking dismissal of the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.[6] Defendants did not seek dismissal on grounds of lack of personal jurisdiction.

On February 26, 2009, this Court recommended that Defendants' Motion to Dismiss be denied. *See* Report and Recommendation [Doc. #93]. At that time, also pending before the Court was Plaintiff's Motion for Leave to Amend Complaint [Doc. #74]. Defendants did not file any objection to Plaintiff's Motion. This Court recommended that Plaintiff's Motion be granted in part and denied in part. Plaintiff was granted leave to further amend the Complaint to add as an additional defendant Matthew Mendez, Case Manager, FCI El Reno. Plaintiff was denied leave to add any additional defendants. The Court recommended denying Plaintiff's request on the following grounds:

> Plaintiff's allegations against each of these individuals pertain to events occurring at USP Terre Haute. As Plaintiff alleges no facts to demonstrate these individuals purposely directed activities at Plaintiff while incarcerated at FCI El Reno, there is no indication that these individuals have purposely established minimum contacts in the State of Oklahoma. This Court, therefore, lacks personal jurisdiction over these individuals.

See Report and Recommendation at 17-18 (citations omitted).[7]

Plaintiff also filed a Motion to Supplement his Motion for Leave to Amend [Doc. #82] to which Defendants filed no response. Plaintiff requested to supplement the

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[6]All Defendants, without any identified exceptions, joined in the motion for dismissal.

[7]It appears this recommendation may have prompted Defendants Lappin and Sauers to file the present motion raising the defense of lack of personal jurisdiction for the first time.

allegations of his Amended Complaint with respect to his Eighth Amendment claims against Defendants Lappin and Sauers. This Court recommended granting Plaintiff's Motion. *See* Report and Recommendation at 18. The District Court adopted these recommendations. *See* Order [Doc. #102].

Thereafter, on March 25, 2009, Plaintiff filed a Second Amended Complaint [Doc. #95]. The substance of the claims raised against Defendants Lappin and Sauers in the Second Amended Complaint are identical to the claims set forth in the Amended Complaint [Doc. #18]. On April 7, 2009, Defendants filed their Answer [Doc. #103] to the Second Amended Complaint.[8] Included among the affirmative defenses, Defendants asserted that "Plaintiff failed to invoke the Court's personal jurisdiction over defendants." *See* Defendants' Answer [Doc. #103], Affirmative Defenses, ¶ 4.

On August 18, 2009, Defendants Lappin and Sauers filed the pending motion to dismiss. This motion comes more than one year after this action was filed. Thus, Defendants have appeared before the Court for a considerable length of time without objection to the Court's exercise of jurisdiction over their persons and they have even argued the merits of the case.[9]

Rule 12(b) of the Federal Rules of Civil Procedure provides the defense of lack of personal jurisdiction must be asserted in the responsive pleading or by motion in lieu of a

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[8]The Answer was filed jointly by all Defendants.

[9]In addition to moving for a Rule 12(b)(6) dismissal for failure to state a claim, Defendants Lappin and Sauers, in their individual capacities, have joined the other named defendants in filing a motion for summary judgment pursuant to Fed. R. Civ. P. 56. *See* Doc. #134.

responsive pleading. Here, Defendants filed a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) but failed to include in that motion a defense of lack of personal jurisdiction. That defense was available to Defendants at the time they filed their initial motion to dismiss as Plaintiff's subsequent amendment of the complaint did not allege any new facts pertaining to the issue of personal jurisdiction. Pursuant to Rules 12(g)(2) and 12(h), therefore, Defendants waived the defense of lack of personal jurisdiction and are precluded from raising the defense in any subsequent Rule 12 motion. *See* Fed.R.Civ.P. 12(g)(2) (". . . a party that makes a motion under [Rule 12] must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion."; Fed.R.Civ.P. 12(h)(1)(A) ("A party waives any defense listed in Rule 12(b)(2)-(5) by . . . omitting it from a motion in the circumstances described in Rule 12(g)(2) . . . ."); *see also Mayfield v. Hayden*, No. 91-3012, 1991 WL 268845 at * 2 (10th Cir. Dec. 11, 1991) (unpublished op.) (defendants waived defense of improper service by filing a motion to dismiss for failure to state a claim without simultaneously objecting to the allegedly improper service). Accordingly, Defendants have waived the defense of lack of personal jurisdiction and their Motion seeking dismissal on this basis should be denied.

III. Docketing Correction – H.J. Marberry, Warden USP Terre Haute, Indiana

When Plaintiff filed this action, he named as a defendant in the Complaint, H.J. Marberry, Warden USP Terre Haute, Indiana. *See* Complaint [Doc. #1] at 3 (identifying Marberry as the "seventh defendant."). However, when Plaintiff filed his Amended Complaint [Doc. #18] and Second Amended Complaint [Doc. #95] he omitted Marberry as a named defendant. The Court's docket was not updated to reflect the amendments to Plaintiff's complaint.[10] Later, the Court expressly denied Plaintiff's request for leave to amend his complaint to add Marberry as a Defendant. *See* Report and Recommendation [Doc. #93] at 17-18, 19; Order Adopting [Doc. #102]. Moreover, Plaintiff concedes, Marberry should not be a defendant in this action. *See* Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss [Doc. #144] at 1 ("Plaintiff does not oppose dismissing Warden H.J. Marberry as a defendant."). Accordingly, H.J. Marberry, Warden, USP Terre Haute, Indiana, should be dropped from this action. *See* Fed. R. Civ. P. 21 ("On motion or on its own, the court may at any time, on just terms, add or drop a party."). It is recommended that the Court Clerk be directed to make a docket entry reflecting that H.J. Marberry has been dropped as a defendant and terminated as a party to this action.

[10]The docketing error is also reflected at the following entries which include reference to Marberry as a defendant: docket ##66, 67, 68, 69, 78, 94, 102, 103, 109, 127, 129, 132, 133, 137, 147, 149, 152 and 164.

IV. Plaintiff's Motion for Reconsideration

Plaintiff has filed a Motion for Reconsideration [Doc. #139] and requests the Court grant him leave to "list" the United States Bureau of Prisons as a party defendant for purposes of his claims for injunctive relief and pursuant to the Federal Tort Claims Act.[11] As Plaintiff correctly points out, he has sued Defendant Lappin in his individual and official capacities. As discussed above, Plaintiff's claims for injunctive relief are properly brought against Defendant Lappin in his official capacity and, therefore, Plaintiff need not name the BOP as a party defendant. In addition, the United States, not the BOP, is the only proper defendant for purposes of Plaintiff's claims brought under the Federal Tort Claims Act. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 476-77 (1994); *Oxendine v. Kaplan*, 241 F.3d 1272, 1275 n. 4 (10th Cir. 2001). Accordingly, the BOP should not be added as a party defendant and Plaintiff's Motion for Reconsideration should be denied.

V. Plaintiff's Motion for Leave to Amend Complaint

Plaintiff has also filed a Motion for Leave to Amend Complaint [Doc. #165] requesting permission to name the United States as a party for purposes of stating a claim pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq*. Plaintiff's Motion states that Defendants have no objection to the proposed amendment. *See* Motion at 2, ¶ 5.

Plaintiff's request for leave to amend is governed by Fed. R. Civ. P. 15 which provides that "the court should freely give leave when justice so requires." Although

[11]Plaintiff seeks reconsideration of the Court's Order [Doc. #125] entered July 7, 2009.

Fed.R.Civ.P. 15(a) requires that leave to amend be given freely, that requirement does not apply where an amendment obviously would be futile. *See Jefferson County School Dist. No. R-1 v. Moody's Investor's Servs., Inc*., 175 F.3d 848, 859 (10th Cir. 1999).

Plaintiff has not alleged specific facts demonstrating that the jurisdictional requirements of any claims brought pursuant to the FTCA have been satisfied. *See* 28 U.S.C. § 2675(a).[12] Plaintiff's allegations regarding exhaustion of administrative remedies and the timeliness of his FTCA claims are wholly conclusory in nature. Indeed, it is not clear that Plaintiff satisfied the exhaustion requirement prior to filing this action. *See* Plaintiff's Motion to Dismiss Additional Jurisdiction Under the Federal Tort Claims Act [Doc. #32] (advising the Court that Plaintiff filed a tort claim for negligence with the South Central Regional Office, Federal Bureau of Prisons, that the claim was dismissed in January

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[12]Section 2675(a) provides:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

28 U.S.C. § 2675(a); *see also Duplan v. Harper*, 188 F.3d 1195, 1199 (10th Cir. 1999) (as a jurisdictional prerequisite, the FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies).

2008, and further advising the Court that he "filed for reconsideration" and that the BOP had until October 29, 2008, to reconsider Plaintiff's tort claim); *see also* Plaintiff's Motion to Withdraw Previous Filed Motion "Docket 32" [Doc. #54] (advising the Court that: "On September 16th 2008 the Federal Bureau of Prisons denied Plaintiff's reconsideration so his tort claim is fully exhausted." *See id*. at 1, ¶ 2). If Plaintiff did not exhaust administrative remedies at the time he filed this action, his failure to do so is a jurisdictional defect that cannot be cured by a subsequent amendment of the complaint. *See Duplan*, 188 F.3d at 1199 (generally, a premature FTCA complaint cannot be cured through amendment, but instead, plaintiff must file a new suit; "allowing claimants generally to bring suit under the FTCA before exhausting their administrative remedies and to cure the jurisdictional defect by filing an amended complaint would render the exhaustion requirement meaningless and impose an unnecessary burden on the judicial system."). *See also, Hill v. Pugh*, 75 Fed. Appx. 715, 717-18 (10th Cir. Sept. 11, 2003) (unpublished op); *accord Buhl v. United States*, 117 Fed. Appx. 39, 42 (10th Cir. Nov. 08, 2004) (unpublished op) ("The FTCA imposes a jurisdictional bar against claims brought before the exhaustion of administrative remedies."). Under these circumstances, Plaintiff should not be granted leave to amend to name the United States as a party for purposes of stating a claim pursuant to the FTCA. However, Plaintiff is not precluded from filing a motion for leave to amend the complaint that provides the Court with *specific* factual allegations demonstrating the jurisdictional prerequisites to a claim under the FTCA have been satisfied. Any such motion should be

filed as a motion for leave to amend pursuant to Fed. R. Civ. P. 15, and not as a motion to reconsider any prior rulings of this Court.

RECOMMENDATION

It is recommended that the following motions be denied: (1) Plaintiff's Motion for Preliminary Injunction and Brief in Support [Doc. #120]; (2) Non-Resident Defendants' Motion to Dismiss [Doc. #135]; (3) Plaintiff's Motion for Reconsideration [Doc. #139]; and (4) Plaintiff's Motion for Leave to Amend Complaint [Doc. #165].

It is further recommended that H.J. Marberry, Warden, USP Terre Haute, Indiana, be dropped as a party and that the Court Clerk make the appropriate docket entry to reflect that Marberry has been terminated as a defendant in this action.

NOTICE OF RIGHT TO OBJECT

The parties are advised of their right to object to this Report and Recommendation. *See* 28 U.S.C. § 636. Within 14 days after being served with a copy of this Report and Recommendation, a party may serve and file specific written objections, and a party may respond to another party's objections within 14 days after being served with a copy of the objections. Fed. R. Civ. P. 72(b)(2). Any objections and responses must be filed with the Clerk of the District Court. Failure to make timely objection to this Report and Recommendation waives the right to appellate review of the factual and legal issues addressed herein. *Moore v. United States*, 950 F.2d 656 (10th Cir. 1991).

STATUS OF REFERRAL

This Report and Recommendation does not terminate the referral by the District Judge in this matter.

ENTERED this 7th day of January, 2010.

VALERIE K. COUCH
UNITED STATES MAGISTRATE JUDGE