

CASREF, PAW

**U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:08-cv-22672-JAL**

Blue v. Patarroyo et al
Assigned to: Judge Joan A. Lenard
Referred to: Magistrate Judge Patrick A. White
Cause: 42:1983 State Prisoner Civil Rights

Date Filed: 10/15/2008
Jury Demand: Defendant
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

Joseph Lewis Blue

represented by **Joseph Lewis Blue**
Paul Rein Facility
PO BOX 407003
Fort Lauderdale, FL 33340
PRO SE

V.

Defendant

Juan Patarroyo
Correctional Officer

represented by **Kathleen Mary Savor**
Office of the Attorney General
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10th Floor
Fort Lauderdale, FL 33301
(954) 712-4600
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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ATTORNEY TO BE NOTICED

Defendant

Herman Schoening
Assistant Warden

Defendant

Sharon Butler-Smith
Classification Officer

Date Filed	#	Docket Text
09/25/2008	<u>1</u>	COMPLAINT against Juan Patarroyo, Herman Schoening, Sharon Butler-Smith ; IFP pending, filed by Joseph Lewis Blue. (Attachments: # <u>1</u> Exhibit) (vt) (Entered: 09/26/2008)
09/25/2008	<u>2</u>	MOTION for Leave to Proceed in forma pauperis by Joseph Lewis Blue. (vt) (Entered: 09/26/2008)
09/25/2008	<u>3</u>	Clerks Notice Referring Case to Magistrate Judge Patrick A. White (vt) (Entered: 09/26/2008)
10/15/2008	<u>4</u>	ORDER PERMITTING PLAINTIFF TO PROCEED WITHOUT PREPAYMENT OF FILING FEE BUT ESTABLISHING DEBT TO CLERK OF \$350.00 and Ganting <u>2</u> Motion for Leave to Proceed in forma pauperis. Signed by Magistrate Judge Patrick A. White on 10/10/08. (tw) (Entered: 10/15/2008)
10/15/2008	<u>5</u>	ORDER OF INSTRUCTIONS TO PRO SE LITIGANT. Signed by Magistrate Judge Patrick A. White on 10/10/08. (tw) (Entered: 10/15/2008)
10/31/2008	<u>6</u>	ORDER re Service of Process Requiring Personal Service upon Juan Patarroyo. Signed by Magistrate Judge Patrick A. White on 10/31/2008. (br) (Entered: 10/31/2008)
11/04/2008	<u>7</u>	Summons Issued as to Juan Patarroyo. (br) (Entered: 11/04/2008)
11/04/2008	<u>8</u>	PRELIMINARY REPORT OF MAGISTRATE JUDGE. Recommending 1. The defendants Schoening and Smith-Butler and the claims concerning failure to investigate the grievance and denial of access to the courts be dismissed as a party to this action pursuant to 28 U.S.C. §1915(e)(2)(B)(ii) for failure to state a claim upon which relief can be granted. 2. The claims of retaliation and endangerment proceed against the defendant Patarroyo, in his individual capacity. Objections to R&R due by 11/24/2008. Signed by Magistrate Judge Patrick A. White on 11/3/2008. (tw) (Entered: 11/04/2008)
11/04/2008	<u>9</u>	ORDER RE SERVICE OF PROCESS REQUIRING PERSONAL SERVICE UPON AND INDIVIDUAL.The United States Marshal shall serve a copy of the complaint and appropriate summons upon: Juan Patarroyo, Dade

		Correctional Institution, 19000 S.W. 377th Street, Florida City, FL 33034-6499. Signed by Magistrate Judge Patrick A. White on 11/3/2008. (tw) (Entered: 11/04/2008)
11/24/2008	<u>10</u>	NOTICE of Change of Address by Joseph Lewis Blue (tas) (Entered: 11/25/2008)
11/24/2008	<u>11</u>	OBJECTION to <u>8</u> Report and Recommendations by Joseph Lewis Blue. (tas) (Entered: 11/25/2008)
12/02/2008	<u>12</u>	SUMMONS (Affidavit) Returned Executed by Joseph Lewis Blue. Juan Patarroyo served on 11/19/2008, answer due 12/9/2008. (tb) (Entered: 12/04/2008)
01/28/2009	<u>13</u>	NOTICE TO PLAINTIFF REGARDING MOTION FOR DEFAULT WHEN NO RESPONSE HAS BEEN FILED TO COMPLAINT (tw) (Entered: 01/28/2009)
02/11/2009	<u>14</u>	ORDER ADOPTING REPORT OF MAGISTRATE JUDGE (D.E. 8). Signed by Judge Joan A. Lenard on 2/11/2009. (lc2) (Entered: 02/11/2009)
02/19/2009	<u>15</u>	NOTICE of Change of Address by Joseph Lewis Blue (ail) (Entered: 02/20/2009)
02/25/2009	<u>16</u>	SECOND NOTICE TO PLAINTIFF REGARDING MOTION FOR DEFAULT WHEN NO PRESONSE HAS BEEN FILED TO COMPLAINT. If the plaintiff intends to request the entry of a default against the defendant he shall do so by filing such a motion on or before march 17, 2009. (tw) (Entered: 02/25/2009)
03/02/2009	<u>17</u>	NOTICE of Attorney Appearance by Kelly Overstreet Johnson on behalf of Juan Patarroyo (Johnson, Kelly) (Entered: 03/02/2009)
03/02/2009	<u>18</u>	ANSWER and Affirmative Defenses to Complaint with Jury Demand by Juan Patarroyo.(Johnson, Kelly) (Entered: 03/02/2009)
03/03/2009	<u>19</u>	SCHEDULING ORDER: Amended Pleadings due by 6/18/2009. Discovery due by 6/4/2009. Joinder of Parties due by 6/18/2009. Motions due by 7/9/2009.. Signed by Magistrate Judge Patrick A. White on 3/3/2009. (tw) (Entered: 03/03/2009)
03/03/2009	<u>20</u>	NOTICE of Attorney Appearance by Ginger Lynne Barry on behalf of Juan Patarroyo (Barry, Ginger) (Entered: 03/03/2009)
03/11/2009	<u>21</u>	NOTICE of Attorney Appearance by Kathleen Mary Savor on behalf of Juan Patarroyo (Savor, Kathleen) (Entered: 03/11/2009)
05/12/2009	<u>22</u>	MOTION to Take Deposition from Joseph Blue by Juan Patarroyo. (Savor, Kathleen) (Entered: 05/12/2009)
05/13/2009	<u>23</u>	ORDER granting <u>22</u> Motion to Take Deposition from plaintiff Joseph Blue. This is an unrepresented plaintiff and the defendants shall govern themselves accordingly. A copy of the plaintiff's deposition shall be furnished to him. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 5/13/2009. (cz) (Entered: 05/13/2009)

07/08/2009	<u>24</u>	MOTION for Summary Judgment by Juan Patarroyo. Responses due by 7/27/2009 (Attachments: # <u>1</u> Exhibit)(Savor, Kathleen) (Entered: 07/08/2009)
07/08/2009	<u>25</u>	MOTION for Extension of Time to File motion for summary judgment by Joseph Lewis Blue. (tb) (Entered: 07/10/2009)
07/10/2009	<u>26</u>	INSTRUCTIONS TO PLAINTIFF RESPONSE TO SUMMARY JUDGMENT. Due on or before July 31, 2009. Signed by Magistrate Judge Patrick A. White on 7/10/2009. (tw) (Entered: 07/10/2009)
07/10/2009		Set/Reset Deadlines per Order at DE <u>26</u> as to <u>24</u> MOTION for Summary Judgment. Responses due by 7/31/2009 (bb) (Entered: 07/13/2009)
07/13/2009	<u>27</u>	ORDER granting <u>25</u> Motion for Extension of Time to File a cross motion for summary judgment to the extent that the plaintiff's reply to the defendant's motion for summary judgment is due on or before 7/31/09 and the plaintiff may file his cross motion at that time. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 7/13/2009. (cz) (Entered: 07/13/2009)
07/27/2009	<u>28</u>	PRETRIAL STATEMENT by Joseph Lewis Blue. (tb) (Entered: 07/28/2009)
08/05/2009	<u>30</u>	RESPONSE in Opposition re <u>24</u> MOTION for Summary Judgment filed by Joseph Lewis Blue. (ail) (Entered: 08/06/2009)
08/05/2009	<u>31</u>	Declaration of Joseph Lewis Blue by Joseph Lewis Blue (ail) (Entered: 08/06/2009)
08/06/2009	<u>29</u>	Statement of: Pretrial Statement by Juan Patarroyo. (Savor, Kathleen) (Entered: 08/06/2009)
09/16/2009	<u>32</u>	NOTICE of Change of Address by Joseph Lewis Blue (system updated) (ail) (Entered: 09/17/2009)
01/08/2010	<u>33</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>1</u> Complaint filed by Joseph Lewis Blue Recommending that: 1) plaintiffs claims for injunctive relief be dismissed; and 2) the defendant Patarroyos motion for summary judgment (DE# <u>24</u>) be granted in part as to the claims that plaintiff Blue was subjected to retaliation and endangerment in May 2008, and denied, in part, as to the claim that plaintiff Blue was subjected to issuance of a retaliatory prison disciplinary report on December 21, 2007. Objections to R&R due by 1/25/2010. Signed by Magistrate Judge Patrick A. White on 1/8/2010. (br) (Entered: 01/08/2010)
01/08/2010	<u>34</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case Recommending that this case be placed on the trial calendar of the District Judge. Objections to R&R due by 1/25/2010. Signed by Magistrate Judge Patrick A. White on 1/8/2010. (br) (Entered: 01/08/2010)
01/13/2010	<u>35</u>	NOTICE of Change of Address by Joseph Lewis Blue (lbc) Modified on 1/13/2010 (lbc). (system updated) (Entered: 01/13/2010)
01/19/2010	<u>36</u>	REPORT AND RECOMMENDATIONS. Recommending that this case be placed on the trial calendar of the District Judge. Objections to R&R due by 2/5/2010. Signed by Magistrate Judge Patrick A. White on 1/19/2010. (tw)

		Modified to restrict document per Chambers and DE# 37 on 1/20/2010 (wc). (Entered: 01/19/2010)
01/20/2010	37	ORDER vacating <u>36</u> Report and Recommendations. This report was inadvertently docketed in this case. Signed by Magistrate Judge Patrick A. White on 1/20/2010. (tw) (Entered: 01/20/2010)
02/16/2010	38	OMNIBUS ORDER ADOPTING AND MODIFYING <u>33</u> REPORT AND RECOMMENDATIONS and ADOPTING <u>34</u> REPORT THAT CASE IS READY FOR TRIAL and GRANTING in part and DENYING in part Defendant Patarroyo's <u>24</u> Motion for Summary Judgment. Signed by Judge Joan A. Lenard on 2/16/2010. (dpv) Modified Text on 2/17/2010 (ral). (Entered: 02/16/2010)
02/16/2010	39	MOTION for Extension of Time to File Response <u>33</u> REPORT AND RECOMMENDATIONS by Joseph Lewis Blue. (ail) (Entered: 02/17/2010)
02/16/2010	40	MOTION for Appointment of Counsel by Joseph Lewis Blue. Responses due by 3/5/2010 (ail) (Entered: 02/17/2010)
02/18/2010	41	ORDER denying as moot <u>39</u> Plaintiff's Motion for Extension of Time to File Objections to the <u>33</u> Magistrate's Report and Recommendations. On February 16, 2010, this Court issued an <u>38</u> OMNIBUS ORDER ADOPTING AND MODIFYING <u>33</u> REPORT AND RECOMMENDATIONS and ADOPTING <u>34</u> REPORT THAT CASE IS READY FOR TRIAL and GRANTING in part and DENYING in part Defendant Patarroyo's <u>24</u> Motion for Summary Judgment. As of that date, neither party had filed objections to the the <u>33</u> Magistrate's Report and Recommendation ("Report"), issued on January 12, 2010. Shortly after the Court issued its Omnibus Order, Plaintiff filed his <u>39</u> Motion for Extension of Time to File Objections to the Report, wherein he indicated that his failure to file timely objections to the Report was due to his recent address change. Plaintiff states that the Report was sent to his previous mailing address and he was not able to obtain the Report until January 29, 2010. See D.E. 39 at 2. Accordingly, it is ORDERED AND ADJUDGED that Plaintiff's Motion for Extension of Time to File Objections to the Report is DENIED as moot. It is further ORDERED AND ADJUDGED that Plaintiff shall have thirty (30) days to file a Motion for Reconsideration of the Court's February 16, 2010 Omnibus Order, therein setting forth his objections to the Magistrate's Report, and Defendants shall then have fourteen (14) days to respond to Plaintiff's Motion for Reconsideration. This entry constitutes the ENDORSED ORDER in its entirety. Signed by Judge Joan A. Lenard on 2/18/2010. (dpv) (Entered: 02/18/2010)
03/16/2010	42	MOTION for Reconsideration re <u>38</u> Omnibus Order Adopting Report and Recommendations, by Joseph Lewis Blue. (lbc) (Entered: 03/17/2010)
05/05/2010	44	MOTION to Appoint Counsel by Joseph Lewis Blue. Responses due by 5/24/2010 (ots) (Entered: 05/05/2010)
05/26/2010	45	ORDER denying <u>40</u> Motion to Appoint Counsel without prejudice. The United States District Judge may wish to attempt to find counsel for this plaintiff for trial. This is a paperless order.. Signed by Magistrate Judge Patrick A. White on 5/26/2010. (cz) (Entered: 05/26/2010)

11/04/2010	46	ORDER denying 44 Motion to Appoint Counsel as stated in previous order.. Signed by Magistrate Judge Patrick A. White on 11/4/2010. (cz) (Entered: 11/04/2010)
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-22672-CIV-LENARD
MAGISTRATE JUDGE P. A. WHITE

JOSEPH BLUE, :
 :
 Plaintiff, :
 :
 v. :
 :
 JUAN PATARROYO, et al., :
 :
 Defendants. :

REPORT OF
MAGISTRATE JUDGE

I. Introduction

In this pro se civil rights action pursuant to 42 U.S.C. §1983, plaintiff Joseph Blue, who is no longer confined, filed a complaint for damages and other relief concerning events at Dade Correctional Institution ("DCI") where he was a state prisoner.¹

After a Preliminary Report (DE#8), and an Order thereon (DE# 14) entered following Blue's Objections (DE#11), the case remained pending solely against DCI Correctional Officer, Juan Patarroyo, on claims of retaliation in December 2007 and May 2008, and endangerment in May 2008. All other claims and defendants were dismissed.

In brief, Blue claims the retaliation occurred, as follows. On the afternoon of December 21, 2007, Patarroyo brought Blue a written "Corrective Consultation" for not showing up for his work detail that morning. There was a verbal encounter between them. Blue allegedly told Patarroyo he was going to file a grievance against him. Patarroyo issued Blue a prison Disciplinary Report ("DR") for "Refusing to Work," which Blue alleges was retaliation for stating that he was going to name him in a grievance. The second incident occurred after Blue failed to appear for his work detail on May 14, 2008, and another corrective consultation for not showing up to work was issued. Blue alleges that Patarroyo gave him an unsatis-

¹ To the extent that plaintiff Blue seeks injunctive relief, that portion of his complaint was rendered moot because he is no longer incarcerated. An inmate's transfer from an institution or release from custody renders moot claims for injunctive or declaratory relief. See Spears v. Thigpen, 846 F.2d 1327 (11 Cir. 1988); Cotterall v. Paul, 755 F.2d 777, 780 (11 Cir. 1985).

factory work rating for May, and alleges it was retaliation for filing a grievance. As noted in the Preliminary Report, it appeared that Blue was alleging in his complaint that the effect of the unsatisfactory work rating was the loss of possible gain time.

The endangerment is said to have occurred in May 2008 when Patarroyo, allegedly having told all Dorm A inmates that they would have to go to work on a daily basis, purportedly announced to them inmates that for the extra work duty they could thank their "union representative Mr. Blue." At initial screening of the complaint for determination whether claims raised therein were frivolous, this allegation was liberally construed as raising a possible claim of endangerment (i.e. "plaintiff alleges that Patarroyo put his safety in danger after he announced that all inmates in the plaintiff's dormitory were being punished because of plaintiff's complaints and actions." See Preliminary Report DE#8, at p.7).

This Cause is before the Court upon Defendants' joint Motion for Summary Judgment (DE#24) with attached exhibits A to H (docketed at DE# 24-2). Plaintiff Blue was advised of his right to respond (Order of Instructions, DE#26).² Blue submitted a Response (DE#30,

² Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is proper

[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.

Fed.R.Civ.P. 56(c).

In Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the Court held that summary judgment should be entered only against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. (citations omitted). Thus, pursuant to Celotex and its progeny, a movant for summary judgment bears the initial responsibility of informing the court of the basis for his motion by identifying those parts of the record that demonstrate the nonexistence of a genuine issue

pp.2-35) with Exhibits marked A, C and D (DE#30, at pp.36-46) and his own Declaration (DE#31), with additional Exhibits marked A to D (at DE#31, pp.14-20). The Defendants filed no Reply.

II DISCUSSION

A. Retaliation

1. The Law Pertaining to Prisoner Retaliation Claims

It is an established principle of constitutional law that an inmate is considered to be exercising his First Amendment right of freedom of speech when he complains to the prison's administrators about the conditions of his confinement. See, e.g., Farrow v. West, 320 F.3d 1235, 1248 (11 Cir. 2003). It is also established that an inmate may maintain a cause of action against prison administrators who retaliate against him for making such complaints. Id. To prevail, the inmate must establish these elements: (1) his speech was constitutionally protected; (2) the inmate suffered adverse action such that the administrator's allegedly retaliatory conduct

of material fact. This demonstration need not be accompanied by affidavits. Hoffman v. Allied Corp., 912 F.2d 1379, 1382 (11 Cir. 1990). If the party seeking summary judgment meets the initial burden of demonstrating the absence of a genuine issue of material fact, the burden then shifts to the nonmoving party, to come forward with sufficient evidence to rebut this showing with affidavits or other relevant and admissible evidence. Avirgan v. Hull, 932 F.2d 1572, 1577 (11 Cir.), cert. denied, 112 S.Ct. 913 (1992). It is the nonmoving party's burden to come forward with evidence on each essential element of his claim sufficient to sustain a jury verdict. Earley v. Champion International Corp., 907 F.2d 1077, 1080 (11 Cir. 1990). The non-moving party cannot rely solely on his complaint and other initial pleadings to contest a motion for summary judgment supported by evidentiary material, but must respond with affidavits, depositions, or otherwise to show that there are material issues of fact which require a trial Fed.R.Civ.P. 56(e); Coleman v. Smith, 828 F.2d 714, 717 (11 Cir. 1987). If the evidence presented by the nonmoving party is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986); Baldwin County, Alabama v. Puller Corp., 971 F.2d 1558 (11 Cir. 1992). "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11 Cir. 1990) (citing Anderson v. Liberty Lobby, Inc., *supra*).

Upon the filing of defendant's motion for summary judgment (DE#24), an Order of Instruction (DE#26) was entered pursuant to Brown v. Shinbaum, 828 F.2d 707 (11 Cir. 1987), to inform plaintiff Blue of his right, as a pro se litigant, to respond to the defendant's summary judgment motion. The Order also instructed the plaintiff about requirements under Fed.R.Civ.P. 56 for a proper response to such a motion.

would likely deter a person of ordinary firmness from engaging in such speech; and (3) there is a causal relationship between the retaliatory action and the protected speech. See Bennett v. Hendrix, 423 F.3d 1247, 1250, 1254 (11 Cir. 2005); Smith v. Mosley, 2008 WL 2609353, 4 (11 Cir. 2008).

Such claims of retaliation by prison officials, which are cognizable in a civil rights suit for damages, may arise under various scenarios, including retaliation against an inmate for exercising the right of free speech, or for filing lawsuits or administrative grievances. Thomas v. Evans, 880 F.2d 1235, 1242 (11 Cir.1989) (First Amendment forbids retaliation for exercising right of free speech); Adams v. Wainwright, 875 F.2d 1536 (11 Cir.1989) (retaliation for filing lawsuits); Wildberger v. Bracknell, 869 F.2d 1467 (11 Cir.1989) (retaliation for filing administrative grievances).

In the "free world" context, an act taken in retaliation for exercise of a constitutionally protected right is actionable under §1983 even if the act, when taken for different reasons, would have been proper. Adams v. James, 797 F.Supp. 940, 948 (M.D.Fla. 1992) (citing Mount Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274, 283 (1977)). A claim of retaliation is a question of causation, and the test applied in the "free world" context is a "but for" analysis. Adams v. James, supra, 797 F.Supp. at 948. See: Mount Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274 (1977) ("but for" the retaliatory motive, the incidents to which the plaintiff refers would not have taken place). In the prison context at least one Circuit has applied the "but for" standard to inmate claims of retaliation. See: McDonald v. Hall, 610 F.2d 16, 18 (1 Cir. 1979). The Eleventh Circuit, however, has declined to follow the "but for" analysis in the context of prisoner retaliation suits, "to the extent that the 'but for' test places a greater burden of proof on the inmate." Adams v. Wainwright, supra, 875 F.2d at 1537; Adams v. James, supra, 797 F.Supp. at 948. Instead, the analysis applied in this Circuit to a prisoner retaliation claim requires a "mutual accommodation" between the penal institution's legitimate needs and goals and the prisoner's retained

constitutional rights, under the "reasonableness" test set forth in Turner v. Safley, 482 U.S. 78 (1987). Adams, supra, at 948.

Thus, to establish a claim for retaliation, the inmate must show a causal connection between his protected conduct and the harm complained of. Farrow v. West, 320 F.3d 1235, 1248-49 (11 Cir. 2003). A prisoner retaliation claim must be factual, and mere conclusory allegations of unconstitutional retaliation will not suffice. Adams, supra, 797 F.Supp. at 948 (citing Frazier v. Dubois, 922 F.2d 560, 562 n.1 (10 Cir. 1990). See Cooper v. Ellsworth Correctional Work Facility, 817 F.Supp. 84, 86 (D.Kan.), aff'd, 2 F.3d 1160 (10 Cir. 1993), and cases cited therein.

Upon consideration of a motion for summary judgment, mere verification of a party's own conclusory allegations is not sufficient to oppose the motion for summary judgment, Adams v. James, 797 F.Supp. 940, 944 (M.D.Fla. 1992) (citing Fed.R.Civ.P. 56(e); and Fullman v. Graddick, 739 F.2d 553, 557 (11 Cir. 1984)). An essential element of a First Amendment retaliation claim is existence of a retaliatory motive. See Gattis v. Brice, 136 F.3d 724, 726 (11 Cir. 2003) ("To succeed in a section 1983 suit based on a claim of retaliation for speech, the plaintiff must show that his speech was a 'substantial' or 'motivating' factor in the allegedly retaliatory decision"). Mere "general attacks" upon a defendant's motivations are not enough, and the plaintiff must articulate "affirmative evidence" of retaliation to prove the requisite motive. Crawford-El v. Britton, 523 U.S. 574, 600 (1998) (citations omitted). In essence, the plaintiff must be able to establish that a defendant was "subjectively motivated to discipline" him for exercising his First Amendment rights. Smith v. Mosely, 523 F.3d 1270, 1278 (11 Cir. 2008). Courts are not to infer causation or construe legal conclusions as facts, Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1248-49 (11 Cir. 2005); and further, courts should give deference to prison officials when evaluating whether there were legitimate penological reasons for conduct alleged to be retaliatory. Sandin v. Conner, 515 U.S. 472 (1995).

Moreover, an inmate cannot state a claim for retaliatory disciplinary proceedings where "the discipline [was] imparted for acts that a prisoner was not entitled to perform." See Cowans v. Warren, 150 F.3d 910, 912 (8 Cir. 1998) (quoting Orebaugh v. Caspari, 910 F2d 526, 528 (8 Cir. 1990)); O'Bryant v. Finch, No. 5:05cv11/LAC/MD., 2008 WL 691689, at *9 (N.D.Fla. Mar.12, 2008).

2. Analysis

a. The December 2007 Incident and DR

Plaintiff Blue claims that Patarroyo gave him a false disciplinary report ("DR") and took him to administrative confinement ("AC") after he [Blue] threatened to file a grievance on December 21, 2007. Blue states his belief that he was being falsely accused of not reporting to work on that day. The parties' exhibits (Defendants' Ex.B at DE#24-2, pp.49-50; and Plaintiff's Ex.C at DE#30, pp.38-39) indicate that an investigation began on 12/21 and ended 12/27/07, that a hearing was conducted on 1/2/08, and that a DR team, of which Patarroyo was not a member, considered Blue's not guilty plea, but found him guilty. The DR documentation, under the heading "BASIS FOR DECISION," indicates that the team's ruling was based on Patarroyo's statement of facts which included Blue's retort to him: "I'm not working for cracker, but I'm going to grieve you until you get fired." The DR shows that the "ACTIONS TAKEN" were: "Disciplinary Confinement 20," "PROBATION DAYS SET 20," and "Loss of Gain Time 0000." It further shows that the Team finding was approved by the Warden on 1/3/08, and that on 3/9/08 the DR was overturned by the Warden, on appeal. (Id.). The DR also shows that Blue was given "Time Served." (Id.).

At his deposition, Blue was asked if at his hearing he was given "time served," and he responded "Yes." (Defendants' Ex.A, DE#24-2, Depo., T/29). He was asked how many days he spent in confinement, and he responded that he spent 12 days on AC [Administrative Confinement] (Id.), and testified that they did not take any gain time from him. (Id., T/29-30). In his Declaration (DE#31) Blue states that he was given 20 days DC and 20 days probation with credit time served, but that after 12 days on

Administrative Confinement he was released to the general inmate population. (Id., p.7).

Patarroyo states in his affidavit that as Inside Grounds supervisor he works the 8-4 shift. Upon arrival he proceeds to the back gate, checks assignments for the day, and retrieves any equipment that may be needed, such as mowers and shovels. In 2007 inmates were assigned to work 2 times per week. The works shifts were from 9-11 a.m., and from 1-3 p.m. When he was assigned to inside grounds Patarroyo went to the inmate dorms and announced to the inmates that they were required to report to Gate 1 for roll call and their job assignments. The inmates gather at Gate 1 for roll call, to get their assignments, and are taken to the area of the grounds where they will be working. Patarroyo states in his affidavit that from the time the job assignments are announced until the end of the work shift, for security reasons he cannot leave the inmates, since jobs performed often require inmates to work with tools in proximity to fences. He also must ensure that the inmates are doing the assignment they are given. He therefore cannot leave the inmates to check which if any of them may be on "call out." Patarroyo states in his Affidavit that he does not receive copies of inmate "call out" sheets listing appointments inmates may have which conflict with their work assignments. He states that it is incumbent upon the inmate to advise him in advance if he has a "call out" which will require him to report somewhere else on the compound during his work period. Patarroyo states that it is a regular occurrence that some inmates will not show up for roll call, and will not check in, and later are found wandering, not wanting to work. Patarroyo states that if an inmate does not show up to roll call and is assigned work, he will issue him a Corrective Consultation. (Patarroyo Affidavit, DE#24-2, Ex.C).³

³ In his Affidavit (DE#24-2, Ex.E), Warden Harris states that Patarroyo was assigned to his position because previous supervisors did not ensure that inmates were performing their work assignments. Patarroyo supervised between 30 and 50 inmates at each shift (9-11 a.m.; and 1-3 p.m.), and from roll call to end of the work period was responsible for making sure their work was done. (Id.).

Patarroyo states in his Affidavit that on 12/21/07 Blue did not show up for roll call, and he therefore issued him a corrective consultation. Patarroyo states that "At no time did Inmate Blue tell me he had callout." He states that Blue was angered by the Corrective Consultation and advised him that he was not going to work for a "Cracker." Patarroyo further states that he ordered Blue to report to work on inside grounds, and that he responded that "he would not work for me." Patarroyo says that he then ordered Blue to "cuff up," because he was going to issue him a disciplinary report ("DR"). Before issuing the DR, Patarroyo contacted his Officer in Charge ("OIC"). Patarroyo explained the events as they happened, the OIC gave permission for issuance of the DR, and it was written, charging inmate Blue with "9-16 Refusing to Work." (Patarroyo Affidavit). Thereafter, until the filing of this lawsuit, Patarroyo had no knowledge that the DR was later overturned. (Id.).

The full STATEMENT OF FACTS in the 12/21/07 DR read as follows, verbatim:

On Friday, December 21, 2007 at approximately 1100 hours while assigned as the inside grounds officer, I was in Delta Dormitory Wing two issuing a corrective consultation to Inmate Blue, Joseph DC# 103239 for 4-2 Unauthorized Absence from Work. After I gave him his copy which he refused to sign I ordered inmate Blue to show up for work again inmate Blue stated "I'm not working for cracker, but I'm going to grieve you until you get fired!" I ordered inmate Blue to show up for work and again he stated "I'm not working for you, you don't know who you messing with." I placed inmate Blue in hand restrains and escorted him to medical for a pre-confinement physical. The OIC was notified and authorized the writing of this report. Inmate Blue is being charged with 9-16 Refusing to Work.

(Ex.B, at DE#24-2, p.49).

It is undisputed that Blue did not appear for work on 12/21/07, and also undisputed that he indeed had conflicting call

outs. Of record are call out sheets for 12/21/07, listing Blue for a Dental Clinic call out at 9:00 a.m. (DE#30, p.36), and for a Law Library call out at 8:30 a.m. (Id., p.37).

In the grievance appeal to the Warden, which Blue filed on 1/3/08, seeking to have his DR overturned (see Defendant's Ex.G, at DE#24-2 pp.61-64), Blue argued that he did not refuse to work. His logic is that he could not have refused to work because in order to have done so he must have been issued a specific work assignment, and refused to do it. As he has in his complaint, and in his Response to the defendants' motion for summary judgment, Blue stated, with regard to his failure to appear for the Work roll call on Friday 12/21/07, that he did not show up because he had 2 call outs for that day. Blue stated in his grievance appeal that "Although Officer Patarroyo alleged that he gave me two (2) orders to show up for work in which I stated that I would not work for him, it is too vague to be characterized as a refusal to work...If I had been directed to report for work at a specific time and date, and failed to do so, the disciplinary team findings may have been proper."

Blue argues, in his Declaration opposing Patarroyo's summary judgment motion, that neither Patarroyo nor his OIC [Taggart] bothered to confirm whether he had call out. It is Blue's belief that it was not his responsibility to show up at roll call in person, before going to his law library and/or dental call outs, to inform his work supervisor Patarroyo that he was not going to work. Blue further states in his Declaration (DE#31), as he did in his grievance appeal (Defendant's Ex.G) that he never called Patarroyo a "Cracker," did not say he would not work, and did not "threaten to seek his termination by grievance." (Declaration, DE#31).

Blue contends that he identified witnesses whose statements he claims would have supported his position: the Law Librarian Stover, and Dentist, Dr. Silva, as well as inmates Timmy Wilmore, Jamal Lewis, Fernard Pierre, and Edward Cooper. In Blue's grievance to the Warden (Defendant's Ex.G) which resulted in the 12/21/07 DR being overturned, Blue argued that the dentist and librarian would

confirm that he had the call outs on 12/21/07, and that Inmates Lewis, Pierre, Cooper and Wilmore would confirm that he did not refuse to work, call Patarroyo a Cracker, or threaten to have him fired by filing a grievance. Blue contends that statements from those witnesses were not considered at the DR hearing. [It is not clear from the record that they were ever obtained].

The DR work sheet for the 9-16 DR issued on 12/21/07 for Refusing to Work indicates under the heading APPEAL PROCESS DISPOSITION, that the DR was overturned on 3/9/08, but provides no details. (Defendants' Ex.B at DE#24-2, p.50; Plaintiff's Ex.C at DE#30, p.39). Blue's 1/3/08 grievance appealing Patarroyo's 12/21/07 DR sought its reversal, and the Warden's Response dated 1/23/08, granted Blue's 1/3/08 grievance, but the Warden's Response also provides no details explaining precisely why the DR was overturned, apart from reference to an unspecified "error" in processing the DR. No additional paperwork pertaining to administrative processes that may have occurred between 1/23 and 3/9/08 has been submitted for the Court's consideration. The Warden's 1/23/08 Response read, as follows, verbatim:

You formal grievance regarding a disciplinary report for 9-16 refusing to work has been received and evaluated.

A review into your request for administrative remedy or appeal reveals that an error occurred in the processing of the disciplinary report. As a result of the error the disciplinary report will be removed from your record and any gain time lost due to the infraction will be restored if applicable.

Grievance Approved.

(Ex.G, DE#24-2 at p.64).

If the issue at hand were merely that Patarroyo had issued the 12/21/07 Corrective Consultation, and if its issuance were the alleged retaliation, it appears that there would be no issue of material fact, and that summary judgment in Patarroyo's favor would

be appropriate because it appears from the record that issuance of the Corrective Consultation was appropriate, where Blue did not check in with Patarroyo ahead of time to inform him that he had a conflicting dental and library call outs, and would not be available for work detail. But here, with regard to the 12/21/07 incident, the claim is that the DR and not the Corrective Consultation was retaliatory, and that the DR was issued not for the failure to appear at the work roll call [which was the basis of the Corrective Consultation] but rather that it was issued because Blue [in response to Statements by Patarroyo saying he must show up for work] allegedly responded twice to Patarroyo that he would not work for him, and called him a Cracker. Patarroyo swears that Blue uttered those refusals to work, for which the DR was issued, and Blue swears that he did not. It is apparent, therefore, that on this claim, there exists a genuine issue as to material fact, which precludes summary disposition of the claim. The existence of conflicting material facts is further confounded by the fact that the DR was overturned, and the record does not substantiate for what reason ("error") it was expunged. Therefore, on the claim that Blue was subjected to issuance of a retaliatory DR on 12/21/07, summary disposition of the complaint is not appropriate.

b. The May 2008 Incident

Plaintiff Blue alleges that in May 2008 Patarroyo gave him an unjustified unsatisfactory work rating in retaliation for filing a grievance, impacting on his gain time.

In his affidavit (Ex.C, DE#24-2) Patarroyo states that on a monthly basis, he is required to send in a rating for each inmate he supervises; and that from December 2007 to August 2008 he rated inmate Blue, above satisfactory, except when his work for the past month warranted an unsatisfactory rating. Patarroyo states that on May 14, 2008 Blue again did not report for roll call for his job assignment, and that after his work shift was over he went to A-Dorm to issue Blue another Corrective Consultation. According to Patarroyo, Officer Williams accompanied him at his request, so that there would be no misunderstanding regarding any conversation between Blue and himself. Patarroyo states that upon his entry into

the dorm, Blue began talking loudly, stated that he was not afraid of him, and complained about property concerning which he had filed a grievance. [Blue's filings indicate that he had grieved because property, including legal papers had been misplaced after they were put in storage when he was transferred to AC on 12/21/07 due to Patarroyo's DR. It is not alleged that Patarroyo was responsible for the alleged loss or misplacement of the property]. Blue was issued a Corrective Consultation, and responded to Patarroyo, stating that he was out on call out. Patarroyo states in his Affidavit that he asked Blue to show him where he [Blue] was on the call out sheet, and Blue never returned any information regarding a call out for that day [i.e. May 14, 2008].

Patarroyo argues in his motion, and demonstrates through his Affidavit, that he had cause to issue Blue the Corrective consultation because he had not shown up for the work roll call on 5/14/08. Blue states in his Declaration that he explained to Patarroyo that he had had a "call out" (Declaration, DE#31, p.8, ¶11), and states that he showed Patarroyo his "pass." In his Declaration (DE#31) Blue further states that the May 14, 2008 incident occurred when he had returned from a Law Library call out. (Id.). Patarroyo has demonstrated through his Affidavit that generally Blue received above satisfactory work ratings from him, but that he would issue an unsatisfactory work rating to Blue if it was warranted for his performance during any particular month. Patarroyo shows through his own Affidavit, and the Affidavit of Marcia Stover, the DCI Law Librarian, that inmates are not assigned to work details for 40 hours a week, and that inmates who have court deadlines are granted permission to come to the law library 2½ days per week when they have an upcoming court deadline within 20 days. As a result, even when inmates are in a period when the law library would be available to them for that reason, they are not to miss work, and are supposed to schedule their law library use around their work schedule. Under the Florida Administrative Code, Law Librarians are not permitted to excuse an open population inmate from work in order to make use of the law library. (Defendant's Ex.F, DE#24-2, pp.59-60).

By way of the Affidavit of Deloye B. Henry, Systems Analyst Supervisor for the Florida DOC (Defendant's Ex.H, DE#24-2, pp.65-67), Patarroyo has demonstrated that Blue's work ratings for December 2007, May 2008, and July 2008 were unsatisfactory, and that his other monthly evaluations between December 2007 and August 2008 were above satisfactory. Through Henry's Affidavit Patarroyo also has established that Blue was released from the Florida DOC on November 7, 2008, and that by May 2007, he had reached his "minimum serve date." Henry's Affidavit establishes that when an inmate reaches his "minimum serve date" he is no longer eligible to accrue additional gain time to shorten the length of his incarceration, and that after May 2007 Blue therefore could not receive gain time applicable toward his early release from prison.

In sum, the defendant's evidence, which is not rebutted by competent evidence from the plaintiff, demonstrates that Blue was not entitled to skip work on May 14, 2008, in order to use the law library, despite his contention that he had a law library "call out" for that day. It shows that Patarroyo was entitled to give Blue a Corrective Consultation on 5/14/08 for not appearing at work roll call. Moreover, Blue has failed to demonstrate that the unsatisfactory work rating for May 2008 was not due to his failure to appear for work call out on 5/14/08. Finally, Blue cannot prevail on his claim that issuance of the unsatisfactory May 2008 work rating amounted to retaliation, and loss of the opportunity to accrue gain time toward his early release, where Henry's Affidavit establishes that for a year prior to the events of May 14, 2008, Blue had no longer been eligible to accrue gain time for that purpose, because he reached his "minimum serve date" in May 2007. On the claim that he subjected the plaintiff Blue to retaliation in May 2007, it is apparent that defendant Patarroyo is entitled to summary judgment in his favor.

B. Endangerment

In this case, the plaintiff Blue alleges that on May 14, 2008, Patarroyo put his safety in danger after he announced to all

inmates in Blue's dormitory that they were being punished because of the plaintiff's complaints and actions.

**1. The Law Relating to Claims of Endangerment
or Failure to Protect**

It is well settled that the failure of prison officials to control or separate prisoners who endanger the physical safety of other prisoners may, under certain conditions, constitute an Eighth Amendment deprivation, however, the constitutional rights of inmates are not violated every time one inmate is injured as a result of another's actions. Farmer v. Brennan, 511 U.S. 825, 828, 833-34 (1994); Smith v. Wade, 461 U.S. 30 (1983); Carter v. Galloway, 352 F.3d 1346, 1349 (11 Cir. 2003); Zatler v. Wainwright, 802 F.2d 397, 400 (11 Cir. 1986).

In a Section 1983 suit against prison officials based on a claim of cruel and unusual punishment, a showing of conscious or callous indifference to the prisoner's rights is required. There must be deliberate indifference to state a claim under §1983, negligence is not enough. Estelle v. Gamble, 429 U.S. 97, 104-06 (1976); Brown v. Hughes, 894 F.2d 1533, 1537-38 (11 Cir. 1990); Washington v. Dugger, 860 F.2d 1018, 1021 (11 Cir. 1988). A prison official's deliberate indifference to a known, substantial risk of serious harm to an inmate violates the Eighth Amendment. Carter v. Galloway, supra, 352 F.3d at 1349 (citing Helling v. McKinney, 509 U.S. 25 (1993)).

The deprivation alleged must be, objectively, "sufficiently serious." Wilson v. Seiter, 501 U.S. 294, 298 (1991); Hudson v. McMillian, 503 U.S. 1 (1992). The prisoner must show that he or she is incarcerated under conditions that pose a substantial risk of serious harm. Farmer v. Brennan, 511 U.S. 825, 834 (1994). This risk violates the Eighth Amendment's requirement "that inmates be furnished with basic human needs, one of which is 'reasonable safety.'" Helling, 509 U.S. at 33 (quoting DeShaney v. Winnebago County Dept. Social Services, 489 U.S. 189 (1989)).

Regarding the second requirement, deliberate indifference, the prison official who ignores a substantial risk of serious harm to an inmate must have a "sufficiently culpable state of mind," Farmer v. Brennan, *supra*, 511 U.S. at 834. Traditionally, applicable authorities have described "deliberate indifference" as a state of mind more blameworthy than mere negligence or even gross negligence, Davidson v. Cannon, 474 U.S. 344 (1976); Estelle, *supra*, 429 U.S. at 104; Parker v. Williams, 862 F.2d 1471 (11 Cir. 1989), and as something more than a lack of ordinary due care for a prisoner's safety. Whitley v. Albers, 475 U.S. 312 (1986).

With regard to the third requirement, there must be an affirmative causal connection between the official's acts or omissions and the alleged constitutional deprivation, *see*: Zatler v. Wainwright, *supra*, 802 F.2d at 401; LaMarca v. Turner, 995 F.2d 1535, 1536 (11 Cir. 1993). "Personal participation ... is only one of several ways to establish the requisite causal connection," Zatler v. Wainwright, *supra* at 401, and thus, personal participation is not the sine qua non for the defendants to be found personally liable. Swint v. City of Wadley, Ala., 5 F.3d 1435, 1446 (11 Cir. 1993), opinion modified on other grounds, 11 F.3d 1030 (11 Cir. 1994). The defendant official must, however, be aware of and ignore a substantial risk of serious harm to the inmate. In such cases, a finding of liability requires a showing that the responsible official was subjectively conscious of specific facts from which the inference could be drawn that a substantial risk of harm to the prisoner exists, and the official must also "draw the inference." Farmer v. Brennan, *supra*, 511 U.S. at 837; Carter v. Galloway, *supra*, at 1349 (noting that in order to be held liable, the existence of a serious risk of harm and legal causation, alone, are not enough).

2. Analysis

In his complaint the plaintiff has alleged that on May 14, 2008 Patarroyo announced to all inmates in Dorm A that they would have to go to work on a daily basis, due to plaintiff Blue's

complaints and actions, and in doing so allegedly stated to them that they could "thank their "union representative Mr. Blue." As noted, supra, this allegation was construed as a possible claim of endangerment.

In his Affidavit (Ex.C, DE#24-2), Patarroyo states under oath that "at no time did I order inmates in A dorm to work daily." He further states that "due to the number of inmates assigned to inside grounds, it would be impracticable." In his Response DE#30, and Declaration (DE#31 at p.8) Blue contends that Patarroyo did make the statement to all of the inmates. Blue further states that several inmates spoke out against Patarroyo's behavior, and others "made verbal threats towards me in terms of physical harm if they had to work every day because of me." (Id.). According to Patarroyo and Blue, Officer Williams was already in the dormitory, and witnessed the events. (Patarroyo Affidavit; Blue Declaration).

In connection with this claim Blue has not presented any sworn statements, declarations, or the like, from any inmates, or from Officer Williams, to substantiate that Patarroyo uttered a threat to make all inmates in Dorm A work every day because of Blue. Nor is there anything to substantiate Blue's claim that he received threats of harm, that such threats were made known to Patarroyo or other prison officials, or that inmates acted upon such threats.

As the non-movant, even as a pro se litigant, plaintiff Blue cannot simply rely on the allegations of his complaint to contest a motion for summary judgment, see Fed.R.Civ.P. 56(e); Coleman v. Smith, 828 F.2d 714, 717 (11 Cir. 1987); nor can he rely on self-serving statements that amount to mere repetition of allegations of the complaint which are not otherwise supported in the record, and under those circumstances are not sufficient to create a question of material fact for determination by a jury. See Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990) ("In ruling upon a Rule 56 motion, 'a district court must resolve any factual issue of controversy in favor of the non-moving party' only in the sense that, where the facts specifically averred by that party contradict

the facts specifically averred by the movant, the motion must be denied. That is a world apart from 'assuming' that general averments embrace the 'specific facts' needed to sustain the complaint. As set forth above, Rule 56(e) provides that judgment 'shall be entered' against the nonmoving party unless affidavits or other evidence 'set forth specific facts showing that there is a genuine issue for trial.' The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.") (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)); Coleman v. Smith, 828 F.2d 714, 717 (11 Cir. 1987) ("the party adverse to the movant for summary judgment cannot rest on his pleadings to present an issue of fact [but must] respond with affidavits, depositions, or otherwise, in order to reflect that there are material facts which must be presented to a jury for resolution") (quoting Van T. Junkins & Assoc. V. U.S. Industries, Inc., 736 F.2d 656, 658 (11 Cir. 1984)); Weeks v. Samsung Heavy Ind. Co., 126 F.3d 926, 939 (7th Cir. 1997) ("a plaintiff's own uncorroborated testimony is insufficient to defeat a motion for summary judgment"); Edward E. Gillen Co. v. City of Lake Forest, 3 F.3d 192, 196 (7 Cir. 1992) ("a party seeking to avoid summary judgment may not establish a dispute of material fact with unsubstantiated assertions in its factual summary or in affidavits").

Under the circumstances it is apparent that on the claim of endangerment based on events in May 2008, the defendant Patarroyo is entitled to summary disposition of the complaint in his favor.

III CONCLUSION

It is therefore recommended that: 1) plaintiff's claims for injunctive relief be dismissed; and 2) the defendant Patarroyo's motion for summary judgment (DE#24) be granted in part as to the claims that plaintiff Blue was subjected to retaliation and endangerment in May 2008, and denied, in part, as to the claim that plaintiff Blue was subjected to issuance of a retaliatory prison disciplinary report on December 21, 2007.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Dated: January 8th, 2010.


UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-22672-CIV-LENARD
MAGISTRATE JUDGE P. A. WHITE

JOSEPH BLUE, :
 :
 Plaintiff, :
 :
 v. :
 :
 JUAN PATARROYO, et al., :
 :
 Defendants. :

REPORT THAT CASE IS
READY FOR TRIAL

In this *pro se* civil rights action pursuant to 42 U.S.C. §1983, a separate Report has been entered this date recommending, for reasons stated therein, that the defendant Patarroyo's motion for summary Judgment (DE#24) be Granted, in part, and Denied, in part. Patarroyo is the sole defendant remaining in the case.

The Report recommends, with regard to plaintiff Blue's claims of retaliation and endangerment, which allegedly occurred in May 2008, that Patarroyo's motion be granted, and that with regard to Blue's claim of retaliation in December 2007, that Patarroyo's motion be denied.

The plaintiff and defendant have filed their unilateral pretrial statements (DE#s 28 and 29, respectively). The case is otherwise now at issue; and the parties have not consented to trial before a Magistrate Judge pursuant to 28 U.S.C. §636(c). The undersigned respectfully recommends that this case be placed on the trial calendar of the District Judge.

Dated: January 8th, 2010.



UNITED STATES MAGISTRATE JUDGE

cc: The Honorable Joan A. Lenard,
United States District Judge

Joseph Blue, Pro Se
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Lauderdale Lakes, FL 33319

Counsel of Record

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 08-22672-CIV-LENARD/WHITE

JOSEPH BLUE,

Plaintiff,

vs.

JUAN PATARROYO, et al.,

Defendants.

**OMNIBUS ORDER ADOPTING AND MODIFYING REPORT AND
RECOMMENDATION (D.E. 33) AND ADOPTING REPORT THAT
CASE IS READY FOR TRIAL (D.E. 34)**

THIS CAUSE is before the Court on the Report and Recommendation of U.S. Magistrate Judge Patrick A. White (“Report,” D.E. 33), issued on January 8, 2010, and on the Report That Case Is Ready For Trial, also issued by Magistrate Judge White on January 8, 2010. In his Report, Magistrate Judge White recommends that Plaintiff’s claims for injunctive relief be dismissed and Defendant Patarroyo’s Motion for Summary Judgment (D.E. 24) be granted in part as to the claim that Plaintiff was subjected to retaliation and endangerment in May 2008, and denied in part as to the claim that Plaintiff was subjected to the issuance of a retaliatory prison report on December 21, 2007. To date, no objections to the Report have been filed. Failure to timely file objections shall bar parties from attacking on appeal the factual findings contained in the report. *See Resolution Trust Corp. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993). Therefore, after an independent review of the Report and record, it is hereby **ORDERED**

AND ADJUDGED that:

1. The Report of the Magistrate Judge (D.E. 33), issued on January 8, 2010, is **ADOPTED**.
2. Plaintiff's claim for injunctive relief (D.E. 1) is **DISMISSED**.
3. Defendant Patarroyo's Motion for Summary Judgment (D.E. 24) is **GRANTED** in part and **DENIED** in part as described in this Order.
4. Plaintiff's claim for punitive damages is **STRICKEN** as he does not allege nor make a showing of physical injury. *See* 42 U.S.C. § 1997(e); *Frazier v. McDonough*, 264 Fed. Appx. 812, 815 (11th Cir. 2008).
4. The Report That Case Is Ready For Trial (D.E. 34), issued on January 8, 2010, is **ADOPTED**.
5. This case shall be placed on the trial calendar of this Court.

DONE AND ORDERED in Chambers at Miami, Florida, this 16th day of February, 2010.



JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 08cv22672JAL.

**The attached hand-written
document
has been scanned and is
also available in the
SUPPLEMENTAL
PAPER FILE**

United States District Court
Southern District of Florida

Case No.: 08-22672 - CIV - Lenard
Magistrate Judge P.A. White

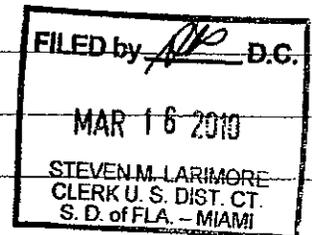
Joseph Lewis Blue,
Plaintiff,

vs.

Juan Patarroyo,
Defendant.

Plaintiff's Motion

For Reconsideration of The
Court's Omnibus Order



In accordance to applicable Federal Rule of Civil Procedure, Plaintiff, Joseph Lewis Blue, in proper person, respectfully moves this Honorable Court to reconsider the Court's Omnibus Order, (Doc. # 38), adopting and modifying the Report and Recommendation of the Magistrate, (Doc. # 33), and to accept as timely filed Plaintiff's Objection to the Report and Recommendation of the Magistrate. In support thereof Plaintiff state as follows:

1. On September 25th 2008, Plaintiff commenced this civil rights action against Defendant Patarroyo under 42 U.S.C. section 1983. (Doc. # 1) On July 24th 2009, Defendant Patarroyo filed a Motion For Summary Judgment pursuant to Rule 56 of the Federal Rules

of Civil Procedure. (Doc. # 24) Plaintiff responded in opposition to Defendant's motion, (Doc. # 30), and on January 8th 2010, Magistrate Judge P. A. White filed a report and recommendation. The magistrate recommended that: (1) Plaintiff's claims for injunctive relief be dismissed; and (2) Defendant Patarroyo's motion for summary judgment be granted in part as to the claims that Plaintiff was subjected to retaliation and endangerment in May 2008, and denied, in part, as to the claim that Plaintiff was subjected to issuance of a retaliatory prison disciplinary report on December 21st 2007. (Doc. # 33).

2. The magistrate erred in concluding Plaintiff failed to demonstrate that the unsatisfactory work rating for May 2008 was not due to Plaintiff's failure to appear for roll call on May 14th 2008. It was also error to conclude Plaintiff had not elicited sufficient evidence to create a triable issue of fact regarding the claim of endangerment. (Doc. # 33, Pg. 13)

May 2008 Incident

3. Uncontradicted evidence in the record demonstrates that, at all times material herein, officials at Dade Correctional Institution, ("DCI") did not have a written policy, regulation, rule, IOP, or inter-office memorandum which mandates inmates to report to their designated work

assignment before proceeding to any scheduled call-out. (Doc. # 31, Pg. 8-9) Moreover, a call-out is a written order and failure to comply with its directive subject a inmate to disciplinary action. (Doc. # 31, Ex. "D", Pg. 2)

The magistrate concluded Defendant Patarrayo's evidence demonstrates that Plaintiff was not entitle to skip work on May 14th 2008 in order to use the law library, despite Plaintiff's contention of having a law library call for that day. (Doc. # 33, Pg. 13)

4. Analysis of Plaintiff's declaration and Defendant Patarrayo's affidavit reveals conflicting testimony of material fact sufficient for trial. The magistrate mistakenly believes Defendant Patarrayo issued the Plaintiff a corrective consultation for being absence from work roll call on May 14th 2008, pursuant to a written policy. FNI Although Defendant Patarrayo alleges that the Plaintiff is required to notify the Defendant of any institutional call-out before reporting to the call-out, the magistrate fails to cite to any prison regulation or portion of the record that would support the Defendant's theory. The magistrate assessment also fails to

FNI. Defendant Patarrayo alleged Plaintiff was issued a corrective consultation May 14th 2008. The record is void of any evidence of this document, and much less if a corrective consultation was actually written.

contravert Plaintiff's claims regarding the existence of procedures at DCI. Defendant Patarroye through affidavit asserts that he acted consistent to DCI policy in issuing Plaintiff a corrective consultation. (DCL # 24, Ex. "C") However, the Defendant has not furnished, or pointed the court to, any evidence of the existence of a "policy" which authorize the Defendant to subject the Plaintiff to a written reprimand for not reporting to a work assignment prior to proceeding to a call-out. None of the affidavits provided by the Defendant directly dispute any the allegations put forth by the Plaintiff on this claim. The uncontradicted evidence indicates that, despite any alleged policy to the contrary, going to a institutional call-out without consulting with, or reporting to the work supervisor was the method prison official routinely made available to the Plaintiff at DCI. Whether or not DCI had a policy prohibiting inmates from going to institutional call-outs without prior notice to the work supervisor is a material fact. If indeed the policy does not exist, Defendant's articulated reason to rate Plaintiff's work evaluation for May 2003 unsatisfactory would be pretextual.

5. If a trier of fact were to concluded the Plaintiff is telling the truth, then Defendant Patarroye is lying about the reason for the unsatisfactory work evaluation for May 2003. A false reason for the rating would support the inference that the real reason was the improper one: retaliation.

The magistrate failed to consider Plaintiff's position regarding the gain-time. Defendant Pataccayo unjustly rated Plaintiff's work evaluation unsatisfactory in retaliation for exercising constitutionally protected conduct. Moreover, Plaintiff vested a liberty interest in gain-time. See section 944.275, Florida Statutes (2008). Gain-time is allowed by the Department of Corrections to encourage a prisoner to mend his way, to conduct himself in an orderly fashion while paying his debt to society, and by his conduct to earn the privilege of release earlier than the terminal date fix by his sentence. However, a prisoner is not eligible to earn any type of gain-time in a amount that would cause a sentence to expire, end, terminate, or result in release, prior to serving a minimum of 85 percent of the sentence imposed. Plaintiff^{AE} reached the minimum sentence in May 2007, yet continued to earn above satisfactory work evaluations and awards of 16 days per month gain-time. (Doc. # 24-2, Ex. "1")

6. It was never alleged that the Plaintiff was not authorized to utilize the law library on May 14th 2008. Likewise, no evidence was adduced regarding any claims that the Plaintiff had already access the law library 2 1/2 days pursuant to rule 33-501.301 (3) (f) (2), FAC. Rather, the evidence demonstrate Plaintiff had authorization to be at the law library on May 14th 2008. (Doc. # 31, Pg. 7) The magistrate contends that Defendant Pataccayo asked the

Plaintiff to show the Defendant where Plaintiff was on the call-out sheet, and Plaintiff never provided information regarding a call out for May 14th 2008 to the Defendant. (Doc. # 33, Pg. 12) This contention is not true. Upon being approached by Defendant Patarroyo regarding Plaintiff's absence from work, Plaintiff advised Defendant Patarroyo of his law library call-out and presented the Defendant Plaintiff's pass. (Doc. # 31, Pg. 7) In the Defendant's affidavit he alleges that he advised all inmates assigned to inside grounds to report to Gate 1 for roll call and job assignments. The Defendant further alleges that he does not receive a copy of the call-out sheet, and once inmates gather at Gate 1 for roll call, inmates will be given their assignment and taken to the area of the ground where they will be working. (Doc. 24-2, Pg. 53)

7. Gate 1 is the internal gate monitored by Correctional Officers, and a post for inmates to log in and out, upon going and returning from institutional call-outs. (Doc. # 30, Ex. "A") Notwithstanding Plaintiff showed Defendant Patarroyo his pass for the law library on May 14th 2008, the Defendant also had at his disposal the call-out reporting sheet maintained at Gate 1. Furthermore, Marcia Stover knew of Plaintiff's call-out to the law library on May 14th 2008. Ms. Stover, as the librarian authorized Plaintiff's May 14th 2008 call-out and permitted the Plaintiff to do volunteer work in the law library. (Doc. # 31, Pg. 10)

Endangerment

8. In recognizing the Eighth Amendment's prohibition on the infliction of cruel and unusual punishments, the Supreme Court has forged two kinds of prisoner cases that are actionable: complaints regarding conditions of confinement and complaints of an excessive use of force. See, e.g., *Estelle v. Gamble*, 429 U.S. 97 (1976); *Whitley v. Albers*, 475 U.S. 312 (1986); *Farmer v. Brennan*, 511 U.S. 825 (1994). Failure to protect inmates from attacks by other inmates also rise to an Eighth Amendment violation if the prison official conduct amounts to an obdurate and wanton disregard for the inmate's safety. *Blankenship v. Meachum*, 846 F.2d 741, 742 (10th Cir. 1988); *McGill v. Duckworth*, 944 F.2d 344, 347 (7th Cir. 1991); See also *Ayala Serrano v. Lebron Gonzalez*, 969 F.2d 8, 14 (1st Cir. 1990). In this case there is more than an allegation of obdurate or wanton disregard for Plaintiff's safety. Before this court is an allegation that Defendant Patacrayo intended to do harm to the Plaintiff by inciting inmates to beat the Plaintiff. Although Plaintiff did not allege any actual physical abuse or contact by any particular inmate, Plaintiff alleged verbal threats sufficient to state a cause of action under the Eighth Amendment.

9. Defendant Patacrayo (and by implication, the magistrate judge) apparently thought that since Plaintiff's allegations of

endangerment were unsubstantiated, Plaintiff's claim must fail. (Doc. # 33, Pg. 16). Plaintiff did not provide the court with any sworn statements, declarations, or the like, from inmates, or Officer Williams, to substantiate that Defendant Patarcuys uttered a threat to make all inmates in A-Dorm work every day because of Plaintiff. However, Plaintiff's deposition (Doc. # 24-2, Ex. "A") clearly identify witnesses prison official failed to interview. Plaintiff revealed the names of several witnesses who had personal knowledge of the events of May 14th 2008. Nevertheless, none of the witnesses were interviewed. When Defendant Patarcuys filed its motion for summary judgment, and Plaintiff filed its response, Plaintiff was incarcerated at the Josepi V. Conte facility on violation of probation charges. As a prisoner, Plaintiff could not obtain declarations of prison inmates. Pursuant to Standard Operation Procedures mail cannot be sent to, or received from another correctional or detention facility unless it is approved by the facility commanders of both the sending and receiving facilities. Plaintiff sought authorization for correspondence with inmates at DCI who witness the events of May 14th 2008, however, Plaintiff's request were never addressed.

10. Defendant Patarcuys has not submitted an affidavit from Officer Williams who allegedly escorted the Defendant to A-Dorm on May 14th 2008. The court has only Plaintiff's uncer-

truncated account of this court event, and it would be unduly harsh to grant Defendant Patarroyo motion for summary judgment because Plaintiff failed elicit testimony to support his claim. If a party opposing a motion for summary judgment shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) deny the motion;
- (2) order a continuance to enable affidavits to be obtain, depositions to be taken, or other discovery to be undertaken; or
- (3) issue any other just order

Rule 56 (f), Federal Rules Of Civil Procedure. Although inartfully drafted Plaintiff literally sought through his declaration additional time to procure testimony to support his claim. (DCC. # 31, Pg. 12) Plaintiff should be given a chance to prove that (1) Defendant Patarroyo stated that all inmates assigned to inside grounds would work every day thanks to their union representative Mr. Blue; (2) Inmates Ricky Farrugia, Anthony St. Fort, Carl Johnson, Charles M. Brady, and Leon Allen witness the events of May 14th 2008; (3) Plaintiff had a law library call-out May 14th 2008; and (4) Officer Williams knew of this specific incident.

Damages

11. The Prison Litigation Reform Act provides, "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered when in custody without a prior showing of physical injury." 42 U.S.C. section 1997e(e). In this case, the Court stricken Plaintiff's claims for punitive damages pursuant to section 1997e(e) and *Frazier v. McDonough*, 264 Fed. Appx. 812 (11th Cir. 2008). The Court found that, because Plaintiff had not alleged any physical injury arising from the actions of Defendant Patarroyo, Plaintiff was not entitled to punitive damages.

12. The claims presented in Plaintiff's complaint are materially distinguishable from *Frazier*. Unlike *Frazier*, Plaintiff is not asserting a claim for mental or emotional injury. Plaintiff is asserting a claim for a violation of his First Amendment rights. The deprivation of First Amendment rights entitles Plaintiff to judicial relief wholly aside from any physical injury Plaintiff can show, or mental or emotional injury Plaintiff may have incurred. Therefore, a Plaintiff who files his complaint while in custody and does not allege any physical injury as a result of an alleged First Amendment violation may not seek compensatory damages but can seek nominal and punitive damages. See *Holloway v.*

Bizzaro, 571 F.Supp.2d 1270 (S.D.Fla. 2008) (citing Frazier v. Mc Duncough, 264 Fed. Appx. 812 (11th Cir. 2008)); see also Lowe v. Stake, 196 F.3d 778 (7th Cir. 1999); Searles v. Van Bebbler, 251 F.3d 869 (10th Cir. 2001); Allah v. Al-Hafeez, 226 F.3d 247 (3d Cir. 2000); and Carnell v. Lightner, 143 F.3d 1216 (9th Cir. 1998).

Punitive damages may be awarded under 42 U.S.C. section 1983 when the Defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others. Smith v. Wade, 461 U.S. 30, 56 (1983). The purpose of punitive damages is to punish the Defendant for his willful or malicious conduct and to deter others from similar behavior. Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986). Therefore, to the extent that Plaintiff's punitive damages claims stem solely from the violation of Plaintiff's First Amendment rights, and not from any emotional or mental distress suffered therefrom, these claims are not claims brought for mental or emotional injury suffered and are not barred by section 1947e(e).

Wherefore, based on the foregoing Plaintiff pray that this Court reconsider its omnibus order (Doc. # 38), vacate the judgment granting Defendant's motion for summary judgment in part, reinstate Plaintiff's claims for punitive damages, and enter an order sua sponte pursuant to Rule 56(f) for

additional discovery.

Certificate of Service

I Hereby Certify that a true copy of the foregoing has been furnished by U.S. Mail, on this 9th day of March, 2010, to the parties below:

Kathleen M. Saver, Asst. Attorney General

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Respectfully Submitted,

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