

U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:10-cv-23230-FAM

Ferguson v. Clark et al
Assigned to: Chief Judge Federico A. Moreno
Referred to: Magistrate Judge Patrick A. White
Cause: 42:1983 State Prisoner Civil Rights

Date Filed: 09/07/2010
Jury Demand: Defendant
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

Dedrick Ferguson
Prisoner ID: 732024

represented by **Dedrick Ferguson**
732024
Hardee Correctional Institution
6901 State Road 62
Bowling Green, FL 33834-9810
PRO SE

V.

Defendant

D. Clark
Classification Officer
TERMINATED: 02/04/2011

Defendant

L. Dean
Officer

represented by **Genny Xiaoya Zhu**
Office of the Attorney General
Civil Division – Fort Lauderdale
110 SE 6th Street, 10th Floor
Fort Lauderdale, FL 33301
954-712-4733
Fax: 954-527-3702
Email: genny.zhu@myfloridalegal.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Sgt. T. Martin
TERMINATED: 09/10/2012

represented by **Genny Xiaoya Zhu**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
09/07/2010	<u>1</u>	COMPLAINT against D. Clark, L. Dean, Sgt. T. Martin. Filing fee \$ 350.00. IFP Filed, filed by Dedrick Ferguson.(rgs) Modified MJSTAR event on 1/6/2011 (yc). (Entered: 09/08/2010)
09/07/2010	<u>2</u>	MOTION for Leave to Proceed in forma pauperis by Dedrick Ferguson. (rgs) (Entered: 09/08/2010)
09/07/2010	3	Judge Assignment RE: Electronic Complaint to Chief Judge Federico A. Moreno (rgs) (Entered: 09/08/2010)
09/07/2010	4	Clerks Notice of Magistrate Judge Assignment to Magistrate Judge Patrick A. White. Pursuant to Administrative Order 2003-19 for a ruling on all pre-trial, non-dispositive matters and for a Report and Recommendation on any dispositive matters. (rgs) (Entered: 09/08/2010)

09/17/2010	<u>5</u>	ORDER denying without prejudice <u>2</u> Motion for Leave to Proceed in forma pauperis and requiring more detailed financial affidavit. Signed by Magistrate Judge Patrick A. White on 9/17/2010. (Attachments: # <u>1</u> Affidavit IFP) (tw) (Entered: 09/17/2010)
09/17/2010	<u>6</u>	ORDER OF INSTRUCTIONS TO PRO SE CIVIL RIGHTS LITIGANTS. Signed by Magistrate Judge Patrick A. White on 9/17/2010. (tw) (Entered: 09/17/2010)
10/04/2010	<u>7</u>	MOTION for Extension of Time to Submit Trust Fund Account Statement re <u>5</u> by Dedrick Ferguson. (ebs) (Entered: 10/05/2010)
10/06/2010	<u>8</u>	ORDER granting <u>7</u> Motion for Extension of Time to File motion for IFP or pay filing fee to on or before 11/2.. Signed by Magistrate Judge Patrick A. White on 10/4/2010. (cz) (Entered: 10/06/2010)
10/07/2010	<u>9</u>	MOTION for Leave to Proceed in forma pauperis by Dedrick Ferguson. (tb) (Entered: 10/08/2010)
10/15/2010	<u>10</u>	ORDER PERMITTING PLAINTIFF TO PROCEED WITHOUT PREPAYMENT OF FILING FEE BUT ESTABLISHING DEBT TO CLERK OF \$350.00 and Granting <u>9</u> Motion for Leave to Proceed in forma pauperis. Signed by Magistrate Judge Patrick A. White on 10/14/2010. (tw) (Entered: 10/15/2010)
10/21/2010	<u>11</u>	MOTION for Injunction Relief by Dedrick Ferguson. (ebs) (Entered: 10/22/2010)
12/20/2010	<u>12</u>	NOTICE of Change of Address by Dedrick Ferguson (asl) (System updated) (Entered: 12/21/2010)
12/23/2010	<u>13</u>	NOTICE of Change of Address by Dedrick Ferguson (asl) (system updated) (Entered: 12/23/2010)
12/28/2010	<u>14</u>	ORDER denying as moot <u>11</u> Motion for Permanent Injunction against officers at Dade Correctional Institution. The plaintiff is no longer confined at Dade CI.. Signed by Magistrate Judge Patrick A. White on 12/28/2010. (cz) (Entered: 12/28/2010)
01/03/2011	<u>15</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>1</u> Complaint filed by Dedrick Ferguson Recommending that 1)the claims of retaliation against Officers Dean and Martin shall continue, in their individual capacities; and 2) the claim of retaliation against Officer Clark shall be dismissed pursuant to 28 U.S.C. §1915(e)(2)(B)(ii), for failure to state a claim upon which relief may be granted. Objections to RRdue by 1/20/2011. Signed by Magistrate Judge Patrick A. White on 1/3/2011. (br) (Entered: 01/03/2011)
01/14/2011	<u>16</u>	ORDER RE SERVICE OF PROCESS REQUIRING PERSONAL SERVICE UPON AN INDIVIDUAL.The United States Marshal shall serve a copy of the complaint and appropriate summons upon: Sgt. T. Martin, Dade Correctional Institution, 19000 S.W. 377th Street, Florida City, FL 33034-6499 and Officer L. Dean, Dade Correctional Institution, 19000 S.W. 377th Street, Florida City, FL 33034-6499. Signed by Magistrate Judge Patrick A. White on 1/14/2011. (tw) (Entered: 01/14/2011)
01/18/2011	<u>17</u>	Summons Issued as to L. Dean, Sgt. T. Martin. (asl) (Entered: 01/18/2011)
02/01/2011	<u>18</u>	NOTICE of Change of Address by Dedrick Ferguson (asl) (system updated) (Entered: 02/01/2011)
02/01/2011	<u>19</u>	MOTION for Reconsideration of Motion for Injunctive Relief re 14 Order on Motion for Permanent Injunction by Dedrick Ferguson. (asl) (Entered: 02/01/2011)
02/04/2011	<u>20</u>	ORDER denying <u>19</u> Motion for Reconsideration. Signed by Chief Judge Federico A. Moreno on 2/3/2011. (mmi) (Entered: 02/04/2011)
02/04/2011	<u>21</u>	ORDER adopting <u>15</u> Report and Recommendations; dismissing Plaintiff's retaliation claim against Defendant D. Clark. Signed by Chief Judge Federico A. Moreno on 2/3/2011. (mmi) (Entered: 02/04/2011)
02/10/2011	<u>22</u>	SUMMONS (Affidavit) Returned Executed L. Dean served on 2/2/2011, answer due 2/23/2011. (asl) (Entered: 02/10/2011)

02/10/2011	<u>23</u>	SUMMONS (Affidavit) Returned Executed Sgt. T. Martin served on 2/2/2011, answer due 2/23/2011. (asl) (Entered: 02/10/2011)
03/03/2011	<u>24</u>	Defendant's MOTION for Extension of Time To File Answer to Complaint re <u>1</u> Complaint/Petition by L. Dean, Sgt. T. Martin. Responses due by 3/21/2011 (Attachments: # <u>1</u> Text of Proposed Order)(Zhu, Genny) (Entered: 03/03/2011)
03/04/2011	25	ORDER granting <u>24</u> Motion for Extension of Time for twenty days to on or before 3/31 to file an answer.. Signed by Magistrate Judge Patrick A. White on 3/4/2011. (cz) (Entered: 03/04/2011)
03/09/2011	<u>26</u>	NOTICE of Inquiry by Dedrick Ferguson. Copy of docket sheet mailed to filer on 3/9/11 (asl) (Entered: 03/09/2011)
03/23/2011	<u>27</u>	MOTION for Appointment of Counsel by Dedrick Ferguson. Responses due by 4/11/2011 (asl) (Entered: 03/23/2011)
03/24/2011	28	ORDER denying <u>27</u> Motion to Appoint Counsel. Signed by Magistrate Judge Patrick A. White on 3/24/2011. (cz) (Entered: 03/24/2011)
03/30/2011	<u>29</u>	<i>Defendants'</i> ANSWER and Affirmative Defenses to Complaint with Jury Demand by L. Dean, Sgt. T. Martin.(Zhu, Genny) (Entered: 03/30/2011)
04/14/2011	<u>30</u>	MOTION for Direction and Guidance and Extension of Time (Responses due by 5/2/2011) by Dedrick Ferguson. (asl) (Entered: 04/14/2011)
04/18/2011	31	ORDER granting <u>30</u> Motion for guidance and extension to the extent that a pre-trial scheduling order will be entered.. Signed by Magistrate Judge Patrick A. White on 4/18/2011. (cz) (Entered: 04/18/2011)
04/19/2011	<u>32</u>	SCHEDULING ORDER: Amended Pleadings due by 8/19/2011. Discovery due by 8/5/2011. Joinder of Parties due by 8/19/2011. Motions due by 9/9/2011.. Signed by Magistrate Judge Patrick A. White on 4/18/2011. (tw) (Entered: 04/19/2011)
04/29/2011	<u>33</u>	NOTICE of Filing Discovery: First Request for Production of Documents Electronically Stored Information and Tangible Things, and Entering onto Land for Inspection and Other Purposes by Dedrick Ferguson.(asl) (Entered: 05/02/2011)
05/05/2011	<u>34</u>	MOTION for Joinder of Claims by Dedrick Ferguson. Responses due by 5/23/2011 (asl) (Entered: 05/05/2011)
05/13/2011	<u>35</u>	RESPONSE in Opposition re <u>34</u> MOTION to Amend/Correct <i>Joinder of Claims</i> filed by L. Dean, Sgt. T. Martin. (Zhu, Genny) (Entered: 05/13/2011)
05/23/2011	<u>36</u>	REPLY to <u>35</u> RESPONSE in Opposition re <u>34</u> MOTION for Joinder of Claims filed by Dedrick Ferguson. (jua) (Entered: 05/24/2011)
05/26/2011	<u>37</u>	Defendant's MOTION for Leave to File <i>Motion for Leave to Depose Incarcerated Plaintiff</i> by L. Dean, Sgt. T. Martin. (Zhu, Genny) (Entered: 05/26/2011)
05/31/2011	38	ORDER granting <u>37</u> Motion for Leave to take deposition of incarcerated plaintiff. The defendants shall provide the plaintiff with a copy of his deposition.. Signed by Magistrate Judge Patrick A. White on 5/31/2011. (cz) (Entered: 05/31/2011)
06/10/2011	<u>39</u>	REPLY to <u>35</u> RESPONSE in Opposition re <u>34</u> MOTION to Amend/Correct filed by Dedrick Ferguson. (jua) (Entered: 06/10/2011)
06/10/2011	40	MOTION to Compel <i>Disclosure or Discovery</i> by Dedrick Ferguson. Responses due by 6/27/2011 (Please see de <u>39</u> for Image)(jua) (Entered: 06/10/2011)
06/13/2011	41	ORDER deferring ruling on 40 Motion to Compel until a response is filed by the defendants.. Signed by Magistrate Judge Patrick A. White on 6/13/2011. (cz) (Entered: 06/13/2011)
06/20/2011	<u>42</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case. Denying <u>34</u> MOTION to Amend/Correct filed by Dedrick Ferguson. Objections to RR due by 7/8/2011. Signed by Magistrate Judge Patrick A. White on 6/16/2011. (tw) (Entered: 06/20/2011)

06/27/2011	<u>43</u>	RESPONSE to Motion re <u>40</u> MOTION to Compel <i>Disclosure or Discovery and Notice of Compliance with Discovery</i> filed by L. Dean, Sgt. T. Martin. Replies due by 7/8/2011. (Zhu, Genny) (Entered: 06/27/2011)
06/29/2011	44	ORDER denying <u>40</u> Motion to Compel for the reasons stated in the defendants' response (DE#43).. Signed by Magistrate Judge Patrick A. White on 6/29/2011. (cz) (Entered: 06/29/2011)
07/01/2011	<u>45</u>	OBJECTIONS to <u>42</u> Report and Recommendations by Dedrick Ferguson. (jua) (Entered: 07/01/2011)
07/07/2011	<u>46</u>	ORDER adopting <u>42</u> Report and Recommendation; denying <u>34</u> Motion for Joinder of Claims. Signed by Chief Judge Federico A. Moreno on 7/6/2011. (mmi) (Entered: 07/07/2011)
07/13/2011	<u>47</u>	Objection to <u>44</u> ORDER denying <u>40</u> Motion to Compel by Dedrick Ferguson. (jua) (Entered: 07/13/2011)
07/21/2011	<u>48</u>	MOTION for Extension of Time to Respond as to <u>32</u> Scheduling Order by Dedrick Ferguson. (jua) (Entered: 07/22/2011)
07/26/2011	49	ORDER granting <u>48</u> Motion for Extension of dates entered in the pre-trial scheduling order. All dates entered in that Order shall be extended for thirty days from the dates in that Order.. Signed by Magistrate Judge Patrick A. White on 7/26/2011. (cz) (Entered: 07/26/2011)
08/23/2011	<u>50</u>	MOTION for Leave to File an Supplement Complaint by Dedrick Ferguson. (jua) (Entered: 08/23/2011)
08/29/2011	<u>51</u>	REPORT AND RECOMMENDATIONS on <u>42</u> USC 1983 case. Denying <u>50</u> MOTION for Leave to File filed by Dedrick Ferguson. Objections to RR due by 9/15/2011. Signed by Magistrate Judge Patrick A. White on 8/29/2011. (tw) (Entered: 08/29/2011)
08/30/2011	<u>52</u>	MOTION for Leave to Serve Additional Interrogatories by Dedrick Ferguson. (ar2) (Additional attachment(s) added on 8/30/2011: # <u>1</u> Interrogatories to Parties Part I, # <u>2</u> Interrogatories to Parties Part II) (ar2). (Entered: 08/30/2011)
08/31/2011	53	ORDER granting <u>52</u> Motion for Leave to File additional interrogatories, defendants shall respond or file objections thereto.. Signed by Magistrate Judge Patrick A. White on 8/31/2011. (cz) (Entered: 08/31/2011)
09/13/2011	<u>54</u>	OBJECTIONS to <u>51</u> Report and Recommendations by Dedrick Ferguson. (jua) (Entered: 09/13/2011)
09/20/2011	<u>55</u>	ORDER ADOPTING <u>51</u> REPORT AND RECOMMENDATIONS by United States Magistrate Judge Stephen T. Brown; denying <u>50</u> Motion for Leave to File. Signed by Chief Judge Federico A. Moreno on 9/19/2011. (mmz) (Entered: 09/20/2011)
09/27/2011	<u>56</u>	MOTION for Reconsideration and MOTION for clarification Re. <u>55</u> Order Adopting Report and Recommendations, Order on Motion for Leave to File,(Responses due by 10/14/2011) by Dedrick Ferguson. (ar2) (Entered: 09/27/2011)
09/27/2011	<u>57</u>	Defendant's MOTION for Extension of Time For Pretrial Deadlines re <u>32</u> Scheduling Order, <u>49</u> Order on Motion for Extension of Time to File Response/Reply, by L. Dean, Sgt. T. Martin. Responses due by 10/14/2011 (Zhu, Genny) (Entered: 09/27/2011)
09/28/2011	58	ORDER respectfully deferring ruling on <u>56</u> Motion for Reconsideration ; deferring ruling on <u>56</u> Motion for Clarification to Chief Judge Moreno; granting <u>57</u> Motion for Extension of Time; all dates entered in the pre-trial scheduling order are extended for sixty days from the dates entered in that order.. Signed by Magistrate Judge Patrick A. White on 9/28/2011. (cz) (Entered: 09/28/2011)
09/29/2011	<u>59</u>	MOTION for clarification of Relief Sought in This Cause of Action re <u>1</u> Complaint by Dedrick Ferguson. Responses due by 10/17/2011 (jua) (Entered: 09/29/2011)

10/03/2011	<u>60</u>	ORDER respectfully deferring ruling on <u>56</u> Motion for Reconsideration ; deferring ruling on <u>56</u> Motion for Clarification to United States Chief Judge Moreno; granting in part and denying in part <u>59</u> Motion for Clarification to add damages, the plaintiff may add damages however, this is not a ruling on whether he is entitled to punitive damages or any other type of damages.. Signed by Magistrate Judge Patrick A. White on 10/3/2011. (cz) (Entered: 10/03/2011)
10/21/2011	<u>61</u>	MOTION for Preliminary Injunction and/or MOTION for Temporary Restraining Order (Responses due by 11/7/2011) by Dedrick Ferguson. (jua) (Entered: 10/21/2011)
10/31/2011	<u>62</u>	MOTION for clarification of all dates entered Re. <u>32</u> Scheduling Order by Dedrick Ferguson. Responses due by 11/17/2011 (ar2) (Entered: 10/31/2011)
11/01/2011	<u>63</u>	Interrogatories to Parties – Ofc. Dean by Dedrick Ferguson. (gp) (Entered: 11/01/2011)
11/01/2011	<u>64</u>	Interrogatories to Parties – Sgt. Martin by Dedrick Ferguson.(gp) (Entered: 11/01/2011)
11/01/2011	<u>65</u>	Request for Admission of Defendant Ofc. Dean by Dedrick Ferguson.(gp) (Entered: 11/01/2011)
11/01/2011	<u>66</u>	Request for Admission of Defendant Sgt. Martin by Dedrick Ferguson. (gp) (Entered: 11/01/2011)
11/04/2011	<u>67</u>	MOTION for Appointment of Counsel Due to Plaintiff's Current Medical Condition by Dedrick Ferguson. Responses due by 11/21/2011 (ar2) (Entered: 11/07/2011)
11/07/2011	<u>68</u>	ORDER granting <u>62</u> Motion for Clarification, all dates entered in the Pre-Trial Scheduling Order were extended for sixty days, that Order is amended and all dates entered in the pre-trial scheduling order are extended for 90 days from the dates entered in that order; denying <u>67</u> Motion to Appoint Counsel.. Signed by Magistrate Judge Patrick A. White on 11/9/2011. (cz) (Entered: 11/07/2011)
11/07/2011	<u>69</u>	RESPONSE in Opposition re <u>61</u> MOTION for Preliminary Injunction MOTION for Temporary Restraining Order filed by L. Dean, Sgt. T. Martin. (Zhu, Genny) (Entered: 11/07/2011)
11/08/2011	<u>70</u>	REPORT AND RECOMMENDATIONS denying <u>61</u> MOTION for Preliminary Injunction MOTION for Temporary Restraining Order filed by Dedrick Ferguson. Objections to RRdue by 11/25/2011. Signed by Magistrate Judge Patrick A. White on 11/8/2011. (tw) (Entered: 11/08/2011)
11/09/2011	<u>71</u>	NOTICE of Filing Discovery: Second Request for Production of Documents Electronically Stored Information and Tangible Things, and Entering onto Land for Inspection and Other Purposes by Dedrick Ferguson (ar2) (Entered: 11/09/2011)
11/28/2011	<u>72</u>	OBJECTIONS to <u>70</u> Report and Recommendations by Dedrick Ferguson. (ar2) (Entered: 11/29/2011)
11/30/2011	<u>73</u>	ORDER ADOPTING <u>70</u> REPORT AND RECOMMENDATIONS; ORDER denying <u>61</u> Motion for Preliminary Injunction; denying <u>61</u> Motion for Temporary Restraining Order. Signed by Chief Judge Federico A. Moreno on 11/30/2011. (mmz) (Entered: 11/30/2011)
12/02/2011	<u>74</u>	ORDER overruling <u>72</u> Objections to Report and Recommendations filed by Dedrick Ferguson. Signed by Chief Judge Federico A. Moreno on 12/1/2011. (mmz) (Entered: 12/02/2011)
12/02/2011	<u>75</u>	ORDER Overruling Objections to Report and Recommendation; re <u>72</u> Objections to Report and Recommendations filed by Dedrick Ferguson. Signed by Chief Judge Federico A. Moreno on 12/1/2011. (asl) (Entered: 12/02/2011)
12/09/2011	<u>76</u>	MOTION for Summary Judgment by L. Dean, Sgt. T. Martin. Responses due by 12/27/2011 (Attachments: # <u>1</u> Exhibit)(Zhu, Genny) (Entered: 12/09/2011)

12/15/2011	<u>77</u>	ORDER INSTRUCTING PRO SE PLAINTIFF CONCERNING RESPONSE to <u>76</u> MOTION for Summary Judgment .(Responses due by 1/3/2012). Signed by Magistrate Judge Patrick A. White on 12/15/2011. (tw) (Entered: 12/15/2011)
12/21/2011	<u>78</u>	NOTICE of Change of Address by Dedrick Ferguson (System updated) (ar2) (Entered: 12/22/2011)
12/23/2011	<u>79</u>	MOTION for Enlargement of Time by Dedrick Ferguson. (yha) (Entered: 12/27/2011)
12/29/2011	80	ORDER granting <u>79</u> Motion for Extension of Time to File Response/Reply re <u>79</u> MOTION for Extension of Time to File Response/Reply Responses due by 1/26/2012. Signed by Chief Judge Federico A. Moreno on 12/29/2011. (cz) (Entered: 12/29/2011)
12/30/2011	<u>81</u>	MOTION for an Order Compelling <i>Disclosure or Discovery</i> by Dedrick Ferguson. Responses due by 1/17/2012 (yha) (Entered: 12/30/2011)
01/03/2012	82	ORDER deferring ruling on <u>81</u> Motion to Compel until defendants reply forthwith.. Signed by Magistrate Judge Patrick A. White on 1/3/2012. (cz) (Entered: 01/03/2012)
01/05/2012	<u>83</u>	MOTION for Enlargement of Time to Respond as to <u>76</u> MOTION for Summary Judgment and/or MOTION for a Court Order Staying the Plaintiff's Response Re: <u>76</u> MOTION for Summary Judgment until Discovery is Complete (Responses due by 1/23/2012) by Dedrick Ferguson. (ar2) (Entered: 01/05/2012)
01/09/2012	84	ORDER granting <u>83</u> plaintiff's Motion for Extension of Time to File Response/Reply re <u>83</u> MOTION for Extension of Time to File Response/Reply as to <u>76</u> MOTION for Summary Judgment MOTION to Stay (Responses due by 1/26/2012); denying <u>83</u> Motion to Stay, defendants shall reply to plaintiff's motion to compel forthwith.. Signed by Magistrate Judge Patrick A. White on 1/9/2012. (cz) (Entered: 01/09/2012)
01/11/2012	<u>85</u>	MOTION for Leave to Supplement <u>83</u> MOTION for a Court Order Staying the Plaintiff's Response Re: 76 MOTION for Summary Judgment until Discovery is Complete by Dedrick Ferguson. (ar2) (Entered: 01/11/2012)
01/17/2012	86	ORDER granting <u>85</u> Motion for Leave to File supplement to motion to stay response to summary judgment only until the defendants file their response to docket entry (DE#81) motion to compel and (DE#85) motion to supplement leave to stay. Defendants shall respond forthwith.. Signed by Magistrate Judge Patrick A. White on 1/17/2012. (cz) (Entered: 01/17/2012)
01/17/2012	<u>87</u>	RESPONSE in Opposition re <u>85</u> MOTION for Leave to File, <u>81</u> MOTION to Compel <i>Disclosure or Discovery</i> filed by L. Dean, Sgt. T. Martin. (Attachments: # <u>1</u> Exhibit A)(Zhu, Genny) (Entered: 01/17/2012)
01/18/2012	88	ORDER denying <u>81</u> plaintiff's Motion to Compel discovery responses for the reasons stated in the defendants response. This case is now at the summary judgment stage.. Signed by Magistrate Judge Patrick A. White on 1/18/2012. (cz) (Entered: 01/18/2012)
01/19/2012	<u>89</u>	Pre-Trial Statement Re: <u>32</u> Scheduling Order by Dedrick Ferguson (ar2) (Entered: 01/19/2012)
01/30/2012	<u>90</u>	MOTION for Reconsideration re 88 ORDER denying <u>81</u> plaintiff's Motion to Compel discovery by Dedrick Ferguson. (jua) (Entered: 01/30/2012)
02/07/2012	<u>91</u>	Statement of: Pretrial Statement by L. Dean, Sgt. T. Martin (Zhu, Genny) (Entered: 02/07/2012)
02/14/2012	<u>92</u>	ORDER denying <u>90</u> Motion for Reconsideration. Signed by Chief Judge Federico A. Moreno on 2/14/2012. (mmz) (Entered: 02/14/2012)
04/16/2012	<u>93</u>	MOTION for an Order Compelling <i>the Defendants to Serve the Plaintiff with</i> <u>91</u> <i>Pretrial Statement</i> by Dedrick Ferguson. Responses due by 5/3/2012 (ar2) (Entered: 04/16/2012)

04/18/2012	94	ORDER granting <u>93</u> Motion to Compel defendants to send a copy of their pre-trial statement to the plaintiff at Hardee Correctional.. Signed by Magistrate Judge Patrick A. White on 4/18/2012. (cz) (Entered: 04/18/2012)
05/04/2012	<u>95</u>	MOTION to Exclude Witness by Dedrick Ferguson. (ar2) (Entered: 05/07/2012)
05/14/2012	96	ORDER dismissing <u>95</u> a Motion to exclude a witness, if a trial is set the plaintiff may file this motion to the District Judge.. Signed by Magistrate Judge Patrick A. White on 5/14/2012. (cz) (Entered: 05/14/2012)
08/08/2012	<u>97</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>1</u> Complaint/Petition filed by Dedrick Ferguson. Recommending that this case be placed on the trial calendar of the District Judge. Objections to RRdue by 8/27/2012 Signed by Magistrate Judge Patrick A. White on 8/8/2012. (tw) (Entered: 08/08/2012)
08/08/2012	<u>98</u>	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re <u>76</u> MOTION for Summary Judgment filed by Sgt. T. Martin, L. Dean. Recommending Defendants motion forsummary judgment (DE# 76) be DENIED as to defendant Dean and be GRANTED as to defendant Martin. Objections to RRdue by 8/27/2012 Signed by Magistrate Judge Patrick A. White on 8/8/2012. (tw) (Entered: 08/08/2012)
08/28/2012	<u>99</u>	CONCURRENCE AND OBJECTION to <u>98</u> Report and Recommendations by Dedrick Ferguson. (ar2) (Entered: 08/29/2012)
09/10/2012	<u>100</u>	ORDER AFFIRMING and ADOPTING <u>97</u> , <u>98</u> REPORT AND RECOMMENDATIONS granting <u>56</u> Motion for Clarification; granting in part and denying in part <u>76</u> Motion for Summary Judgment. Signed by Chief Judge Federico A. Moreno on 9/10/2012. (prs) (Entered: 09/10/2012)
09/10/2012	<u>101</u>	SCHEDULING ORDER: (Trial set for 3/25/2013 in Miami Division before Chief Judge Federico A. Moreno., Calendar Call set for 3/19/2013 02:00 PM in Miami Division before Chief Judge Federico A. Moreno., In Limine Motions due by 1/25/2013., Pretrial Stipulation due by 3/12/2013.), and ORDER REFERRING CASE to Mediation. Mediation Deadline 1/25/2013. Signed by Chief Judge Federico A. Moreno on 9/10/2012. (See Order for details). (ar2) (Entered: 09/11/2012)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-23230-CIV-MORENO
MAGISTRATE JUDGE P.A. WHITE

DEDRICK FERGUSON :
 :
 Plaintiff, :
 v. :
 D. CLARK, et al., :
 Defendants. :

REPORT OF
MAGISTRATE JUDGE

I. Introduction

The plaintiff, Dedrick Ferguson filed a pro se civil rights complaint pursuant to 42 U.S.C. §1983 for damages, while confined at the Dade Correctional Institution alleging that Officers Martin, Dean, and Clark retaliated against him for filing grievances.

This Cause is before the Court upon a the defendants' motion for summary judgment. (DE#76).

II. Factual and Procedural History

The parties do not dispute the following facts. In January of 2009, Ferguson filed a grievance against defendant Dean wherein he alleged that she refused to allow him access to the law library to prepare for a January 9, 2009 hearing even though he had two valid "legal call-outs" on that day. (DE# 1, Ex. B-1). His grievance was investigated and ultimately denied. (Id.). A year later, on January 7, 2010, Ferguson filed an informal grievance against Dean wherein he alleged that on January 4, 2010, Dean forced Ferguson to wait outside in 30-degree weather so that Dean could finish her book. (DE# 76-1, p. 35-36). When Dean finally decided to allow Ferguson to come inside, she told him, "hurry up and close my door

before I lock your ass up in confinement." (Id.). His grievance was approved to the extent a prison official agreed to look into the matter. (Id.).

On January 28, 2010, Defendant Dean filed a Disciplinary Report ("DR"), Log# 463-100119, in connection with an incident involving the plaintiff. The DR's statement of facts provided:

On Thursday, January 28, 2010, at approximately 12:00 PM, I observed Inmate Ferguson, Dedrick DC# 732024 walking around inside of Wing II of Bravo Dorm. I gave Inmate Ferguson a direct verbal order to have a seat on his assigned bunk due to count procedures still being conducted, but to no avail. Inmate Ferguson continued to walk around with complete utter disregard to staff and to all orders given. Shift officer in charge was notified and authorized the writing of this report. Inmate Ferguson was given a pre-confinement physical and will remain in administrative confinement pending the outcome of this disciplinary hearing. Inmate Ferguson is being charged with 6-1, Disobeying a verbal order.

(DE# 76-1, p. 7). At a subsequent hearing, Ferguson declined the offered staff assistance and plead not guilty. (Id.). The hearing team found Ferguson guilty based on the above statement of facts, and sentenced him to 30-days disciplinary confinement. (Id.). Ferguson filed an appeal, which was denied on February 15, 2010. (DE# 76-1, p. 21-22).

On February 4, 2010, Ferguson filed a formal grievance against Dean. Ferguson alleged that Dean retaliated against him on January 28, 2010 because of his prior grievances regarding Dean and because he and his family had previously complained about Dean to the prison administrators. (DE# 76-1, p. 23-35). Ferguson claimed that in retaliation, Dean ignored Ferguson's medical emergency, kicked him in the leg, and placed him in confinement based on false assertions. (Id.).

On February 4, 2010, Ferguson filed a formal grievance against defendant Martin. Dean claimed that on January 28, 2010, Martin ordered him out of his wheelchair and threatened to use pepper spray. (DE# 76-1, p. 27). Ferguson alleged that he attempted to get out of the chair because he did not want to be sprayed and in so doing, he fell to the floor and injured his knee. (Id.). Ferguson filed a second grievance against Martin on May 24, 2010 wherein he stated the following. (DE# 76-1, p. 29). On May 3, 2010, Ferguson underwent knee surgery. (Id.). While he was recovering on May 24, 2010, Martin came to the infirmary and, in retaliation for Ferguson's prior complaints about Martin, verbally harassed him by ordering him to "sit down and shut up." (Id.). Officials interviewed Martin and issued a response denying Ferguson's formal grievance as his allegations of retaliation could not be substantiated. (DE# 76-1, p. 30). On June 28, 2010, Ferguson filed another formal grievance against Martin based on Martin's actions the day before. (DE# 76-1, p. 31). Ferguson explained that he received a pass from Officer Mizzel which allowed him to go to the visitation area to visit with his family. (Id.). Martin prevented him from getting to the proper area by following him and repeatedly closing doors and refusing him passage. (Id.). Ferguson's formal grievance was denied. (DE# 76-1, p. 32). Ferguson filed an appeal, which was denied. (DE# 76-1, p. 33-34).

The plaintiff alleged in his initial complaint (DE#1) that on January 28, 2010, Officer Martin ordered the plaintiff out of his wheel chair or he would spray him, causing him to fall and further damage his right knee, which he previously injured playing basketball on July 3, 2009. The plaintiff filed a grievance and on May 24, 2010, in retaliation for filing the grievance, Martin harassed him. His grievance was subsequently denied and he was threatened with more severe physical harm if he appealed his

grievance. In his grievances he states that Martin continued to harass him, and when he attempted to exercise his injured knee, Martin ordered him to "sit down and shut up". (DE# 1, Ex A-2). He claimed that on January 28, 2010, Officer Dean retaliated against him for filing grievances against her by ignoring his medical emergency, kicking him in his right leg, and placing him in confinement under false assertions. He contended that Officer Clark retaliated against him for using the grievance process by verbally threatening him that he would take punitive action. The plaintiff seeks monetary damages and injunctive relief.

Following a preliminary screening, a Report was entered by the Undersigned Magistrate Judge recommending the case proceed against Officers Martin and Dean for retaliation for the plaintiff's filing grievances, at times resulting in physical assault. (DE#15). The Report further recommended that the plaintiff's claim of retaliation by Officer Clark, that he threatened to take some punitive action against him in the future, was too vague to meet the Twombly standard, and should therefore be dismissed. The Report and Recommendation was adopted on February 4, 2011. (DE# 21).

The plaintiff then filed a motion for joinder of additional claims (DE#34), seeking to add the additional claim that Sgt. Martin continued to violate his civil rights with ongoing acts of retaliation. He stated that Martin identified him to other officers in an attempt to cause him further harm, and refused to honor his medical shaving pass. He filed further grievances against Martin, one of which was denied because the plaintiff's allegations could not be substantiated, and the others have remained unanswered. The defendants filed a response in opposition. (DE# 35).

A Report and Recommendation was entered by the Undersigned recommending that the motion for joinder of claims be denied. The Report stated that the plaintiff cannot be permitted to pursue this litigation in a piecemeal fashion, and the Court cannot respond to the plaintiff's allegations of harassment on a daily basis. Review of the motion revealed that it added no new claims to the initially filed complaint, as the case was progressing against Sgt. Martin for harassment against the plaintiff. (DE# 50). The Report was adopted by Chief United States District Judge Federico Moreno on July 7, 2011. (DE# 73).

The plaintiff next filed a motion for leave to file a supplemental complaint, almost a year after filing his initial complaint seeking to add Drs. Poveda and Aguilar, along with Warden Churchwell, and Officers Acotsa, Urbina and Carlisle. (DE#50).

The Undersigned issued a report recommending that the plaintiff's Motion for leave to file a supplemental complaint be denied. (DE# 51). The Undersigned asserted the following in support of its recommendation. By adding Drs. Poveda and Aguilar, he is essentially attempting to litigate a new lawsuit, with allegations that were known to him over a year ago before filing his initial complaint, and are unrelated to his initial allegations of retaliation. This would cause prejudice to the defendants, and these proposed defendants should be dismissed. As to his claims against Officers Acosta, Urbina and Carlisle, he makes a conclusory claim that these officers should have known he would be harassed by Officers Dean and Martin and should have taken steps to prevent this. This is an entirely conclusory statement, which does not rise to the Twombly standard. Further, these are allegations that should have been known to this defendant at the initiation of his lawsuit, and raised at that time. To allow this complaint to go forward

would require additional service and discovery time, which again would prejudice the defendants litigating this case. These defendants should be dismissed. The allegation against Warden Churchwell consists of a conclusory statement that he should have known the plaintiff was at risk. Churchwell is clearly named in his role as Supervisor. This defendant cannot be sued for liability merely for an improper or even unconstitutional act of his employees under a theory of respondeat superior. (DE# 51). The District Court issued an order adopting the report and recommendation. (DE# 73).

The plaintiff next filed a motion for temporary preliminary injunction/temporary restraining order. (DE# 61). The plaintiff alleged that Officers Johnson and McCray destroyed his legal mail, in the form of requests for discovery, in a cell search in retaliation for his filing the instant complaint. (Id.). The Undersigned issued a report recommending that the motion be denied because Johnson and McCray were not parties to the suit and, therefore, the court lacked jurisdiction. (DE# 70). In addition, the report noted that the motion failed to state a prima facie case for preliminary injunctive relief. (Id.). The District Court issued an order adopting the report. (DE# 73).

On December 9, 2011, Martin and Dean jointly filed a motion for summary judgment, with exhibits attached in support thereof. (DE# 76). This court issued an order instructing the plaintiff concerning a response to the defendants' motion for summary judgment. (DE# 77).

Ferguson never filed a response to the motion for summary, however, he filed a pre-trial statement. (DE# 89). The

Undersigned will consider the contents of the pre-trial statement a response to the motion for summary judgment.

III. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) 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."

In Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), the Supreme 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 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 non-moving 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 non-moving 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 non-moving 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. Purcell 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, 477 U.S. 242).

IV. Analysis

A. 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 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 F.2d 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).

B. Relevant Facts in the Instant Case

Defendants' Version of Events: Martin and Dean attached the following documents to the summary judgment motion: Dedrick Ferguson's Inmate Population Information Detail (Ex. 1); Affidavit of Inmate Records Custodian Patrice McFadden along with a copy of Ferguson's disciplinary report file and Ferguson's grievances against the defendants (Ex. 2); Affidavit of Defendant Dean (Ex. 3); Affidavit of Defendant Martin (Ex. 4); Affidavit of Dr. Jorge

Aguilar along with a copy of Ferguson's medical file (Ex. 5); Affidavit of Dade CI Captain Travis Donaldson (Ex. 6); Letter from Dedrick Ferguson (Ex. 7); Excerpts from Ferguson's July 12, 2011 Deposition (Ex. 8). See (DE# 76-1).

Defendant Dean executed an affidavit wherein she stated that on January 28, 2010 around noon, she was conducting a count from the officer station, during which inmates are required by the written inmate handbook to stay seated on their assigned bed. (DE# 76, Ex. 3, ¶7). During this task, she observed Ferguson get off his bed and walk around the dorm, without assistance from a cane or crutch. (Id. ¶8). She ordered him to sit on his bunk, but he disobeyed and said he was going to the bathroom. (Id. ¶8). When he refused to comply with her second verbal order to sit on his bunk, she told him to come to the officer station because she was going to write a disciplinary report. (Id. ¶8). He walked back to his bunk, got in his wheelchair, and wheeled himself to the officer station. Dean called Officer Martin for assistance, and explained the circumstances. (Id. ¶10). Martin opened the door for Ferguson to allow him to enter the room adjacent to the officer station, referred to as the laundry room. (Id. ¶9). Dean next called the officer in charge, Officer Urbina, explained the situation, and obtained his permission to write the disciplinary report. (Id. ¶11). At this point, Martin attempted to restrain Ferguson so he could be brought to the infirmary for a pre-confinement examination. (Id. ¶12).

According to Martin's affidavit, she ordered Ferguson to submit to handcuffs behind his back. (DE# 76, Ex. 4, ¶10). She refused and said he wanted his hands restrained in front of his body, which was not permitted without a front-handcuff pass, which Ferguson did not have. (Id.). Martin told Ferguson to stand up so

she could put on the handcuffs, and he said no. (Id.). He told him that if he did not submit to handcuffs, she would use chemical spray. (Id.). Ferguson explained he could not stand up because he was in a wheelchair, so Martin told him to lean forward in the chair so she could handcuff him behind his back. (Id.). Ferguson leaned forward and fell out of the wheelchair. (Id.). Dean called two inmates who assisted Ferguson back into the chair. (Id.). Ferguson leaned forward again and Martin handcuffed him behind his back. (Id.).

According to Dean's affidavit, she never had any physical contact with Ferguson during the January 28, 2010 incident. (DE# 76, Ex. 3, ¶16). Martin stated in her affidavit that Dean was 15 to 20 feet away from Ferguson the entire time and, contrary to Ferguson's claims, Dean did not kick him. (DE# 76, Ex. 3, ¶12). Martin asserted that the only physical contact she, Martin, had with Ferguson occurred when she placed the handcuffs on him. (Id. ¶11). Once Ferguson was restrained, Officer Travis Donaldson wheeled Ferguson to the infirmary for his pre-confinement examination. (Id. ¶15).

With respect to Ferguson's allegations against Martin regarding the May 24, 2010 incident, Martin asserted in her affidavit that she did not recall encountering Ferguson in the infirmary on that day and/or telling him to "sit down and shut up." (Id. ¶17).

According to Ferguson's medical records, Ferguson was treated in the prison infirmary for a knee injury he sustained playing basketball in July of 2009. (DE# 76-1, p. 49). Dr. Aguilar executed an affidavit wherein he stated that he performed Ferguson's January 28, 2010 pre-confinement examination. (DE# 76,

Ex. 5, ¶5). Dr. Aguilar completed a Pre-Special Housing Health Assessment form on which he made the following hand-written note.

Subjective: Inmate brought to infirmary. He stated he sprained his right knee 30 minutes ago - history of complete anterior cruciate ligament tear. Is pending of surgery. Objective: Alert. Cooperative. Right knee: no evident swelling or deformities, no bruises, limited range of motion of knee secondary to subjective pain.

(Id.; 76-1, p. 9-10).

Aguilar also stated the following in his affidavit. (DE# 76, Ex. 5). On January 28, 2010, Ferguson did not state he had been kicked by a correctional officer. (Id. ¶6). Aguilar would have documented that type of comment on the Pre-Special Housing Health Assessment form. (Id. ¶6). Ferguson was medically approved for use of chemical restraint agents. (Id. ¶7). Ferguson's chronological record of health care contained no record that he was treated at the infirmary on May 24, 2010. (Id. ¶8). This last statement is corroborated by the attached medical records. (DE# 76-1, p. 49-54).

Ferguson was deposed in the instant proceedings on July 12, 2011. (DE# 76, Ex. 8). The defendants attached four pages from Ferguson's 100-page deposition to the motion for summary judgment. A complete copy of the deposition was not provided by either party. The following is gleaned from the portion provided by the defendants. At noon on January 28, 2010, Officer Dean was in the officer station and all the other inmates were sitting on their bunks when Ferguson got off his bed, got his crutches, and asked permission to go to the bathroom. He crutched part of the way to the station when she banged on the window several times and ordered him back to his bunk. According to Ferguson,

When [Dean] did that I kind of twisted my knee to kind of - because she startled me. The, like you know how you mess up, you're like, woah, you know. And that's when it went to swelling.

(DE# 76-1, p. 60). Subsequently, the following exchange took place regarding what occurred after Martin arrived and, according to Ferguson, he was in the laundry room next to the officer station with Dean and Martin, and no one else. (DE# 76-1, p. 61-62).

Defendants' Counsel: What happened after that?

Ferguson: After that, I was grabbing my knee, I felt a kick and I really went to cussing.

Defendants' Counsel: What do you mean, you felt a kick?

Ferguson: Somebody kicked me. I felt a kick. Somebody kicked me in my right leg.

Defendants' Counsel: Did you see anything?

Ferguson: I was in pain at the time.

Defendants' Counsel: How do you know you felt a kick?

Ferguson: I felt a kick. If - believe me, you feel it.

Defendants' Counsel: Were your eyes closed?

Ferguson: I - I felt a kick. That's all I can tell you. I can't remember if my eyes were opened or closed, but I know somebody kicked me.

Defendants' Counsel: Who kicked you?

Ferguson: Officer Dean. I believe it was Officer Dean that kicked me.

(Id.). Ferguson went on to explain that he believed it was Officer Dean because shortly thereafter, she commented "I should have kicked the shit right out of him." (Id. at 62).

Plaintiff Ferguson's Version of Events: Ferguson's sworn version of the facts is contained in his complaint (DE# 1) and his pre-trial statement (DE# 89). Ferguson alleged that during the January 28, 2010 incident, Officer Dean retaliated against him by ignoring his medical needs, kicking him in the right knee, and filing a false DR against him. He alleges that Officer Martin retaliated against him on January 28, 2010 by threatening him with pepper spray and causing him to fall out of his wheelchair and that she retaliated against him again on May 24, 2010 by harassing him at the infirmary and telling him to sit down and shut up.

C. Application of Law to Facts

1. Defendant Dean

The parties do not dispute that Ferguson filed grievances against Dean prior to the January 28, 2010 incident and that Dean filed a DR against Ferguson on January 28, 2010. However, Ferguson argues that the DR was filed in retaliation for the prior grievances. Ferguson also alleges that without provocation, Dean punched Ferguson in the knee on January 28, 2010, in retaliation for prior grievances.

As is indicated above, 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 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). Ferguson's grievances against Dean were constitutionally protected

speech. However, Ferguson has not established that the January 28, 2010 DR would likely deter a person of ordinary firmness from engaging in such speech or that there was a causal relationship between the DR and the prior grievances. See id.

Ferguson admitted during his deposition that he was out of his bed during the count procedures and that he was ordered back to his bed by Officer Dean. Being out of his bed when Officer Dean was conducting a count constituted an act prohibited by the written inmate handbook. See Warren, 150 F.3d at 912, supra (an inmate cannot state a claim for retaliatory disciplinary proceedings where the discipline was imparted as a result of the inmate's performing a prohibited act). Therefore, the DR was caused by Ferguson's actions on January 28, 2010, not by prior grievances against Dean. Because Ferguson's own actions, which he admits to, resulted in a DR, the DR would not deter a person of ordinary firmness from filing the grievances against Dean. Ferguson has failed to make a sufficient showing of two essential elements. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986) ("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.").

However, the analysis does not end here because Ferguson has alleged that Dean punched him in the knee in retaliation for filing the prior grievances. Unlike the DR, an unprovoked punch to an already injured knee would likely deter a person of ordinary firmness from filing grievances against the attacker. In addition, there is arguably a causal connection between the prior grievances and Dean's alleged actions. The key fact is whether Dean actually punched Ferguson's knee without provocation. The court is

presented with contradictory sworn statements from Dean and Ferguson.

In light of the foregoing, an attempt to resolve at summary judgment the fact in dispute regarding the punch to Ferguson's injured knee would require the Court to step outside its assigned role, and invade the province of the jury. As the Supreme Court stated in its opinion in Anderson v. Liberty Lobby, Inc., "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." 477 U.S. 242, 255 (1986)(citing Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970)).

Due to the existence of genuine issues of material fact, summary disposition in favor of defendant Dean, on the narrow claim of whether Ferguson received an unprovoked physical attack from Dean in retaliation for Ferguson's prior grievances against Dean, is not appropriate. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

2. Defendant Martin

Ferguson claims that Martin retaliated against him on January 28, 2010 by threatening him with pepper spray and causing him to fall out of his chair. Even assuming these facts are true, Ferguson has failed to make a sufficient showing of all three essential elements of a retaliation claim. There is no evidence in the record that Ferguson filed a grievance against Martin prior to January 28, 2010, nor does Ferguson claim that he filed a grievance against Martin before January 28, 2010. Accordingly, Martin was

not retaliating against Ferguson for filing grievances against her. However, the May 24, 2010 incident occurred after Ferguson had filed a February 4, 2010 grievance against Martin. At that time, there existed constitutionally protected speech, namely, the February grievance. However, even assuming Martin went to the infirmary and told him to "sit down and shut up," Ferguson fails to establish that Martin's behavior would likely deter a person of ordinary firmness from engaging in such speech. In fact, it did not deter Ferguson from filing several more grievances against Martin.

In light of the foregoing, Ferguson has failed to make a sufficient showing of an essential element. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986) ("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."). Accordingly, Martin is entitled to summary judgment in her favor as to the §1983 retaliation claim.

V. Conclusion

It is therefore recommended as follows: Defendants motion for summary judgment (DE# 76) be DENIED as to defendant Dean and be GRANTED as to defendant Martin.

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

It is so recommended at Miami, Florida, this 8th day of August, 2012.



UNITED STATES MAGISTRATE JUDGE

cc: Dedrick Ferguson
732024
Hardee Correctional Institution
6901 State Road 62
Bowling Green, FL 33834-9810

Genny Xiaoya Zhu
Office of the Attorney General
Civil Divison - Fort Lauderdale
110 SE 6th Street, 10th Floor
Fort Lauderdale, FL 33301

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 10-23230-CIV-MORENO

DEDRICK FERGUSON,

Plaintiff,

vs.

D. CLARK, *et al.*,

Defendants.

ORDER ADOPTING MAGISTRATE'S REPORTS AND RECOMMENDATION

THE MATTER was referred to the Honorable Patrick A. White, United States Magistrate Judge for a Report and Recommendation on Plaintiff's Complaint (**D.E. No. 1**), filed on **September 7, 2010**. The Magistrate Judge filed Reports and Recommendation (**D.E. No. 97, 98**) on **August 8, 2012**. The Court has reviewed the entire file and record. The Court has made a *de novo* review of the issues that the objections to the Magistrate Judge's Report and Recommendation present, and being otherwise fully advised in the premises, it is

ADJUDGED that United States Magistrate Judge Patrick A. White's Reports and Recommendation (**D.E. No. 97, 98**) on August 8, 2012 are **AFFIRMED** and **ADOPTED**. Accordingly, it is

ADJUDGED that:

- (1) Defendants' Motion for Summary Judgment (**D.E. No. 76**) is **GRANTED** as to Defendant Martin and **DENIED** as to Defendant Dean for the reasons stated in the Report and Recommendation (**D.E. No. 98**). The Court notes that Defendant Dean has not filed

objections to the Report and Recommendation and the time for doing so has now passed.

See S.D. Fla. L.R. 7.1(C).

(2) Plaintiff's Motion for Clarification (**D.E. No. 56**) is GRANTED. The Court clarifies that Magistrate Judge White has issued all the Reports and Recommendations the Court has adopted in this case.

(3) The Court will by separate order set the case against Defendant Dean for trial.

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of September, 2012.



FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies provided to:
United States Magistrate Judge Patrick A. White
Counsel and Parties of Record

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 10-23230-CIV-MORENO

DEDRICK FERGUSON,

Plaintiff,
vs.

L. DEAN,

Defendant.

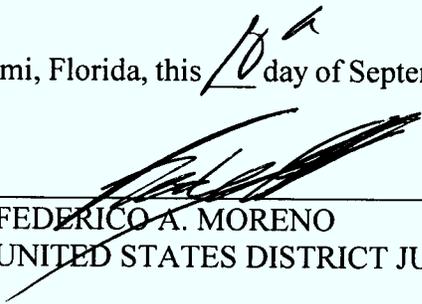
SCHEDULING ORDER

THIS COURT issues this order in accordance with S.D. Fla. L. R. 16.1. The parties shall comply with the following deadlines.

- Deadline for the filing of pretrial motions, including motions *in limine* and *Daubert* motions: **January 25, 2013**
- Mediation to be completed no later than: **January 25, 2013**
- Plaintiff's witness and exhibit lists: **March 6, 2013**
- Defendant's witness and exhibit lists: **March 8, 2013**
- Pretrial stipulations to be filed by: **March 12, 2013**
- Calendar Call at 2:00 P.M. on: **March 19, 2013**
- Trial set for the two-week period commencing: **March 25, 2013**

To the extent that the parties request modification of any date in this Court's Scheduling Order, the parties shall file either a *Motion to Continue Trial* or a *Motion to Continue Pretrial Deadlines*.

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of September, 2012.



FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies provided to:

Counsel and Parties of Record

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 10-23230-CIV-MORENO

DEDRICK FERGUSON,

Plaintiff,

vs.

L. DEAN,

Defendant.

ORDER SETTING TRIAL

Pursuant to *Federal Rules of Civil Procedure* 40, this action is at issue. It is therefore

ADJUDGED that:

(1) **TRIAL DATE** - This case is set for trial during the two-week period commencing **March 25, 2013**, in Miami, Florida

(2) **CALENDAR CALL** - Counsel must appear at Calendar Call which shall take place before the undersigned at the United States Courthouse, Wilkie D. Ferguson Building, Courtroom 13-3, 400 North Miami Avenue, Miami, Florida 33128, on **Tuesday, March 19, 2013, at 2:00 P.M.**

The parties need not appear at Calendar Call. At Calendar Call counsel may bring all matters relating to the scheduled trial date to the attention of the Court. Counsel also shall be prepared to address all motions pending before the Court.

(3) **PRETRIAL CONFERENCE** - The Pretrial Conference allowed for under *Federal Rules of Civil Procedure* 16(a) and required by S.D. Fla. L.R. 16.1.C., shall take place immediately following Calendar Call only if requested by the parties in advance. If the parties do not request a pretrial conference in advance of Calendar Call then no pretrial conference will be held.

(4) **PLAINTIFF'S WITNESS AND EXHIBIT LISTS** - Plaintiff shall electronically upload onto the case docket a copy of Plaintiff's Witness List and a copy of Plaintiff's Exhibit List no later than **Wednesday, March 6, 2013, at 5:00 P.M.**

(a) **PLAINTIFF'S WITNESS LIST** - Plaintiff's Witness List shall include all the witnesses, both lay and expert, that Plaintiff intends to call at trial. Plaintiff's Witness List shall briefly describe the nature of each witness's testimony and whether such witness will be testifying live or by deposition. Witnesses omitted from the list will not be allowed at trial.

(b) **PLAINTIFF'S EXHIBIT LIST** - Plaintiff's Exhibit List shall include all the exhibits that Plaintiff intends to use at trial. Plaintiff's Exhibit List shall in consecutively numbered paragraphs adequately describe the nature of each document listed. The actual exhibits shall be pre-marked with corresponding numbers (*e.g.* Plaintiff's Exhibit #1, P.E. #2, P.E. #3...) which numbers they will retain through the end of trial. The exhibit list shall refer to specific items and shall not include blanket statements such as *all exhibits produced during depositions* or *Plaintiff reserves the use of any other relevant evidence*. Exhibits omitted from the list will not be allowed at trial.

(5) **DEFENDANT'S WITNESS AND EXHIBIT LISTS** - Defendant shall electronically upload onto the case docket a copy of Defendant's Witness List and a copy of Defendant's Exhibit List no later than **Friday, March 8, 2013, at 5:00 P.M.**

(a) **DEFENDANT'S WITNESS LIST** - Defendant's Witness List shall include only those additional lay and expert witnesses not included on Plaintiff's Witness List. Witnesses listed by Plaintiff will be available for both parties and should not be re-listed on Defendant's Witness List. Defendant's Witness List shall briefly

describe the nature of each additional witness's testimony and whether such witnesses will be testifying live or by deposition. Witnesses omitted from Defendant's Witness List and not listed on Plaintiff's Witness List will not be allowed at trial.

(b) DEFENDANT'S EXHIBIT LIST - Defendant's Exhibit List shall include only those additional exhibits that Defendant wishes to introduce at trial which are not on Plaintiff's Exhibit List. Defendant's Exhibit List shall in consecutively numbered paragraphs adequately describe the nature of each document listed. The actual exhibits shall be pre-marked with corresponding numbers (*e.g.* Defendant's Exhibit #1, D.E. #2, D.E. #3...) which numbers they will retain through the end of trial. The exhibit list shall refer to specific items and shall not include blanket statements such as *all exhibits produced during depositions* or *Plaintiff reserves the use of any other relevant evidence*. Exhibits omitted from Defendant's Exhibit List and not listed on Plaintiff's Exhibit List will not be allowed at trial.

(6) PRETRIAL STIPULATION - Pursuant to S.D. Fla. L.R. 16.1.E., the parties shall file a Pretrial Stipulation no later than **Tuesday, March 12, 2013**. The Pretrial Stipulation shall conform to the requirements of S.D. Fla. L.R. 16.1.E. The parties shall attach to the Pretrial Stipulation copies of the witness and exhibit lists along with any objections as allowed for under S.D. Fla. L.R. 16.1.E.9. A pending motion for continuance shall not stay the requirement for the filing of a Joint Pretrial Stipulation.

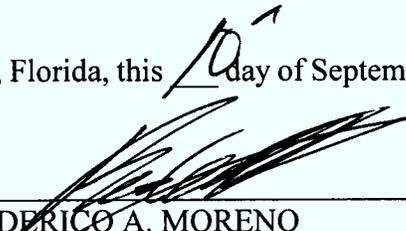
(7) CONTINUANCE / SETTLEMENT - A motion for continuance or a stipulation of settlement must be in writing. S.D. Fla. L.R. 7.1.4. Unless the Court grants the motion in writing, counsel must appear at the Calendar Call.

(8) MOTIONS - When submitting motions, the parties shall submit a proposed order only for those motions listed in S.D. Fla. L.R. 7.1.A.1.

(9) **DEPOSITIONS** - Depositions are limited to seven hours during one day absent court order or agreement of the parties and any affected non-party witnesses. S.D. Fla. L.R. 26.1.K.

(10) **SUMMARY JUDGMENT** - The practice of filing multiple motions for partial summary judgment which are collectively intended to dispose of the case (as opposed to one comprehensive motion for summary judgment) in order to evade memorandum page limitations is specifically prohibited. *See Administrative Order 97-06* (S.D. Fla. January 31, 1997) (amending Local Rule 7.1.C.2.).

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of September, 2012.



FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies provided to:

Counsel and Parties of Record

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 10-23230-CIV-MORENO

DEDRICK FERGUSON,

Plaintiff,

vs.

L. DEAN,

Defendant.

ORDER OF REFERRAL TO MEDIATION

Trial having been set in this matter for **March 25, 2013** pursuant to *Federal Rule of Civil Procedure* 16 and S.D. Fla. L.R. 16.2, it is

ADJUDGED as follows:

(1) **MEDIATION** - All parties must participate in mediation. The parties shall complete mediation no later than **January 25, 2013**.

(2) **SELECTION OF MEDIATOR** - Plaintiff's counsel, or another attorney agreed upon by all counsel of record and any unrepresented parties, shall be the "lead counsel" and responsible for scheduling the mediation conference. The parties are encouraged to avail themselves of the services of any mediator on the List of Certified Mediators, maintained in the office of the Clerk of this Court, but may select any other mediator. The parties shall agree upon a mediator no later than **October 20, 2012**. If there is no agreement, lead counsel shall promptly notify the Clerk in writing and the Clerk shall designate a mediator from the List of Certified Mediators, which designation shall be made on a blind rotation basis.

(3) **ORDER SCHEDULING MEDIATION** - A place, date, and time for mediation

convenient to the mediator, counsel of record, and unrepresented parties shall be established. Lead counsel shall complete the form order attached and submit it to the Court. After the Court enters the completed form order, the mediator may, with consent of the parties, reschedule mediation at the mediator's discretion without further order of the Court.

(4) **ATTENDANCE** - The appearance of counsel and each party or representatives of each party with full authority to enter into a full and complete compromise and settlement is mandatory. If an insurer is involved, an adjuster with authority up to the policy limits or the most recent demand, whichever is lower, shall attend.

(5) **CONFIDENTIALITY** - All discussions, representations and statements made at the mediation conference shall be confidential and privileged.

(6) **MEDIATOR SUMMARY** - At least **ten** days prior to the mediation date, all parties shall present to the mediator a brief written summary of the case identifying issues to be resolved. Copies of these summaries shall be served on all other parties.

(7) **NON-COMPLIANCE** - The Court may impose sanctions against parties and / or counsel who do not comply with the attendance or settlement authority requirements or who otherwise violate the terms of this order. The mediator shall report non-attendance and may recommend imposition of sanctions by the Court for non-attendance.

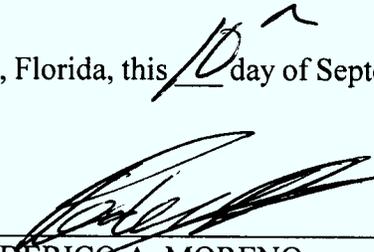
(8) **MEDIATOR COMPENSATION** - The mediator shall be compensated in accordance with the standing order of the Court entered pursuant to S.D. Fla. L.R. 16.2.B.6, or on such basis as may be agreed to in writing by the parties and mediator selected by the parties. The parties shall share equally the cost of mediation unless otherwise ordered by the Court. All payments shall be remitted to the mediator within thirty days of the date of the bill. Notice to the mediator of cancellation or settlement prior to the scheduled mediation conference must be given at least two full business days in advance. Failure to do so will result in imposition of a fee for one hour.

(9) **SETTLEMENT** - If a full or partial settlement is reached in this case, counsel shall promptly notify the Court of the settlement in accordance with S.D. Fla. L.R. 16.2.F, by the filing of a notice of settlement signed by counsel of record within **ten** days of the mediation conference. Thereafter the parties shall submit an appropriate pleading concluding the case.

(10) **MEDIATION REPORT** - Within **five** days following the mediation conference, the mediator shall file a Mediation Report indicating whether all required parties were present. The report shall also indicate whether the case settled (in full or in part), was continued with the consent of the parties or whether the mediator declared an impasse.

(11) **SANCTIONS** - If mediation is not conducted, the case may be stricken from the trial calendar, and other sanctions including dismissal or default may be imposed.

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of September, 2012.



FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies provided to:

Counsel and Parties of Record

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 10-23230-CIV-MORENO

DEDRICK FERGUSON,

Plaintiff,

vs.

L. DEAN,

Defendant.

_____ /

ORDER SCHEDULING MEDIATION

The mediation conference in this matter shall be held with

_____ on

_____, 2012, at _____ AM / PM at

_____.

DONE AND ORDERED in Chambers at Miami, Florida, this ___ day of _____, 2012.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies provided to:

Counsel and Parties of Record