United States Court of Appeals for the Eleventh Circuit.

CASE NO. 01-13664-A
L.T. No. 99-14027-CIV-GRAHAM

MARCELLUS M. MASON, JR.,

Plaintiff/Appellant/Petitioner

v.

HIGHLANDS COUNTY BOARD OF COUNTY COMMISSIONERS,

Defendant/Appellees/Respondent

On Appeal from the United States District Court

For the Southern District of Florida

CASE NO. 01-13664-A
L.T. No. 99-14027-CIV-GRAHAM

INITIAL BRIEF

Petition for Review Court of Order from the United States District Court
Southern District of Florida
Donald L. Graham, Judge

Marcellus M. Mason, Jr.
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Sebring, FL 33870
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CASE NO. 01-13664-A
Mason v. Heartland Library Cooperative, *et al*.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1, APPELLANT hereby certifies the following list of individuals and entities are known to me to have an interest in the outcome of this particular case:

Highlands County Board of County Commissioners

Heartland Library Cooperative

Hardee County Board of County Commissioners

Desoto County Board of County Commissioners

Okeechobee County Board of County Commissioners

Mary Myers

Ed Kilroy

Diane Hunt

Fred Carino

Carl Cool

Carolyn Hesselink

Fred Myers

Leslie Wood

Maria N. Sorolis, Esq.

Brian Koji, Esq.

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not desire oral argument on this matter and is opposed to oral argument.

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JURISDICTIONAL STATEMENT

Appellant seeks to invoke the jurisdiction of this court pursuant 28 U.S.C. § 1291. Appellant's *Notice of Appeal* was timely filed and docketed with the United States District Court on June 25, 2001. (Doc. 795).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Judge improperly dismiss this case based upon a blatantly aggressive act of usurpation committed by the Magistrate Judge who acted in clear violation of all jurisdiction in issuing a "pretrial discovery issue and not an injunction per se " which directed that Mason, a nonlawyer, must seek the permission of a private for profit lawfirm in order to communicate with his government and request records under Florida Law?
2. Did the Magistrate Judge by not including a "Notice of Waiver" in his Report and Recommendation[s]?
3. Did the district court correctly dismiss every single individual from the plaintiff's Second Amended Complaint?
4. Did the district court err in gutting the plaintiff's Fourth Amended Complaint by dismissing meritorious claims?
5. Did the Magistrate improperly narrow the plaintiff's discovery in a Title VII action?
6. Did the District Court improperly apply the law with respect to leave to amend?
7. Has Mason presented direct evidence of a retaliatory motive ?
8. Did the District Judge properly manage this case?
9. Did the District Court err by not disqualifying itself on Plaintiff's motion to recuse thereby rendering all orders of the District Court null and void?
10. Did the district court improperly allow the Defendants to obstruct discovery by disallowing

the Plaintiff the opportunity to properly introduce critical evidence in this matter?

STATEMENT OF CASE

On November 18, 1996, the Heartland Library Cooperative, hereafter, "HLC, " hired Marcellus M. Mason, Jr., hereafter, "Mason," as its Network Services Manager. (Doc. 797, Ex[1]. Pg. 1 of 2). The HLC was formed by Interlocal Agreement pursuant to Florida Statute 163.01 and signed by the Highlands County Board of County Commissioners, hereafter, "Highlands County," Hardee County Board of County Commissioners, Okeechobee County Board of County Commissioners, and the DeSoto County Board of County Commissioners. (Doc. 770, pg.1). The purpose of the HLC was to share library resources among the member counties. Mason was subsequently fired by the Highlands County on November 25, 1998. (507, Ex. 3); (507, Ex. 4, pg.3, ¶4). The HLC Board met on November 24, 1998 and January 13, 1999 and specifically acquiesced in the decision to fire Mason. (Doc. 60, pgs. 2-3, ¶¶). Mason filed an appeal for his job back on or about November 30, 1998. (Doc. 341, pg. 28, ¶329). Defendants' supervisory agent, Fred Carino, conducted a so-called "EEO Investigation" commencing on or about November 30, 1998 and ending on or about January 11, 1999. (Doc. 341, pg. 28, ¶330). This so-called "EEO Investigation" consisted of Fred Carino collecting affidavits of HLC member employees between December 14, 1998 and January 7, 1999. (Doc. 341, pg. 29, ¶¶338, 341, 348). After the Plaintiff was fired on November 25, 1998, Defendant, Highlands County Board of County Commissioners, issued three successive "No Trespass Warnings" to the Plaintiff, thereby barring Mason from the use of a publicly owned facility, the Sebring Public Library. (Doc. 321, pgs. 50, 58-63, ¶¶361, 410-458[2]);(Doc. 341, pg. 30, ¶¶361).

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[1] "Ex." Is an abbreviation of "Exhibit." The "pg." Refers to the actual page number and number of pages of the referenced Exhibit and not to the page number of the document to which the exhibit is attached.

[2] Defendants have admitted to the allegations at ¶¶410-458 because Defendants answer does not respond to these allegations. See (Doc. 341, pg. 34). Defendants answer ends at ¶409 and re-starts at

Thereafter, Mason brought this lawsuit on February 4, 1999.

SUMMARY OF THE ARGUMENT

I. Did the District Judge improperly dismiss this case based upon a blatantly aggressive act of usurpation committed by the Magistrate Judge who acted in clear violation of all jurisdiction in issuing a "pretrial discovery issue and not an injunction per se " which directed that Mason, a nonlawyer, must seek the permission of a private for profit lawfirm in order to communicate with his government and request records under Florida Law? The Magistrate Judge circumvented the will of the United States Congress as codified at 28 U.S.C. § 636 by cloaking an injunction inside of a device not described anywhere in the legal literature called a "pretrial discovery issue and not an injunction per se." The Magistrate Judge granted a request for an injunction that violated the Plaintiff's First Amendment rights and violated the Plaintiff's rights under the Florida Constitution and the Florida Statutes. Plaintiff's lawsuit was ultimately dismissed because of these aggressive actions of usurpation committed by the Magistrate Judge.

II. Did the Magistrate Judge err by not including a "Notice of Waiver" in his Report and Recommendation[s]? This Circuit and the U.S. Supreme Court has strongly suggested that the appellate consequences of not filing objections to a Report and Recommendation, or a "Notice of Waiver," should be included in the Report and Recommendation and this is especially true where a party is proceeding pro se.

III. Did the district court correctly dismiss every single individual from the plaintiff's Second Amended Complaint? The Magistrate Judge aggressively attacked the Plaintiff's Second Amended Complaint by dismissing every single individual from this lawsuit on the very first time any Complaint of the Plaintiff's was passed upon by the Court.

¶458.

IV. Did the district court err in gutting the plaintiff's Fourth Amended Complaint by dismissing meritorious claims? In the plaintiff's Fourth Amended Complaint [Doc. 321], the court erred in dismissing Plaintiff's claims with respect to Counts 3, 5, 7, 8, 10, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 & 27. This ruling was in contravention of Rule 12 (b) (6), Federal Rules Civil Procedure.

V. Did the Magistrate improperly narrow the plaintiff's discovery in a Title VII action? In almost every instance, the district court failed to set forward legal reasoning for its discovery decisions.

VI. Did the District Court improperly apply the law with respect to leave to amend? In denying the Plaintiff leave to amend, the district court created novel reasons for denial. The record does not support, nor does the law support any of the district court's reasons for denial of leave to amend. At the time, Mason submitted motions for leave to amend, no scheduling order had been rendered, discovery had not ended, and the last date for leave to amend had not expired.

VII. Has Mason presented direct evidence of a retaliatory motive ? Defendant gave Mason written reprimands for "threatening litigation" and admitted under oath that Mason did not have the right to "threaten litigation."

VIII. Did the District Judge properly manage this case? The District Judge did not properly manage this case as the District Judge allowed scores of pretrial motions to languish without any action. The district court usurped legal authority.

IX. Did the District Court err by not disqualifying itself on Plaintiff's motion to recuse thereby rendering all orders of the District Court null and void? The Judges in this matter deliberately lied to the Plaintiff and misapplied the law. The District Judge failed to conduct proper "de novo" reviews as required by law. The district court allowed scores of motions and appeals to merely languish in the court without a ruling.

X. Did the district court improperly allow the Defendants to obstruct discovery by disallowing the

Plaintiff the opportunity to properly introduce critical evidence in this matter? Mason attempted all manner of ways to introduce audiotapes of sworn testimony given at Florida Unemployment Compensation Bureau hearings into the record evidence. However, the Magistrate and Defendants' counsel were unhappy with all of the Mason's efforts and as a result of this "unhappiness," relevant and critical evidence was not authenticated.

ISSUE ARGUMENTS

NAKED AND AGGRESSIVE USURPATION

I. Did the District Judge improperly dismiss this case based upon a blatantly aggressive act of usurpation committed by the Magistrate Judge who acted in clear violation of all jurisdiction in issuing a "pretrial discovery issue and not an injunction per se " which directed that Mason, a nonlawyer, must seek the permission of a private for profit lawfirm in order to communicate with his government and request records under Florida Law?

This case was dismissed on June 20, 2001 by order of the District Judge in a mere one and half page order that the District Judge claimed was a "de novo" review. (Doc. 791). This "de novo" review was based upon a Report and Recommendation, "R&R," of the Magistrate Judge which was rendered on May 31, 2001. (Doc. 766). Plaintiff properly filed his objections to this R&R on June 15, 2001. (Doc. 783);(Doc. 738). The R&R recommended dismissal of the Plaintiff's action because of the Plaintiff's alleged failure to comply with "pretrial discovery issue[s] and not an injunction[s] per se" that were rendered by the Magistrate Judge on June 19, 2000, (Doc. 201), and July 25, 2000, (Doc. 246). (Doc. 766, Pgs. 3-4, ¶¶5,6). These orders, (Doc. 201) and (Doc. 246), which directed that the Plaintiff should notify a private for profit lawfirm located in Tampa, Florida or about 90 miles away from Sebring, Florida where Plaintiff and his government is located, and not communicate directly with his government directly about matters in this controversy or request public records under Florida law or communicate about matters pending between his government and other parties, are patently illegal. Therefore any dismissal based upon these illegal orders, (Doc. 201) and (Doc.

246), have no legal effect.

These orders, (Doc. 201) and (Doc. 246), "preliminary injunctions" are invalid because this issue was not referred to the Magistrate pursuant to 28 U.S.C. § 636(b)(1)(A). Additionally, these orders invalid because the Defendants failed to file a complaint and failed to meet the requirements for a "temporary restraining order," or "TRO," or injunction. See Ingram v. Ault, 50 F.3d 898, 900 (11th Cir. 1995). See also Hill v. Butterworth, 941 F. Supp. 1129, 1136 (N.D.Fla. 1996)("Plaintiff is not entitled to issuance of a TRO because he has filed neither an affidavit accompanying his petition, nor a verified complaint.").

A Magistrate does not have the legal authority to issue an injunction. "A judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief…" 28 U.S.C. § 636(b)(1)(A). "[A] magistrate lacks power to enter an injunction even in a case where the district court has jurisdiction." United Steelworkers Of America, v. Bishop, 598 F.2d 408, 411 (5th Cir. 1979). There is no difference between a "pretrial discovery issue and not an injunction per se" and an injunction or restraining order[3]. A district court's characterization of a "restraining order" or an "injunction is not dispositive. Cuban American Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1421-2 (11th Cir. 1995) ("where the order has the effect of a preliminary injunction this court has jurisdiction to review the order and is not bound by the district court's designation of the order"); Geneva Assur. v. Medical Emergency Services, 964 F.2d 599, 600 (7th Cir. 1992) (citing Sampson v. Murray, 415 U.S. 61, 85-88, 94 S.Ct. 937, 950-951, 39 L.Ed.2d 166 (1974)) ("What is true, [i]s that the name which the judge gives the order is not determinative.").

Under 28 U.S.C. § 636(e), the Magistrate was without jurisdiction to entertain the contempt hearing contemplated in the Order to Show Cause (Doc. 650);(Doc. 672). See In Re Kitterman, 696 F. Supp. 1366, 1368-9 (Nev. 1988). As a result of this "Show Cause hearing," the Magistrate issued

[3] Restraining Order- An order in the nature of an injunction. Black's Law Dictionary, Revised Fourth Edition, West Publishing Company, Copyright @ 1968.
Injunction- A judicial process operating in personam, and requiring person to whom it is directed to do or refrain from doing a particular thing. See *Blacks' Law*, *supra*. "1. An enjoining; bidding; command. Something enjoined; command; order. 3. A writ or order from a court prohibiting a person group from carrying out a given action, or ordering a given action to be done." Webster's New World™ Collegiate Dictionary, Fourth Edition, MacMillan USA, Copyright @ 1999, Pg. 736.

a report and recommendation. (Doc. 766). The district judge treated the order of the Magistrate as a "proposed finding and recommendation" pursuant to section 636(b)(1)(B) and failed to hold the requisite *de novo* hearing. (Doc. 791). "Section 636(e) requires the district judge to conduct a de novo hearing." Taberer v. Armstrong World Industries, Inc., 954 F.2d 888, 904 (3rd Cir. 1992) See also Bingman v. Ward, 100 F.3d 653, 657 (9th Cir. 1996)(Federal magistrates have no power of contempt themselves but must certify the facts to a judge of the district court."). . The clear intent of the Congress was to preclude a magistrate from trying his own contempt charges.

"Plaintiff shall correspond only with Defendants' counsel including any requests for public records**.**" (DE #246). A federal judge has no authority to regulate how the Plaintiff accesses public records under Florida law. Public records under Florida law is not any of the federal government's business. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." *Tenth Amendment, U.S. Constitution*. "Courts created by statute only have such jurisdiction as the statute confers." Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 820 (1988). The Federal Rules of Civil Procedure do not create federal jurisdiction. In re Infant Formula Antitrust Litigation, MDL 878 v. Abbott Laboratories, 72 F. 3d 842, 843 (11th Cir. 1995)(citing Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 368-370 & n. 7, 98 S.Ct. 2396, 2400 & n. 7, 57 L.Ed.2d 274 (1978)). See also Smith v. GTE Corp., 236 F.3d 1292, 1299 (11th Cir. 2001) ("Lower federal courts can exercise this power only over cases for which there has been a congressional grant of jurisdiction"). Plaintiff challenged the subject matter jurisdiction of the Court, but the Magistrate failed to respond. (Doc. 738, pgs. 7-8). Assuming the Magistrate had jurisdiction to direct that the Plaintiff shall correspond only with Defendants' counsel including any requests for public records, the order would still be improper because Florida Courts, Supreme Court and District Courts of Appeals, don't feel they have the right to take such liberties. "*We would be less than candid if we did not acknowledge that, as the present case demonstrates public agencies are placed at a disadvantage, compared to private person's, when faced with potential litigation claims. It is also pertinent to observe that the wisdom of such a policy resides exclusively within the province of the legislature."* Tober v. Sanchez, 417 So 2d 1053, 1055 (App. Dist. 3 1982). "[P]ublic officials must

conduct public business in the open and . . . public records must be made available to all members of the public." Henderson vs. State Of Florida, 745 So. 2d 319, 325 n.5; (Fla. 1999). **"[W]e do not equate the acquisition of public documents under chapter 119 with the rights of discovery afforded a litigant by judicially-created rules of procedure**" Id. "Courts cannot judicially create any exceptions, or exclusions to Florida's Public Records Act." Board of County Commissioners of Palm Beach County v. D.B.,784 So. 2d 585, 591 (Fla. 4th DCA 2001).

The district court punished the Plaintiff for exercising his right of "free speech" by dismissing this meritorious[4] lawsuit. Plaintiff has a clear right to communicate with his government about the matters in this controversy, litigation notwithstanding. "[T]here is nothing that prohibits one party to a litigation from making direct contact with another party to the same litigation. These rules are designed to regulate the conduct of nonlawyers, and simply do not apply to the conduct of nonlawyers." E.E.O.C. v. McDonnell Douglas Corp., 948 F.Supp. 54, 55 (E.D.Mo. 1996). See also *Rule 4-4.2, R. Regulating Fla. Bar*[5] and *§ 99, Restatement Third The Law Governing Lawyers*[6]. See (Doc. 738, pgs. 3-6);(Doc. 783, pg. 3). Mason repeatedly attacked these illegal orders[7] and the district court has adamantly refused to cite legal authority for its actions each time.

The emails upon which was this dismissal was based were irrelevant to any claim or defense pending in this matter and the district court expressly acknowledged this fact. (Doc. 469). Additionally, Plaintiff challenged the authenticity of these emails, but the Magistrate authenticated them anyway. See note 17, infra. Lastly, the emails upon which this case was dismissed upon were

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[4] For the factual and legal basis upon which the Plaintiff concluded that his lawsuit was meritorious, See (Doc. 507);(Doc. 667);(Doc. 668));(Doc. 706);(Doc. 797). Incidentally, the Defendants have tacitly admitted by not refuting with record evidence, that the Plaintiff has made a prima face case. See Defendants' Summary Judgment Motion, (Doc. 769, Pg. 7).
[5] See Addendum.
[6] See Addendum.
[7] For example, and note that this list is not collectively exhausted, **see Plaintiff's motions and responses**, (Doc. #200);(Doc. #239); (Doc. #262);(Doc. #264);(Doc. #284);(Doc. #334);(Doc. #509);(Doc. #515);(Doc. #526);(Doc. 554);(Doc. 632, pg. 5);(Doc.#633);(Doc. 652);(Doc. 663); (Doc. 735); (Doc. 736); (Doc. 738); (Doc. 783); (Doc. 787, pgs 2-3); (Doc. 810); (Doc. 812); (Doc. 813); (Doc. 817); (Doc. 829), (Doc. 845);**and the court's orders**: (Doc. 201);(Doc. 246);(Doc. #279);(Doc. 281);(Doc. #407);(Doc. #514);(Doc. #524);(Doc. #528);(Doc. #634);(Doc. 673);(Doc. 744);(Doc. 745);(Doc. 766);(Doc. 791);(Doc. 868);(Doc. 874);(Doc. 882, pgs. 1-2), **and relevant Defendants' responses and motions**, (Doc. 199); (Doc. 199);(Doc. 231);(Doc. 274);(Doc. 275); (Doc. 348);(Doc. 511);(Doc. 559);(Doc. 639);(Doc. 646);(Doc.690); (Doc. 823);(Doc. 834); (Doc. 838);(Doc. 841); (Doc. 859).

still being challenged for relevancy to the district judge via an appeal. (Doc. 694);(Doc.728). See also Discovery Abuses.

Lastly, and equally important, a reversal in this case is required because the district court failed to make the necessary finding of prejudice to the Defendants and that lesser sanctions would not suffice. "Although we occasionally have found implicit in an order the conclusion that `lesser sanctions would not suffice', we have never suggested that the district court need not make that finding, which is essential before a party can be penalized for his attorney's misconduct. This court has only inferred such a finding "where lesser sanctions would have `greatly prejudiced' defendants." World Thrust v. Intern. Family Entertainment, 41 F.3d 1454, 1456-7 (11th Cir. 1995); Hall v. C.I.R. (Dept. Of Treasury), 805 F.2d 1511, 1514 (11th Cir. 1986)("Dismissal with prejudice is proper only where a lesser sanction would not serve the interest of justice."). See (Doc. 783, pgs. 4-5); (Doc. 738, pgs. 8-12).

NOTICE OF WAIVER

II. Did the Magistrate Judge err by not including a Notice of Waiver in his Report and Recommendation[s]?

Discussion

In the instant case, appellant who is proceeding pro se, did not raise an objection to the, "R&R," (Doc. 191) (Doc. 192), on plaintiff's second consolidated amended complaint. (Doc. 159). However, the R&R did not contain a warning apprising the parties of the consequences of a failure to object. (Doc. 192, pg.12). This omission appears to be at odds with Thomas v. Arn, 474 U.S. 140, 144, 155 (1985). Thomas requires "clear notice" the consequences of failure to object to a Magistrate R&R. This Court in Nettles v. Wainwright, 677 F.2d 404,405 (5th Cir. 1982) (en banc)[8] (former Fifth Circuit case) highly recommended a statement like the following be included in the R&R:

> Failure to file written objections to the proposed findings and recommendations

[8] Decisions by the former Fifth Circuit issued before October 1, 1981 are binding precedent in the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

> contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal."

Similarly, in this Court in Resolution Trust Corp. v. Hallmark Builders, 996 F.2d 1144, 1148 n.2, 1149, (11th Cir. 1993), also emphasized the desirability of including a warning in the R&R. Notwithstanding the foregoing, Plaintiff is still entitled to "de novo" review with respect to the Magistrate's conclusions of law as this Court in Nettles stated:

> [T]he failure of a party to file written objections to proposed findings and recommendations in a magistrate's report, filed pursuant to Title 28 U.S.C. § 636(b)(1), shall bar the party from a de novo determination by the district judge of an issue covered in the report and shall bar the party from attacking on appeal factual findings accepted or adopted by the district court.

See also One World One Family Now v. City of Miami, 175 F.3d 1282, 1285 n.4 (11th Cir. 1999) (Court of Appeals reviews questions of law de novo.). As argued *infra*, a motion to dismiss is reviewed de novo.

DISMISSAL OF ALL CLAIMS AS TO ALL INDIVIDUALS

III. Did the district court correctly dismiss every single individual from the plaintiff's Second Amended Complaint?

Standard of Review

"*This Court reviews de novo the dismissal of a complaint for failure to state a claim, construing all allegations in the complaint as true and in the light most favorable to the plaintiff.*" Dunn v. Air Line Pilots Ass'n, 193 F.3d 1185, 1190 (11th Cir. 1999).

Discussion

The Magistrate Judge aggressively attacked the Plaintiff's Second Amended Complaint by dismissing every single individual from this lawsuit in one fell swoop on the very first time any Complaint of the Plaintiff's was passed upon by the Court. (Doc. 192). The court dismissed all the individuals from Counts 3, 9, 10, 11, 14, 15, 16, 21, 23, and 24. The R&R was based on the Defendants' motion to dismiss and supplement. (Doc. 122)(Doc. 177). The first problem with the Magistrate's R&R is that the Magistrate did not elucidate for the Plaintiff what it takes to state a claim for each of the different counts that the Plaintiff has set forth. (Doc. 192);(Doc. 227); (Doc. 122);(Doc. 177). . "*The allegations against these individual Defendants relate solely within their*

supervisory or employment capacitates. There are no allegations against any of theses Defendants that takes their conduct out of the employment realm." (Doc. 192- Pg. 3-5). Plaintiff must assume that the Magistrate dismissed the individuals from this complaint because of the plaintiff's alleged failure to state a claim. Assuming arguendo, that the plaintiff failed to state a claim against theses individuals, the dismissal with prejudice as to each and every individual from every claim was still improper. This court has repeatedly stated, "*A complaint may not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle plaintiff to relief*." See, Dunn, supra. "*The Complaint should not be dismissed on motion unless, upon any theory, it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts that could be proved in support of his claim*." Carss v. Outboard Marine Corporation, 252 F.2d 690, 691 (5th Cir. 1958). Moreover, in Brooks v. Blue Cross and Blue Shield, 116 F.3d 1364,1369 (11th Cir. 1997), this court has also stated, "*A complaint may not be dismissed because the plaintiff's claims do not support the legal theory he relies upon since the court must determine if the allegations provide for relief on any possible theory. We hasten to add that this motion is viewed with disfavor and rarely granted. Dismissal of a claim on the basis of barebone pleadings is a precarious disposition with a high mortality rate*." In Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir. 1991), this court also stated, "*A district court's discretion to dismiss a complaint without leave to amend is `severely restricted by Fed.R.Civ.P. 15(a), which directs that leave to amend` shall be freely given when justice so requires*." See also Welch v. Laney, 57 F.3d 1004, 1009 (11th Cir. 1995) ("*Where a more carefully drafted complaint might state a claim upon which relief could be granted, the district court should allow the plaintiff to amend the complaint rather than dismiss it.*"). It can hardly be said that the Magistrate Judge attempted to "*determine if the allegations provide for relief on any possible theory,* instead he opted for a broad ranging dismissal of every individual with respect to every claim. A reversal is required on this basis alone because a Plaintiff must be given at least one opportunity to state a claim. The rules do not allow "gotcha" jurisprudence. In the instant case, the Magistrate Judge has virtually stated, "Hey buddy, it's one shot and out."

The R&R must be reversed because it is procedurally improper. Plaintiff's Second Amended

Complaint was filed on 2/24/00, (Doc. 159), while the Defendants' motions to dismiss, (Doc. 122);(Doc. 124), were filed on 1/18/00 and directed to a prior Complaint. Defendants' replies, (Doc. 149);(Doc. 150), were filed on 1/27/00. The R&R expressly acknowledges that it was based upon "pending Motions To Dismiss [D.E. #149, #150, #176, #177]". See also (Doc. 227)("the motions to dismiss (D.E. ## 149, 150, 176, 177) are GRANTED"). To the extent that the R&R was based upon any motion to dismiss prior to Plaintiff filing his Second Amended Complaint, the trial court must be reversed.

The Magistrate must be reversed because the Magistrate dismissed the Plaintiff's claims as to individuals on a basis not claimed by the Defendants. See Fredyma v. AT & T Network Systems, Inc., 935 F.2d 368, 370 (1st Cir. 1991) (holding that dismissal, sua sponte, without notice, is legally improper.). In the Defendants' motion to dismiss, with the exceptions of counts 3 and 14, the Defendants claimed qualified immunity, Counts 9, 10, 11, 15, 16. (Doc. 122, Pgs. 7-13.). The R&R expressly states that the Court will not even get into the issue of qualified immunity. (Doc. 192, pg. 4). With respect to counts 23 and 24, claims for 42 U.S.C. §§ 1981, 1983, these claims are not specifically addressed in the R&R or in the Defendants' motion to dismiss. Count 21, civil conspiracy, was dismissed in part because all the individuals were released from this lawsuit. (Doc. 192, pg. 6). Notwithstanding the fact that two legal organizations, Heartland Library Cooperative and Highlands County, were also included in the Plaintiff's civil conspiracy allegations, the Magistrate dismissed the civil conspiracy claim in its entirety. (Doc. 192, pg. 6). The District Court must be reversed as to Count 21 because the Plaintiff must be allowed at least one opportunity to cure any defects in his allegations in order to state a claim.

Mason submitted a motion for reconsideration of the R&R on 7/28/00. (Doc. 250). The Magistrate quickly denied the plaintiff's motion on the very same day it was submitted and even before the Defendants replied. The Magistrate violated Local Rule 7.1.C. yet again. Plaintiff properly filed his objections to the Court's denial of his motion for reconsideration. (Doc. 260).

MAGISTRATE ATTACKS PLAINTIFF'S FOURTH AMENDED COMPLAINT

IV. Did the district court err in gutting the plaintiff's Fourth Amended Complaint?

Discussion

Plaintiff's Fourth Amended Complaint was filed with the Court on September 15, 2000. (Doc. 321). In direct response to the defendants' partial motion to dismiss, (Doc. 342), the Magistrate dismissed the Plaintiff's claims with respect to Counts 3, 5, 7, 8, 10, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 & 27. See *R&R*, (Doc. 435). Plaintiff properly preserved his appellate rights by filing his objections to the R&R. (Doc. 436). The District Judge in another one of his mere one and half page "de novo" reviews, which didn't address a single issue as raised by the Plaintiff, accepted the R&R in whole and without a single comment. (Doc. 466). Mason abandons no argument on appeal and specifically directs this Court and the Defendants/Appellees to the following filings in the record which fully sets forth Mason's position with respect to the Magistrate's R&R: See *Plaintiff's Objections To Magistrate Judge's Report and Recommendation On Defendants' Partial Motion To Dismiss*; *Plaintiff's Reply To Defendants' Response To Plaintiff's Objections To Magistrate Judge's Report And Recommendation On Defendants' Partial Motion To Dismiss*. (Doc. 436) and (Doc. 454).;*Plaintiff's Response To Defendants' Motion To Dismiss And Supporting Memorandum Of Law* (Doc. 352);. Plaintiff incorporates by reference these documents, [(Doc. 365),(Doc. 436) and (Doc. 454)], as these documents fully set forth the Plaintiff's position with respect the Court's R&R, (Doc. 435).

The R&R is procedurally improper in that the Defendants have admitted to all allegations in the Complaint set forth at ¶¶410-458 and ¶¶ 488-539 by deliberately failing to respond to allegations. (Doc. 321, pgs, 58-63, ¶¶410-458);(Doc. 341, pgs. 34, 35). The Defendants attempt to partially fix this problem on 2/26/01 after the Plaintiff's claims are dismissed. See (Doc. 483).

42 U.S.C. § 1981 Claims

Counts Eight, Nineteen, Twenty-One, Twenty-Three and Twenty-Five of plaintiff's fourth amended complaint are brought pursuant to 42 U.S.C. § 1981. In one fell swoop the Magistrate Judge recommended that all of plaintiff's 42 U.S.C. § 1981 be dismissed. (Doc. 435-Pg. 3). In the R&R, the Magistrate Judge's sole reason for dismissing plaintiff's § 1981 claims is this court ruling in Butts v. County of Volusia, 222 F.3d 891, 892 (11th Cir. 2000). In arguing against the

dismissal of the Plaintiff's § 1981 claims, Plaintiff refers this Court and the Appellees to his Objections to the R&R. (Doc. 436, Pgs. 8-9). See also Plaintiff's reply (Doc. 454, pg. 3). In further support Plaintiff's argument against dismissing the Plaintiff's § 1981 claims, Plaintiff refers this Court and the Appellees to his motion for reconsideration. (Doc. 591) (Doc. 632, pg. 4). Cases heard by this Court subsequent to Butts make abundantly clear § 1981 claims can be stated against state actors. See Bass v. Board OF County Commissioners, 256 F.3d 1095, 1102-3 (11th Cir. 2001);Vason v. City of Montgomery, 240 F.3d 905, 906 n.1 (11th Cir. 2001), decided January 29, 2001; Rice-Lamar v. City Of Fort Lauderdale, Florida, 232 F.3d 836, 839 (11th Cir. 2000), decided November 8, 2000.

42 U.S.C. § 1983 Claims

The Magistrate Judge in his R&R [Doc. 435 – Pg. 2-4] decided to gut the plaintiff's fourth amendment complaint and rid the court and the defendants of multiple 42 U.S.C. § 1983 claims. Plaintiff's claims brought pursuant to 42 U.S.C. § 1983 that were dismissed as follows: Counts 18, 20, 22, and 24 were dismissed with prejudice. In support of Plaintiff's argument against the dismissal of the Plaintiff's § 1983 claims, Plaintiff refers this Court and the Appellees to his Objections to the R&R. (Doc. 436, Pgs. 9-13). See also Plaintiff's reply (Doc. 454, pgs. 3-4). The Magistrate Judge launched a multi-pronged attack on plaintiff's 42 U.S.C. § 1983 claims. Despite the fact that the plaintiff's fourth Amended Complaint is replete with claims of blatant racism, the Magistrate Judge seemed to impose a hypertechnical pleading on the plaintiff to add the words "racial animus" to his court § 1983 claims, counts 18, 20, and 22. The Magistrate Judge appeared to be fixated on this term "racial animus" even though the plaintiff's counts 18, 20, and 22 also allege deprivations of 1st and 14th Amendment rights. Moreover, even the defendants themselves with respect to plaintiff's § 1983 claims, counts 18, 20, and 22 stated, " *Plaintiff's allegations, in counts 17 through 27, essentially amount to claims of racial motivation*." See (Doc. 342-Pg. 6). "*The Supreme Court has stated that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is `a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and*

the grounds upon which it rests. " Harry v. Marchant, 237 F.3d 1315, 1322 (11th Cir. 2001). Essentially, the court, *sua sponte*, asserted its' own hypertechnical grounds to dismiss. The Magistrate Judge's ruling says that the plaintiff, a black man, can not prove under any circumstances that the "No Trespass Warnings" issued to the plaintiff by the white defendants in this matter, barring the plaintiff from using a the Sebring Public Library, a public facility within the meanings of 42 U.S.C. § 2000b, were motivated by a racial animus. Such a conclusion is conclusion defies credulity. More importantly, plaintiff has stated a claim for violations of section 1983. "*In order to state a cause of action under § 1983, the plaintiff must allege only two things: (1) some person has deprived him or her of a federal right; and (2) that he or she acted under color of state law*." See McKinley v. Kaplan, infra. Count 24 was dismissed because the Court claimed it was too late to seek leave to amend. For argument against this dismissal, Plaintiff refers this Court and Appellees to his Objections to the R&R. (Doc. 436, Pgs. 2-8). See also LEAVE TO AMEND-Undue Delay section below. Clearly, plaintiff's counts 18, 20, 22, and 24 were improperly dismissed and must be reversed.

42 U.S.C. §§ 1985, 1986 Claims

The Magistrate Judge in his R&R [Doc. 435] decided to gut the plaintiff's fourth amendment complaint and rid the court and the defendants of multiple 42 U.S.C. §§ 1985, 1986 claims (Doc. 321-Pgs. 66, 73). Counts 10 and 11, 42 U.S.C. §§ 1985, 1986, respectively, relate to conspiracy to deprive plaintiff of his constitutional protections with respect to his termination. Counts 26 and 27, 42 U.S.C. §§ 1985, 1986, respectively, relate to conspiracy to deprive plaintiff of his constitutional protections and a racial animus with respect to issuing the plaintiff, black man, a "No Trespass Warning" prohibiting him from using the Sebring Public Library, thereby preventing the plaintiff from using a using a public facility which is in direct violation of 42 U.S.C. § 2000b. The only reason the plaintiff can find for Magistrate Judge's attacks on the plaintiff's 42 U.S.C. §§ 1985, 1986 is the statement in the R&R which says, "*There is nothing in the pleadings which would indicate that these newly added counts are direct results of new information and/or evidence that the Plaintiff has just discovered which would give rise to the these claims. The plaintiff is just seeking to decide to add these claims at this time in his fourth Amended Complaint. He should not be allowed to do so and*

they should be dismissed with prejudice." [Doc. 435 –Pg. 2, 3]. In support of the Plaintiff's argument against this dismissal, Plaintiff refers this Court and the Appellees to his Objections to the R&R. (Doc. 436, Pgs. 2-8). See also LEAVE TO AMEND-Undue Delay section below. The Magistrate's R&R is in error with respect to plaintiff's 42 U.S.C. §§ 1985, 1986 claims and must be reversed.

Defamation Claim

The Magistrate Judge dismissed the plaintiff's defamation claims, Counts 12 and 13. (Doc. 435-Pgs. 5,6). The Magistrate Judge attacked the plaintiff's defamation claims on a basis not asserted by the defendants. In support of the Plaintiff's argument against this dismissal, Plaintiff refers this Court and the Appellees to his Objections to the R&R. (Doc. 436, Pgs. 2-8); (Doc. 436-Pgs. 13-16); (Doc. 352-Pgs. 10-13). See also Plaintiff's reply (Doc. 454, pg. 4). The Magistrate Judge gave the defendants' qualified immunity when the defendants in this matter laid no claim to immunity. In giving the defendants in this matter immunity, the court went beyond the four corners of the complaint and assumed facts not alleged.

Intentional Emotional Distress Claims

The Magistrate Judge dismissed the plaintiff's intentional emotional distress claims, Counts 3 and 17. (Doc. 435-Pgs. 6,7). In support of the Plaintiff's argument against this dismissal, Plaintiff refers this Court and the Appellees to his Objections to the R&R. (Doc. 436, Pgs. 2-8);(Doc. 436-Pgs. 16-20) ;(Doc. 352-Pgs. 13-18).. Of particular note in the instant case, the plaintiff alleges that he had a mental condition, clinical depression, that the defendants knew of and tried to exploit. (Doc. 321 Page 12, ¶¶90-, 91). Plaintiff cites three cases with similar facts where a claim for intentional infliction of emotional distress was stated: McAlpin v. Sokolay, 596 So.2d 1266, 1268-70 (Fla.App. 5 Dist. 1992); Doe v. Board of County Com'rs, 815 F.Supp. 1448, 1450 (S.D. Fla. 1992); Williams v. City Of Minneola, 575 So.2d 683, 692-3 (Fla.App. 5 Dist. 1991). For specific allegations supporting these claims, see *Complaint*, (Doc. 321, ¶¶188, 201, 205-208, 234, 238, 239, 242, 245-253, 384-409).

DISPARATE IMPACT

The Magistrate Judge dismissed the plaintiff's disparate impact claims, Counts 5 and 7. (Doc. 435-Pg. 8). In support of the Plaintiff's argument against this dismissal, Plaintiff refers this Court and the Appellees to his Objections to the R&R. (Doc. 436, Pgs. 2-8);(Doc. 436-Pgs. 20, 21) ;(Doc. 352-Pgs. 18, 19).

FLORIDA WHISTEBLOWER CLAIM

The Magistrate Judge dismissed the plaintiff's Florida Whistleblower claim, Count 15. (Doc. 435-Pgs. 2, 3). The Magistrate Judge attacked the plaintiff's Florida Whistleblower claim not because the plaintiff failed to state a claim, but allegedly because the plaintiff failed to seek leave to amend his fourth amended complaint to add a Whistle-Blower claim. For a more complete discussion on this matter, See (Doc. 436-Pgs. 2-8) ;(Doc. 352-Pgs. 8-10). See also the section entitled LEAVE TO AMEND-Undue Delay in this brief. The Magistrate Judge attacked the plaintiff's Florida Whisteblower claim even in the face of the undeniable and undisputed fact that the plaintiff had filed a report from the Florida Commission on Ethics that had found the plaintiff's supervisor, Mary Myers, to be guilty of an ethics violation. (Doc. 211, Exhibit 12). Mary Myers had given the plaintiff a letter of reprimand on October 12, 1998 because the plaintiff refused to reveal his allegations of wrongdoing against her at the time. "*Among other things, you stated that you knew bad things about me or my organization that would, as you put it, "blow us away." Despite being invited by the Assistant Administrator to specify any allegations or complaints and submit them for proper investigation, you declined and threatened legal action and "going to the newspapers"*. (Doc. 39 exhibit #'s1 and 2);(Doc. 164 exhibit #'s1 and 3); (Doc. 171 exhibit #1); (Doc. 183 exhibit #3); (Doc. 211 exhibit #'s1 and 2).

LEAVE TO AMEND-Undue Delay

The Magistrate attacks Counts 10, 11, 13, 15, 24, 25, 26, and 27 (Ten, Eleven, Thirteen, Fifteen, Twenty-Four, Twenty-Five, Twenty-Six, and Twenty-Seven) because: "There is nothing in the pleadings which would indicate that these newly added counts are direct results of new information and/or evidence that the Plaintiff has just discovered which would give rise to these

claims. The Plaintiff is just seeking to decide to add these claims at this time in his fourth Amended Complaint. He should not be allowed to do and they should be dismissed with prejudice." (Doc. 435, Pgs. 2-3). The Magistrate made up his own law as the reasons he set forth for dismissing the Plaintiff's claims with prejudice are simply not supported by the law given the facts of this case. The Scheduling Order was rendered on 4/12/01. (Doc. 643). The last date to amend the complaint was set at April 30, 2001. (Doc. 643, ¶18). The discovery deadline was set for May 29, 2001. (Doc. 643, ¶18). The deadline for filing all pretrial motions and memorandum of law was set for June 4, 2001. As of the date that this R&R was rendered there was no binding scheduling order in effect. In support of Plaintiff's argument against that there was no undue delay, Plaintiff refers this Court and the Appellees to his Objections to the R&R. (Doc. 436, Pgs. 2-8). See also Plaintiff's reply (Doc. 454, pgs.1-2). "*Delay standing alone, is an insufficient basis for denying leave to amend, and this true no matter how long the delay*." Wallace Hardware Co. Inc., v. Abrams, 223 F.2d 382, 389,409-410 (6th Cir. 2000); See also Sosa v. Airprint Systems Inc., 133 F.3d 1417, 1418-9 (11th Cir 1998) ("District courts are required to "enter a scheduling order that limits the time to ... join other parties and to amend the pleadings ..."). In the Magistrate's R&R, he asserts that the plaintiff did not seek leave to amend. However, this is not the state of the case plaintiff sought leave to amend on 6/5/00 (Doc. 196). On 6/26/00, the court denied this leave to amend without prejudice and no other actions was taken with respect to this request. (Doc. 204). On 6/28/00, plaintiff filed a motion for leave to amend. (Doc. 218). On 6/28/00, the court denied this leave to amend without prejudice and no other actions was taken with respect to this request (Doc. 220). The court issued a stay of proceedings on and 3/3/00, (Doc. 162), it ended on 7/5/00. (Doc. 227). On 7/17/00, plaintiff submitted a Third Consolidated Amended Complaint. (Doc. 235). This Third Amended Complaint had claims for violation of 42 U.S.C. §§ 1985, 1986, [counts 11, 12, 23, 24], Florida Whistleblower Claim [Count 9], and conspiracy to defame [count 26]. On 8/11/00, plaintiff sought leave to amend to add a claim of breach of contract. (Doc. 272). On 8/18/00, the court granted leave to amend to add a claim for breach of contract and the result of which mooted the plaintiff's Third Amended Complaint. (Doc. 286). During the time between the plaintiff's filing of his Third Amended complaint

on July 5, 2000 and time mooted the plaintiff's Third Amended Complaint on August 18, 2000, the court made no mention of the claims the plaintiff had added in Third Amended Complaint as a result of the plaintiff's two prior motions for leave to amend. (Doc. 196); (Doc. 218). These motions for leave to amend sought to add claims for violation of 42 U.S.C. §§ 1985, 1986, Florida Whistleblower, and conspiracy to defame. Plaintiff, upon submitting his Fourth Amended Complaint 9/15/00, added the claims for 42 U.S.C. §§ 1985, 1986, Florida Whistleblower, and conspiracy to defame. (Doc. 322).

DISCOVERY ABUSES

V. Did the Magistrate improperly narrow the plaintiff's discovery in a Title VII action?

Standard of Review

The denial of a motion for reconsideration or a motion to compel discovery is reviewed only for abuse of discretion. Sanderlin v. Seminole Tribe Of Florida, 243 F.3d 1282, 1285 (11th Cir. 2001).

Discussion

As the Magistrate's Judge's orders almost invariably are not in the form of a memorandum of law, it is largely impossible to discern the legal basis for his decisions. "*A plaintiff who must shoulder the burden of proving that the reasons given for his discharge are pretextual should not normally be denied the information necessary to establish that claim..*" Marshall v. Westinghouse Elec. Corp., 576 F.2d 588, 592 (5th Cir.1978). "Indeed, summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to [its] opposition."" Burnside-Ott Aviation Training Ctr. v. U.S., 985 F.2d 1574, 1582 (Fed. Cir. 1993) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n. 5, 106 S.Ct. 2505, 2511 n. 5, 91 L.Ed.2d 202 (1986)). Plaintiff is proceeding *in forma pauperis* and lacked the financial resources to conduct oral depositions, therefore the Plaintiff relied heavily on contention type Interrogatories to support his claims. The record will show that when the Defendants bothered to respond to discovery requests they were extremely evasive in their responses.

On September 21, 2000, Mason submitted his *Plaintiff's Motion To Compel Defendants' To*

Allow Inspection. (Doc. 332). Plaintiff sought to compel the Defendants to allow him to inspect computers for information. The Defendants, fully cognizant of Mason's financial poor condition, decided that they would allow Mason to inspect computers only if Mason paid an unspecified fee in advance of inspection. (Doc. 332, Exhibit 2). §119.01, et.al., Fla.Stat. does not allow for the charging of a fee to merely view public records. Notwithstanding this fact, the Magistrate denied Mason's motion and concluded that the Plaintiff must pay the government defendants some undetermined "fee" to inspect computers. The Magistrate absolutely refuses to cite legal authority for his conclusion that Mason must pay some type of fee. (Doc. 371). Essentially, the Magistrate allowed the fox to guard the chickencoop. Mason promptly filed his objections to this order, which was never acted upon by the District Judge. (Doc. 389).

The plaintiff submitted a motion to compel to the court on 3/5/01. (Doc. 519);(Doc. 589). The court in an order rendered on 3-27-01, largely ignored the plaintiff's motion to compel. (Doc. 600). This Order was properly objected to. (Doc. 632). Of all the discovery requests that the plaintiff sought to compel discovery, the court only addressed one set of interrogatories [Plaintiff's 19th Interrogatories]. The court ignored all other discovery requests the plaintiff had pending or summarily denied them all without explanation. For a list of the pending discovery request in dispute, see (Doc. 519, Pgs., i-ii). The court's ruling on plaintiff's motion to compel was woefully deficient because it must have accepted the defendants' improper application of the Federal Rules of Civil Procedure in the following areas: 1)the defendants heavily rely on Rule 33(d), Fed.R.Civ.P., but adamantly refuse to identify the responsive documents, therefore leaving the plaintiff to guess at his own peril what documents the defendants contend are responsive;2)the defendants cling to the "work unit doctrine", but completely failed to define it fully and allows the magistrate to make a decision in total ignorance;3)the court severely limits the temporal scope of plaintiff's discovery requests allowing the plaintiff no discovery in the years prior to the plaintiff's employment or 1996. Along this same vein the court allows the defendants to have discovery back to plaintiff's attendance at the Florida A&M University in 1976, or some 25 years ago;4)the court allows the defendants to assert unduly burdensome without any proof of such;5)the defendants have claimed that the plaintiff

may not bring a pattern and practice suit as individual;6)the defendants have stated that how the defendants treated its' white employees and selectively applied the rules within its own employee handbook is not relevant. The court's order (Doc. 600) denying the plaintiff's motion to compel (Doc. 519) is gross miscarriage of justice and violative of the plaintiff's due process rights.

On March 30, 2001, the magistrate improperly denied plaintiff's motion to compel. (Doc. 617);(Doc. 539);(Doc. 631). The order denying plaintiff's motion makes broad sweeping generalizations without any reference to facts. The Magistrate was extremely hypertechnical in denying the plaintiff's motion to compel as the plaintiff's motion to compel was substantially in compliance with all applicable rules. (Doc. 617);(Doc. 539);(Doc. 631). Plaintiff submitted a motion for clarification of this denial, (Doc. 627), which denied on the very same day it was submitted without an explanation. (Doc. 629). Plaintiff properly filed his objection to this denial for clarification that was never acted upon by the District Judge. (Doc. 660).

The defendants use a tactic of asserting serial objections and the magistrate allows this strategy. Defendants' counsel will assert a blanket objection and force the plaintiff to file a motion to compel. (Doc. 251);(Doc. 359);(Doc. 385); (Doc. 392) and (Doc. 331); (Doc. 345); (Doc. 393) Upon the failure of their frivolous objections, the court will order the defendants' to respond. At this point, the defendants interpose new objections for the very first time. (Doc. 418) [new objections related to (Doc. 251);(Doc. 359);(Doc. 385); (Doc. 392)]. The court denies the plaintiff's motion to compel and leave to amend allegedly because of a court-imposed stay[9]. (Doc. 417);(Doc. 418); (Doc. 422). Plaintiff properly objected to these orders. (Doc. 440);(Doc. 441). Plaintiff also filed a motion for sanctions because the defendants refused to comply with the court's previous orders to orders to compel, [Doc. 392 and Doc. 393]. (Doc. 420);(Doc. 431). Here again in reply the court does absolutely nothing. (Doc. 432). On the defendants' next opportunity to respond to a court order, (Doc. compelling

On 2/15/01, the court granted the defendants' motion for a protective order. (Doc. 465);(Doc.

[9] During a previously imposed stay, (Doc. 162) and (Doc. 221), the court not only allows the defendants to submit motions during the pendency of a stay, but grants the motions as well. (Doc. 199);(Doc.

471). This is order granting the defendants' motion for a protective was an egregious example of abuse of discretion by the Magistrate Judge. Over the vehement opposition of the plaintiff, the court granted this protective order in total ignorance of the facts upon which it was granted and based solely on the mere conclusory allegations of defendants' counsel. (Doc. 470); (Doc. 472); (Doc. 473). The magistrate had none of the disputed discovery in his possession when he unwisely and unfairly granted the protective order. (Doc. 470); (Doc. 472); (Doc. 473). Plaintiff also filed his objections and appeal to the district judge in opposition to this protective order. (Doc. 481). Further, exacerbating this grievous error made by the court, the court denied plaintiff's motion to compel [Doc. 489] filed on 2/26/01. (Doc. 531). Plaintiff's motion to compel [Doc. 489] points out the fact that when the court issued its' blind protective order (Doc. 471), the defendants had already exceeded their lawful 30 days to respond to an interrogatory. In the magistrate orders [Doc. 531] denying the plaintiff's motion to compel, the court rejected the plaintiff's motion to compel without any explanation. The Plaintiff was outraged that the magistrate judge could grant the defendants' a protective order based not only on mere conclusory allegations of the defendants' counsel, but the magistrate rubbed salt into the plaintiff's wounds by allowing the defendants' to have a protective order when the time to respond had already past.

The court's order granting the defendants an emergency protective order constitutes an abuse of discretion. (Doc. 599). The defendants submitted an amended emergency motion[10] for a protective order seeking to prohibit the plaintiff from among other things, from taking pictures in two public facilities (Doc. 577, Exhibit 1), the Sebring Public Library and the Government Center of the Highlands County Board of County Commissioners. (Doc. 577). Plaintiff's position on this emergency protective order is fully set forth in his responses and motions, (Doc. 592));(Doc. 587). The Magistrate granted this protective order despite its procedural flaws[11]. The plaintiff formerly

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#231);(Doc. 201);(Doc. 246).

[10] Defendants' counsel had previously filed an emergency protective order that was procedurally flawed. (Doc. 547). Plaintiff responded to this flawed motion with a motion to strike. (Doc. 566). The court denied the plaintiff's motion to strike as moot. (Doc. 578). Plaintiff subsequently appealed this denial of his motion to strike. (Doc. 607).

[11] The defendants clearly recognized that they had submitted yet another procedurally flawed emergency motion for a protective order by filing a second amended emergency motion for a protective order on or

worked in the Sebring Public Library and sought to take pictures and conduct some sound testing. Apparently, the court ruled that the plaintiff's former workplace and its surroundings could have no possible relevance to the plaintiff's claim and apparently the information as sought by the plaintiff could not serve as background material for a fact finder either. The court in granting the defendants their "emergency" protective order stated that the plaintiff was in violation of Rule 34(b) which states in pertinent part:

> The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

It is unclear how more precise the plaintiff can be when he asserts that he wants to photograph the entire building from the inside. (Doc. 577, Exhibit 1). Apparently, the defendants' counsel convinced the court that the plaintiff merely sought to "harass" and "annoy" the defendants by taking pictures of these public facilities. Given all the facts surrounding the issuance of this "emergency" protective order, it's apparent that this "emergency" protective order is not legally sufficient and it must be vacated. Plaintiff properly raised his objections. (Doc. 632, pg. 1-4, ¶¶1-2).

On 2/26/01, plaintiff filed a motion for reconsideration of an earlier granted protective order (Doc. 490). The court rejected the plaintiff's motion for consideration stating only "*noting that plaintiff seeks reconsideration of an order issued on July 24, 2000.*" (Doc. 496). The magistrate did not even bother to wait for the defendants to respond. Plaintiff merely sought to have a protective order that he asserts was improvidently granted on July 24, 2000 vacated or modified. (Doc. 241). Plaintiff had opposed the defendants' request for a protective order, (Doc. 232). (Doc. 237). Plaintiff also filed his objections to the magistrate judge's refusal to address the plaintiff's motion for reconsideration. (Doc. 563). As the plaintiff clearly points out in his motion for reconsideration, the need for the requested information was critical to proving the Plaintiff's allegations and for impeachment purposes. (Doc. 490, pgs. 5-13). See also (Doc. 785, pg. 6, ¶3).

On April 23, 2001, the court rendered an order (Doc. 680) granting the defendants' motion

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about March 28, 2001. This motion was moot because the court had already issued an order granting the defendants their amended emergency motion for a protective order, (Doc. 577), on 3/27/01 despite its

(Doc. 661) to determine the deficiency of the plaintiff's responses. Plaintiff opposed the defendants' motion on the grounds that the information requested was not relevant, that the court had previously ruled the information was not relevant, and further that requests for admissions are not properly served for the purpose of defeating a jurisdictional argument on appeal. (Doc. 662). Plaintiff objected to the court order of the Magistrate Judge and filed an appeal with the District Judge. (Doc. 694); (Doc.728).

On 5/1/01 the Magistrate Judge rendered an order (Doc.695) denying the plaintiff's motion to compel the defendants' to answer the plaintiff's fifty-second interrogatory (Doc. 687). The Magistrate denied the plaintiff's motion to compel without even waiting for the defendants to respond. Plaintiff properly objected to the court order (Doc. 695) denying his motion to compel. (Doc. 702). The Magistrate Judge purports to have denied the plaintiff's motion to compel because it exceeded 20 pages in violation of Local Rule 7.1.C. Plaintiff contends that the Magistrate Judge blatantly abused his discretion in that under the circumstances it would have been impossible for the plaintiff to comply with Local Rule 7.1.C. and Local Rule 26.1.H.2. Local Rule 26.1.H.2. required that the Interrogatory in question and the answer to it be included, verbatim, in the motion to compel. Under this standard, the motion to compel was doomed to be 28 pages in length even before the plaintiff filed the motion to compel. (Doc. 687).

Plaintiff appeals the Magistrate's Order (Doc. 700) of May 4, 2001 denying the plaintiff's motion to compel (Doc. 688). Plaintiff properly filed his objections on May 11, 2001. (Doc. 723). The Magistrate decided that the Plaintiff was only entitled to "formal complaints" that were filed against the Defendants and he allowed the Defendants to define this term. This clearly was an abuse of discretion as no other federal court in U.S. history has made such a ruling. Plaintiff is entitled to complaint information whether it is "formal" or "informal."

Plaintiff's motion to compel, (Doc. 363), was denied by the Magistrate on November 20, 2000. (Doc. 428). The Magistrate abused his discretion and without attempting to support his decision with any facts, the Magistrate made the mere conclusory assertion that Plaintiff's request

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flaws. (Doc. 599).

was "overbroad and/or irrelevant." Plaintiff properly objected to unsupported legal conclusion. (Doc. 438).

Plaintiff's motion to compel, (Doc. 519), was denied by the Magistrate on March 27, 2001. (Doc. 600). The Magistrate abused his discretion in failing to set forth a proper legal explanation for this denial. Plaintiff properly objected to unsupported legal conclusion. (Doc. 632, pg. 4, ¶3).

On May 10, 2001, Plaintiff submitted a motion for reconsideration of a protective order granted to the Defendants. (Doc. 713);(Doc. 740). This motion was promptly denied without explanation or a response from the Defendants on May 11, 2001. (Doc. 720). The information sought by the Plaintiff was essential to proving his claims. The Magistrate's decision was completely arbitrary and Mason properly filed his objections to the District Judge. (Doc. 734).

The rulings of the court provide absolutely no guidance with respect to discovery In order to minimize discovery disputes, and as a consequence, the plaintiff filed a motion for court ordered discovery plan. (Doc. 605). Two days after and on March 30, 2001 and after the motion was filed and placed on the court's docket, the court rejected the plaintiff's motion without any comment or response from the defendants. (Doc. 616). It should be readily apparent from the foregoing that the Defendants attempted to obstruct discovery and "run out the clock" on the Plaintiff so that they could win a summary judgment by default. Plaintiff attempted to protect his right to discovery by submitting his objections to the Court's scheduling order. (Doc. 693).

CREATIVE REASONS FOR DENIAL OF LEAVE TO AMEND

VI. Did the District Court improperly apply the law with respect to leave to amend?

Discussion

In denying the Plaintiff leave to amend, the district court created a novel reason for denial. At the time Mason submitted motions for leave to amend, no scheduling order had been rendered, discovery had not ended, and the last date for leave to amend had not expired. The Scheduling Order was rendered on 4/12/01. (Doc. 643). The last date to amend the complaint was set at April

30, 2001. (Doc. 643, ¶18). Mason filed a motion for leave to amend on 2/26/01[12], (Doc. 491) (Doc. 564), which was denied on March 30, 2001. (Doc. 618). Plaintiff properly objected to this denial and filed an appeal. (Doc. 631). At the outset Plaintiff notes that the Magistrate is severely misguided in that he apparently feels that Esrey v Wainwright. 734 F.2d 748, 750 (11th Cir. 1984) affords him unfettered discretion to deny leave to amend. In fact, nothing could be farther from the truth in that the law severely restricts the District Court's discretion in denying leave to amend. Espey expressly states, ""`[d]iscretion' may be a misleading term, for rule 15(a) severely restricts the judge's freedom…"[u]nless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." There is no finding of bad faith on the part of the Plaintiff, therefore the Magistrate's order can not be affirmed on that basis and must be reversed. The Magistrate's order intimates, though it does not expressly state a case for undue delay and hence, prejudice to the Defendants. This Court and other Courts have consistently looked to the Scheduling Order to determine if there is undue delay. Loggerhead Turtle v. County Council of Volusia County, 148 F.3d 1231, 1257 (11th Cir.1998)(reversing trial court's denial of leave to amend where Turtles filed their motion for leave to amend within the time set by the Court's scheduling order and further noting that the mere passage of time is not sufficient to support a finding of unude delay.); Wallace Hardware Co. v. Abrams, 223 F.3d 382; 2000 U.S. App. LEXIS 18086; 2000 FED App.0250P (6th Cir. 2000) ("Delay, standing alone, is an insufficient basis for denying leave to amend, and this is true no matter how long the delay."). For more argument related to this issue, Plaintiff refers the Court and the Appellees to his *Plaintiff's Objections To Court Orders Denying Plaintiff's Motion To Compel (DE #539) And Denying Plaintiff's Motion For Leave To Amend*. (Doc. 631)(Doc. 654). See also this brief, LEAVE TO AMEND-Undue Delay.

[12] Mason also filed prior motions for leave to amend: See (Doc. 320),(Doc. 366), filed on September 15, 2000 and October 17, 2000, respectively, and denied without prejudice on October 19, 2000. (Doc. 370). See also (Doc. 376) filed October 23, 2000, denied without prejudice on October 23, 2000. (Doc. 380).

DIRECT EVIDENCE?

VII. Has Mason presented direct evidence of a retaliatory motive ?

"Direct evidence of discrimination is "evidence which, if believed, would prove the existence of a fact [in issue] without inference or presumption." Bass v. Board Of County Commissioners, 256 F.3d 1095, 1105 (11th Cir. 2001). On October 2nd and 12th 1998, Defendants' supervisory agent, Mary Myers gave Mason written reprimands for "threatening litigation." (Doc. 507, pg. 2, ¶¶6-7). Subsequent to Mason's termination, MYERS gave sworn testimony to the Division[13] that MASON did not have the right to "threaten litigation." (Doc. 321, pg. 18, ¶154); (Doc. 341, pg. 14, ¶154). Specifically, Mary Myers stated, "No, I don't feel he [Mason] has the right to threaten litigation." (Doc. 219, Tape 22). Despite the fact that the Plaintiff has used the statement ["No, I don't feel he [Mason] has the right to threaten litigation."] in support of his motions for summary judgment and preliminary injunction, the Defendants have freely chosen not to deny or controvert this statement. (Doc. 507, pg. 2, ¶8; pg. 13, ¶55);(Doc. 569); (Doc. 667, pg. 1, ¶2); (Doc. 667, pg. 6, ¶5);(Doc. 698, pgs. 5-6, ¶5); (Doc. 699, pgs. 3-10); (Doc. 705, pgs. 3,4). See also *Running From The Audiotapes*, infra. "Threatening litigation" is legally protected speech. See 42 U.S.C. § 2000e-3.

The letters that Mason received for "threatening litigation" on October 2, 1998 and October 12, 1998 are adverse actions. See Davis v. Town Of Lake Park, Florida, 245 F.3d 1232, 1240, 1242 n.3 (11th Cir. 2001) (holding that a formal reprimand under the town's progressive discipline structure could be an adverse action); See also Wideman v. Wal-Mart Stores, Inc.,141 F.3d 1453, 1455 (11th Cir. 1998). Opposition to discrimination is a protected activity even if the complainant is mistaken about the unlawfulness of the challenged practices. EEOC Directives Transmittal, Number 915.003, Date 5/20/98, EEOC Compliance Manual, Section 614. If an official expresses bias against a Charging Party based on a protected activity, then there is direct evidence linking that statement of bias to the adverse action. Such a link would be established if, for example, the statement was

[13] "Division," refers to Florida Department of Labor and Security, Bureau of Unemployment Compensation.

made by the decision-maker at the time of the challenged action. Id. It couldn't be any clearer that issuing two written reprimands for "threatening litigation" and testifying under oath that Mason doesn't have the right to "threaten litigation" constitutes direct evidence of an unlawful motive.

LANGUISHING LITIGATION

VIII. Did the District Judge properly manage this case?

The District Judge did not properly manage this case as the District Judge allowed scores of pretrial motions to languish without any action. "District courts must take an active role in managing cases on their docket." Chudasama v. Mazda Motor Corporation, 123 F.3d 1353, 1366 (11th Cir. 1997). District courts enjoy broad discretion in deciding how best to manage the cases before them. "This discretion is not unfettered, however. When a litigant's rights are materially prejudiced by the district court's mismanagement of a case, we must redress the abuse of discretion." Id. at 1367. "Failure to consider and rule on significant pretrial motions before issuing dispositive orders can be an abuse of discretion." Id. "*Judge's decision to refuse to act on case is subject to review if party is dissatisfied and makes timely objection*." Edwards v. United States, 334 F.2d 360,362 (5th Cir. 1964). In the instant case, the trial court had scores of motions, appeals, and other filings pending when it decided to dismiss this action on June 20, 2001. Indeed, many of these filings had been pending for months, or in the case of the Plaintiff's motion for a preliminary injunction, it had been pending for years.

Mason filed a motion for a preliminary injunction on November 24, 1999. (Doc. 39). When the trial court illegally dismissed this complaint, Mason's motion had been pending for 574 days. The district Judge's behavior virtually said to the Plaintiff, I will do whatever the hell I feel like doing and I aint going to rule on your motion for a preliminary injunction. As a matter of fact, Mason filed an appeal with the District Judge because the Magistrate refused to explain why he would not rule on the motion. (Doc. 518). The Defendants even opposed the Plaintiff's motion to clarify (Doc. 703) why the court would not rule on his motion for preliminary injunction. (Doc. 719). This opposition was based on frivolous legal ground and the Plaintiff sought sanctions. (Doc. 741);(Doc. 719, pgs. 3-4).

When the District Judge dismissed this case after having conducted a mere one and half page "de novo" review which was completed in warp speed coming just six days after Mason filed his objections to the R&R (Doc. 783, dtd. 6-15-01); (Doc. 791, dtd. 6-21-01), the following motions and appeals were pending and had not been acted even though they had submitted for considerably more than six days and did not require a "de novo" review:

~~Motion~~/Appeal	Date Filed	Motion/~~Appeal~~	Date Filed
388	10/25/00	667	4/18/01
437	11/29/00	703	5/07/01
438	11/29/00	709	5/10/01
439	11/29/00	710	5/10/01
440	11/29/00	711	5/10/01
441	11/29/00	712	5/10/01
518	3/5/01	714	5/10/01
544	3/12/01	715	5/10/01
554	3/14/01		
555	314/01	716	5/10/01
561	3/16/01	724	5/11/01
563	3/18/01	726	5/16/01
607	3/28/01	741	5/21/01
632	4/4/01	742	5/21/01
637	4/9/01		
660	4/13/01	749	5/23/01
693	4/30/01	775	6/6/01
694	5/1/01	780	6/6/01
702	5/7/01	786	6/19/01
723	5/11/01	788	6/19/01
733	5/18/01		
734	5/18/01		
776	6/6/01		
777	6/6/01		

Graham sat on several motions to proceed on appeal *in forma pauperis* for more than three months before he referred them to the Magistrate who denied the motions on September 18, 2001. (DE #796, #799, # 811);(DE #877). During the course of this litigation, the District Judge has failed to do his lawful duty and conduct "de novo" reviews on Mason's objections to the R&R's of the Magistrate Judge on three separate occasions. (DE #336); (DE #351); (DE #408); (DE #435); (DE #466); (DE #766); (DE #791). By failing to conduct proper "de novo" reviews, the District Judge has circumvented 28 U.S.C. § 636, and allowed a Magistrate Article III authority. A comparison of a " non de novo" review, (Doc. 227), with alleged "de novo" reviews, will yield that there is no substantial difference. Additionally, 28 U.S.C. § 636 was violated in that the Magistrate acted without legal

authority in denying a motion for an interlocutory appeal and motions to proceed *in forma pauperis*. (Doc. 621);(Doc. 877). See Massey v. City Of Ferndale, 7 F.3d 506, 508 (6th Cir. 1993)(magistrate judge is without authority to deny motions to proceed in forma pauperis); Vitols v. Citizens Banking Co., 984 F.2d 168, 169-70 (6th Cir. 1993)("a magistrate judge, acting pursuant to a reference under § 636(b)(1) or (3), has no authority to issue a dispositive ruling on a motion to certify a district court order for interlocutory appeal under § 1292(b)").

DISQUALIFICATION OF THE JUDGES

IX. Did the District Court err by not disqualifying itself on Plaintiff's motion to recuse thereby rendering all orders of the District Court null and void?

Discussion

The District Judge failed in its duty to disqualify when the Plaintiff presented his motion to disqualify on February 7, 2001 and as a result, all orders of the District Court are null and void. (Doc. 460); (Doc. 533); (Doc. 543); (Doc. 560); (Doc. 567);(Doc. 610); (Doc. 611);(Doc. 636); (Doc. 638); (Doc. 653);(Doc. 655);(Doc. 660). In U.S. v. Cerceda, 172 F.3d 806, 812 (11th Cir. 1999) (citing Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864, 108 S. Ct. 2194, 2205, 100 L.Ed.2d 855 (1988)), this court set forth the following factors in determining whether vacatur was appropriate: [1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process. The District Judge concluded that the factual allegations in the Plaintiff's motion to disqualify are not legally sufficient to warrant recusal in this matter. (Doc. 640, Pg. 5). The instant case parallels Chudasama, in many respects. "Pursuant to 28 U.S.C. § 455(a), a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The standard under § 455 is objective and requires the court to ask "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality. *** [E]xcept where pervasive bias is shown, a judge's rulings in the same or a related case are not a sufficient basis for recusal." Bolin v.

Story, 225 F.3d 1234, 1239 (11th Cir. 2000). "[W]e have required recusal when "such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party." Loranger v. Stierheim, 10 F.3d 776, 780 (11th Cir. 1994). Plaintiff has formally called for the disqualification of both Judges in this matter. The court denied the plaintiff's motion to disqualify on 4/11/01. (Doc. 640).

In evaluating the risk of injustice to the parties in the particular case, this Court stated that it was appropriate to look at two things: "First, the reviewing court should consider whether the party seeking vacatur has pointed to particular circumstances that may indicate a risk of injustice to that party. Second, the court should consider the seriousness of the violation of section 455(a) that is involved." U.S. v. Cerceda at 172 F.3d 813. In support of this argument, Mason asserts that the Magistrate and the District Judge have been guilty of lying, misconduct, misfeasance, and malfeasance. For a specific example of a lie told by the Magistrate Judge and the District Judge, Mason refers this Court to the R&R of the Magistrate Judge, which was ratified in whole by the District Judge. (Doc. 435)(Doc. 466). In his R&R, the Magistrate Judge states that the Plaintiff my not state a claim under 42 U.S.C. § 1981 against a state actor. (Doc. 435, Page 3). He supposedly relies on this Court's decision in Butts v. County of Volusia, 222 F.3d 891, 892 (11th Cir. 2000) to support this flawed notion. At the same time, the district court was feeding Mason this line, they were allowing the Plaintiff in Fa Nina St. Germain v. Highlands County Board of County Commissioners, et.al., Case No. 00-14094, (S.D. Fla. 2000) to state under a claim under 42 U.S.C. § 1981 against the very same state actor, Highlands County Board of County Commissioners. In fact in this case was disposed of through a summary judgment on the facts. See Case No. 00-14094, (Doc #58). For further proof that both Judges in this matter have intentionally lied, Plaintiff submitted a motion for reconsideration, where he demonstrates with cases decided subsequent to Butts that Butts does not hold that Plaintiff may not state a claim 42 U.S.C. § 1981 against state actors. (Doc. 591). Without even waiting for the Defendants to respond[14], the Magistrate Judge

[14] The Magistrate violates Local Rule 7.1.C. yet again. Motion was filed on 3-26-2001 and denied on 3-27-2001.

summarily dismisses the Plaintiff's motion for reconsideration without making any comment as to why Plaintiff's motion for reconsideration was or was not dispositive. (Doc. 601). Additionally as fully set forth above in Languishing Litigation, and in the Plaintiff's motion to disqualify and all supplements thereto the district court has been guilty of the following:

- The district court failed to act on scores of pending pretrial motions and other significant filings. The most egregious example of this is the fact that the district court refused to act on the plaintiff's motion for preliminary injunctive relief that has been since November 24, 1999. (Doc. 39).
- The Magistrate granted the defendants a protective order motion that was fatally flawed. The Magistrate often finds for the defendants without the defendants even responding on plaintiff's motions. The Magistrate makes decisions without allowing the plaintiff his lawful opportunity to reply to a response of the defendants. (Doc. 533).
- The Magistrate selectively enforces the rules to the detriment of the plaintiff. (Doc. 543);(Doc. 567);(Doc. 611);(Doc. 607).
- The Magistrate Judge has deprived the Plaintiff of his rights under Local Rule 7.1.C. to file a reply on several occasions. See (Doc. 722), (Doc. 730); (Doc. 746).
- The district court applied the same rule and the same set of circumstances differently and in favor of the Defendants. See Ojections (Doc. 439, pgs. 1-3).
- The District Court intentionally and wantonly usurped legal authority. (Doc. 201);(Doc. 246).
- As fully argued in this brief, the district court has made a string of clearly erroneous rulings.

Essentially, the District Judge is arguing that he could be in violation of the *Code of Conduct for United States Judges* and still not be required to disqualify. "A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings…A judge should dispose promptly of the business of the court. *Code Of Conduct For United States Judges*, Canon 3A(2) and 3A(5). Mason should not be condemned to be assigned Judges who refuse to rule on a motion for a preliminary injunction. (Doc. 39). Mason should not be condemned to Judges who allow scores of pre-trial motions to languish. See Languishing Motions,

supra. Mason is entitled to Judges who will not issue illegal "pretrial discovery issues and not injunctions per se." (Doc. 201)(Doc. 246). Mason is entitled to have Judges who will not intentionally and willfully lie.

The risk that the denial of relief will produce injustice in other cases is equally self-evident in this case. If this Court does not apply the remedy of vacatur, then there is no disincentive for the district court not to behave this way again in the future. This risk is magnified for indigent pro se parties. Equally troubling is the apparent attitude of the district court that this court will find some way to affirm the string of clearly erroneous decisions, notwithstanding the law and the facts.

The risk of undermining the public's confidence in the judicial process is great in the instant case. The public will have no confidence in a district court that lies by intentionally misrepresenting the law, allows significant pre-trial motions to languish, and makes a string of really bad decisions. In fact, the integrity of the entire federal system has been imperiled by the district court. Had these events occurred in a Court in the State of Florida, the district courts of appeal would have corrected this matter long ago by granting mandamus. In fact, the Second District Court of Appeal granted mandamus for this Petitioner against one of these same state actors, Carl Cool, Highlands County Administrator, under similar circumstances where a trial judge refused to rule on a petition in quo warranto. See Mason v. Cool, et.al., Case No. 2D01, (Fla. 2d DCA 2001).

RUNNING FROM THE AUDIOTAPES

X. Did the district court improperly allow the Defendants to obstruct discovery by disallowing the Plaintiff the opportunity to properly introduce critical evidence in this matter?

Discussion

Mason attempted all manner of ways to introduce audiotapes of sworn testimony given at Florida Unemployment Compensation Bureau hearings into the record evidence. On June 28, 2000, Mason filed 24 audiotapes of unemployment compensation hearings held between Mason and Highlands County Board of County Commissioners. (Doc. 214);(Doc. 219). The record does not show that Defendants ever opposed the submission of these audiotapes in to the record. In the

Plaintiff's Fourth Amended Complaint submitted on September 21, 2000, the Plaintiff included quotations, characterizations, and colloquies taken from these audiotapes. (Doc. 321, ¶¶38,43,47, 150, 154-157, 159, 161-164, 191, 193, 253, 256, 262-263, 274, 297, 300, 301, 323,396-401, 404). In filing their *Defendants' Partial Answer and Affirmative Defenses*, the Defendants answered the allegations as set forth above in the Plaintiff's Fourth Amended Complaint, without variation, with the following litany of gobbledygook to each paragraph referenced above:

> The sworn testimony given by witnesses during the unemployment compensation appeal hearing between Mason and his employer, Highlands County, speaks for itself. The record of that proceeding constitutes the best evidence of the witnesses' testimony. To the extent Plaintiff's characterization of the testimony is inconsistent with the record of that proceeding, paragraph __ is denied.

(Doc. 341, ¶¶38,43,47, 150, 154-157, 159, 161-164, 191, 193, 253, 256, 262-263, 274, 297, 300, 301, 323,396-401, 404). Plaintiff well knows that the sworn testimony "speaks for itself," but the Defendants are required to either admit or deny or state without knowledge. Rule 8, Fed.R.Civ.P. See also Controlled Environment Systems, etc., v. Sun Process, 173 F.R.D. 509, 510; 1997 U.S. Dist. LEXIS 9218, **3 (N.D.Ill. 1997)(holding that a speaks for itself is not proper under Rule 8.); Foster v. Starwood Hotels & Resorts Worldwide, Inc., 2000 U.S. Dist. LEXIS 2030, *2 (N.D. Ill. 2000); See also Koprowski v. Straight Arrow Publishers, Inc., 1993 U.S. Dist. LEXIS 13140, *6 (E.D. Pa. 1993) ("Holding that "speaks for itself" is not among the options contained in Rule 36 for responding to a request for an admission. ");Kistler Instrumente, A.G. v. PCB Piezotronics, Inc., 1983 U.S. Dist. LEXIS 17138, *10, 11 (W.D. NY 1983) ("[I]t is not sufficient that the patent document speaks for itself. What is desired is that plaintiff speak for plaintiff; plaintiff must do so."). Plaintiff felt the foregoing answer of the Defendant was evasive and as a result the Plaintiff moved to strike the foregoing answer and "admission." (Doc. 353, 1-7). The Magistrate denied Plaintiff's motion. (Doc. 372). The Magistrate did not wait for a response from the defendants and ruled that the Defendants' answers were adequate. Plaintiff properly objected to the Magistrate's Order. (Doc. 388). Notwithstanding the fact that Plaintiff's objections have been pending since October 25, 2000, the District Judge has failed to rule on the Plaintiff's objections. . (Doc. 388).

On 2/26/01, plaintiff submitted his Plaintiff's Motion To Determine The Sufficiency Of The

Defendants Answers And Deem As Admitted Requests For Admission And Motion To Strike. (Doc. #482). In their response Defendants claimed that Plaintiff must provide them with an "official transcript" in order for them to authenticate the audiotapes or identify their own voices. (Doc. 520). The Magistrate bought the Defendants objections and stated, "Rule 36(a) requires Plaintiff to provide an official transcript identifying the statements Plaintiff requests the Defendants to admit or deny…" (Doc. 523). Neither the Court, nor the Defendants have cited any case where a Court has supported this legal conclusion. Plaintiff objected to this order and the District Judge yet again failed to act. (Doc. 555);(Doc. 590).

On 4/27/01, plaintiff submitted another motion to determine sufficiency of defendants' response and objections to plaintiff's 9th request for admission. (Doc. 689); (Doc. 730). The defendants, in their response claimed yet again that they needed "official transcripts" in order for them to admit or deny the sound of their own voices on audiotape. (Doc. 718). The Defendants claimed, and the Magistrate bought into their wild claim and unsupported legal conclusion, that Rule 36(a) requires that the Plaintiff provide them with official transcripts. (Doc. 722). The Magistrate violated Local Rule 7.1.C[15] by rendering his decision before the Plaintiff filed his reply. (Doc. 730). On 4/30/01, plaintiff submitted yet another motion to determine sufficiency of defendants' response and objections to plaintiff's 3rd request for admission. (Doc. 692); (Doc. 729). Mason refers the Court and the Appellees to his properly filed objections in support of this argument. (Doc. 733). If the defendants are unhappy with the plaintiff's "unofficial transcripts," then they are obligated by law to produce their own transcripts. In United States v. Rochan, 563 F.2d 1246, 1251 (5th Cir. 1977)[16], the court opined:

> In Onori[17] we outlined the procedures to be used when transcripts supplement tapes. First, the parties in the trial court should seek to arrive at a "`stipulated' transcript, one to which all sides to the dispute can agree". If the parties cannot agree, each side should produce its own supplemental transcript, or its own version of the disputed portions. Each party is also free to put on "additional evidence supporting the accuracy of its version.

See also United States v. Cruz, 765 F.2d 1020, 1023 (11th Cir. 1985).

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[15] See Addendum
[16] See Bonner, supra.
[17] United States v. Onori, 535 F.2d 938, 947 (5th Cir., 1976).

On May 21, 2001, Mason filed a motion for an evidentiary hearing to authenticate the audiotapes. (Doc. 739). This motion was denied on the very same day it was submitted to the Court on May 21, 2001. (Doc. 746). In fact it was denied without the defendants even responding to the motion. Plaintiff filed an objection to this denial. (Doc. 777). Without waiting for the Plaintiff to file his reply pursuant to Local Rule 7.1.C, the Magistrate again deprived the Plaintiff of his rights and granted Defendants relief *sua sponte*. Mason relied on these tapes to fight off the Defendants' summary judgment motion and to support his own summary judgment motion. (Doc. 705, pgs. 3,4);(Doc. 785, pgs. 2-3);(Doc. 667, Pg. 6, ¶5). At the same time the Magistrate was denying the Plaintiff an opportunity for an evidentiary hearing on the authenticity of these tapes, the Magistrate was demanding to hold an evidentiary hearing on irrelevant email that he had no subject matter jurisdiction over. (Doc. 469);(Doc. 650);(Doc. 738, pgs. 7-8).

After all the other efforts of the Plaintiff's failed, Plaintiff filed a motion to transcribe the audiotapes and tax the cost the Defendants on June 6, 2001. (Doc. 780). The Defendants have stated that they need an "official transcript" to authenticate the sound of their voices on audiotape and the Magistrate agreed with this preposterous declaration. Defendants have a $2,000,000 insurance policy to pay any and all legal expenses and the Plaintiff is indigent and proceeding *in forma pauperis*. (Doc. 474). In their response, (Doc. 789), the defendants now raise a new and specious objection that "discovery is now closed." (Doc. 789, Pg.2).

CONCLUSION

The district court's handling of this case was irresponsible, reckless, and dishonest. The handling of this case is particularly egregious in that the merits of this case was supplanted by superfluous and irrelevant crap or email that reaches neither the merits of any defense or claim in this matter. This court's failure to act has emboldened the district court and counsel. Mason should not have to had his lawsuit dismissed in order to get appellate review when the Magistrate Judge clearly exceeded all jurisdiction in issuing a "pretrial discovery issue and not an injunction issue per se." Mason should not have been forced to file a direct appeal after final judgment when the District

Court refused to rule on a motion for a preliminary injunction. Mason should not have been saddled with Judges who are to arrogant to state where they derive the legal authority from to issue a "pretrial discovery issue and not an injunction per se." The appellees have no hope under the law to have any of the judgments of the district court contested here affirmed, but rather their hope is placed not on prevailing on the merits, but rather on this Court's willingness to mount highly technical procedural attacks on pro se appeals and this Court's apparent willingness to protect a fellow federal judge. In a word, this case stinks and is riddled with acts of dishonesty and artifice. No litigant should have had to endure the attacks launched by the district court on the Plaintiff's rights.

WHEREFORE, and based upon the foregoing. Mason requests the following:

1. Mason requests that severe sanctions be imposed upon counsel in this matter.
2. Mason requests that this Court publicly rebuke and reprimand the Judges handling of this matter.
3. Mason requests that Donald L. Graham and Frank Lynch, Jr. be permanently barred from presiding over any case for he is a party to.
4. Mason requests that triple costs be taxed against the Defendants.

Respectfully Submitted:
Marcellus M. Mason, Jr.
218 Florida Drive
Sebring, FL 33870
863-385-8501

Dated this 11th day of March, 2002

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CERTIFICATE OF COMPLIANCE

I, Marcellus M. Mason Jr., hereby declare that this brief is in compliance with the volume limitation as set forth in 32(a) (7)(B)(i) and it uses it contains no more than 14,000 words. This brief as reported by the word count function of Microsoft Word 97 contains 13,970 words, excluding the table of contents, table of authorities, and other items not countable towards the 14,000 word limit.

____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via US Mail, postage prepaid, first class on March 11, 2002, to: Allen, Norton & Blue, 324 South Hyde Park Avenue, Suite 350, Tampa, Florida, 33606

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ADDENDUM

Local Rule 7.1.C states:

> Each party opposing a motion shall serve an opposing memorandum of law not later than ten days after service of the motion as computed in the Federal Rules of Civil Procedure. Failure to do so may be deemed sufficient cause for granting the motion by default. The movant may, within five days after service of an opposing memorandum of law, serve a reply memorandum in support of the motion, which reply memorandum shall be strictly limited to rebuttal of matters raised in the memorandum in opposition without reargument of matters covered in the movant's initial memorandum of law. No further or additional memoranda of law shall be filed without prior leave of Court.

Local Rule 26.1.H.2

> *Motions to Compel.* Except for motions grounded upon complete failure to respond to the discovery sought to be compelled or upon assertion of general or blanket objections to discovery, motions to compel discovery in accordance with Rules 33, 34, 36 and 37, Fed.R.Civ.P., shall quote verbatim each interrogatory, request for admission or request for production and the response to which objections is taken followed by (a) the specific objections, (b) the grounds assigned for the objection (if not apparent from the objection), and (c) the reasons assigned as supporting the motion, all of which shall be written in immediate succession to one another. Such objections and grounds shall be addressed to the specific interrogatory or request and may not be made generally.

Rule 4-4.2, R. Regulating Fla. Bar states the following:

> Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party to a controversy with a government agency with a government officials abut the matter. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

§ 99, Restatement Third The Law Governing Lawyers in pertinent part states:

> No general rule prevents a lawyer’s client, either personally or through a nonlawyer agent, from communicating directly with a represented nonclient. Thus, while neither a lawyer nor a lawyer’s investigator or other agent (see Comment be hereto) may contact the represented nonclient, the same bar does not extend to the client of the lawyer or the client’s investigator or other agent.

First Amendment, United States Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.