

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

Bernard McFadden, #199135,)
Plaintiff,)
v.)
Bernard McKie, *Warden of Kirkland CI*;)
Mr. Latter, *Major of KCI*;)
Mr. Jackson, *FNU Major of KCI*;)
Mrs. Reeves, *FNU Sergeant of KCI*;)
Mr. Thomas, *Food Service Director of KCI*;)
Mrs. Marshall, *Food Service Supervisor; in their individual or personal capacities*,)
Defendants.)

C/A No. 3:11-673-JMC
OPINION AND ORDER

This matter is before the court upon the Magistrate Judge's Report and Recommendation [Doc. #9], filed on April 11, 2011, recommending Plaintiff's motion for leave to proceed *in forma pauperis* be denied and his complaint dismissed *without prejudice* unless he pays the full filing fee of three hundred fifty dollars (\$350). The Report and Recommendation sets forth in detail the relevant facts and legal standards on this matter, and the court incorporates the Magistrate Judge's recommendation without recitation.

STANDARD OF REVIEW

The Magistrate Judge's Report and Recommendation is made in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02 for the District of South Carolina. The Magistrate Judge only makes a recommendation to this court; the recommendation has no presumptive weight. The

responsibility to make a final determination remains with this court. *See Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objections are made; the court may accept, reject, or modify, in whole or in part, the Magistrate Judge's recommendation, or it may recommit the matter with instructions. *See* 28 U.S.C. § 636(b)(1).

DISCUSSION

Plaintiff Bernard McFadden is a *pro se* litigant petitioning for relief under 42 U.S.C. § 1983. Plaintiff specifically alleges that Defendants are providing him with inadequate amounts of food, including during a short-term prison lock-down; he further alleges retaliation, collective punishment, and lack of exercise. Plaintiff has had three previous complaints dismissed in this court as frivolous and is thus subject to the “three strikes” rule: he may not proceed with his claim unless he demonstrates he is in immediate physical harm or unless he fully prepays the filing fee. 28 U.S.C. § 1915(g).

Plaintiff timely filed objections to the Magistrate Judge's Report and Recommendation denying the motion to proceed *in forma pauperis*. Objections to the Report and Recommendation must specifically identify the portions of the Report to which objections are made as well as the basis for such objections; failure to file specific objections constitutes a waiver of a party's right to further judicial review, including appellate review, if the recommendation is accepted by the district judge. *See United States v. Schronce*, 727 F.2d 91, 94 & n.4 (4th Cir. 1984).

Here, Plaintiff specifically objects that one of his three previously-dismissed cases was wrongly decided and therefore should not count toward the “three strikes” rule; however, that decision was reviewed and upheld by the United States Court of Appeals for the Fourth Circuit.

McFadden v. Allen, C.A. No. 3:05-0887-RBH-JRM (D.S.C. Nov. 29, 2005), *aff'd*, C.A. No. 05-7952, 193 Fed. Appx. 251, 2006 WL 2226561 (4th Cir. Aug. 4, 2006). Accordingly, the court finds Plaintiff's objection without merit. Therefore, after a thorough review of the Magistrate Judge's Report and Recommendation and the record in this case, the court adopts the Magistrate Judge's Report and Recommendation [Doc. #9] and incorporates it herein.

It is therefore **ORDERED** that Plaintiff's motion to proceed *in forma pauperis* is **DENIED** *without prejudice*. Plaintiff shall have twenty-one (21) days from the date of this order to pay the full three hundred fifty dollar (\$350.00) filing fee or to seek an extension of time to do so. If Plaintiff fails to pay the full three hundred fifty dollar (\$350.00) filing fee or to seek an extension of time to do so, this court shall, by separate order, dismiss Plaintiff's complaint without prejudice and without issuance of service of process.

IT IS SO ORDERED.

s/J. Michelle Childs
United States District Judge

June 6, 2011
Greenville, South Carolina