Belile v. Amo et al

2016 | Cited 0 times | N.D. New York | August 18, 2016

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK _____ JOSEPH J. BELILE,

Plaintiff, Civil Action No. 9:15-CV-0198 (LEK/DEP)

v. TIMOTHY AMO, et al.,

Defendants. _____ APPEARANCES: OF COUNSEL: FOR PLAINTIFF: JOSEPH J. BELILE, Pro Se No. 14-A-3897 Wende Correctional Facility P.O. Box 1187 Alden, NY 12953 FOR DEFENDANTS: HANCOCK ESTABROOK LLP ZACHARY M. MATTISON, ESQ. 1500 AXA Tower I 100 Madison Street Syracuse, NY 13221 DAVID E. PEEBLES CHIEF U.S. MAGISTRATE JUDGE

REPORT AND RECOMMENDATION Pro Se plaintiff Joseph Belile, a prison inmate who is currently being held in the custody of the New York State Department of Corrections and Community Supervision ("DOCCS"), has commenced this action, pursuant to 42 U.S.C. § 1983, claiming that two St. Lawrence County corrections employees violated his civil rights while he was a pretrial detainee confined in the St. Lawrence County Correctional Facility ("SLCCF"). Specifically, plaintiff's complaint alleges that Corrections Sergeant Timothy Amo used excessive force against him, and Corrections Officer Robert Rusaw failed to protect him from that use of force, in violation of plaintiff's constitutional rights. Currently pending before the court is a motion brought by the defendants requesting the entry of summary judgment dismissing plaintiff's claims. In their motion, defendants argue that there is no evidence in the record from which a reasonable factfinder could conclude either that plaintiff was subjected to excessive force or that defendant Rusaw had a duty to intervene but failed to do so. For the reasons set forth below, I recommend that defendants' motion be denied. I. BACKGROUND 1 Plaintiff is a prison inmate currently being held in the custody of the DOCCS at the Wende Correctional Facility located in Alden, New York. Dkt. No. 25. At the times relevant to his complaint, plaintiff was confined at the SLCCF as a pretrial detainee. Dkt. No. 1 at 4. On the morning of May 28, 2014, plaintiff was in the shower room in SLCCF's booking area changing into clothes to be worn during his trial in St. Lawrence County Court. Dkt. No. 1 at 4. While he was changing, defendant Amo instructed plaintiff to "hurry up" so that the facility's first court transport would not leave without him. Id. As plaintiff emerged from the changing area, he noticed that he had missed the first transport from the facility to court. Id. at 5. Plaintiff asked defendant Amo to instruct the transport to wait for him. Id. Defendant Amo, who was on the telephone at the time, responded by directing plaintiff to enter a holding cell located near the shower room where plaintiff had

changed his clothes, and to wait there until the transport returned to take him to court, stating, "'[G]et in 4 cell & close the fucking cell door.'" 2

Id. Plaintiff "took offense to the rude

1 In light of the procedural posture of the case, the following recitation is derived from the record now before the court, with all inferences drawn and ambiguities resolved in plaintiff's favor. Terry v. Ashcroft, 336 F.3d 128, 137 (2d Cir. 2003). 2 According to defendant Amo, upon learning that the transport left without him, plaintiff became "upset" and began to "yell and curse." Dkt. No. 26-7 at 1. Plaintiff and duragatory [sic] manner of Defendant SGT Amo and stated 'dont [sic] talk to me like that you fucking shitbag!'" 3

Id. As instructed, plaintiff entered the holding cell. Dkt. No. 1 at 5. Plaintiff maintains that the door of the holding cell locked behind him. 4

Dkt. No. 26-4 at 10. Defendant Amo, however, states that plaintiff "did not shut the door all the way as to engage the latch." Dkt. No. 26-7 at 2. The parties' versions concerning the events that followed differ markedly. For their part, defendants maintain that plaintiff "continued to yell and curse about missing the initial transport." Dkt. No. 26-7 at 2; see also Dkt. No. 26-9 at 2. Defendant Amo claims that, as a means of "calming the disturbance," he approached plaintiff's cell and gave plaintiff a verbal order "to stop yelling and to sit on the bench[.]" Dkt. No. 26-7 at 2 "As [defendant Amo] approached [the cell], Plaintiff opened the door to confront him," and defendant Amo then "directed [plaintiff] back into [the cell.]" Id; see also Dkt. No. 26-9 at 2. Because plaintiff "stood his ground with an aggressive stance," defendant Amo pushed him back into the cell

denies having yelled or cursed. Dkt. No. 31-1 at 1-2. 3 At his deposition, plaintiff testified that, in response to defendant Amo's instruction to enter the holding cell, he said, "'Fuck you, suck my dick. Don't talk to me like that, you fucking asshole[.]'" Dkt. No. 26-4 at 9. 4 Plaintiff alleges that the holding cell's door is electronic and can only be opened by computer control, which defendant Rusaw was operating. Dkt. No. 1 at 5; Dkt No. 26-4 at 10. and continued to verbally direct him to sit on the bench. Dkt. No. 26-7 at 2. When plaintiff refused to comply with those instructions, defendant Amo "walked toward Plaintiff, who stepped toward[s] him[, and t]hen, again[,] [defendant Amo] pushed Plaintiff towards the bench." Id. As defendant Amo "walked Plaintiff towards the bench . . ., Plaintiff grabbed [defendant Amo's] shirt by the collar with his right hand and grabbed [defendant Amo's] right bicep with his left hand." Id.; see also Dkt. No. 26-9 at 2. According to defendant Amo, plaintiff then "leaned backwards onto the bench, bringing [defendant Amo] down," at which point defendant Amo "struck Plaintiff three (3) times in the face to force him to release his grip[.]" Dkt. No. 26-7 at 2; see also Dkt. No. 26-9 at 2.

Plaintiff, on the other hand, alleges that, once he was inside the holding cell, he "sat down on the bench by the window and quietly waited" for the next transport to the courthouse. Dkt. No. 1 at 5; see

also Dkt. No. 26-4 at 9-10. He alleges that approximately two minutes later, defendant Amo hung up the telephone and ordered defendant Rusaw to open the cell door in a "loud tone." Dkt. No. 1 at 5. Alarmed, plaintiff stood up and faced the cell door as defendant Amo walked toward him. Id. at 6. Once the cell door was "clicked open," defendant Amo "whipped [it] wide open, and immediately started violently shoving plaintiff[, causing] plaintiff [to lose] his footing, and ended up sitting on the bench by the window again." Id. Defendant Amo then stepped on plaintiff's feet and yelled at him saying, "[n]ot while Im [sic] on the phone scumbag[.]" Id.; see also Dkt. No. 26-4 at 11. Plaintiff contends that he then "calmly put his right & left hands, palms flat, out & softly touched" defendant Amo's chest "to try to get space and stop [defendant Amo] from stepping on [his] feet." Dkt. No. 1 at 6; see also Dkt. No. 26-4 at 12. Defendant Amo then punched plaintiff three times with a closed fist in the face "causing a black & swollen eye with a small laceration which bled[.]" Dkt. No. 1 at 6; see also Dkt. No. 26-4 at 12, 13- 14. Plaintiff denies defendants' allegation that he grabbed defendant Amo's shirt or bicep during the altercation. Dkt. No. 26-4 at 12-13.

Although defendants have submitted a video recording of the altercation between defendant Amo and plaintiff, it does not contain any audio of the incident. Dkt. No. 28 (filed by traditional means; not available electronically). In addition, the quality of the recording is such that a viewer cannot discern whether plaintiff opened the cell door or defendant Amo did after defendant Rusaw unlocked it using a computer control. Id. The video recording does, however, show that plaintiff was not seated in the cell, as he alleges, prior to defendant Amo hanging up the telephone and approaching plaintiff's cell. Id. Instead, plaintiff can be seen standing behind the window of the holding cell's door from the time he entered the cell until defendant Amo entered the cell and shoved him backwards. Id. The recording also shows that defendant Rusaw stood in the doorway of the cell during almost the entire incident before entering and assisting defendant Amo in handcuffing plaintiff. Id.; see also Dkt. No. 1 at 6; Dkt. No. 26-7 at 3; Dkt. No. 26-9 at 2. Finally, the video recording also confirms plaintiff's allegation that defendant Rusaw did not "step in and try to stop" defendant Amo's use of force. Dkt. No. 28. The video, however, is not dispositive as it does not clearly show the sequence of events occurring in the portion of the cell where some of the physical altercation occurred.

As a result of the incident, plaintiff suffered a small laceration or bruise under his left eye that measured one-quarter to one-third of an inch in length. Dkt. No. 26-4 at 15. He was treated by the medical staff at the SLCCF and also underwent an x-ray of his face, which did not reveal any fractures. Id. at 14-15. II. PROCEDURAL HISTORY Plaintiff filed his complaint in this action, accompanied by an application for leave to proceed in forma pauperis ("IFP"), on or about February 23, 2015. Dkt. Nos. 1, 2. Named as defendants in that complaint are two SLCCF employees, Sergeant Timothy Amo and Corrections Officer Rusaw. Dkt. No. 1 at 1-2. Senior District Judge Lawrence E. Kahn issued a decision and order on May 15, 2015, pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b), granting plaintiff's IFP request and sua sponte dismissing the portion of plaintiff's excessive force claim that was based upon his allegation that defendants applied his handcuffs too tightly after the altercation with defendant Amo, but otherwise permitting the action to go forward. Dkt. No. 6. On

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February 8, 2016, following the close of discovery, defendants moved for summary judgment seeking dismissal of plaintiff's complaint on the ground that the record evidence does not reveal the existence of a genuine dispute of material fact with respect to whether defendant Amo used force maliciously and sadistically against plaintiff, or defendant Rusaw failed to protect Belile from harm. See generally Dkt. No. 26-10. Plaintiff has since responded in opposition to defendants' motion, Dkt. No. 31, and defendants have filed a reply brief in further support of the motion. Dkt. No. 33. Defendants' motion, which is now fully briefed, has been referred to me for the issuance of a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Northern District of New York Local Rule 72.3(c). See also Fed. R. Civ. P. 72(b). III. DISCUSSION A. Summary Judgment Standard Summary judgment motions are governed by Rule 56 of the Federal Rules of Civil Procedure. Under that provision, the entry of summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc., 391 F.3d 77, 82-83 (2d Cir. 2004). A fact is "material" for purposes of this inquiry if it "might affect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248; see also Jeffreys v. City of N.Y., 426 F.3d 549, 553 (2d Cir. 2005). A material fact is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. A party moving for summary judgment bears an initial burden of demonstrating that there is no genuine dispute of material fact to be decided with respect to any essential element of the claim in issue; the failure to meet this burden warrants denial of the motion. Anderson, 477 U.S. at 250 n.4; Sec. Ins. Co., 391 F.3d at 83. In the event this initial burden is met, the opposing party must show, through affidavits or otherwise, that there is a material dispute of fact for trial. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 250.

When deciding a summary judgment motion, a court must resolve any ambiguities, and draw all inferences, in a light most favorable to the non-moving party. Anderson, 477 U.S. at 255; Jeffreys, 426 F.3d at 553; Wright v. Coughlin, 132 F.3d 133, 137-38 (2d Cir. 1998). The entry of summary judgment is justified only in the event of a finding that no reasonable trier of fact could rule in favor of the non-moving party. Bldg. Trades Employers' Educ. Ass'n v. McGowan, 311 F.3d 501, 507-08 (2d Cir. 2002); see also Anderson, 477 U.S. at 250 (finding summary judgment appropriate only when "there can be but one reasonable conclusion as to the verdict"). B. Excessive Force Claim Asserted Against Defendant Amo As a pretrial detainee, plaintiff's excessive force claim is properly analyzed under the due process clause of the Fourteenth Amendment. Caiozzo v. Koreman, 581 F.3d 63, 69 (2d Cir. 2009); see also Flake v. Peck, No. 12-CV-0517, 2014 WL 1289582, at *12 (N.D.N.Y. Mar. 31, 2014) (D'Agostino, J., adopting report and recommendation by Baxter, M.J.) ("The right of a pretrial detainee to be free from excessive force amounting to punishment is protected by the Due Process Clause of the Fourteenth Amendment, not the Eighth Amendment, which only relates to convicted prisoners." (emphasis omitted)). The legal standard governing plaintiff's Fourteenth Amendment claim, however, is the same as the one applicable to a convicted inmate's Eighth Amendment excessive force claim. United States v. Walsh, 194 F.3d 37, 48 (2d Cir. 1999). The Eighth Amendment

prohibits prison conditions that are "incompatible with 'the evolving standards of decency that mark the progress of a maturing society[,]' or 'involve[s] the unnecessary and wanton infliction of pain[.]'" Estelle v. Gamble, 429 U.S. 97, 102-03 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958) and Gregg v. Georgia, 428 U.S. 153, 169-73 (1976) (citations omitted)). The Eighth Amendment is violated by an "unnecessary and wanton infliction of pain." Whitley v. Albers, 475 U.S. 312, 319 (1986) (quotation marks omitted); Griffin v. Crippen, 193 F.3d 89, 91 (2d Cir. 1999). "A claim of cruel and unusual punishment in violation of the Eighth Amendment has two components B one subjective, focusing on the defendant's motive for his conduct, and the other objective, focusing on the conduct=s effect." Wright v. Goord, 554 F.3d 255, 268 (2d Cir. 2009) (citing Hudson v. McMillian, 503 U.S. 1, 7-8 (1992); Blyden v. Mancusi, 186 F.3d 252, 262 (2d Cir. 1999)).

To satisfy the subjective requirement in an excessive force case, the plaintiff must demonstrate that "the defendant had the necessary level of culpability, shown by actions characterized by wantonness in light of the particular circumstances surrounding the challenged conduct." Wright, 554 F.3d at 268 (quotation marks omitted). This inquiry turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Hudson, 503 U.S. at 6 (quotation marks omitted); accord, Blyden, 186 F.3d at 262. The Supreme Court has emphasized that the nature of the force applied is the "core judicial inquiry" in excessive force cases B not "whether a certain quantum of injury was sustained." Wilkins v. Gaddy, 559 U.S. 34, 37 (2010).

When considering the subjective element of the governing Eighth Amendment test, a court must be mindful that the absence of serious injury, though relevant, does not necessarily negate a finding of wantonness. Wilkins, 559 U.S. at 37; Hudson, 503 U.S. at 9. Conversely, courts must bear in mind that "[n]ot every push or shove, even if it later may seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." Romano v. Howarth, 998 F.2d 101, 105 (2d Cir. 1993) (quotation marks omitted); see also Griffin, 193 F.3d at 91. "The Eighth Amendment's prohibition of cruel and unusual punishments necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind." Hudson, 503 U.S. at 9-10 (quotation marks omitted). "The objective component [of the excessive force analysis] . . . focuses on the harm done, in light of 'contemporary standards of decency.'" Wright, 554 F.3d at 268 (quoting Hudson, 503 U.S. at 8); see also Blyden, 186 F.3d at 263 (finding the analysis of the objective element "context specific, turning upon 'contemporary standards of decency'"). In assessing this component, a court must ask whether the alleged wrongdoing is objectively harmful enough to establish a constitutional violation. Wilson v. Seiter, 501 U.S. 294, 303 (1991); accord Hudson, 503 U.S. at 8; see also Wright, 554 F.3d at 268. "But when prison officials use force to cause harm maliciously and sadistically, 'contemporary standards of decency always are violated. This is true whether or not significant injury is evident.'" Wright, 554 F.3d at 268-69 (quoting Hudson, 503 U.S. at 9) (alterations omitted)). The extent of an inmate's injury is but one of the factors to be considered in determining whether a prison official's use of force was "unnecessary and wanton" because "injury and force . . . are imperfectly correlated[.]" Wilkins, 559

U.S. at 38. In addition, courts consider the need for force, whether the force was proportionate to the need, the threat reasonably perceived by the officials, and what, if anything, the officials did to limit their use of force. Hudson, 503 U.S. at 7; Whitley, 475 U.S. at 321; Romano, 998 F.2d at 105. The record evidence now before the court clearly demonstrates the existence of genuine disputes of material fact with respect to whether defendant Amo used force against plaintiff maliciously and sadistically, or in an effort to protect himself or restore order. Plaintiff contends that he was sitting quietly when defendant Amo approached his holding cell, and did nothing to resist or antagonize Amo, other than to gently place his hands on the sergeant's chest after being pushed twice, and while defendant Amo stood on his feet. Dkt. No. 26-4 at 12-13; Dkt. No. 31 at 4. In contrast, defendants maintain that plaintiff created a disturbance by yelling after he learned he had missed the first transport to the courthouse, and continuing to yell after he entered the holding cell, and that the plaintiff initiated the confrontation through his aggressive actions. Dkt. No. 26-7 at 2; Dkt. No. 26-9 at 1-2.

According to defendant Amo, "[t]he only force that anyone used on Plaintiff during this entire incident were the three strikes that [he] utilized to try to force Plaintiff to release his grip[.]" Dkt. No. 26-7 at 3. Having reviewed the video recording of the incident, it is clear to me that plaintiff went into the holding cell and did not, as he contends, sit on the bench inside the cell, but instead remained standing in front of the cell's window. Dkt. No. 28. Without audio recording, however, I am unable to discern whether plaintiff was talking – or yelling, as defendants allege – while inside the cell. Id. The recording shows that defendant Amo entered the cell approximately thirty seconds after the plaintiff and, upon entering, pushed plaintiff toward the back of the cell. Id. In light of the dispute between the parties as to whether plaintiff was causing a disturbance, and the lack of audio recording, the video recording is susceptible of more than one reasonable interpretation regarding whether defendant Amo acted in good faith to restore order under the circumstances, and therefore raises a question of fact more appropriately resolved by a factfinder after trial. See Mack v. Howard, No. 11-CV-0303, 2014 WL 2708468, at *12 (W.D.N.Y. June 16, 2014) (finding that whether the video of the defendant showed malicious intent during use of force on the plaintiff was a question of fact). On a motion for summary judgment, where the record evidence could reasonably permit a rational factfinder to find that corrections officers used force maliciously and sadistically, dismissal of an excessive force claim is inappropriate. See Wright, 554 F.3d at 269 (reversing summary dismissal the plaintiff's complaint, though suggesting that prisoner's evidence of an Eighth Amendment violation was "thin" as to his claim that a corrections officer struck him in the head, neck, shoulder, wrist, abdomen, and groin, where the "medical records after the . . . incident with [that officer] indicated only a slight injury") (citing Scott v. Coughlin, 344 F.3d 282, 291 (2d Cir. 2003)). It is worth noting, moreover, that while there is no apparent dispute regarding the nature of plaintiff's injuries, which include only a small laceration or bruise under his left eye and no broken bones to his face, the Second Circuit has counselled that, in the context of an excessive force claim, it is "not whether a certain quantum of injury was sustained, but rather 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'" Harris v. Miller, 818 F.3d 49, 65 (2d Cir. 2016) (quoting Wilkins, 559 U.S. at 37 (2010)). In this case, plaintiff maintains that,

in response to him yelling at defendant Amo for showing alleged disrespect, defendant Amo stormed into the holding cell, pushed him, stepped on his feet, and punched him multiple times. See, e.g., Dkt. No. 1 at 5-6. If plaintiff's version of the incident is credited, a reasonable factfinder could conclude that defendant Amo maliciously used force against plaintiff. Accordingly, at this juncture, plaintiff's seemingly de minimis injury is only marginally relevant and only one factor to be considered. Having concluded that the existence of material issues of fact exist, I recommend that defendants' motion be denied as it relates to plaintiff's excessive force claim. C. Failure to Intervene Claim Asserted Against Defendant Rusaw Plaintiff has also asserted a failure to intervene claim against defendant Rusaw based on that officer's alleged failure to protect plaintiff from defendant Amo's use of force. Dkt. No. 1 at 7. In support of their motion, defendants argue that the encounter between the plaintiff and defendant Amo occurred so rapidly that defendant Rusaw did not have a realistic opportunity to intercede. Dkt. No. 26-10 at 17-18.

"[A]ll law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence." Anderson v. Branen, 17 F.3d 552, 557 (2d Cir. 1994); see also Figueroa v. Mazza, --- F.3d ----, No. 14- 4116, 2016 WL 3126772, at *11 (2d Cir. June 3, 2016). To establish liability on the part of a defendant for violating this duty and failing to protect an inmate from harm at the hands of fellow corrections officers, "the plaintiff must adduce evidence establishing that the officer had (1) a realistic opportunity to intervene and prevent the harm, (2) a reasonable person in the officer's position would know that the victim's constitutional rights were being violated, and (3) that officer [did] not take reasonable steps to intervene." Henry v. Dinelle, No. 10-CV-0456, 2011 WL 5975027, at *4 (N.D.N.Y. Nov. 29, 2011) (Suddaby, J.) (citing Jean-Laurent v. Wilkinson, 540 F. Supp. 2d 501, 512 (S.D.N.Y. 2008)); see also Farmer, 511 U.S. at 842 ("[I]t is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.").

A plaintiff asserting a failure to protect claim of the nature now at issue must prove that the defendant actually knew of and disregarded an excessive risk of harm to his health and safety. Hayes v. N.Y. City Dep't of Corrs., 84 F.3d 614, 620 (2d Cir. 1996). This "reckless disregard" to a plaintiff's health and safety can be proven by evidence establishing "a pervasive risk of harm to inmates from other[s] . . . and a failure by prison officials to reasonably respond to that risk." Knowles v. N.Y. City Dep't of Corrs., 904 F. Supp. 217, 222 (S.D.N.Y. 1995) (quotation marks omitted).

Defendants' motion is focused upon whether defendant Rusaw had a realistic opportunity to intervene and protect the plaintiff from harm. In this regard, the Second Circuit recently reiterated that the inquiry will turn on several factors, including the duration of the assault, the number of officers present, the relative placement of the officers, the environment in which the officers acted, the nature of the assault, "and a dozen other considerations." Figueroa, 2016 WL 3126772, at *13. While the duration of the assault "will always be relevant and will frequently assume great importance," the Second Circuit has rejected attempts by district courts to engraft a "hard-and-fast temporal cutoff" onto the test for determining failure to intervene claims. Id. In this case, the record

evidence reflects that defendant Rusaw was present for and witnessed the encounter between defendant Amo and plaintiff. Specifically, plaintiff alleges that defendant Rusaw opened the door to the holding cell for defendant Amo using computer controls, Dkt. No. 1 at 7, and defendant Rusaw acknowledges in his declaration that he witnessed defendant Amo approach plaintiff's cell while he was seated approximately fifteen feet away. Dkt. No. 26-9 at 2-3. In addition, the video recording shows that from the time plaintiff emerged from the shower area, where he was changing his clothes, until the time the defendants exited the holding cell after plaintiff was handcuffed, approximately two minutes elapsed. Dkt. No. 28. In those two minutes, defendant Amo is seen inside plaintiff's cell for approximately one minute, and defendant Rusaw is shown to have arrived at the doorway of the cell only ten seconds behind defendant Amo. Id. The recording also shows that defendant Amo continued to use force against plaintiff after defendant Rusaw arrived at the cell. Id. While I am mindful that the duration of an assault is always relevant in the context of a failure to intervene claim, as noted above, the Second Circuit has rejected the idea that these claims are dictated by "a hard-and-fast temporal cutoff[.]" Figueroa, 2016 WL 3126772, at *13. Instead, courts considering a failure to intervene claim must "keep[] in mind that circumstances other than an assault's duration might bear significantly on an officer's ability to stop it from happening." Id.

In this instance, there is evidence suggesting that defendant Rusaw controlled the operation of plaintiff's cell door, was in close proximity to the cell at the time defendant Amo menacingly approached the cell, and was located either in the doorway of or inside the cell during the time that defendant Amo used force against plaintiff. Viewing all of the evidence in the light most favorable to plaintiff, I find that a reasonable factfinder could conclude that defendant Rusaw had, but failed to avail himself of, a realistic opportunity to intervene and protect plaintiff from defendant Amo's use of force. See Figueroa, 2016 WL 3126772, at * 13 (reversing the district court's dismissal of the plaintiff's failure to intervene claim where the district court concluded, as a matter of law, that "'assaults that take place in less than thirty seconds do not offer police sufficient time to intercede in order to prevent the assault'" (alterations omitted)). Accordingly, I recommend that defendants' motion be denied as to the claim asserted by the plaintiff against defendant Rusaw. IV. SUMMARY AND RECOMMENDATION Having reviewed the record evidence, including a video recording of the force used against plaintiff by defendant Amo, I find that plaintiff's excessive force claim, and similarly his claim of failure to intervene, cannot be determined on a motion for summary judgment, in light of the existence of disputed issues of fact that can only be resolved by a factfinder after a trial. Accordingly, it is hereby respectfully RECOMMENDED that defendants' motion for summary judgment (Dkt. No. 26) be DENIED. NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections must be filed with the clerk of the court within FOURTEEN days of service of this report. FAILURE TO SO OBJECT TO THIS REPORT WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72; Roldan v. Racette, 984 F.2d 85 (2d Cir. 1993). It is hereby ORDERED that the clerk of the court serve a copy of this report and recommendation upon the parties in accordance with this court's local rules. Dated: August 18, 2016 Syracuse, New York Footnotes *

The Clerk of Court is directed to amend the official caption to conform with the caption above. 1

We view the facts in the light most favorable to Samuel. See Runner v. N.Y. Stock Exch., Inc., 568 F.3d 383, 386 (2d Cir. 2009). 2

References to "App." are to plaintiff-appellant's appendix. References to "SPA" are to the special appendix. 3

Police had also ascertained that the photos had been taken in the restroom of a McDonald's restaurant. App. 264-65. 4

In April 2010, a judge of the Kings County Family Court, having learned that Saenz was taking explicit photographs of her son for this purpose, had directed that she stop the practice lest she be "prosecuted for child pornography" and lose custody of the child. App. 150-54. But this was not known to the officers at the time of Samuel's arrest and was not relied on by the District Court in ruling on defendants' Rule 50 motion. Figueroa v. Mazza, 59 F.Supp.3d 481, 491 (E.D.N.Y. 2014). 5

With one exception, discussed below in note 6, defendants do not contest that all relevant officers had knowledge of Samuel's complaint and Saenz's report at all relevant times. See Defs.' Br. 33.

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Though defendants suggest otherwise, see Defs.' Br. 15; App. 309, it appears that, at the time Nagrowski interviewed Beatrice, he was aware that Samuel had lodged a complaint against her, see App. 998. 7

Title 42 of the United States Code, section 1983, creates a private right of action for damages against a person who, acting under color of state law, deprives another of a right secured by the laws of the United States. Rehberg v. Paulk, ––– U.S. ––––, 132 S.Ct. 1497, 1501, 182 L.Ed.2d 593 (2012) . It provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress .... 42 U.S.C. § 1983. 8

We pause to note that, although the standard applied is the same in each case, Rule 50 motions and summary-judgment motions are decided on different evidentiary records. Because "summary judgment motions are usually made before trial," they are "decided on documentary evidence." Anderson, 477 U.S. at 251, 106 S.Ct. 2505 (internal quotation marks omitted). It follows from the

purpose of the summary-judgment device—to determine whether there exists a genuine issue of material fact for trial—that any evidence considered on summary judgment must be reducible to admissible form. See Fed. R. Civ. P. 56(c)(2); Santos v. Murdock, 243 F.3d 681, 683 (2d Cir. 2001). By examining such documentary evidence as could be admitted at trial, a court adjudicating a summary-judgment motion determines whether any reasonable juror could, if presented with that evidence at trial, find for the nonmovant. The Rule 50 inquiry differs. Because "[Rule 50] motions are made at trial," they are decided not on what evidence could have been admitted, but on "the evidence that has been admitted." Anderson, 477 U.S. at 251, 106 S.Ct. 2505 (emphasis supplied) (internal quotation marks omitted); see Rothstein v. Carriere, 373 F.3d 275, 284 (2d Cir. 2004) ("[O]nce a trial has occurred, the focus is on the evidence that was actually admitted at trial, not on the earlier summary judgment record."). What we care about at the Rule 50 stage is not whether the nonmovant has managed to collect evidence sufficient to support his cause, but whether he has actually put that evidence before the jury charged with deciding the dispute. Evidence kept hidden under a bushel, never brought out to enlighten the factfinder, does not figure in the calculus. For that reason, we are unable to endorse our dissenting colleague's view that "[the record that] should properly be considered on the issue of arguable probable cause [as to Samuel's false arrest claims] ... includes all relevant evidence in the district court's record, not just the evidence admitted at trial." Dissenting Op. at 113. Samuel brought his false arrest claims to trial and, at trial, offered evidence to support them. In considering defendants' Rule 50 motion as to those claims, the District Court properly confined its review to the trial record, see Figueroa, 59 F.Supp.3d at 486– 87, and we must do the same in considering the claims on appeal. Accordingly, our analysis of Samuel's false arrest claims does not take account of evidence—such as a series of written reports from a Detective Hawkins concerning Saenz's mid-June complaint to police—that was never put before the jury, but on which our dissenting colleague thinks it appropriate to rely. See Dissenting Op. at 113–14. 9

In light of these conclusions, we need not determine whether a reasonable officer could have determined that, notwithstanding Romero's statement that she had seen Saenz and her child on June 30, 2010, there was probable cause to believe that the boy had been kidnapped. 10

We discuss below whether Saenz's explanation was indeed "innocent" or must necessarily have been viewed as such by a reasonable officer. 11

We will assume that if a reasonable officer were to view these photos knowing why they were produced, he would be forced to conclude that they are not pornographic, see Horner, 752 N.Y.S.2d at 149 (reviewing court must consider "whether the visual depiction is intended or designed to elicit a sexual response in the viewer" (internal quotation marks omitted)), and that, accordingly, an officer required to accept Saenz's explanation of the photos' provenance could not reasonably have determined that § 263.15 or § 263.16 had been violated. 12

These claims pertain to the conduct of defendants in apprehending Samuel within his mother's apartment and escorting him outside. They do not relate to the incident during which Samuel

allegedly was punched while sitting in the police cruiser; the officer who is said to have perpetrated that assault has never been identified. 13

A lawful arrest is not an assault or battery under New York law, provided the force used is reasonable. See Cunningham v. United States, 472 F.Supp.2d 366, 381 (E.D.N.Y. 2007) (collecting New York cases). 14

Failla and Chan do not argue that, if a constitutional violation indeed occurred, they are entitled to qualified immunity. 15

A party may not create an issue of fact that will defeat summary judgment by submitting an affidavit that contradicts the party's prior deposition testimony, but it is permissible to clarify by affidavit ambiguous or incomplete deposition testimony.

Maxwell v. City of New York, 380 F.3d 106, 109 (2d Cir. 2004). Nothing in Samuel's affidavit contradicts the testimony

he gave at his deposition. 16

As is true of Samuel's failure-to-intervene claims, defendants do not argue that they are entitled to qualified immunity on the unlawful-entry claims if their conduct violated the Fourth Amendment. 17

The cases do not define the phrase. In Olson, for instance, the defendant had slept in the searched dwelling the night prior to the search (which occurred late in the afternoon). Olson, 495 U.S. at 93–94, 97 n. 6, 110 S.Ct. 1684 . But for "several days" before that, he had been sleeping someplace else, id. at 97 n. 6, 110 S.Ct. 1684, and the Court did not discuss whether he had ever slept in the relevant dwelling before or had planned to sleep there the night after the search occurred. (The facts suggested that the defendant had not planned to sleep in the dwelling a second night: the police had been told that he planned to "leave town." Id. at 93, 110 S.Ct. 1684.) The Supreme Court nevertheless characterized the defendant as an "overnight guest" and held that he was entitled to claim the protection of the Fourth Amendment in his hosts' home. We need not determine what this says about whether Samuel—who often stayed in his mother's apartment, but might not have stayed there the night before his arrest and might not have planned to stay there the night of his arrest—was an "overnight guest." Nor do we think such an exercise would be particularly useful. As discussed below, a person's status as an "overnight guest" matters because sleeping in a dwelling says much about one's connection with the property and one's expectations while present there; the law can take account of these considerations without drawing hard lines concerning what kind of guest counts as an "overnight" one. 18

Defendants also argue that, even if Samuel enjoyed a legitimate expectation of privacy in his mother's apartment, this portion of the judgment can stand because the trial record shows that

Samuel's mother consented to defendants' entry. We disagree. The officers so testified, but Samuel testified that his mother did nothing more than open the door a foot or two before Samuel stepped in front of her. App. 627-28. If Samuel is believed, his mother did not consent to defendants' entering her apartment. See United States v. Vasquez, 638 F.2d 507, 527 (2d Cir. 1980) (concluding that merely opening a door when officers knock is not consent). 19

Samuel does not appear to have sought additional discovery after the new documents were produced. See Pl.'s Br. 39-40; Pl.'s Reply Br. 47-50. End of Document © 2016 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1

Judge D'Agostino dismissed the complaint in its entirety as against defendants Trip and Breeyear and as against the Washington County Sheriff's Department. (Dkt. No. 7 at 19–20). She ordered the Clerk to replace the Washington County Sheriff's Department with Washington County in the caption. (Dkt. No. 7 at 6 n. 3). 2

Although Judge D'Agostino dismissed plaintiff's other claims without prejudice and with the opportunity to amend, (Dkt. No. 7 at 7 n. 5), plaintiff did not attempt to file an amended complaint. Rather, in his response to defendants' motion for summary judgment, plaintiff simply added the old claims back into his argument. This is not sufficient to revive the dismissed claims. 3

At his deposition, plaintiff was asked to identify which defendants were associated with each of plaintiff's remaining claims. With respect to excessive force, plaintiff named defendants Elliott, Little, M. Minor, White, Tripp, and VanArnum. (Pl.'s Dep. at 93, 95–97, 99). Although the complaint is clear that defendant Fisher participated in one of the incidents, at his deposition, plaintiff testified that he was not too sure why he sued Fisher. (Id. at 100). 4

The court will cite to the complaint by its CM/ECF page number, together with the number that plaintiff has assigned to the paragraph on the page. The reason for the double citation is that plaintiff has numbered each claim beginning with paragraph 1. Thus, there are multiple paragraphs with the same number. 5

For ease of identification, the court will refer to the cells with the letter identifying the “Pod” and then the number of the cell (i.e. “D–8” refers to cell number 8 in D–Pod). 6

The citations are to the original page numbers at the top right-hand corner of the deposition pages. The pages are not all numbered consecutively because defendants filed only excerpts of the deposition. 7

This detail was not in the complaint. 8

Plaintiff did not mention this detail either in his complaint or during the deposition. According to the plaintiff, his reason for wanting to stay in cell D–8 was that D–11 was too cold. 9

Plaintiff did not mention the knee on his chest during the deposition. 10

Defendant Elliott also filed a contemporaneous report regarding the incident. (Def. s' Ex. C; Dkt. No. 34–4 at 11). In that report, defendant Elliott also noted that plaintiff had been told that his stay in D–8 would only be temporary, and that he would be moved back to D–11 after other inmates had been moved out. (Id .) This is consistent with the statement in the complaint that plaintiff was told that he was initially moved to D–8 "to make room for Protective Custody Inmates." (Compl. at 19, ¶ 1). 11

Defendant Jansson was the third officer who arrived at the law library and was involved in carrying plaintiff back to his cell. (Jansson Aff. ¶ 3) (Dkt. No. 34–22). The complaint does not mention this defendant in its description of the law library incident. 12

During his deposition, plaintiff testified that when Officer Peck refused to allow plaintiff to borrow the JLM, plaintiff left Peck's office and went back to sit down at the computer to look up more cases, and it was then that Peck came out of his office, and the other officers arrived to help take plaintiff back to his cell. (Pl.'s Dep. at 54). The exact details of the

incident regarding who showed up and when are not material. All parties agree that plaintiff argued about going back to

his cell, and defendant Little called the rover guards to assist her in getting plaintiff back to his unit. 13

Plaintiff never mentions anyone putting ankle restraints on him, and there is no indication that he had ankle restraints on prior to the arrival of the other officers. 14

During his deposition, after denying that he called Sergeant Little a "fat slob" and Officer Minor a "bitch with a badge," plaintiff admitted that he called Officer White a "faggot" and an "A hole." (Pl.'s Dep. at 57–58). 15

In the complaint, plaintiff states that about 10–15 minutes after he was locked in, Officers Minor, White and Little came to his cell with a nurse so that plaintiff could be examined. (Compl.¶ 15). 16

Defendant "M." Minor is a female officer (Michele). 17

This defendant "A. Rivers" has submitted an affidavit explaining that her name is now "Schuyler," and that Rivers is her maiden name. (Schuyler Aff. ¶ 1) (Dkt. No. 34–29). 18

Plaintiff testified at his deposition that the defendants associated with the unconstitutional conditions of confinement were: Officers Jackson and Sergeant Lascar. (Pl.'s Dep. at 101, 104). His complaint indicates that he was denied the shower by Officer Rivers/Schuyler and Sergeant VanArnum. (Compl. at 28, ¶ 8 (top of page)). The complaint also alleges that the individuals responsible for denying him extra blankets were: Officers Jackson, R. Minor, M. Minor; A. Rivers, and Sergeants Dougherty, Jamieson (plaintiff misspelled this defendant's name, but the court will refer to him by the correct spelling—"Jamieson"), and Lascar. 19

The court notes that any personal property and access to court claims were dismissed by Judge D'Agostino. 20

Plaintiff subsequently filed a grievance complaining about the deprivation of his property during this incident. 21

The complaint only alleges the denial of a shower on one date by two defendants. (Compl. at 28, ¶ 1 (top of page)). 22

This is a different "Minor" that the defendant discussed above. M. Minor is Officer Michele Minor, and R. Minor is Officer Richard Minor. 23

Plaintiff stated that his shoulder was lowered in order to maneuver around defendant VanArnum, due to the size of the cell, however, the lowering of plaintiff's shoulder could also have been interpreted as an aggressive posture. 24

Defendant Gene McKenna, the WCJ administrator has submitted an affidavit, in which he states that plaintiff spent most of his time in SITU while incarcerated in WCJ. (McKenna Aff. ¶ 5) (Dkt. No. 34–25). Defendant McKenna indicates that the disciplinary infractions causing plaintiff's confinement to SITU included numerous counts of disobeying staff; numerous counts of insolence toward corrections officers; numerous counts of disruptive conduct; numerous counts of making threats toward others; and numerous counts of engaging in violence or threats of violence. (Id.) Plaintiff also admitted that he had many disciplinary problems, and that he was ultimately transferred to Mid–State SITU because he had too many disciplinary tickets. (Pl.'s Dep. at 105). 25

This is assuming that plaintiff only bumped defendant VanArnum once as plaintiff claims. The court is making no such finding as all the evidence generated contemporaneously to the incident supports the defendants allegation that plaintiff bumped defendant VanArnum twice. 26

Defendant VanArnum's warning to plaintiff was clearly an effort to avoid the use of any force at all. 27

The medical records indicate that plaintiff complained of "recurrent back pain" when he was

admitted to the facility in July of 2010, contrary to plaintiff's allegation that he never had back pain before the November 10, 2010 incident. (Def.s' Ex. M at 8, 15) (Dkt. No. 34–14). 28

During his deposition, he stated that he "inadvertently" hit the stool. (Pl.'s Dep. at 83). 29

None of the defendants recall plaintiff hitting the chair on the way to the floor, and defendant VanArnum states that he did not put his knee on plaintiff's chest. The court is not making any factual finding, nor do I need to make any factual finding regarding the details of the fall. 30

Whether defendants Peck was incorrect about the JLM or whether the defendants were incorrect in forcing plaintiff to go back to his cell is not relevant. An inmate is required to follow officers' orders regardless of whether the inmate may believe that he is correct and the officers are wrong. 31

During his deposition, plaintiff stated that the "dragging and carrying was the force used," but it was not "that long," only 3–5 feet, and he was not injured by the dragging. (Pl.'s Dep. at 80–81). Plaintiff also admitted that the defendants "took" plaintiff's actions "as me just trying to like sit down or lay down. Like come on." (Id. at 56). He also stated that, while he was not struggling or resisting, he was cursing at the defendants and telling them to "get the F off me." (Id.) 32

The court recognized that less serious injuries could support a claim of excessive force where the force used was excessive and gratuitous. Vazquez, 2013 WL 5408858, at *4 (citing Lemmo v. McKoy, No. 08–CV–4264, 2011 WL 843974, at *5 (E.D.N.Y. March 8, 2011) (twisting of plaintiff's thumbs was entirely gratuitous); Davenport v. County of Suffolk, No. 99–CV–3088, 2007 WL 608125, at *11 (E.D.N.Y. Feb.23, 2007) (denying summary judgment where

defendant allegedly hit plaintiff's head against the car intentionally and unnecessarily); Wilkins v. Gaddy, 559 U.S. 34,

130 S.Ct. 1175, 175 L.Ed.2d 995 (2010) (an inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury). 33

The court notes that both plaintiff and defendant White state that White's left forearm was against plaintiff's head. While plaintiff alleges that White gave him a stiff little punch with his right hand, it is clear that defendant White was assisting the other officers in the removal of the handcuffs. The hand cuffs would probably have been at the level of plaintiff's low back. Thus, it is possible that plaintiff felt pressure in that area while defendants were trying to remove the handcuffs so that plaintiff could be locked back in his cell. Defendant Jansson made a statement in connection with the disciplinary charges against plaintiff resulting from this incident. Defendant Jansson states that he was the officer who began to take the restraints off plaintiff, but that plaintiff was "resisting," and plaintiff was "restrained" by officers White and Minor, while defendant Jansson finished removing

his restraints. (Def.s' Ex. B at 40). Sergeant Little and Officer White also made a statement in connection with the disciplinary charges. (Id. at 41, 42). The defendants all noted in their statements that plaintiff was verbally abusive during this incident and told defendant White that plaintiff would " 'fuck him up.' " (See id. at 41, 44). 34

Finally, defendant McKenna points out that when plaintiff appealed the grievance relating to the law library incident, the New York State Commission of Correction Citizens Policy and Complaint Review Council ("CPCRC") viewed video evidence of the incident, but found that it did not substantiate plaintiff's claims. The CPCRC requested the video taped evidence. (Def. s' Ex. D at 9 (letter from CPCRC requesting additional evidence regarding the incident)). That video taped evidence has not been found. (See McKenna Aff. ¶ 7; Def.'s Ex. D at 21 (affirmance of denial of grievance), 22 (letter from counsel for the Commission on Correction, stating that the Commission did receive copies of the video footage, but "[u]nfortunately, said copies have since been lost or misplaced and are no longer maintained in the Commission's files."). The absence of the video footage does not change this court's findings because plaintiff's allegation of excessive force is contradicted by all the evidence, including his own statements. The court also notes that in McKinney v. Dzurenda, No. 13–1901, 2014 WL 642572, at *1 (2d Cir. Feb.20, 2014) , the Second Circuit reaffirmed the holding that when opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no jury could possibly believe it, the court should not adopt that version for purposes of ruling on a motion for summary judgment. 35

The court would point out that plaintiff only alleges that defendant White used any force on him during the law library incident. Defendant Peck did not leave the law library and was not present for the alleged "punch." Defendant Little states that she did not see White strike plaintiff, and plaintiff testified that M. Minor never used any force during the incident. (Pl.'s Dep. at 94). Plaintiff never mentioned the third rover. In order for any officers present at the use of force to be held liable for "failure to intervene," they would have to have had the opportunity to stop the unconstitutional conduct. If at worst plaintiff alleges one "little" punch, none of the other officers would have had the opportunity to stop that conduct because it was over as soon as it happened. Thus, even if the case were to proceed on the law library incident, it would proceed only as against defendant White. 36

Defendants have also filed a "Cell Movement Log," showing the dates that plaintiff was housed in a particular cell for the entire time that plaintiff was incarcerated at WCJ. (Def.s' Ex. H at 9). Plaintiff was only housed in D–11 for approximately one month. (Id.) 37

The investigator also found that plaintiff did not like D–11 because it was further away from the television and from other inmates. (Def. s' Ex. E at 5). 38

Specifically plaintiff stated: "I asks [sic] every inmate in D pod is they [sic] cell cold [sic] they tell me no and always tell me its [sic] cold in your cell I can feel it over here (meaning) out side of my cell...." (Def.s' Ex. F at 2). 39

Apparently the CPCRC was not aware that plaintiff was given an extra blanket long before the appeal was sent on January 3, 2011. Officer Jamieson stated that plaintiff was given a blanket on December 15, 2010, even before he filed the grievance on December 16, 2010. (Def.s' Ex. H at 13). 40

Plaintiff's belongings were presumably moved while he was not in his cell in order to avoid another incident like the one on November 10, 2010. 41

In his grievance, plaintiff alleged that he asked "every inmate in D Pod." (Def. s' Ex. F at 2). 42

Defendant Jamieson states that "all WCJ housing units are controlled by central thermostat, which is regularly monitored by maintenance and set and maintained at temperatures prescribed by New York state law." (Jamieson Aff. ¶ 6). Thus, it is highly unlikely that only one cell on the unit was so unbearably cold. 43

Defendants do not concede that plaintiff's water was turned off for an extended period of time. As defendant Jamieson stated, he did not recall plaintiff asking to have his water turned on December 18, nor was defendant Jamieson aware that the water was off because the jail staff did not have access to turn the drinking water off, only the toilet water. (Def.s'

Ex. H at 13). In defendant Jamieson's affidavit, he states that as a result of plaintiff's repeated attempts to flood his unit,

his water was turned off for short periods of time. During those short intervals, plaintiff could request to have his water temporarily turned back on by making this request to the corrections officer who was making rounds to allow him to use the facilities in his cell. (Jamieson Aff. ¶ 7). Defendant Dougherty's affidavit also states that plaintiff's water was never turned off for more than a few hours at a time, and was turned back on so that plaintiff could "use the toilet and/or drinking fountain under direct supervision." (Dougherty Aff. ¶ 7). 44

In any event, the only defendants that were involved in the plaintiff's challenged conditions of confinement were defendants Lascar; Jamieson; and Jackson. 45

Plaintiff indicated in the grievance that the denial of the shower happened on December 15, but that he was not given the grievance form until the next day. (Def. s' Ex. J at 2). 46

As stated above, the deprivation of a shower for up to two weeks has been rejected as the basis for a constitutional violation. Thus, defendant Rivers/Schuyler did not violate plaintiff's constitutional rights when she denied him a shower on December 15, 2010. 47

On December 22, 2010, the same day as the law library incident described above, plaintiff filed another grievance regarding the denial of a shower. (Def.'s Ex. K at 2) (Dkt. No. 34–12). However, in

that grievance, plaintiff admitted being late, but argued that he went to the law library and missed the shower call, not that he failed to get up in time. He stated that he had been told he would get the shower when he got back, but CO "Peck" and Sergeant "Little" "made a problem in the law library because I was right by the Facility Rules...." (Id.) Plaintiff requested his shower if that was possible. (Id.) The grievance was denied at the facility level and ultimately on appeal to the Commission on Correction. (Id. at 4–7). It is clear from the documents that plaintiff concedes that he was not at his cell at the appropriate time in order to request the shower, and he then became disruptive at the law library causing the incident described above. Clearly, the subsequent denial of a shower was justified under the rules and did not violate plaintiff's constitutional rights. In any event, plaintiff did not challenge this denial in his complaint. 48

At plaintiff's deposition, he testified that he was not sure why he sued Officer Rivers/ Schuyler. (Pl.'s Dep. at 99). He stated that he thought he named defendant Rivers/Schuyler because she denied him the ability to type up a motion, and he could not recall whether she ever denied him a shower. (Id.) The complaint does allege that this defendant denied him a shower on one occasion. Judge D'Agostino has dismissed any claims regarding access to courts. Thus, any claim that Rivers/Schuyler denied plaintiff the ability to type a motion has already been dismissed, and I am recommending dismissal of plaintiff's shower claim. 49

Plaintiff did not mention RLUIPA in his complaint. However, in his memorandum in opposition to defendants' motion, plaintiff has included a random article from "Wikipedia" discussing RLUIPA. (Pl .'s Ex. H) (Dkt. No. 37 at 45–50). Plaintiff does not make any arguments relative to this article. He only includes it as an exhibit with much of the article underlined, most of which has nothing to do with this case. However, in an attempt to interpret plaintiff's claims as liberally as possible, this court will also analyze plaintiff's religion claim under RLUIPA. See Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir.1994) (a court is to read a pro se party's "supporting papers liberally, and ... interpret them to raise the strongest arguments that they suggest")). 50

Although the complaint states that the date of the first incident was December 19, 2010, the grievance plaintiff filed states that the date was December 14, 2010, and was filed on December 20, 2010. (Def.s' Ex. L at 2). In this grievance, plaintiff never specified who denied him the ability to go to bible study. 51

There is a split of authority regarding whether missing one religious service can be a substantial burden on an inmate's right to practice his religion. Robinson v. Jimminez, No. 08–CV902, 2012 WL 1038917, at *6 (E.D.N.Y. March 6, 2012) (citing Page v. Breslin, No. 02–CV–6030, 2004 WL 2713266, at *6 (E.D.N.Y. Nov.29, 2004) (citing cases)), Rep't Rec. adopted, 2012 WL 1039825 (E.D.N.Y. March 8, 2012). End of Document © 2016 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1

(Compare Dkt. No. 24, Attach. 9, at ¶ 17 [Defs.' Rule 7.1 Statement] with Dkt. No. 27, Attach. 3, at ¶ 17 [Plf.'s Rule 7 .1 Response]; see also Dkt. No. 24, Attach. 4, at 100, 102–03 [attaching pages 216, 218 and 219 of Trans. of Plf.'s Depo.]; Dkt. No. 33, at 2–3 [attaching pages 228 and 229 of Trans. of Plf.'s Depo .].) 2

(Compare Dkt. No. 24, Attach. 9, at ¶ 17 [Defs.' Rule 7.1 Statement] with Dkt. No. 27, Attach. 3, at ¶ 17 [Plf.'s Rule 7 .1 Response]; see also Dkt. No. 24, Attach. 4, at 59–60, 100, 102–03 [attaching pages 175, 176, 216, 218 and 219 of Trans. of Plf.'s Depo.]; Dkt. No. 33, at 2–3 [attaching pages 228 and 229 of Trans. of Plf.'s Depo.].) 3

In their motion, Defendants do not challenge the evidentiary sufficiency of Plaintiff's Eighth Amendment excessive-force claim against Defendants Dinelle or Duckett. (See generally Dkt. No. 24, Attach. 10 [Defs.' Memo. of Law].) 4

Plaintiff does not oppose Defendants' arguments that (1) Plaintiff's excessive-force claim against Defendant Norton should be dismissed, and (2) Plaintiff's substantive due process claim should be dismissed. (See generally Dkt. No. 27, Attach. 5 [Plf.'s Response Memo. of Law].) 5

Generally, " '[n]ormal' SHU conditions include being kept in solitary confinement for 23 hours per day, provided one hour of exercise in the prison yard per day, and permitted two showers per week." Whitaker, 2009 WL 5033939, at *5 n. 27 (citing Ortiz v. McBride, 380 F.3d 649, 655 [2d Cir.2004]).

6

See also Pena v. DePrisco, 432 F.3d 98, 115 (2d Cir.2005); Clue v. Johnson, 179 F.3d 57, 61 (2d Cir.1999); McEvoy v. Spencer, 124 F.3d 92, 97 (2d Cir.1997); Shechter v. Comptroller of City of New York, 79 F.3d 265, 271 (2d Cir.1996); Rodriguez v. Phillips, 66 F.3d 470, 476 (2d Cir.1995); Prue v. City of Syracuse, 26 F.3d 14, 17–18 (2d Cir.1994) ; Calhoun v. New York State Div. of Parole, 999 F.2d 647, 654 (2d Cir.1993). 7

See also Anderson v. Creighton, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) ("[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective reasonableness of the action.' "); Davis v. Scherer, 468 U.S. 183, 190, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984) ("Even defendants who violate [clearly established] constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard."); Benitez v. Wolff, 985 F.2d 662, 666 (2d Cir.1993) (qualified immunity protects defendants "even where the rights were clearly established, if it was objectively reasonable for defendants to believe that their acts did not violate those rights"). 8

See also Malsh v. Corr. Oficer Austin, 901 F.Supp. 757, 764 (S.D.N.Y.1995) [citing cases]; Ramirez v.

Holmes, 921 F.Supp. 204, 211 (S.D.N.Y.1996). 9

See also Hunter v. Bryant, 502 U.S. 224, 299, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) ("The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.") [internal quotation marks omitted]. 10

Defendants also argue that Plaintiff's First Amendment claim should be dismissed to the extent that it is based solely on the fact that misbehavior reports against him were false (as opposed to being false and retaliatory). The Court agrees that Plaintiff has no general constitutional right to be free from false misbehavior reports. See Boddie v. Schneider, 105 F.3d 857, 862 (2d Cir.1997). As a result, to the extent that the Plaintiff's Complaint may be construed as asserting a claim based solely on the issuance of false behavior reports, that claim is dismissed. 11

See Wade–Bey v. Fluery, 07–CV–117, 2008 WL 2714450 at *6 (W.D.Mich. July 8, 2010) ("Although it is well established that prisoners have a constitutional right of access to the courts ..., the filing of a frivolous lawsuit would not be protected activity.") [citation omitted]. 12

The Court notes that numerous cases exist for the point of law that even expressly threatening to file a grievance does not constitutes protected activity. See, e.g., Bridges v. Gilbert, 557 F.3d 541, 554–55 (7th Cir.2009) ("[I]t seems implausible that a threat to file a grievance would itself constitute a First Amendment-protected grievance.") [emphasis in original]; Brown v. Darnold, 09–CV–0240, 2011 WL 4336724, at *4 (S.D.Ill. Sept.14, 2011) ("Plaintiff cannot establish that his threat to file a grievance against Defendant Darnold is a constitutionally protected activity."); Koster v. Jelinek, 10–CV– 3003, 2011 WL 3349831, at *3, n. 2 (C.D.Ill. Aug.3, 2011) ("The plaintiff does not seem to be asserting that he had a First Amendment right to threaten the facilitators with lawsuits and grievances, nor does the Court believe that he has such a right."); Ingram v. SCI Camp Hill, 08–CV–0023, 2010 WL 4973302, at *15 (M.D.Pa. Dec.1, 2010) ("Stating an intention to file a grievance is not a constitutionally protected activity."), aff'd, No. 11–1025, 2011 WL 4907821 (3d Cir. Oct.17, 2011) ; Lamon v. Junious, 09–CV–0484, 2009 WL 3248173, at *3 (E.D.Cal. Oct.8, 2009) ("A mere threat to file suit does not rise to the level of a protected activity...."); Miller v. Blanchard, 04–CV–0235, 2004 WL 1354368, at *6 (W.D.Wis. June 14, 2004) ("Plaintiff alleges that defendants retaliated against him after he threatened to file a lawsuit against them. Inmates do not have a First Amendment right to make threats."). 13

McKinnie v. Heisz, 09–CV–0188, 2009 WL 1455489, at *11 (W.D.Wis. May 7, 2009) ("Hoping to engage in constitutionally protected activity is not itself constitutionally protected activity. At most, petitioner's actions could be construed as a 'threat' to assert his rights but that is not enough."). 14

See Hynes v. Squillance, 143 F.3d 653, 657 (2d Cir.1998) (holding that defendants met their burden of showing that they would have taken disciplinary action on valid basis alone where the evidence demonstrated that plaintiff had committed "the most serious, if not all, of the prohibited conduct"); Jermosen v. Coughlin, 86–CV–0208, 2002 WL 73804, at *2 (N.D.N.Y. Jan.11, 2002) (Munson, J.)

(concluding, as a matter of law, that defendants showed by a preponderance of the evidence that they would have issued a misbehavior report against plaintiff even in the absence of his complaints against correctional department personnel, because they established that the misbehavior report resulted in a disciplinary conviction, "demonstrat[ing] that plaintiff in fact committed the prohibited conduct charged in the misbehavior report."). 15

For these reasons, the Court finds to be inapposite the case that Plaintiff cites for the proposition that the Court must accept as true his sworn denial that he committed any of the violations alleged in the misbehavior reports issued against him. See Samuels v. Mockry, 142 F.3d 134, 135–36 (2d Cir.1998) (addressing a situation in which a prisoner was placed in a prison's "Limited Privileges Program," upon a finding rendered by the prison's Program Committee, that he had refused to accept a mandatory work assignment, "without a hearing or a misbehavior report") [emphasis added]. The

Court would add only that, even if it were to accept Plaintiff's sworn denial as true, the Court would still find that he

has failed to establish that Defendants Duckett and Norton would not have issued the misbehavior reports against him anyway, based on their subjective belief that he was acting in a disturbing, interfering, harassing and disobedient manner at the time in question (as evident from, inter alia, their misbehavior reports, the disciplinary hearing testimony of three of the Defendants, and admissions made by Plaintiff during his deposition regarding the "confusion" and "misunderstanding" that occurred during his examination by Defendant Norton, his persistent assertions about his prescribed frequency of visits, and his unsolicited comments about his proper course of treatment). 16

See O'Neill v. Krzeminski, 839 F.2d 9, 11–12 (2d Cir.1988) (noting that "three blows [that occurred] in such rapid succession ... [is] not an episode of sufficient duration to support a conclusion that an officer who stood by without trying to assist the victim became a tacit collaborator"); Blake v. Base, 90–CV–0008, 1998 WL 642621, at *13 (N.D.N.Y. Sept.14, 1998) (McCurn, J.) (dismissing failure-to-intervene claim against police officer based on finding that the punch to the face and few body blows that plaintiff allegedly suffered "transpired so quickly ... that even if defendant ... should have intervened, he simply did not have enough time to prevent plaintiff from being struck"); Parker v. Fogg, 85–CV–0177, 1994 WL 49696, at *8 (N.D.N.Y. Feb.17, 1994) (McCurn, J.) (holding that an officer is not liable for failure-to-intervene if there "was no 'realistic opportunity' to prevent [an] attack [that ends] in a matter of seconds"); see also Murray–Ruhl v. Passinault, 246 F. App'x 338, 347 (6th Cir.2007) (holding that there was no reasonable opportunity for an officer to intervene when one officer stood by while another fired twelve shots in rapid succession); Ontha v. Rutherford Cnty., Tennessee, 222 F. App'x 498, 506 (6th Cir.2007) ("[C]ourts have been unwilling to impose a duty to intervene where ... an entire incident unfolds 'in a matter of seconds.' "); Miller v. Smith, 220 F.3d 491, 295 (7th Cir.2000) (noting that a prisoner may only recover for a correction's officer's failure to intervene when that officer "ignored a realistic opportunity to intervene"). 17

(Dkt. No. 27, Attach. 2, at 19–20.) 18

(Dkt. No. 27, Attach. 2, at 10, 14.) 19

See Spence v. Senkowski, 91–CV–0955, 1998 WL 214719, at *3 (N.D.N.Y. Apr.17, 1998) (McCurn, J.) (finding that 180 days that plaintiff spent in SHU, where he was subjected to numerous conditions of confinement that were more restrictive than those in general population, did not constitute atypical and significant hardship in relation to ordinary incidents of prison life); accord, Husbands v. McClellan, 990 F.Supp. 214, 217–19 (W.D.N.Y.1998) (180 days in SHU under numerous conditions of confinement that were more restrictive than those in general population); Warren v. Irvin, 985 F.Supp. 350, 353–56 (W.D.N.Y.1997) (161 days in SHU under numerous conditions of confinement that were more restrictive than those in general population); Ruiz v. Selsky, 96–CV–2003, 1997 WL 137448, at *4–6 (S.D.N.Y.1997) (192 days in SHU under numerous conditions of confinement that were more restrictive than those in general population); Horne v. Coughlin, 949 F.Supp. 112, 116–17 (N.D.N.Y.1996) (Smith, M.J.) (180 days in SHU under numerous conditions of confinement that were more restrictive than those in general population); Nogueras v. Coughlin, 94–CV–4094, 1996 WL 487951, at *4–5 (S.D.N.Y. Aug.27, 1996) (210 days in SHU under numerous conditions of confinement that were more restrictive than those in general population); Carter v. Carriero, 905 F.Supp. 99, 103–04 (W.D.N.Y.1995) (270 days in SHU under numerous conditions of confinement that were more restrictive than those in general population). 20

See also Robison v. Via, 821 F.2d 913, 924 (2d Cir.1987) (“[T]he parties have provided conflicting accounts as to [who] initiated the use of force, how much force was used by each, and whether [the arrestee] was reaching toward [a weapon]. Resolution of credibility conflicts and the choice between these conflicting versions are matters for the jury and [should not be] decided by the district court on summary judgment.”). End of Document © 2016 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1

The captions for both the Fourth Amended Complaint and the Report and Recommendation list Daniel Buziak as a defendant. Dkt. Nos. 56 & 86. The Defendants' objections to the R & R do not list Buziak as a defendant. Dkt. No. 89. However, the Plaintiff's response continues to list Buziak as a defendant. Dkt. No. 90. The parties are directed to advise the Court on whether Buziak remains a party to this case. 2

To prevail on a claim of excessive force, the Plaintiff must prove that the force used against him was both objectively and subjectively unreasonable. See Hudson v. McMillan, 503 U.S. 1, 7 (1992). In general terms, the objective element requires that the Plaintiff prove that the force used against him was “sufficiently serious.” Griffin v. Crippen, 193 F.3d 89, 91 (2d Cir.1999). The subjective element requires that the Plaintiff prove that the Defendants “had a wanton state of mind when they were

engaged in the alleged misconduct." Id. (internal quotation marks omitted). 3

The Defendants argue that the R & R "simply identifie[d] the generalized protection against excessive force" and did not address whether the right to remain free of excessive force was "clearly established in a more particularized sense." Dkt. No. 89 at 19–20 (internal quotation marks omitted). However, the Defendants do not propose the more "particularized" right that might be at issue and do not point to any facts that should cause the Court to view this case as anything different than a struggle between a detainee and his guards. 1

Taken from the pleadings and motion papers filed in this action. 2

Filed as Defendants' Exh. E and Dr. Lakomy Affirmation Exh. B, each page separately Bates stamped. 3

Filed as Defendants' Exh. B, and separately as Doc. No. 69. 4

Filed as Defendants' Exh. C, and separately as Doc. No. 70. 5

References to "Plaintiff's Dep. Tr." are to pages of the transcript of Plaintiff's deposition, a copy of which is filed as Defendants' Exh. A.